Law Commission
Reforming the law

Simplification of the Immigration Rules: Report

HC14

Law Com No 388

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Simplification of the Immigration Rules: Report

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The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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Professor Sarah Green and Professor Penney Lewis were appointed Law Commissioners on 1 January 2020. The terms of this report were agreed on 24 October 2019 when Stephen Lewis and Professor David Ormerod QC were Law Commissioners.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk/project/simplifying-the-immigration-rules.

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Simplification of the Immigration Rules: Report

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

1.1 The Immigration Rules regulate the entry into and stay in the UK of people who are subject to immigration control. They impact on millions of people each year.[1] Yet it is widely acknowledged that the Rules have become overly complex and unworkable. They have quadrupled in length in the last ten years. They have been comprehensively criticised for being poorly drafted, including by senior judges.[2] Their structure is confusing and numbering inconsistent. Provisions overlap with identical or near identical wording. The drafting style, often including multiple cross-references, can be impenetrable. The frequency of change fuels complexity.[3]

1.2 It is a basic principle of the rule of law that applicants should understand the requirements they need to fulfil. The law "must be accessible and so far as possible intelligible, clear and predictable".[4] Simplified and more easily accessible Rules offer increased legal certainty and transparency for applicants. For the Home Office, benefits include better and speedier decision-making. This leads to a potential reduction in administrative reviews, appeals and judicial reviews, and to a system which is easier and cheaper to maintain. A simpler and more accessible immigration system builds trust, increases public confidence and brings reputational benefit to the UK internationally.

1.3 Our consultation paper reviewed the Rules in order to identify the underlying causes of their complexity and to make proposals for how they could be simplified and made more accessible. It was published on 21 January 2019. Our consultation period ran until 3 May 2019.

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1 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 2.23 and 2.33. See chs 2 and 3 for a full survey of the place of the Immigration Rules in the overall system of immigration control.

2 See, for example, *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] INLR 291 at [4].

3 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 1.4 to 1.6.

4 T Bingham, *The Rule of Law* (2010) p 37.

TERMS OF REFERENCE

1.4 The scope of our project is the Rules, including their relationship with policy guidance and the way in which they are published. It does not include consideration of substantive immigration policy or changes to the statutory structure which underlies the Rules. The Terms of Reference for the project agreed between the Home Office and the Law Commission are as follows:

(1) To review the Rules to identify principles under which they could be redrafted to make them simpler and more accessible to the user, and for that clarity to be maintained in the years to come.

(2) The project might include consideration of the structure and drafting of the Rules, the timing and frequency of amendments to the Rules, the division of material between Rules and guidance and the way in which the Rules are published. The Commission will seek to identify the underlying causes of complexity in the Rules and make recommendations to improve them for the future.

(3) The project will include a public consultation. It will conclude with a report setting out the Commission's recommendations, and including a redraft of some of the Rules, putting some of those recommendations into effect.

(4) The review will not consider substantive immigration policy.

1.5 Over the course of preparing our consultation paper, and when considering consultees' responses, it became apparent that we could not properly consider the complexity of the Rules from the perspective of the user in isolation from complexity in the system of guidance and application forms in which they are embedded. We have accordingly looked in more detail at the system as a whole, including guidance and application forms.

THE CAUSES OF COMPLEXITY

1.6 Our consultation paper identified both intrinsic and extrinsic causes of complexity in the Rules. We examined recent drivers of complexity, considering the impact of the *Alvi* decision,[5] the policy of detailed prescription followed by the Home Office since 2008, and the policy decision to incorporate the requirements of article 8 of the European Convention on Human Rights (the right to family and private life) within the Rules.[6] We looked in particular at the way in which a prescriptive approach generates a need for frequent amendments in a cycle of "detail begetting detail"; the drive

[5] *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208. The decision of the Supreme Court in *Alvi* determined that s 3(2) of the Immigration Act 1971 requires that anything laid down by the Secretary of State that amounts to a requirement that a migrant must satisfy as a condition of being given leave must be contained in the Immigration Rules if it is to be enforceable.

[6] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 5.

towards prescriptive detail, intended to create greater clarity in the Rules, instead begins to result in greater confusion.[7]

1.7 We also looked at matters of structure,[8] internal organisation and drafting style[9] which increase complexity. We recognised that approaches to drafting which require extensive cross-referencing by the user are difficult to navigate, and inconsistency in systems such as numbering can make these systems difficult to follow.

1.8 We looked at the place of the Rules within the wider system of guidance and application forms, and identified that the guidance is itself confusing and suffers from many of the same problems as the Rules. We also found that the interaction between these parts of the system can itself generate complexity.[10]

1.9 We recognised that the technique currently employed for amending the Rules also makes changes to the Rules difficult to follow, and that this problem is exacerbated by the frequency of changes. Where it is necessary to go back to older versions of the Rules, we identified that it can be difficult to know when changes have been made and to compare different versions of the Rules.[11]

THE COST OF COMPLEXITY

1.10 Our consultation paper also looked at the cost of complexity to the judicial system, the Home Office and applicants. We suggested that this takes the form of mistakes, slower decision-making and costlier administration, and an increased number of administrative reviews, appeals and judicial reviews. Above and beyond financial costs, the impact on applicants' lives of making a mistake in an application is unquantifiable but can be devastating.

PROPOSALS FOR SIMPLIFICATION

1.11 Our consultation paper looked for solutions. We identified fundamental principles to underpin the drafting of the Rules.[12] We considered whether complexity could be reduced by adopting more generally expressed, less prescriptive Rules.[13] We suggested different options for restructuring the Rules,[14] and made provisional

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7 This phenomenon is not confined to the Immigration Rules. The potential for a prescriptive approach to produce complexity and uncertainty has also been observed in social security regulations: "Their complexity may increase the uncertainty that detailed prescription and greater precision were intended to minimise". (N Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (2013) p 7).

8 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 7.

9 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, chs 9 and 10.

10 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 4.

11 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 13.

12 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 1.

13 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 6.

14 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 8.

proposals for improvements to their internal organisation and drafting style.[15] We included an illustrative re-draft of two portions of the Rules.[16]

1.12 We made proposals to protect the improved structure and drafting in the longer term by improvements to review mechanisms and to systems for updating the Rules.[17] We looked at ways in which archiving could be made more accessible.

1.13 We also suggested improvements to guidance and the way in which both guidance and application forms link to the Rules. Finally, we looked at the role that modern technology can play in improving online presentation and accessibility.[18]

1.14 We asked consultees 54 questions in order to obtain their views on our analysis and provisional proposals. This report presents these views and sets out our recommendations for reform. The recommendations are set out in full in chapter 12 of this report. Appendix 1 lists the 50 individuals and organisations who responded to our consultation. It also provides some brief background information about the respondents and an explanation of abbreviations used to identify respondents in the report.

CONSULTATION EVENTS

1.15 Following publication of the consultation paper, we held a series of consultation events with stakeholders. Appendix 2 to this report lists the 16 events and meetings we attended during this period. It also lists a further five meetings held after the consultation period ended to consolidate our understanding of the current system and to establish whether the recommendations we were in the process of formulating were workable.

1.16 In order to ensure that we captured the views of as many non-expert users of the Rules as possible, our consultation also included an online poster campaign sent to a range of educational and charitable organisations involved in outreach work with migrant groups. The poster was also circulated on social media. The poster set out in simplified form a selection of consultation questions likely to be of particular interest to those using the immigration system without legal assistance. The poster is reproduced at appendix 3.

CONSULTATION ANALYSIS

1.17 All responses to the consultation and our consultation analysis are available on the Law Commission website. Responses are reproduced in the form in which they were submitted. The consultation analysis presents a table of all the responses for each consultation question. It also explains our methodology in conducting the analysis. In some cases, we re-categorised the “yes”, “no” or “other” responses to ensure that

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15 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, chs 9 and 10.

16 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 11.

17 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, chs 12 and 13.

18 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 14.

views which were similar in content were grouped together. We have marked the analysis tables to show where this has been done.

1.18 In formulating its response, the Immigration Law Practitioners' Association ("ILPA") sought the views of its membership in the form of a ten-question survey and a set of long-answer questions. The questions matched or were closely modelled on those in our consultation paper. The survey received 31 responses. Where percentages appear in the ILPA response, these refer to the survey responses. ILPA also provided a longer, more thematic response on behalf of all its members. Two members, labelled A and B, provided their own independent responses in an appendix. We have obtained permission to identify them and do so in this report.

1.19 Let Us Learn, a youth-led group which campaigns for young migrants with insecure immigration status, submitted a joint response with Coram Children's Legal Centre. The response included views and experiences of named members of Let Us Learn. These members are identified by their first name only. In addition, the Law Commission held a workshop with Let Us Learn members and recorded the views of some of the participants in the workshop. These are referred to by the letters LUL and a number.

OVERVIEW OF OUR REPORT AND RECOMMENDATIONS

1.20 At the outset of our consultation paper, in Consultation Question 1, we asked if consultees agreed that there was a need for an overhaul of the Rules. All 27 respondents to this question agreed. We accordingly make this our first recommendation.

Recommendation 1.

1.21 We recommend that the Immigration Rules be overhauled.

1.22 In chapter 2 of this report we consider respondents' views on the principles we proposed in our consultation paper to underpin the simplification project and on our proposal that the Rules should be drafted so as to be accessible to the non-expert user. We have slightly remodelled our principles in response to these views, and recommend that they inform the drafting of the Rules at every stage. We confirm the view provisionally expressed in our consultation paper that the Rules should be drafted so as to be accessible to the non-expert user. We agree nevertheless with respondents that the substantive content of many Rules remains complicated and that accessibility to the non-expert user would not remove the need for legal advice in these areas.

1.23 We consider views on the impact of complexity in chapter 3. Most respondents agree with the proposition that complexity increases the number of mistakes made by applicants. They also think that it causes mistakes by the Home Office and others. We also consider views on the other benefits that simplification could bring, including cost savings for the judicial system, the Home Office, and applicants and their representatives. There are also important non-financial benefits for applicants. We

have incorporated the information provided by respondents into the impact assessment which accompanies this report.

1.24 In chapter 4 we set out respondents' views on the analysis in our consultation paper of recent drivers of length and complexity in the Rules. Many respondents thought that we had underplayed the impact on complexity of the content of immigration policy and the frequency with which it changes. While immigration policy is outside our terms of reference, we acknowledge the impact of policy on complexity. Policy-making which recognises the need to avoid increasing complexity could contribute towards simplification. We also recognise that the frequency of policy change has a significant impact on complexity. We consider specifically the possibility of reducing prescription as both an issue of policy and a matter of drafting style.

1.25 Chapters 5 to 11 of this report set out recommended steps for the simplification project.

1.26 A first step for the Home Office is to decide, as a matter of policy, those areas of the Rules in which the level of prescription could be reduced. Chapter 5 considers this issue. The clear view of respondents was that, in the absence of safeguards to ensure high quality and consistent decision-making, reduced prescription should be confined to evidential requirements. Our recommendation is that consideration should be given to introducing a residual open-ended category of evidence, or a tiered approach to evidence, in suitable areas. If the specified evidence in a list is provided, the decision-maker would be required to accept that the provision is satisfied. If the less specifically-defined evidence is considered, the decision-maker would need to decide if the purpose of the Rules has been satisfied.

1.27 Responses to our consultation suggest that user needs are not uniform. In making the choice as to which areas of the Rules would benefit from less prescriptive evidential requirements, we suggest that the Home Office consider the circumstances of the particular group affected. Groups seeking temporary entry such as international students may be able to provide a specified list of documents and benefit from the certainty this brings to applications. Others seeking to remain in the UK on the basis of a family relationship or long residence, possibly with long and complex immigration histories or vulnerabilities, may find it more difficult to comply with highly prescriptive evidential requirements, but a grant of leave would nevertheless accord with the underlying purpose of the Rule.

1.28 We acknowledge that reduced evidential prescription will require changes to the approach taken to decision-making. We express a preference for these more flexible provisions to be incorporated into the Rules rather than in guidance, in order to ensure that a move to less prescription does not lead to a loss of certainty for applicants who are able to provide the specified forms of evidence.

1.29 The Home Office will also need to adopt a new structure for the Rules. The Rules need to be structured and drafted in a way that users can understand and navigate. Chapter 6 looks at the approach to be taken. Respondents agreed with our proposals for a clearer division of material and an audit of overlapping provisions in order to determine where differences in wording can be eliminated. Identification of a clearer core of common provisions will help drafters to decide which of the possible structural approaches to the presentation of the Rules will work best. For this reason, we

recommend that this audit is undertaken before reaching a final decision on the presentation of the Rules.

1.30 Respondents were divided as to their preferred approach to presentation. Our consultation paper had canvassed the different possible approaches. These were the presentation of a single set of Rules or presentation in the form of "booklets" specific to categories of applicant, together with the possibility that the Rules be formally made and laid in Parliament in the form of a single set and re-worked editorially to produce booklets.

1.31 While we acknowledge the need for an initial audit of overlapping provisions before a final decision is taken, in the light of consultees' responses we recommend that the Rules be formally made and laid in Parliament as a single set of Rules. In our view the making of separate sets of Rules for different immigration categories, inevitably containing a number of overlapping common provisions, would increase the burden on Parliament and would pave the way to the reintroduction of the inconsistencies that bedevil the current Rules.

1.32 On the other hand, a number of consultees stressed the accessibility of booklets from the point of view of applicants. We therefore recommend that, pending the development of technology that directs an applicant to Rules relevant to their application, the Rules are reworked editorially by a team of experienced officials and checked to ensure legal and policy compliance so as to produce accurate booklets for each category of application.

1.33 The next step will be to improve the internal organisation of the individual Parts of the Rules. We consider different aspects of this issue in chapter 7. With the broad agreement of respondents, we have made a series of recommendations for the improvement of internal organisation and drafting, including a new numbering system, self-standing paragraphs, signposting and the use of a guide to drafting style and technique in order to provide clarity.

1.34 Respondents highlighted the extent to which frequent changes to the Rules contribute to complexity. Chapter 8 looks at how the drafting and updating of the Rules can be kept under more effective review in order to maintain simplicity of presentation over the course of successive changes to the Rules. It also looks at how to introduce more clarity into the process of making changes. In other words, we look at how to "future proof" the Rules.

1.35 Respondents agreed that consultation and review could play a part in controlling complexity and promoting consistency, and welcomed our proposal for a more structured and regular framework of review. We recommend the formation of an informal advisory committee to review the drafting of the Rules from the perspective of the principles we have identified. The committee would have no role in reviewing immigration policy. We also recommend a more structured process for receiving and responding to user feedback.

1.36 Following consideration of views as to the impact of current approaches to amendments of the Rules, we also provide a series of recommendations to make the substance of changes to the Rules easier to understand, and to regulate the

frequency of changes. These include the presentation of statements of changes to the Rules in the form of an informal Keeling schedule.[19]

1.37 Similarly, in chapter 9, in order to bring greater clarity to Rule changes, we recommend improvements to the presentation of information concerning the temporal application of the Rules. We recommend that this information take the form of text alongside a Rule stating the date from which it applies and also explaining whether the commencement date relates to decisions or applications or applies any alternative formula. This also serves to alert the user to the existence of a previous version of the Rule. We consider views on how well the current archiving system works, and recommend improvements to make it easier to locate the relevant version. We suggest that consideration be given to adopting either an online archive search facility which allows a search of versions of a Rule by keying in a date, or the presentation of the Rules in an annotated form which provides links to previous versions of the Rules.

1.38 The Rules cannot be looked at in isolation. They operate within a network of application forms and guidance which themselves need to be organised in a simple and coherent fashion. These elements need to link accessibly to the Rules, so that users can interact easily with all parts of the system. In chapter 10, we consider respondents' experiences of this wider system. We recommend steps to improve the presentation and updating of guidance, the clarity of the application process, and interface between the different parts of the system.

1.39 Chapter 11 sets out the clear consensus on the part of respondents that modern technology has the potential to improve the presentation of the Rules and the accessibility of the system as a whole. It can help navigation around the Rules, particularly in mitigating the difficulties of navigating a single set of Rules. It can also provide more streamlined interaction between the Rules, guidance and application forms, and help applicants to access previous and pending versions of the Rules more easily. We make recommendations for the use of hyperlinks to improve navigation and to streamline interaction between Rules and guidance. We consider the need for applicants to be able to view an application form before completing it.

1.40 But respondents also had reservations about online systems. There were warnings about digital exclusion, and the risk of introducing rigidity into the system as it becomes more automated. Many thought that paper alternatives need to be maintained. Technology must not operate as a straitjacket which cuts users off from alternative routes or shuts out applications because of an inability to provide an answer to a mandatory question which could be resolved with a more flexible approach. There were also concerns that an automated system can work at one remove from the Rules and lacks transparency.

1.41 We looked ahead, finally, to the possible direction of future technological innovation. We consider the possibility of a smarter digital platform which could eventually merge the applications process so that applicants are channelled directly to the relevant provisions, prompted to provide the necessary evidence, and alerted if something is missing. We consider suggestions to ensure that rigidity in the system does not

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[19] This is a schedule to a piece of amending legislation setting out the text of the legislation being amended with the amendments incorporated.

prevent applicants from pursuing alternative routes, the need for a logical progression in the end-to-end process from the applicant's initial point of entry via an internet search, and the potential for assisted decision-making. This could operate to improve the quality of decisions by singling out difficult cases for more careful consideration.

1.42 We do not make recommendations as to future innovation, but hope that the discussion generated will help to shape future steps to improve the accessibility and connectivity of the system as a whole.

STRENGTHENING THE SIMPLIFIED STRUCTURE

1.43 Common themes emerge from our recommendations which have application to the simplification process as a whole. These need to be addressed to strengthen the simplified structure of Rules, guidance and forms which we anticipate will result from our recommendations.

1.44 The first is the need to build trust in decision-making. Accessible Rules, clearly linked to guidance and application forms, help to build transparency and improve decision-making. But more is required. Training is needed for caseworkers to make the shift from a mandatory mindset to the more flexible evaluative approach needed in applying more open-ended evidential requirements. Caseworking systems could usefully take an approach with applicants that is more interactive. This would address omissions or deficiencies in applications before a decision is taken, and identify what evidence the applicant is able to provide. Applications which satisfy a "tick list" of specified requirements and whose processing can be more easily automated may need to be separated out from those requiring more skilled individual caseworker attention. Decision-making structures need to build in quality assurance control to ensure consistency of approach, and redress mechanisms need to be trusted to be effective. With enhanced trust in decision-making, there might be scope to reduce the level of prescription in the Rules further.

1.45 A drafting review committee and a more structured approach to interaction with users, recommended in our report in order to support consistency and accessibility, could also help to improve communication and thereby build trust.

1.46 Another strand which runs through our report is the need to improve connections across all the parts of the system, and, as part of this, an organisational need for internal structures which operate to foster consistency, to ensure accessibility, and to promote organisational learning. The development of well-structured, consistent and accessible Rules which adhere to common drafting principles, their possible transposition into accurate booklets, and the ability to maintain these structures over time require some kind of centralised control. Similarly, the interaction between Rules, guidance and forms, both in their design and in their online presentation, needs oversight to ensure that the structure works as intended.

1.47 Improved centralised systems can also help to consolidate feedback from applicants and their representatives. This can speed up the correction of anomalies and ensure that individual teams get the benefit of the lessons learned. Without a centralised point to ensure the overall coherence of the system, it seems inevitable that the system will fragment over time. Such a framework could be viewed as having a "policing" role, but, more positively, could promote organisational learning.

1.48 We recognise that the organisational changes we propose will need an investment in time and resources in the short term. We think that this can be justified by the longer-term savings and benefits made possible by the simplification project as a whole.

IMPACT ASSESSMENT

1.49 Our impact assessment sets out the potential savings to the judicial system as a result of reduced numbers of appeals and judicial reviews and reductions in judicial reading and writing time. It also quantifies potential savings to Home Office casework arising from a reduced number of applicant errors and queries, improved navigation of the system, and less frequent changes to the Rules. It projects savings to organisations providing advice to applicants. We have been unable to quantify savings to applicants, but highlight the potential for both monetary savings in the form of fewer wasted fees, and the non-financial benefits generated by greater ease in navigating the system and fewer errors in applications. We also highlight the potential benefits of simplification for the global reputation of the UK. In total we project savings of almost £70 million over the next ten years.

ACKNOWLEDGEMENTS

1.50 Our thanks go to all those who took part in the consultation process, both for participating in consultation events or meeting with us to discuss the consultation paper, and for submitting formal written responses. We are grateful for the work, time and careful thought they have given to the issues covered in this report. We also thank officials from the Home Office who have hosted internal events to help us to understand the workings of the immigration system, and given us feedback as we have formulated our recommendations. Finally, we are grateful to Jonathan Kingham, former team lawyer who worked on the consultation paper, who continued to provide valuable assistance over the course of the preparation of this report.

PROJECT TEAM

1.51 The following members of the public law team have contributed to this report: Henni Ouahes (team manager), Lisa Smith (team lawyer), Stephanie Theophanidou (research assistant) and Jagoda Klimowicz (research assistant).

Chapter 2: Defining our principles

2.1 At the outset of our consultation paper, we proposed a list of principles to guide the redrafting of the Immigration Rules.[20] We also looked at whether there is a target audience for the Rules, but noted that even if the Rules are to be written with the needs of the non-expert user in mind, these may not be very different to the needs of legal professionals.[21]

2.2 Consultees were asked if they agreed with the principles that we had identified to underpin the simplification exercise. We also asked if they thought the Rules should be drafted with the needs of the non-expert user in mind.

PRINCIPLES UNDERPINNING THE SIMPLIFICATION PROJECT

Our provisionally proposed principles

2.3 The principles provisionally proposed in our consultation paper to underpin the redrafting of the Rules were:

(1) suitability for the target audience;

(2) comprehensiveness;

(3) accuracy;

(4) accessibility;

(5) consistency;

(6) durability (making the Rules apt for amendments); and

(7) capacity for presentation in a digital form.

2.4 Consultees were asked at Consultation Question 2 whether they agreed that these principles should underpin the drafting of the Rules. Of the 29 consultees who provided a response to this question, 22 agreed with our proposed principles. However, the detailed responses revealed varying degrees of agreement. A total of 12 respondents agreed without qualification while the remaining 10 broadly agreed with our proposal but made several suggestions, including additional principles.

2.5 Six respondents answered “other”. These respondents typically expressed concern over particular principles, questioned the effectiveness of our principles in practice, or doubted whether our proposal covered all necessary principles. One respondent disagreed but did not provide a reason.

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20 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.27.

21 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.35.

Additional principles

2.6 Some respondents proposed the insertion of additional principles. Two Immigration Law Practitioners' Association ("ILPA") members suggested that "clarity" should be considered as an additional principle. They believed that this principle could benefit a range of users:

> Clarity works to the benefit of migrants as well as immigration judges and lawyers, because clear rules make for more consistent application by decision-makers and judges. The Home Office benefit from applications which properly understand the Rules.

2.7 Our consultation paper identified that clarity is a measure of the quality of legislation.[22] It relates to how easily the law is understood by its readers. To some extent, clarity is an aspect of accessibility, but we are happy to include it expressly.

2.8 ILPA also suggested that we should include a specific principle on the layout and organisation of the Rules. We do not believe that the layout and organisation of the Rules is of the same order as the abstract higher-level principles we are proposing. Instead, the layout and organisation of the Rules are two areas in which the proposed principles are applied.

2.9 An additional principle was also suggested by Professor Thom Brooks (University of Durham) who believed that our proposal should include a principle that relates to the frequency of changes to the Rules. Professor Brooks argued that if the timing of changes was better known in advance, individuals would have a "better opportunity to know when changes potentially affecting their applications might come into place". The Institute for Government's response also focussed on changes to the Rules, arguing that the simplification of the Rules must also consider the review and scrutiny of these changes.

2.10 In our view, our provisionally proposed principle of durability is intended to promote a regulatory framework which can retain its accuracy and accessibility when subjected to change. It therefore strengthens the ability of the Rules to accommodate change and ensure simplification is maintained. The realisation of this aim will involve considering when changes can take place and how they are reviewed.

2.11 A few respondents nevertheless questioned the value of the durability principle, seemingly as a result of our statement that this requires the Rules to be "apt for amendments". Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) stressed that "a big part of the problem with the current Rules is precisely because they are 25 years old with repetitive editing". He proposed a scheme of obsolescence every 5-10 years. Universities UK and Universities and Colleges Employers Association ("UCEA") (joint response) were also concerned about the Rules being amended constantly and argued that the principle of "adaptability" would be more suitable, either as a substitute for durability or in addition to it. They explained that

[22] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.19.

adaptable Rules would ensure that future changes were accounted for as much as possible, reducing the need for constant updates.[23]

2.12 These responses have led us to conclude that the chosen wording of our proposed durability principle was misleading. We do not wish to adopt principles which appear to encourage frequent change. As mentioned in paragraph 2.10 above, our intention was for the principle of durability to ensure that the Rules are structured in such a way as to hold their frame well and remain intelligible when necessary amendments are made.[24] In light of these responses, we have rephrased the principle to "durability (a resilient structure that accommodates amendments)".

2.13 Respondents suggested that the position of the Rules within the wider immigration law framework should also be considered as a principle underpinning the redrafting of the Rules. Migrant Voice expressed the view that the Rules form "part of the wider immigration law and other laws of the country and therefore should be fair, and compatible with our human rights and equalities obligations". Nashit Rahman (Taj Solicitors) added that the Rules should better reflect landmark case-law.

2.14 In our view, the principle of consistency encompasses the objective that the Rules need to be consistent both internally and with case law and the wider legislative framework, including the European Convention on Human Rights.[25]

2.15 The Incorporated Society of Musicians argued that the Rules and guidance should be drafted with cultural and lifestyle sensitivities in mind. They explained that this could be achieved by making clearer to decision-makers which forms of documentary evidence applicants in particular professions and from diverse parts of the world might be able to supply.

2.16 In our view, an appreciation of cultural and lifestyle sensitivities is subsumed within the principle of "suitability for the target audience" as the audience will be from a range of cultures and lifestyles. This does not presuppose any particular content, but encourages drafters to reflect on whether a provision would be meaningful across different cultures and lifestyles. For example, if a requested document does not exist in all countries, drafters might be inclined to provide an alternative. Overall, we believe that this is a good illustration of how a higher level abstract principle can incorporate a more specific consideration, such as cultural variations.

Clarifying the "target audience"

2.17 In addition to proposing alternative principles, respondents made suggestions on how to improve the formulation of some of the principles we had proposed. Respondents believed that the meaning of "target audience" in the suitability principle would benefit from further clarification. As stressed by one ILPA member, this encompasses a diverse range of groups which each have different needs:

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23 Also see ch 5 of this report for a discussion on how prescription can lead to frequent amendment of details.

24 See ch 8 of this report for a discussion of mechanisms for amendments to the Immigration Rules and for keeping the amended Rules under review.

25 Rules that contravene the European Convention on Human Rights will also contravene a broader principle of legality, in that they will be unlawful under section 6 of the Human Rights Act 1998.

> ILPA submits that the target audience for the Immigration Rules are an incredibly diverse array of groups, ranging from, for example, legal practitioners, immigration judges, Home Office caseworkers, Home Office Presenting Officers to prospective and existing migrants, as well as their families and friends. Each of these groups, it is submitted, will have different aims as to what makes the Immigration Rules more "suitable" for them.

2.18 Our consultation paper recognised that these groups use the Rules for different purposes and might therefore require different qualities from them. We identified that non-expert users want provisions which are easy to understand. Parliamentarians will be concerned with what their effect will be and will want to understand the policy behind them. Caseworkers and advisers want to be able to navigate around the Rules and apply them to particular cases.[26] Our paper also identified that there were over three million applications for entry clearance in the year ending June 2018. We considered it unlikely, due to cost and accessibility from abroad, that more than a fraction of these applications were made with professional assistance.[27] We reached a provisional conclusion that the Rules should be written primarily for the unrepresented user.[28] We return to the justification for drafting the Rules for the non-expert user at paragraph 2.26 below, including consideration of the benefits of this approach for all the groups who use the Rules.[29]

The need for balance between the principles

2.19 Respondents also discussed the balance between our proposed principles. Although the UK Council for International Student Affairs ("UKCISA") believed that our proposed principles would make a positive difference, they noted that "getting the right balance between them might take some time".

2.20 Our consultation paper acknowledged that there can be a tension between the concepts of clarity and precision.[30] This could result in a tension between the proposed principle of accuracy on the one hand, and those of suitability and accessibility on the other. This tension was identified by several respondents, although they held different views on which principle should prevail if a conflict arises. Upper Tribunal (Immigration and Asylum Chamber) judges expressed the view that accuracy should prevail when drafting 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

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26 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 1.32 to 1.33. We also recognised that the legislative context of the Rules, as laid down by the Immigration Act 1971, is to provide guidance "as to the practice to be followed in the administration of this Act". In this sense, the role of the Rules is to provide practical guidance to caseworkers. See Immigration Act 1971, s 3(2) and Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 2.20 and 3.3.

27 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.33.

28 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 1.34 to 1.35

29 See below at paras 2.44 to 2.46 and 2.55 to 2.56 for a discussion of the different types of non-expert user.

30 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.20.

> 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.

2.21 A larger proportion of respondents suggested that importance should be accorded to ensuring the Rules are accessible in the sense that they can be understood by those using them. These included Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response), the Law Society of England and Wales, Amnesty International UK, and Destination for Education. CCLC and Let Us Learn focussed on the inaccessibility of legal advice and support to bolster their argument:

> Many of our service users, whether approaching us through our advice line, outreach or training, find the Immigration Rules and wider immigration system far too complex. With significant cuts to legal aid, social services budgets and support services over the last few years, many of our service users no longer have access to legal advice and support. Many of our service users, who are some of the most vulnerable members of our society (care leavers, destitute families and homeless young people), are having to make applications with limited or no legal support. It is therefore essential that the Immigration Rules are accessible and understandable.

2.22 The ability to reach a balance between potentially conflicting principles was supported by ILPA who identified that there are many examples of legal writing and modern drafting "which are both legally precise and capable of being understood by the layperson".

Additional comments

2.23 Professor Thom Brooks (University of Durham) recommended that a Royal Commission should produce "a new draft Immigration Bill that creates a new cornerstone replacing the Immigration Act 1971 by merging changes since into one coherent, systematic Act". The Institute for Government proposed a review of what can and cannot be done through the medium of secondary legislation. These comments fall outside our Terms of Reference.

Discussion

2.24 Most of our respondents agreed with our proposed list of principles. Some respondents suggested further principles. We have considered these suggestions, and have made amendments to our list of principles by adding the concept of clarity, and rewording the durability principle to avoid confusion about its scope and meaning. Respondents also suggested that the meaning of "target audience" in the suitability principle would benefit from further clarification (which we attempt further in the section below).

2.25 We accept that there is inevitably the potential for tension between our principles. By identifying these principles, we are asking future drafters to ensure that they are all considered and balanced against each other.

ACCESSIBILITY OF THE RULES TO THE NON-EXPERT USER

2.26 Consultees were asked at Consultation Question 3 whether they agreed with our provisional proposal that the Rules should be drafted for the non-expert user. Of the 33 respondents who addressed themselves to this proposal, 25 agreed. Seven respondents selected "other", with six out of seven not providing a firm view for their response. One respondent disagreed but did not provide a reason for this.

Lack of access to legal advice and support

2.27 The main reason for such substantial agreement was that most applicants do not have access to professional legal support, typically because of the lack of legal aid and/or the high cost of seeking legal advice independently. This was a particularly compelling reason to ensure that the Rules are comprehensible to applicants. This view was expressed by UKCISA:

> Yes – we agree that everyone who must apply under the Immigration Rules should be able to understand the requirements they must meet for their applications … This would be the case in any event, but is particularly important when most applicants cannot afford immigration lawyers and/or have no access to them.

2.28 The Law Society of England and Wales emphasised that the number of individuals making applications without professional assistance is increasing. The Bar Council relied on the large number of unrepresented applicants to argue that it is fundamental to the rule of law that the Rules are drafted for a non-expert audience. The Joint Council for the Welfare of Immigrants ("JCWI") also believed that it is fundamental to the rule of law that the Rules "should be drafted in as simple a manner as possible".

2.29 Many consultees who had previously made an immigration application stressed the challenges faced when having to do this without legal support. Visitors to the drop-in service provided by Hackney Migrant Centre, anonymised as HMC 1 and HMC 3, explained that they were unable to identify under which grounds to make their application without legal advice. Pelumi, a Let Us Learn campaigner, argued that "even trying to figure out what application you need to use can be confusing without asking a lawyer". Adeola, another Let Us Learn campaigner, described the anxiety which the process can cause without the support of a professional legal adviser:[31]

> Solicitors are accountable, and if they get anything wrong you have someone to blame. Making an application on your own is fearful because you don't have anyone to fall back on and you don't know what to expect. Unfortunately, I have to do the application myself as I cannot afford the lawyer. The fees are just too high and my hope is that the immigration application online is simple enough for me to use.

2.30 Where applicants are able to access legal advice, the advice received can be expensive and of poor quality. A volunteer at Hackney Migrant Centre, reporting on the experience of a visitor anonymised as HMC 2 and of many other visitors to the drop-in service, described "people going to incompetent lawyers, spending money they don't have (borrowed) and getting nowhere". This point was also made by HMC 1

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31 These responses were provided as part of the CCLC and Let Us Learn joint response.

who said they had paid for solicitors who had "not been reliable" and in one case they believed "it to have been a scam".

2.31 In our view the risk of poor quality advice is exacerbated by the complexity of the Rules. Nevertheless, it is not because of complex presentation alone that applicants may require legal advice when navigating the Rules. The substantive content of many Rules is itself complicated. Clearer drafting only goes so far. This is an issue to which we now turn.

2.32 Some respondents were concerned that the Government would use the simplification exercise as a reason to withdraw legal aid from immigration matters. JCWI argued that this would be "unacceptable":

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

2.33 CCLC and Let Us Learn (joint response) made a similar argument and in doing so, stressed that they "fundamentally disagreed" with the Government's response to the Windrush Compensation consultation indicating that legal advice is not necessary for making an immigration application.[32] Islington Law Centre argued that it would be unfair for the Government to think that the simplification exercise would allow applicants to navigate the system alone:

> We do not believe it would be fair to our clients for the government to assume that asylum and immigration applicants will be able to navigate the system on their own once a consolidation of the Immigration Rules (and policy Guidance and Forms) has taken place. There are applicants who will always need the additional, expert advice and support provided by specialists, including immigration solicitors. Even a simpler set of Rules and more streamlined application system will not bypass that need in every case.

2.34 We agree with respondents that, where the substantive content of the Rules is complicated, access to good legal advice remains necessary.

The need for non-experts to understand the Rules

2.35 Consultees provided additional arguments in favour of the Rules being drafted for a non-expert audience. The Bar Council, for example, agreed with the view expressed in our consultation paper that good drafting will make the translation of the Rules easier for those users who are not English speakers.[33] ILPA believed that "it is a matter of good law that people be able to understand rules that bring about such a significant impact upon their lives".

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[32] In its formal response to the Windrush Compensation consultation, the Home Office noted that: "The Government's position is that obtaining legal advice is not necessary in making an immigration application and that no advantage in the application process should accrue to people who choose to access, and are able to afford legal advice, over those who cannot". See https://www.gov.uk/government/consultations/windrush-compensation-scheme (last visited on 17 September 2019) para 4.15.

[33] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.33.

2.36 Migrant Voice believed that the Rules should be drafted for a non-expert audience for reasons of public awareness too:

> Another reason the clarity is needed is to create greater public awareness as to what is contained in the Rules for example to dispel notions that migrants are abusing the system, or that Rules favour migrants, etc.

Benefits for other groups

2.37 Consultees believed that drafting the Rules for non-expert applicants would assist other groups of users too, such as legal professionals, businesses, and Higher Education Institutions ("HEIs"). This was because the current complexity of the Rules makes them inaccessible to these groups too, which can result in significant monetary and non-monetary burdens.

2.38 The Migration Advisory Committee noted that the complex drafting of the Rules creates a financial burden for businesses as they are forced to engage immigration lawyers to help them deal with Tier 2 recruitment:

> Stakeholders consistently inform us that the complicated Rules are a hindrance to their ability to recruit through the Tier 2 visa system. They find it confusing and overly complex and many do not understand the current system. Many firms have reported that they have had to hire immigration lawyers to undertake the task of dealing with Tier 2 recruitment as the task is too complex for them to do it themselves.

2.39 The current inaccessibility of the Rules creates particular challenges for HEIs. Universities UK and UCEA (joint response) stressed that the "lack of accessibility (of the Rules) demands unnecessary costs and resourcing from HEIs to ensure the correct immigration advice is provided for applicants". Moreover, the University of York Immigration Advice Team identified the different types of guidance they provide to students making applications, and how this sometimes requires them to contact the UK Visas and Immigration Premium Customer Service for which they have an expensive annual subscription.[34]

2.40 Some consultees argued that the current drafting of the Rules makes them inaccessible even to those with legal training, including lawyers and judges. The Law Society of Scotland explained that "senior judges of the some of the highest courts in the UK admit difficulties in interpreting and applying the relevant legislation". Ehren Mierau (in a personal capacity and on behalf of York College International Student Support) expressed a similar view, stating that the current state of the Rules is "evidently beyond the ability of even some perfectly qualified and intelligent judges and lawyers to understand".[35]

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[34] The financial burden this creates for Higher Education Institutions is discussed in paras 3.35 to 3.36 below.

[35] Our consultation paper included reference to some of the comments made by senior judges. See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.5, citing criticism of the Rules as "Byzantine" in *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] INLR 291 by Jackson LJ at [4], and of their "rebarbative drafting" in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74, [2015] WLR(D) 66 by Underhill LJ at [59].

2.41 David Mills (Home Office Presenting Officer) reflected on his own experience to provide insight into the challenges faced by legal professionals when interpreting and applying the Rules:

> I work as a Senior Presenting Officer, representing the Secretary of State in immigration appeals in the Upper Tribunal. An inordinate amount of time is taken up in the UT dealing with appeals where a First-tier Judge has erred in their understanding of the Rules, often because they have been misled by the advocates for one or both parties. If Judges sometimes struggle to understand the Rules, there is a clear problem. It is no wonder that non-experts are frequently confused.

2.42 Our consultation paper recognised that legislation written for a wider audience could also meet the requirements of legal professionals.[36] This was also suggested by Amnesty International UK who believed "that accessibility to non-expert users is both a good end in itself and likely to ensure accessibility to others including legal advisers and decision-makers". With this in mind, drafting the Rules so as to be more accessible to applicants could also offer the prospect of significantly improving the ability of legal professionals to interpret and apply the Rules.

2.43 Two respondents, however, were not convinced that drafting the Rules for applicants could benefit legal professionals. Robert Parkin (10 KBW) was concerned that the needs of legal professionals might be sacrificed in this simplification exercise. More specifically, he argued that "there is a risk of sacrificing clarity of precision for ease of comprehension". Nashit Rahman (Taj Solicitors) maintained that "the language should not be so plain that legal terminologies vanish from the Immigration Rules". We recognised the potential tension between precision and readability in paragraph 2.20 above and suggested that a balance must be struck when drafting the Rules.

Defining the non-expert user

2.44 Respondents made some suggestions for improving our proposal to draft the Rules for the non-expert user. One of these suggestions was that the term "non-expert user" needs further clarification. Respondents argued that there is more than one type of applicant and that there are issues specific to each.

2.45 Islington Law Centre identified the range and multiplicity of vulnerabilities which some applicants might face and argued that redrafting the Rules may not be enough to make the Rules accessible to these users:

> We agree in principle but we believe that requires a shared understanding of who that 'non-expert user' might be. The consultation paper asserts the Rules should be accessible 'to those who are affected by them' (para 1.34). However, both the government and the Law Commission need to recognise that redrafting Rules, Guidance and Forms in plain English may not be enough to make complex material accessible to asylum-seekers and vulnerable migrants who struggle with filling in forms in English, and have a range and multiplicity of vulnerabilities with which to cope including mental health problems and the effects of trauma. In addition, many of our clients are unaccompanied or separated children under the age of 18.

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[36] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.35.

2.46 ILPA asked whether non-English speakers and children were envisaged as falling within the scope of our proposal:

> ILPA submits that it is unclear as to whether the Law Commission are envisioning migrants who have English as their first language when they pose this question. It is further unclear as to whether children are envisioned as falling within the scope of this question. Arguably, it is a matter of good law that the Immigration Rules be understandable by children, especially refugee children who may go on to sponsor family members. Given the breadth of people who could fall within the scope of 'non-expert user', ILPA would welcome further clarity as to who the Law Commission have in mind as 'non-expert users'.

Sources of complexity for the non-expert user extrinsic to the Rules

2.47 Another argument made was that even if the Rules are drafted for a non-expert audience, this might not necessarily provide effective simplification and accessibility for applicants. This is because many applicants look at other sources of information when completing their application, if they even look at the Rules at all. These sources of information include the gov.uk platform, guidance, and the application forms.

2.48 Jonathan Collinson and Gemma Manning (University of Huddersfield) said that the first place that many applicants will go to is the gov.uk website. They performed a Google search on "how to apply for UK visit visa" and reported that the Rules do not appear on the first 10 pages of results.[37] Therefore, in order to ensure the simplification and accessibility of the system, they argued that the online information available on gov.uk must also be "cohesive, consistent, accurate, and user-friendly".

2.49 Other consultees, such as Coventry University London, explained that some applicants do not even look at the Rules but instead refer to guidance and policy instructions:

> From our students' perspective, although the Rules are publicly accessible, they are for the main part not known to exist. Students rely more on the policy guidance as these are the links also on the various immigration routes.

2.50 CCLC and Let Us Learn (joint response) identified issues stemming from guidance specifically. They argued that complexity increases when applicants struggle to locate the relevant guidance and/or when guidance is removed for the purposes of being updated and there is a significant time lag in replacing it.

2.51 The complexities of accessing and understanding application forms were also raised by consultees throughout this consultation. For example, Olayinka, a Let Us Learn campaigner, reflected on her experience of the application process:

> Even though I was educated in the UK there were a lot of technicalities/words I couldn't quite understand which were anxiety-inducing and made the whole application take a lot longer than necessary. I can't even begin to guess how difficult the process would be if I had a complicated case or English wasn't my main

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[37] The first result from an official source is: https://www.gov.uk/standard-visitor-visa/apply (last visited 16 September 2019) and then https://www.gov.uk/browse/visas-immigration/tourist-short-stay-visas (last visited 16 September 2019) (which directs applicants through to the first link).

language. In the end I had to submit my application with so many uncertainties and hope for the best.

2.52 These responses suggest that for the non-expert user the Rules cannot usefully be simplified in isolation from the process of accessing and applying them. Guidance and application forms should therefore also be improved. Overall, we believe that the overhaul of the Rules should therefore take place alongside simplification of the system within which they operate.[38]

Other ways to cater for a non-expert audience

2.53 Respondents made other suggestions to increase accessibility for non-expert users which did not involve the direct drafting of the Rules. Many of these related to online legal design and improved communication with the Home Office. These are discussed in chapter 11, which considers the role of technology in facilitating access.

Discussion

2.54 There was strong support from respondents for our proposal that the Rules should be drafted for the non-expert user. Not only would this assist individuals when making their immigration applications, but it would also provide advantages for other groups of users too.

2.55 We therefore conclude that the Rules should be drafted with the needs of the non-expert user in mind. We think that that this will be of benefit to the other "target audiences" of the Rules described above at paragraph 2.18, as it will also make the Rules easier for them to understand. We have amended our proposed principles to reflect this.

2.56 We nevertheless agree with respondents that there is not a "one size fits all" approach to the needs of the non-expert user. We agree that the Rules should be drafted with these varying needs in mind. This includes vulnerable users such as children, and those who may have difficulty in reading English. But, as we noted in our consultation paper, there is a tension between clarity and precision, and a debate as to which concept should prevail. Over-emphasis on precision can make legislation harder to understand, which in turn lowers its overall clarity. On the other hand, favouring readability over precision may jeopardise the accurate communication of the legislature's intention.[39] Where necessary, we think that precision needs to prevail. This means that we do not think that it will always possible to lower the reading age of the Rules to allow all readers to understand them.

2.57 Despite the strong support for drafting the Rules for a non-expert user, some respondents also stressed that this might not necessarily improve accessibility as many applicants consider other sources of information when completing their application, such as guidance and application forms. This suggests that the simplification of the Rules cannot be considered in isolation from the process of

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[38] See chs 10 and 11 for discussion of the ways in which guidance and application forms can be made more accessible and connect better with the Rules. See paras 11.85 to 11.87 for discussion of the users' experience of an initial online search and the "end-to-end process".

[39] See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.20 and Reed Dickerson, "The Diseases of Legislative Language" (1964) 1 *Harvard Journal on Legislation* 11.

accessing and applying them. We have concluded that the overhaul of the Rules should take place alongside simplification of the system within which they operate.

Recommendation 2.

2.58 We recommend that the following principles should underpin the redrafting of the Immigration Rules:

(1) suitability for the non-expert user;

(2) comprehensiveness;

(3) accuracy;

(4) clarity and accessibility;

(5) consistency;

(6) durability (a resilient structure that accommodates amendments); and

(7) capacity for presentation in a digital form.

Chapter 3: The impact of complexity

3.1 Our consultation paper reflected on the impact of complexity in the Immigration Rules and the potential benefits of this simplification project. We thought that benefits included transparency, certainty, better and speedier decision-making and a potential to reduce administrative reviews, judicial reviews and appeals. We anticipated that these improvements would produce not only savings in time and costs to applicants and to decision-making bodies, but also a qualitative gain in helping to give a "human face" to the immigration system.[40] There is also a potential benefit in increasing confidence in the system, both on the part of applicants and on the part of the UK population as a whole, and to the global reputation of the UK.

3.2 We suggested that such improvements to the Rules would be all the more important as, following the exit of the UK from the EU, the system would need to cater for many more applicants. With the removal of EU rights of entry and residence, EU nationals would become subject to the same Rules as all other nationals.[41]

3.3 Consultees were asked whether they thought that complexity had increased the number of mistakes made by applicants. We also asked consultees about the costs savings we had identified in our preliminary impact assessment.

THE EFFECT OF COMPLEXITY ON APPLICANT ERROR

Mistakes by applicants

3.4 At Consultation Question 4, consultees were asked to what extent they thought that complexity in the Rules increases the number of mistakes made by applicants. Of the 31 respondents to this question, the majority (21) thought that complexity in the Rules increases the number of mistakes made by applicants. The view most clearly expressed amongst these respondents was that complexity in the Rules results in applicants failing to understand fully the eligibility criteria and evidential requirements for a successful application.

3.5 Other respondents qualified their view and expressed doubts over whether the complexity in the Rules increases the number of mistakes made by applicants. For example, the Joint Council for the Welfare of Immigrants found it "hard to say for sure" whether this was the case. Moreover, Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) accepted that the complexity of the Rules does not help matters but nevertheless believed that there were other "real problems" which lead to applicant mistakes. These problems included the presence of highly prescriptive rules, arbitrary requirements, a lack of independent review, and the poor quality of legal advice and representation.

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40 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.40 and see also the Home Secretary's statement to the House of Commons on the Windrush generation (23 April 2018): https://www.gov.uk/government/speeches/home-secretary-statement-on-the-windrush-generation (last visited 21 December 2018).

41 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 2.25.

3.6 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges also expressed some doubt over whether the complexity of the Rules leads to applicants making mistakes "in the sense that an applicant could have qualified under them, but for his or her misunderstanding of what the particular rule requires". Nevertheless, they appreciated that applicants might struggle to meet prescriptive evidential requirements because of a failure to recognise "that there are multiple parts to the Rules and that all relevant requirements must be met".

3.7 The only respondent to disagree outright was the University of York Immigration Advice Team. They did not believe that the complexity of the Rules increased the number of mistakes made by their students as the advice team provides guidance which can alleviate the effects of complexity. This guidance is provided on their website, by email, and face-to-face. Moreover, if students have any doubts about a particular regulation, the advice team can check this with the UK Visas and Immigration Premium Customer Service on their behalf. The consultee did mention, however, that the University's annual subscription to UK Visas and Immigration costs £8,000.

Evidential requirements

3.8 One of the key themes in the responses was that complexity in the Rules increases the number of mistakes made by applicants as they are often unable to identify correctly the evidence required for their application. Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response) stated that applicants "generally struggle to correctly identify the supporting evidence required, as they struggle to decode the Rules and guidance". This was reiterated by HMC 1, a visitor to the drop-in service at the Hackney Migrant Centre, who explained, "it is difficult to know what evidence I need to have to prove my case".

3.9 The view that mistakes are specifically caused by the complexity of the Rules was clearly reflected in some responses. For example, Destination for Education said:

> In our experience most of the refusals of student visas we see relate to mistakes regarding the meeting of evidential requirements. It is complex to identify exactly what a student has to provide. Without assistance and guidance it would be nearly impossible for a student to be able to identify this for themselves. This is only due to the complexity of the Rules. The introduction of document checklists would greatly assist. We know this is due to mistakes made by applicants because on analysis the applicant did, for example, hold the relevant funds for the relevant period of time, they simply did not provide the required evidence of this, e.g. insufficient bank statements, or statements in an incorrect format.

3.10 The Law Society of England and Wales identified how a lack of clear wording in the Rules can lead to mistakes by applicants. They provided a recent example of a British citizen's partner navigating various Rules and guidance on Appendix FM (Family members). The couple were relying on the partner's self-employment income to meet the financial requirements. They were unable to understand that it was the last full financial year's documents which were required, as these were not yet due to be filed with HM Revenue and Customs. They also made a mistake as to the relevant income to be provided. This was partly because different terminology was used on a tax return. As a result, the application was refused, the couple had to seek legal advice

and they needed to make a fresh application. Their error also led to their lengthy separation. The Law Society of England and Wales argued that a lot of "time and effort could have been avoided if the Rules were more clearly worded".

3.11 The response provided by David Mills (Home Office Presenting Officer) evidenced the consequences of such mistakes at the appeal stage. He explained that a large number of appeals heard in tribunals related to cases where the required evidence was not submitted at the time of application, simply because the applicant did not fully understand the requirements. He argued that "this leads to a high number of allowed appeals where missing evidence is simply provided at the hearing, wasting time and money for all parties".

Eligibility criteria

3.12 In addition to evidential requirements, consultees argued that the complexity in the Rules also makes it difficult for applicants fully to understand the eligibility criteria for a successful application. This can result in applicants applying for visas for which they are ineligible.

3.13 HMC 1 and HMC 3, visitors to the drop-in service at the Hackney Migrant Centre, stressed that it is difficult to understand on which grounds to apply to the Home Office. HMC 3 added that this complexity is likely to mean that individuals apply under the wrong category. Moreover, Coventry University London International Student Advice explained that it is not always obvious to students that two routes are different:

> As untrained individuals, the students may also be prone to misapplication of the Rules. For example, there is a standard visitor visa rules which is different from the family visitor visa rules. It may not be immediately apparent to students that the two routes are different and one can only imagine the consequences of applying an incorrect route to one's immigration situation which may ultimately lead to a refusal and mar on one's immigration history.

3.14 A similar argument was made by Destination for Education who argued that students often make mistakes on the academic progression Rules because it is hard to work out the different Rules for the two and five-year time limits. This results in students regularly making mistakes as to which courses they can study.

Guidance and application forms

3.15 Our consultation paper recognised that discrepancies between the Rules and guidance can sometimes create confusion.[42] Responses to this consultation question indicated that mistakes do not only arise from the internal complexities of the Rules, but that they also arise from guidance and application forms. The following responses illustrate how these can contribute to applicant error. In their response, Universities UK and the Universities and Colleges Employers Association ("UCEA") (joint response) stated:

> As the UK Council for International Student Affairs identify, the definition of 'established presence' in Appendix C was amended five times while not added to

[42] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.26. The relationship between the Rules and guidance is discussed further in ch 10.

the Rules until 2010 and removed in 2013. While the definition was set out in the policy guidance, it was not reproduced in the Immigration Rules until 2011, carrying significant implications since many students were refused leave.

3.16 The Incorporated Society of Musicians pointed to the incidence of musicians failing to provide the necessary documentation when applying for a visitor's visa to perform at a permit-free festival.[43] They blamed these errors on the failure of the Rules, external guidance for musicians and internal Home Office guidance to cross-refer to one another. In addition to guidance, the response provided by LUL 12 showed that application forms can also increase the number of mistakes made by applicants when attempting to find the correct route:

> When I was applying for my mum's renewal, I initially thought I had the right form which I did in the end anyway but my mum was saying that her friend who recently did a renewal didn't have these questions that she was getting. This made me really scared as her leave was about to expire especially when I found out there were two forms, and the names were so similar. Thankfully I was able to be put in contact with a lawyer who clarified what the names of the forms meant.

Mistakes by others including the Home Office

3.17 Respondents argued that the complexity of the Rules increases the mistakes made by other groups, including legal professionals. Arkam, a Let Us Learn Campaigner, reflected on his experience as part of the CCLC and Let Us Learn joint response:

> When we hired a lawyer for our case, my dad was on the path to receiving Indefinite Leave to Remain (ILR), which he did receive. However, the lawyer gave me, my mom and brother the wrong advice on the application and told us to apply with my dad, although my dad had been in the UK much longer than us. Unfortunately, due to poor advice, myself, mum and brother were rejected by the Home Office on more than one occasion. We ended up going to court and having to fight for our lawful stay in the UK. When we arrived in the UK, we had lawful status under my dad, and we would have finished our route to settlement a while ago, had we not been wrongly advised. We now have to start the 10-year long settlement process again and it's painful.

3.18 Consultees also argued that complexity in the Rules leads to mistakes made by the Home Office. LUL 7 commented "I think we don't make as many mistakes as the Home Office does". The UK Council for International Student Affairs expressed the view that the complexity in the Rules can lead to misunderstandings by Home Office staff when writing guidance or providing policy answers. They believed that the likelihood of misunderstandings is higher when the Rules are drafted in such a way that they do not reflect the original policy intention.

3.19 Universities UK and UCEA (joint response) gave their view on mistakes made by the Home Office:

> The complexity of the Rules has also resulted in misinterpretation by Home Office officials in written and verbal correspondence through the helpline advice with

[43] This is a festival for which a certificate of sponsorship under the points-based system is not required.

applicants and sponsors and in policy answers. There are many examples within the Higher Education sector of misinterpretation of the Rules by caseworkers particularly with regard to relationship and family visas.

3.20 Anonymous consultee 1 identified that mistakes can also be made by universities in their attempt to navigate the Rules. The student was advised by her university that she did not require health insurance. The applicant was therefore "quite shocked" when she was told at a later stage that she was unable to apply for permanent residence as she did not have comprehensive health insurance during her studies.

Discussion

3.21 Respondents strongly agreed that complexity in the Rules increases the number of mistakes made by applicants. Respondents also noted that complexity in the Rules can lead to mistakes by other groups too, including legal professionals and the Home Office. Moreover, respondents were clearly of the view that mistakes do not only arise from the internal complexities of the Rules, but that they also arise from the complexities of guidance and application forms. We discuss complexity in guidance and application forms in chapter 10.

PROJECTED SAVINGS IN THE EVENT THAT THE RULES ARE SIMPLIFIED

3.22 Our draft impact assessment set out projected savings for the judicial system if the Rules were simplified, and noted, although it did not quantify, the potential for savings for the Home Office. It also asked consultees for views on cost savings for applicants. Consultation Question 5 asked consultees whether they thought the projected savings in the draft impact assessment were accurate. Of the 19 consultees who responded, four agreed and 15 selected "other".

3.23 There was a wide range of responses amongst those respondents who answered "other". Some respondents broadly accepted our projected savings whereas others did not believe enough data existed to inform an opinion on the accuracy of the assessment. Some of these respondents also provided evidence of possible savings for some users of the Rules, and gave views on cost savings for applicants in general.

Applicant savings

3.24 Some respondents believed that there would be cost savings for applicants if the simplification project was a success.[44] The Bar Council thought that it was hard to quantify the financial impact on applicants, but considered that these savings could be "sizeable" for a number of reasons. First, there would be fewer wasted application fees as more applications capable of succeeding would do so the first time. Secondly, the number of lost application fees could be further reduced as greater clarity should result in fewer unmeritorious applications being lodged. Thirdly, applicants would be less likely to need legal advice. Moreover, if legal advice was still required, the time needed to advise applicants should be reduced. Fourthly, there would be fewer legal challenges which would save the costs of advice, representation, and court fees.

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[44] Our draft impact assessment was not able to quantify cost savings for applicants and therefore asked practitioners and other consultees for evidence on these cost savings if the Rules were to be simplified.

3.25 Migrant Voice and the UTIAC judges also believed that the simplification project would lead to savings for applicants. Both emphasised that clearer Rules would mean that applicants are less likely to make mistakes which would avoid the cost of repeat applications. Migrant Voice added that fewer mistakes could also result in fewer administrative reviews being requested.

3.26 The only consultee who expressed scepticism that there would be cost savings for applicants was Robert Parkin (10 KBW) who noted "I doubt there will be much financial saving for the applicant as fixed fees are generally charged".

Non-monetary savings for applicants

3.27 The draft impact assessment predicted that the simplification exercise would lead to non-monetised cost savings for the main affected groups. Professor Thom Brooks (University of Durham) stated that the simplification of the Rules could lead to non-monetary savings for applicants as this exercise could benefit the "general wellbeing of those directly affected". The view that the benefits of simplification could go beyond cost savings was strengthened by a number of respondents who had previously been through the application process. For example, Anonymous consultee 2 stressed that the uncertainties resulting from the application process cause "immense emotional difficulties". The complexities of the process itself can cause great anxiety. The consequences for an applicant of getting it wrong cannot be quantified in financial terms but can be devastating.

Savings for HM Courts and Tribunals Service

3.28 Our draft impact assessment predicted cost savings for HM Courts and Tribunals Service ("HMCTS") as a result of fewer appeals and judicial reviews. It also identified savings for judges in time spent reading and in writing judgments as a result of more easily navigated Rules. A few consultees agreed that simplification of the Rules should save costs for the courts. David Mills (Home Office Presenting Officer) believed that if more applications succeeded first time, this should lead to a reduction in costs for the judicial system as there would be fewer refusals and subsequent appeals. The UTIAC judges, however, expressed doubts over whether the simplification of the Rules would in itself reduce the number of statutory appeals or of judicial reviews in the short to medium-term:

> 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 (Philippine*s) [2019] UKUT 00122 (IAC).

3.29 The UTIAC judges were also sceptical that simplification of the Rules would reduce the rate of appeals and judicial reviews in the middle to long-term. The judges believed that as long as the underlying policy objectives remained constant, approximately the same proportion of applicants would qualify under both the

redrafted rule and its predecessor. If so, the tribunal system could expect to receive the same number of appeals and judicial reviews related to the redrafted rule.

3.30 Moreover, the UTIAC judges were not convinced that simplification of the Rules would reduce the time spent by the judiciary in considering cases and writing judgments. They commented that UTIAC judges are "specialists who are very familiar with the Rules". Other than in a limited number of appeals, the judges therefore rarely spend a significant length of time searching for the relevant provisions in the Rules.

3.31 The UTIAC judges did express the view, however, that substantial savings could be made if the simplification project included the enhancement of evidential flexibility procedures in which "UK Visas and Immigration staff had a wider remit to revert to applicants, and highlight deficiencies in applications prior to refusal". The UTIAC judges assumed that this would lead to fewer administrative review applications and hence fewer judicial review claims.

3.32 It is worth noting that at consultation events with a wider range of the judiciary, many judges expressed the view that simplification of the Rules would save judicial time.

Home Office savings

3.33 Our draft impact assessment predicted that simpler Rules are likely to increase caseworker efficiency by reducing time spent trying to understand the Rules and the incidence of caseworker error. It also predicted time savings in the Home Office from a reduced number of invalid applications or applications submitted without the correct supporting evidence, and reduced time spent on preparation for hearings. Robert Parkin (10 KBW) found it "highly plausible" that the Home Office could save money on decision-making if the Rules were simplified. Migrant Voice believed that simplification of the Rules should save costs for the Home Office, making caseworkers less likely to make mistakes when initially deciding an application.

Business savings

3.34 Some respondents commented on the cost and resourcing burdens which complexity in the Rules creates for businesses. The Migration Advisory Committee noted the complaints of businesses involved in Tier 2 recruitment that complexity in the Rules generates additional costs in requiring them to pay for legal advice.[45]

3.35 The cost which the complexity of the Rules creates for Higher Education Institutions ("HEIs") was identified by Universities UK and UCEA (joint response), who described the financial burden created for HEIs who are required to spend considerable amounts of time and money on providing immigration advice to staff and students:

> Currently, the lack of accessibility demands unnecessary costs and resourcing from HEIs to ensure the correct immigration advice is provided for applicants. In regards to staff sponsorship, Russell Group universities, for example, spent around £7.3 million on supporting immigration applications for staff with £172K on fees paid directly to UK Visas and Immigration and £98K on staffing costs during the academic year of 2017-18. Furthermore, on average, £712K is spent on supporting immigration applications for students. Universities UK conducted a survey

[45] See also para 2.38 above.

investigating the financial burden of Tier 4 sponsorship to universities. Survey results suggest that the sector spends over £40m per year on Tier 4 compliance duties, which translates to an average of £240k per institution. Accessing the Rules, particularly in more nuanced, context-specific cases, should not be strongly dependent on UK Visas and Immigration assistance or legal specialist advice for a non-legal user.

3.36 The University of York Immigration Advice Team also identified that they have an annual subscription to UK Visas and Immigration which costs £8000 per year, allowing the advice team to contact the UK Visas and Immigration Premium Customer Service if a student has any doubts about a particular regulation of the Rules.

Additional non-monetary benefits

3.37 The Faculty of Advocates took the view that the current state of the Rules must involve some "reputational risk" for the UK. They believed that a significant non-monetary benefit of simplification of the Rules is ensuring that the requirements of lawfulness are met. Drawing on the decision of the European Court of Human Rights in *Sunday Times v United Kingdom*, they highlighted that the law must be adequately accessible and formulated with enough precision to allow citizens to regulate their conduct.[46]

Discussion

3.38 Our draft impact assessment focussed primarily on cost savings for HMCTS. Respondents suggested that simplification of the Rules could lead to cost savings for applicants too. Moreover, respondents identified cost benefits to businesses in the UK, including employers and HEIs, in the event that the Rules are simplified. Respondents also identified a number of non-monetary benefits, including considerable benefits to the general wellbeing of affected groups and the satisfaction of the requirements of lawfulness.

3.39 Our final impact assessment finalises our estimates of saving to HMCTS. It also includes potential cost savings for HEIs, and non-monetised benefits for applicants. We were not able to quantify cost savings for applicants, but believe that there is a potential for savings in fees if the fees paid for applications rejected due to applicant mistakes (which would have succeeded but for the error) are counted. While the cost to applicants of mistakes is not quantifiable, we include in our assessment the non-monetary benefits to the health and wellbeing of applicants of Rules which are easier to understand and which generate fewer errors.

3.40 We have also included a figure for potential savings in Home Office casework costs. These are quantified as an efficiency saving on casework costs as a result of a reduced number of applicant errors, improved navigation of the system, less frequent changes to the Rules and fewer applicant queries. The impact assessment also highlights other areas of potential savings such as time spent on preparation for hearings, but we have not been able to quantify these.

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46 *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (App No 6538/74) para 49.

3.41 Our final impact assessment is published alongside this report. In total, we project savings of almost £70 million over a period of ten years in the event that our recommendations for the simplification of the Rules are implemented.

Chapter 4: Recent causes of length and complexity in the Rules

4.1 Our consultation paper noted that the Immigration Rules have almost quadrupled in length in the last ten years, increasing from under 300 pages in 2008 to around 1133 pages by the end of 2018. We identified three distinct recent drivers of length and complexity in the Rules: a highly prescriptive approach to their drafting; the *Alvi* decision;[47] and the codification of article 8 of the European Convention on Human Rights ("ECHR").[48] We also considered the interaction between these factors.

4.2 The first sets of Rules under which the Immigration Act 1971 was administered were under 40 pages in length and operated as a formal description of the policy followed by the Home Office in administering the immigration system.[49] The Rules outlined substantive requirements governing entry and leave to remain, often supported by non-exhaustive illustrations of how these requirements could be met. There was a place for discretion in the system, particularly as to the evidence needed to show compliance with a Rule.[50]

4.3 The prescriptive approach to drafting, followed in the points-based system Rules introduced from 2008 and later in other areas such of the Rules such as Appendix FM, set down precise detail in Rules which mandated a refusal of leave if the applicant did not meet the exact requirements. In contrast to the Rules as originally drafted, the Rules became a comprehensive statement of detailed criteria.[51]

4.4 Decisions by the courts also led to significant changes in the Rules. In 2010 the Court of Appeal decided, in *Pankina,* that an application could not be refused on grounds of a failure to satisfy additional requirements set out in guidance.[52] Following this decision, and a number of others in 2010 and 2011, some guidance considered to include mandatory requirements was brought into the Rules. These developments

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47 *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208.

48 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 5.

49 On 23 October 1972 the Secretary of State laid two sets of Immigration Rules before Parliament: a Statement of Immigration Rules for Control on Entry (Cmnd 4606), and a Statement of Immigration Rules for Control after Entry (Cmnd 4792). These Rules were 17 and 20 pages long. The statements were disapproved after a debate on the floor of the House of Commons on 22 November 1972. But they were the Rules under which the Act was administered until two new sets of Rules, one for Commonwealth citizens and the other for foreign nationals, were laid on 23 January 1973: HC (1972-1973) HC 79-82. The current Immigration Rules have their origin in a Statement of Changes in the Immigration Rules (HC 395) which was laid before Parliament on 23 May 1994. This extended to 80 pages. For this account of the history of the Immigration Rules, see the judgment of Lord Hope in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208 at [10 -11].

50 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.2 and 5.3.

51 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.4 and 5.5.

52 *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, [2011] QB 376.

culminated in the *Alvi* decision of the Supreme Court in 2012,[53] which confirmed that an application could not lawfully be refused for non-compliance with a requirement set out in extrinsic material rather than in the Rules.[54] The day after the judgment, some 300 pages were added to the Rules in a single statement of changes.

4.5 The Rules were also expanded to incorporate the assessment of applications invoking article 8 of the ECHR into the Rules. The July 2012 statement of changes which introduced this policy stated that the Rules would "reflect fully the factors which can weigh for or against an Article 8 claim". The intention was that this should reflect "the view of the Government and Parliament as to how article 8 should, as a matter of public policy, be qualified in the public interest in order to safeguard the economic well-being of the UK".[55]

4.6 Our consultation paper suggested that these developments drove not only the increasing length of the Rules, but also their growing complexity. Increased volume is not intrinsically a cause of complexity. The transfer of freestanding material into the Rules increases their length without necessarily adding to their complexity. However, we thought the increased complexity was a consequence of the way in which external material was grafted, often at great speed, into the Rules. We also thought that complexity was caused by the tendency of a prescriptive approach to generate ever-increasing detail.[56] We used the sequence of amendments to paragraph 10 of Appendix FM-SE (Family members – specified evidence) from 2012 onwards to illustrate this way in which complexity develops.[57]

4.7 We asked in Consultation Question 10 whether consultees agreed with our analysis of the causes of increased length and complexity in the Rules. Consultation Question 11 sought consultees' views on whether our example of successive changes in Appendix FM-SE was illustrative of the way in which prescription can generate complexity. Consultation Question 12 asked whether consultees could provide other examples of Rules where the underlying immigration objective has stayed the same, but evidential details have changed often. We now turn to consultees' responses to each of these questions.

VIEWS ON THE CAUSES OF INCREASED LENGTH AND COMPLEXITY

4.8 Eighteen consultees answered Consultation Question 10. Seventeen agreed or broadly agreed with our analysis. Jonathan Collinson and Gemma Manning (University of Huddersfield) were the only respondent to record their response

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53 *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208.

54 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.14 to 5.16.

55 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.25 to 5.27.

56 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.28 to 5.41.

57 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.42 to 5.52.

expressly as disagreement, although some of their points of disagreement overlapped with reservations expressed by consultees who broadly agreed with our analysis.

4.9 Of those who agreed or broadly agreed with our analysis, many identified further causes which we had not identified, or suggested additional causes to which we had attributed insufficient significance.

4.10 These views are considered in more detail below.

Frequency of change

4.11 One of the principal themes pursued was that we had not sufficiently highlighted that the frequency of change is itself a driver of complexity, because of the difficulty of keeping up with the changes and following the process of their insertion into the Rules. As the First-tier Tribunal (Immigration and Asylum Chamber) judges noted:

> The Rules have become lengthier and more complex by frequent additions and alterations with lettering and numbering that does not follow sequentially.

Policy and changes of policy

4.12 Many consultees also commented that we had not identified specifically that the frequency of these changes is generated by the frequency of substantive policy changes as well as by the need to fine-tune the content of prescriptive rules. The Bar Council observed:

> The complexity in the Rules and immigration law more broadly is at least in part attributable to the uniquely controversial position the topic of immigration holds in domestic political discourse. The consultation paper rightly identifies a number of specific drivers of complexity in the Rules: the introduction of a "points based system", the attempted codification of article 8 ECHR within the Rules, the requirement, in line with the Supreme Court's decision in *Alvi v Secretary of State for the Home Department* [2012] 1 WLR 2208, to move extensive qualifying criteria from Home Office guidance into the Rules. Underpinning all of this, however, is the fact that the policy which the system of immigration control in the United Kingdom is intended to reflect is in a state of perpetual flux. Current indicators are that this is likely to continue and quite possibly accelerate. Whilst this remains the case, there are in our view limits to what can be achieved through restructuring and redrafting the Rules, however necessary that process may be in itself.

4.13 Amnesty International UK acknowledged that recommendations on policy are outside the terms of reference of our simplification project, but argued that immigration policy is itself a cause of complexity:

> Policy is itself a significant cause or potential source of complexity. How policy is made and implemented (questions of consultation, notice, transition, timing and frequency of change) are also a cause or potential source of complexity. Moreover, leadership and culture (or policy) regarding how decision-makers are directed, encouraged or licensed to implement policy (including around questions of discretion/flexibility or prescription) impact upon the aims of simplification ….

We recall the observation of Lord Scott of Foscote in his short opinion on the appeal of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 (paragraph 4):

"... policies that involve people cannot be, and should not be allowed to become, rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not".

4.14 Amnesty International UK detected in the Rules an absence of consideration of their impact on people, as observed by Lord Scott:

The observation has more general application as it highlights the importance that policy and rules do not achieve justice if they are made and applied without due consideration to their impact on people - most particularly, the applicants to whom they apply and their families. Any project of the sort to which this consultation relates must keep that well in mind. The fundamental reason why policy and rules have become so complex (both in their drafting and their application) is, in our view, that this has not been in the mind of those responsible for setting policy; for drafting rules, guidance and other instruments by which policy is to be implemented; and for applying policy.

4.15 Others attributed the frequency of policy changes to a policy of reducing the number of successful applications from certain categories. Carter Thomas Solicitors (Respondent B from the Immigration Law Practitioners' Association ("ILPA")) observed:

The analysis seems to be correct. However, a wider point would be that the complexity and length of the Rules helps to reduce the numbers of successful applications in certain categories and allows caseworkers more opportunities to refuse applications. This may be an end in itself, reducing the number of successful immigration applications from certain categories. For instance, the Adult Dependent Relative (ADR) category is now extremely complex and only a few hundred applications are successful per year. This complexity therefore reduces the successful applications under this route. However, it can be said the ADR route is still open, it is simply so complex it may as well be closed.

4.16 Ehren Mierau (in a personal capacity and on behalf of York College International Student Support) commented:

The rate at which secondary legislation (the necessity of which is highly questionable) is produced is a significant contributing factor, but to be frank I think there is actually a deliberate intention to make the Rules impenetrably complex. As an (EU) immigrant myself and as the member of staff at an FE college faced with the unhappy task of supporting Tier 4 applicants and students with a very wide range of other immigration statuses, I get the distinct impression that the government does not want me to be able to understand immigration law even as it pertains solely and specifically to my situation. The Immigration Rules have become a barrier which helps further the government's agenda to reduce migration.

4.17 The Joint Council for the Welfare of Immigrants ("JCWI") commented specifically on policy around the incorporation of article 8 of the ECHR into the Rules. They criticised

that policy as being driven by a desire to exclude judicial oversight and to replace what had been a careful and considered decision as to compliance with human rights with a "tick box" exercise.

4.18 The impact of the litigation which often follows changes to the Rules is an additional factor noted by some respondents. The complexity of provisions can increase as a consequence of the need to amend the Rules to reflect judicial decisions. The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges noted that there is often a spike in litigation following changes to the Rules, and that in some cases it can take many years to settle key issues in interpretation. This has been the case particularly with the provisions incorporating article 8 ECHR into the Rules.[58]

4.19 The Incorporated Society of Musicians ("ISM") attributed complexity in the Rules to a different cause:

> The ISM believes that while the analysis is correct, it does not address how austerity and the need to cut costs have impacted on the Immigration Rules. Clearly a system that is prescriptive and based on a tick-box format means that the Home Office decision-maker can make decisions more quickly and with less thought, which could mean that a lower-grade, less-skilled civil servant can be employed to make the decision.

4.20 Collinson and Manning (University of Huddersfield) disagreed with our analysis, which they described as "overly simplistic", failing to recognise the policy of prescription itself, and the codification of article 8 considerations, as distinct causes of complexity. They commented that:

> the recent increase of the length and complexity of the Immigration Rules is as a consequence of conscious political decisions by the Secretary of State, rather than as an unfortunate side effect of the Supreme Court in *Alvi.*

4.21 Collinson and Manning also saw unsuccessful attempts to reform particular categories of the Rules as a further cause of complexity. They instanced the reform of the visitor Rules to create a single "standard visitor visa" in place of the previous distinct categories of visit visa, which had included, for example, general, family, child, business, and sports categories:

> The consequence has been a complex scheme of 'permitted purpose or activities'…and 'permitted paid engagements'… This is a classic example where "simplification" (turning nine visas into one) has created instead a complex web of Immigration Rules. This is because the comprehensiveness and prescription of each former category has been reproduced within the Rules for a single visa category, at the expense of user-friendliness and clarity.

4.22 Amnesty International UK made a plea for policy-makers to recognise the need to avoid introducing or increasing complexity by policy decisions:

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[58] See for example *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273.

> It is necessary that the Home Office … recognise and address the need to avoid introducing or increasing complexity by policy. We note that during the evidence sessions of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill public bill committee, Ministers repeatedly responded to general concern regarding complexity in the Immigration Rules by emphasising to witnesses (and others) the need to respond to this consultation. While that was an entirely appropriate suggestion, there is a risk that the Commission's review of the structure and drafting of the Rules is taken to provide the opportunity to fully address complexity. If so, we do not agree. We do not agree because policy …. is a significant source or cause of complexity.

VIEWS ON OUR EXAMPLE OF SUCCESSIVE CHANGES IN APPENDIX FM-SE

4.23 We asked at Consultation Question 11 for consultees' views on whether the example given in our consultation paper of successive changes to the evidential requirements in paragraph 10 of Appendix FM-SE[59] was illustrative of the way in which prescription can generate complexity. Seventeen consultees answered this question. All agreed that the example given was illustrative of this process. Some consultees had further comments to make about the impact of prescription on drafting.

Prescription can undermine the purpose of a policy

4.24 The Law Society of England and Wales observed that the kind of prescriptive drafting illustrated by our example can act to undermine the purpose of the policy it seeks to implement:

> For example, the requirements to have a bank statement in a certain format undermine the purpose of the Rules as, anecdotally, banks are unwilling in some circumstances to provide documents that meet the requirements. Also, the requirement to have wages deposited into banks and shown on bank statements does not actually correspond with a legal requirement for wages to be paid in that way.

The relationship between judicial decisions and drafting

4.25 The UTIAC judges looked at the effect of appeals and judicial reviews in identifying lacunae in prescriptive Rules:

> 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.
>
> … 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

[59] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 5.42 to 5.52.

> 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.

4.26 David Mills (Home Office Presenting Officer) looked at reactive drafting from a different perspective:

> The attempt to be prescriptive, and therefore consistent, has led to constant tweaking to clarify original intent, in light of appeal decisions where a different interpretation is adopted by judges. I fully understand the desire for more prescription, having seen at first hand the wildly different interpretations of the same Rule by different judges over time, but I do wonder whether we have caused greater problems than have been solved with this approach.

Need for specialist help

4.27 Carter Thomas Solicitors (Respondent B from ILPA) observed that our example illustrates the way in which the degree of complexity involved means that this route "requires specialist help for all but the simplest applications".

Policy objectives underlying prescription

4.28 In line with the analysis discussed in the previous question, JCWI was of the view that our analysis misses the underlying driver of complexity in Appendix FM. In their view, its complexity is generated by a combination of the need to respond to the outcome of litigation and a political desire to exercise greater control over the number of applications which are granted.

OTHER EXAMPLES OF FREQUENT CHANGES TO EVIDENTIARY DETAILS

4.29 We asked at Consultation Question 12 whether consultees could provide other examples in the Rules where the underlying policy objective has remained the same but evidentiary details have changed often.

4.30 The Faculty of Advocates thought that the Appendix FM example given in our paper reflected an approach taken across the Rules generally:

> With the exception of recent changes in respect of EU nationals, virtually all recent changes to the Rules – whether in Appendix FM or elsewhere – have been either to modify evidential requirements or to refine definitions contained in the Rules whilst the underlying immigration objective has stayed the same.

4.31 Five of the 11 consultees who answered this question gave the Tier One (Entrepreneur) route (now closed) as a further example. Robert Parkin (a barrister at 10 King's Bench Walk) noted that:

> 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.

4.32 David Mills (Home Office Presenting Officer) observed that changes in this area have been made "with gradually more subjective requirements being introduced to counter perceived abuse of the route".[60]

4.33 Two respondents gave the Tier 4 student requirements as an example. The UK Council for International Student Affairs observed:

> The evidentiary requirements for Tier 4 maintenance, set out in Appendix C, have been amended at least 14 times since April 2010, including three times since January 2018. The underlying immigration objective has remained the same, ie students must provide evidence that they hold fixed sums of money to cover their fees and living costs in the UK.

4.34 The Bar Council pointed to paragraph 245AA, the Rule providing "evidential flexibility" which permits caseworkers to contact applicants to request certain types of missing evidence.

4.35 Professor Thom Brooks (University of Durham) gave the example of Appendix O (Approved English language tests) providing lists of approved tests and test centres as "perhaps the most frequently changing part of immigration policy".

DISCUSSION

4.36 Since immigration policy is outside our terms of reference, we pass on the additional observations as to the relationship between complexity and policy contained in this chapter without specific comment on our part. It is self-evident that the simpler any substantive scheme of rules is, the easier it will be to understand. It is undeniable that the content of immigration policy, and the frequency with which it changes, can have a significant impact on the complexity of the Rules. But the terms of the substantive scheme, and changes to it, are matters for the Secretary of State, not us. As we acknowledged in the consultation paper,[61] criteria for immigration leave have to deal with a wide variety of situations. We share Lord Justice Underhill's doubt that modern immigration rules will ever be "easy, plain and short";[62] the challenge of this project is to improve the presentation of intrinsically complicated material.

4.37 Our intention in including discussion of drivers of complexity in our consultation paper was to stimulate debate as to how policy changes could contribute towards simplification.[63] We hope that consultees' views will be of value to the Home Office in

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60 For further reference to the introduction of subjective requirements into the Immigration Rules, see para 5.6 below.

61 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.22.

62 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.5.

63 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.7, 6.8 and 6.89.

considering the future formulation of the Rules. We also hope that the additional examples provided by respondents of frequent successive changes in other areas of the Rules will provide a useful supplement to the analysis set out in our consultation paper.

4.38 The possibility of reducing prescription as part of the simplification exercise, a matter which straddles issues of policy and matters of drafting style,[64] is considered in chapter 5. The frequency of changes to the Rules as a driver of complexity is considered as part of our discussion of how to maintain simplification over time contained in chapter 8.

[64] See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 1.10.

Chapter 5: Less prescriptive Rules?

5.1 In discussing the causes of complexity in the Immigration Rules, our consultation paper identified the shift towards a policy of detailed prescription as one of the recent and most significant drivers of complexity.[65] Our analysis of Appendix FM-SE showed that the prescriptive approach itself has had a tendency to generate increasing amendments supplying more detail. We presented, in other words, a vicious circle which generated more detail, longer Rules, and more frequent changes.[66]

5.2 In order to reduce the complexity caused by this feedback loop, our consultation paper investigated whether a less prescriptive approach to drafting the Rules could still adequately convey the purpose or policy objective behind the Rule. It looked at the possibility of supporting more generally expressed Rules with non-exhaustive guidance which does not breach the principle in *Alvi.*[67]

5.3 While a decision to move to a less prescriptive approach is a matter of policy for the Home Office, we sought consultees' views on the issue of whether, how and where the Rules could benefit from a less prescriptive approach.

ADVANTAGES AND DISADVANTAGES OF A LESS PRESCRIPTIVE APPROACH

5.4 Our consultation paper suggested some of the pros and cons of adopting a less prescriptive approach.[68]

Advantages	Disadvantages
Ease of navigation because Rules are simpler and shorter	Loss of certainty, clarity, and transparency, especially with loss of appeal rights and the limitations of internal administrative review in non-human rights cases
Time/cost savings in decision-making	Risk of inconsistency between decisions/caseworkers
More common-sense approach by decision-makers with greater job satisfaction	Loss of speed and efficiency in cases which fall squarely within the Rules
Fewer amendments to the Rules needed	Risk that complexity is pushed into the underlying guidance or that it breaches the *Alvi* principle

65 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 3.

66 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 5.

67 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 6.

68 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.9 to 6.22.

Time/cost savings in dealing with refusals and re-applications where the applicant is able to meet substantive requirements	Risk that guidance and Rules diverge and inconsistencies develop
	Risk of increased litigation over meaning and effect and to challenge the exercise of subjective judgment, involving time and cost for both the Home Office and the applicant, and with wider adverse consequences to an applicant remaining in the UK following a refusal

COMPARING DIFFERENT APPROACHES TO PRESCRIPTION

5.5 Our consultation paper examined different approaches to the level of prescription, by contrasting the current and pre-2008 Rules, as well as equivalent provisions in other jurisdictions. We looked, by way of example, at the pre-2008 Business Person Rules, contrasting them with the Tier 1 (Entrepreneur) Rules which formed part of the points-based system which replaced them. We also looked at the New Zealand Entrepreneur rules, the EU settlement scheme and Appendix V (Visitors).[69]

5.6 We found a far greater degree of evidential prescription in the Tier 1 (Entrepreneur) category than in the pre points-based system equivalent. The evidential criteria in relation to the funds invested, for example, contained far more detail as to the documents required than in the previous version. We gave the example of the requirement to provide lawyers' letters confirming the authenticity of signatures on certain specified documents. We noted, in contrast, that decision-makers used subjective judgement in relation to the "genuineness" of the applicant's intentions.[70]

5.7 We found that the New Zealand Operational Manual was drafted quite differently. Its Entrepreneur category relied on the subjective judgement of officials to a much greater extent. Many of its requirements stipulate that the applicant needs to demonstrate "to the satisfaction of" a "business immigration specialist" that the relevant requirement is met. The requirements contain lists of evidence to be provided which are non-exhaustive.[71]

5.8 The EU settlement scheme includes a tiered evidential system which seeks to structure discretion in relation to some evidential requirements. Cross-departmental data sharing is used to minimise the need to submit evidence as to residence. If government records do not confirm the periods of residence required, guidance provides non-exhaustive lists of evidence which can be provided. The types of

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69 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 6.

70 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.23 to 6.31.

71 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.33 to 6.49, citing the New Zealand Operational Manual, available at https://www.immigration.govt.nz/opsmanual (last visited 5 November 2019).

evidence are categorised as “preferred evidence”, “alternative evidence” and “unacceptable evidence”. In relation to certain evidential requirements, such as evidence of identity, particular evidence is still required. There is also a requirement for decision-makers to contact the applicant where evidence is missing. The scheme also gives decision-makers discretion as to substantive entitlement to leave, stipulating that applicants must meet requirements to the satisfaction of the decision-maker.[72]

5.9 We looked finally at Appendix V (Visitors) in the current Rules. This also adopts a less prescriptive approach to substantive (as distinct from purely evidential) requirements. For example, the requirement that visitors must not intend to work does not exhaustively define “work”. It is supplemented by guidance for the decision-maker which gives examples of what work may involve.[73]

5.10 We also noted the interactive approach already adopted in some areas by the Home Office as a means of mitigating the rigidity introduced into the system by highly prescriptive rules. This approach permits decision-makers to contact an applicant to ask for missing documents or to correct errors in the application form prior to making a decision. These powers also allow for an application to be granted even where evidence is missing or in the wrong format if the information is verifiable from other documents. This more interactive approach, known as “evidential flexibility”, lessens the impact of prescription.[74]

5.11 The Windrush Scheme Guidance provides for the most flexible approach to evidence to be taken by decision-makers: caseworkers “must take a holistic view where evidence is not provided that proves matters of fact and decide the case on balance of probability”.[75]

5.12 We used our analysis to try to identify types of Rules which might benefit from less prescription. We identified evidential rules specifically, but found it difficult to isolate any other type of rule. We detected a spectrum of approaches. At one end of the spectrum, evidential matters can be left to the subjective judgement of the official, with judgement guided to a greater or lesser extent by non-exhaustive lists in guidance. Intermediate positions include a tiered approach to evidence. At the other end of the spectrum, only specified evidence will do. The ability to choose between different approaches allows more nuanced options which do not need to be applied across the board. The choice is not between a highly prescriptive approach and unrestricted discretion.[76]

5.13 We described three different levels of prescription by way of illustrative models:

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72 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.52 to 6.64.

73 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.67 to 6.71.

74 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 6.79.

75 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 6.80.

76 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.73 to 6.78.

(1) Level 1: captures only the basic principle behind the policy. For example, family members of a settled person must be able to show sufficient resources to support themselves.

(2) Level 2: includes some minimum standards, but leaves elements beyond that to the caseworker's judgement. For example, family members of a settled person must be able to show a minimum level of annual income of £18,600 with an additional amount per child, or savings at a certain level. These requirements may be fleshed out by non-mandatory guidance as to how these requirements may be met, for example in relation to what types of funds may be held by the applicant.

(3) Level 3: extensive detailed prescriptive elements, for example as demonstrated by the current Rules for family members set out in Appendix FM and FM-SE.[77]

CONSULTATION QUESTIONS ON PRESCRIPTION

5.14 Our consultation paper sought views on whether the Home Office should review the content of the Rules to decide which parts need detailed prescription, and which might benefit from being more general. We suggested that a less prescriptive approach might be advantageous in the case of Rules which have been subject to frequent successive amendment, Rules containing detail which is the subject of rapid social or technological change, or Rules raising issues which need to be determined by the subjective judgement of officials or on the basis of information obtained via cross-departmental checks.[78]

5.15 Before investigating views on the adoption of a less prescriptive approach, we asked at Consultation Question 13 whether consultees thought that the discretionary elements within Appendix EU and Appendix V (Visitors) have worked well in practice. We went on to ask consultees more generally about whether the Rules should contain less prescription, and, if so, which Rules. At Consultation Question 14 we asked for views on whether it was better to preserve the detail in the Rules in the interests of transparency and clarity, even if this means that the Rules have to be very long. At Consultation Question 15, we asked for the views of consultees on the advantages and disadvantages of adopting a less prescriptive approach. We asked at Consultation Question 16 whether the Rules should be less prescriptive as to evidential requirements. Consultation Question 17 asked more generally what areas of the Rules would benefit from being less prescriptive, even if that meant having less certainty.

5.16 At Consultation Question 18, we asked about the factors which might trigger a decision to make a Rule less prescriptive. We asked if consultees agreed that the nature and frequency of changes to a provision would be a good guide to identifying a suitable Rule (where the changes were made for reasons other than policy reasons). We also asked whether it would be relevant if the matter was one best left to the

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77 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.83 to 6.85 for further examples of Levels 1, 2 and 3 drawn from the entrepreneur and skilled worker routes.

78 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 6.90.

judgement of officials. We asked finally at Consultation Question 19 for views on subjective formulations such as “to the satisfaction of the decision-maker”.

Views on the discretionary elements in Appendix EU and Appendix V (Visitors)

5.17 Sixteen respondents answered Consultation Question 13 with views on whether the discretionary elements of Appendix EU and Appendix V (Visitors) worked well in practice. Two thought that the discretionary elements worked well. Four disagreed. Ten answered “other”. When the content of the responses is analysed, most respondents positively endorsed the Appendix EU discretionary provisions and most had reservations about the discretionary elements in Appendix V. The different attitudes reflected differences in the formulation of the discretionary provisions and different perceptions of caseworkers’ approaches to the two immigration routes.

Appendix EU

5.18 Eight respondents commented in detail on the discretionary elements in Appendix EU. Some found it too early to know how well the scheme was working. The Bar Council, the Immigration Law Practitioners’ Association (“ILPA”), the UK Council for International Student Affairs (“UKCISA”) and Universities UK and Universities and Colleges Employers’ Association (“UCEA”) (joint response) thought that the discretionary elements were working well.

5.19 The Bar Council provided an example of discretion working well from the second Private Beta Testing Phase for Appendix EU. Rights of Women[79] assisted a group of applicants who did not have evidence of residence for the requisite periods in the form listed in the Home Office guidance, helping them to identify other evidence of residence. This alternative evidence included, in one case, a letter from a support worker for an applicant with a history of modern slavery which identified points in time when official records may have been generated. As a result, the Home Office carried out checks which produced evidence of the applicant’s contact with them. This, together with evidence of an application for a National Insurance number, and taking into account the woman’s circumstances, was sufficient to allow settled status to be granted.

5.20 The Bar Council noted that this example arose in a pilot scheme involving a low volume of applications, that the scheme had not been open long, and that it is unique in its intent. Nevertheless, in their view:

> The way Appendix EU appears to be operating in practice demonstrates that a move away from a highly prescriptive approach to a more flexible and purposive approach to ascertaining whether relevant criteria are satisfied can be operated successfully.

5.21 ILPA thought that the discretionary elements were working well, but that this could be because of the more straightforward application requirements which govern the scheme, and because more complex cases had not yet been tested. UKCISA agreed that the discretionary elements were welcome, but pointed to the wider context of the

[79] This is a charitable organisation who were involved in the second Private Beta Testing Phase for Appendix EU.6. They assisted 12 women and their dependants to make applications.

scheme in which the default position is to grant rather than to refuse leave, with the consequence that there is a long, non-exhaustive list of acceptable evidence.

5.22 The Law Society of England and Wales thought it too soon to judge the success of the scheme. They were concerned however by the lack of specific information on the face of the Rules as to what was required, and that the provision for automated checks with other government departments paved the way for the Rules to "take a back seat to the automated process".

5.23 UKCISA also expressed concerns about the automated checks:

> The use of cross-departmental data in theory is a good idea, but there should be an opportunity for applicants to cross-check any data before the Home Office uses it in order to ensure that it is the data belonging to the applicant, it is correct, and does not lead to unforeseen and unintended consequences.[80]

Appendix V (Visitors)

5.24 Nine respondents looked closely at the Appendix V approach. The Law Society of England and Wales, the Bar Council, the Law Society of Scotland, Carter Thomas Solicitors (Respondent B of ILPA), the Incorporated Society of Musicians ("ISM"), and Jonathan Collinson and Gemma Manning (University of Huddersfield) were emphatic in their view that the discretionary elements do not work well.

5.25 The Law Society of England and Wales found that discretion allows inconsistencies of treatment between applicants from different countries, suggesting that "some applicants from specific countries seem to have been treated very harshly". They described a visit to the Home Office in which they had observed the operation of the "enrichment" process whereby an algorithm assigns levels of risk to a case before consideration:

> We were told that holding a particular national citizenship on its own could be enough for the application to be deemed high risk and subject to increased scrutiny and requirements.
>
> We also observed immigration officers conducting assessments of cases flagged as high risk and in one example saw a visit visa application by the elderly mother of a man who was originally from Nigeria being refused because she had failed to provide a birth certificate to prove the relationship. It is important to note that a birth certificate is not a requirement in the Immigration Rules in such circumstances and we have seen numerous applications from other countries where that would not have been a reason for refusal in a case of this sort. It is clear to us that restrictions on applications beyond those set out in the Rules are being applied in practice and

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80 See the comments of the First-tier Tribunal (Immigration and Asylum Chamber) judges below at para 5.37 in relation to the decision in *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647. For further concerns about automated data checks, see also Open Rights Group and ILPA*, EU Settled Status Automated Data Checks*, February 2019, examining the scope of legal duties to give reasons for data check outcomes and the need for supervisory control by caseworkers. Available at https://www.ilpa.org.uk/resources.php/35141/ilpa-and-open-rights-group-briefing-paper-eu-settled-status-automated-data-checks-19-february-2019 (last visited 17 September 2019).

in the absence of a clear framework it is impossible for applicants to prepare in order to ensure that they can be issued visas.[81]

5.26 The Law Society of England and Wales also gave the example of a new checklist of documents which applicants for a visit visa are required to provide, which in their view has in effect made the Home Office approach more prescriptive without changing the Rules. The checklist forms part of the online application form:

> It is apparent in practice that the wording of the Immigration Rules [in relation to] … the visit visas has become almost irrelevant. Where documents such as those listed … are not provided by applicants they will almost inevitably receive a refusal of the application querying their intention to return home at the end of the visit.

5.27 In their analysis, these developments point to the way in which additional requirements can be introduced, either across the board, or only for some higher risk applicants, without amendment of the Rules.[82]

5.28 The Law Society of Scotland commented:

> It seems the discretionary elements in these applications have had the opposite effect of giving caseworkers too much free rein which results in high numbers of refusals in visitor visa applications, with little in the way of recourse against decisions.

5.29 Carter Thomas Solicitors (Respondent B from ILPA) added that "in subsequent applications a great deal of evidence must be submitted to convince the caseworker that the first decision should not be upheld".

5.30 ISM pointed to the dangers of unconscious bias and lack of cultural awareness by decision-makers in the exercise of discretion. In their view, clear culturally-aware guidance is needed to overcome this. They gave the example of the refusal of visas for musicians seeking to perform at a music festival in 2018 to illustrate how the discretionary elements in Appendix V have not worked well in the absence of such guidance.[83]

5.31 Collinson and Manning (University of Huddersfield) found the "intention to leave" requirement at Rule V4.2(a) a better example of the pitfalls of the discretionary approach than the example of V4.5 in our consultation paper of an intention not to

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[81] The enrichment system has been analysed by the Independent Chief Inspector for Borders and Immigration: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631520/An-inspection-of-entry-clearance-processing-operations-in-Croydon-and-Istanbul1.pdf (last visited 17 September 2019).

[82] Their response also emphasised the impact on applicants of a refusal decision over time. Once an applicant has been rejected two or three times, it may be impossible for them ever to obtain a visit visa. They saw this as a further aspect of the process by which procedures and practices become more detached from the Rules themselves.

[83] See the consultation analysis table for Consultation Question 13 for the full example given.

work. They highlighted the need for adequate caseworker training and appropriate insight.[84]

5.32 Another three respondents, UKCISA, Universities UK and UCEA (joint response) and Destination for Education, voiced concerns about the way in which the less prescriptive approach in Appendix V can generate different outcomes. UKCISA thought that this was associated with whether the policy intention communicated to caseworkers is that a generous interpretation should be applied in favour of the applicant, or a restrictive approach taken.

5.33 Universities UK and UCEA (joint response) suggested that discretion should not be used if it leads to variability between caseworkers. They thought that non-exhaustive lists of evidential documents would be more effective than open-ended discretion, by supporting the caseworker in exercising a level of discretion and minimising variability in response. They gave the example of the list of "permitted activities" within Appendix V, which they said needs to be more general to account for the wide number of academic and professional activities carried out within higher education institutions, but would need to be supported by a non-exhaustive list to minimise variability of response.

5.34 Destination for Education commented:

> Our view is that in general, provisions allowing discretion have the potential to be useful, but in practice they are not used consistently or indeed well by Home Office decision-makers (for example the ability to request additional documentation to corroborate financial information submitted as part of a visa application is rarely used).

5.35 A number of respondents thought that the discretionary elements could not be described as working well in the absence of an effective means of redress in the form of a right of appeal or other independent form of merits-based review.

5.36 Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) observed that an assertion of disbelief by a caseworker could only be overturned on administrative review if the Secretary of State for the Home Department agrees (which he said is uncommon) or on judicial review if irrational (also uncommon). He added that "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)". The Law Society of England and Wales observed that:

> When rules which are not published are being applied, and where there is no effective means of redress or accountability by way of appeal or administrative review a less prescriptive system such as is operated with the visit visa regime at the current time can be highly unfair.

5.37 The First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges could not offer a view on how well the current discretionary elements under discussion were working, as appeals in the area are rare. They did sound a note of caution, however:

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[84] See the consultation analysis table for Consultation Question 13 for sources and further detail.

> Any words that carry a discretion should be clearly defined. There should be a clear right where the rule is discretionary to allow an applicant to address concerns or submit further evidence before a decision is made. The "minded to" approach to decision-making considered in *Balajigari and Others*[85] might be an appropriate model.

5.38 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges had experience of the area through judicial review applications, and told us that most cases they see are refusals based on an assessment of whether an applicant is a "genuine visitor" under paragraph V4.2. They noted:

> 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 Entry Clearance Officers might be setting the bar unnecessarily high in their subjective assessment of whether a visitor is genuine.

5.39 Two respondents had positive observations to make about the discretionary elements in Appendix V. The UTIAC judges thought that the use of non-exhaustive lists to define "work" worked well. David Mills (Home Office Presenting Officer) thought that "leaving a greater degree of discretion to caseworkers to apply the facts of the case to the spirit of the rule, is undoubtedly simpler for all concerned". However, he pointed out that a consequence of this is to give a wider discretion to the judiciary to find that a rule had been met "even on very flimsy evidence". He observed that it was a matter of policy as to which approach was preferable.

Length as a price worth paying for the benefits of transparency and clarity

5.40 Eighteen respondents answered Consultation Question 14 with views as to whether the length of the Rules was a worthwhile price to pay for the benefits of transparency and clarity.

5.41 The internal survey of ILPA members gave the most positive of the responses to this question. 83.9% responded that length could be worthwhile if it delivered transparency and clarity. Over half of the respondents indicated that there was no problem with length in itself. The difficulty, in their view, lay with complexity. The FTT(IAC) judges observed that "length is not a problem; complexity is. An encyclopaedia is easy to navigate despite its length because it is set out in a logical manner". In Amnesty International's view:

> Reduced length is not in and of itself a sufficient or necessary goal. If the Rules are clear and accessible … whatever length is necessary to achieve that will likely be worthwhile.

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85 *Balajigari and Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, in which the Court of Appeal found that the Secretary of State should, before applying a discretionary ground for refusal, give applicants an opportunity to proffer an innocent explanation when discrepancies in financial information were found between figures provided by the applicant and those provided directly to the Home Office by HM Revenue and Customs.

5.42 The Bar Council thought that the overall length of the Rules was not a factor of great significance in and of itself. In their view, it was the rigid and detailed evidential prescription which contributed to the length of the Rules which was "a barrier to clarity and ease of use". UKCISA said the more important issue is that length is not generated by "unnecessary repetition or overly detailed provision, and that full use is made of technology to facilitate navigation". The UTIAC judges thought, as the Rules are now so often accessed online, the key to accessibility was "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".

5.43 Nine of the respondents disputed the correlation between length and transparency. There was a consensus amongst them that the current length of the Rules had not contributed in any way to clarity or transparency. Sian Pearce (Bristol Law Centre) commented that "if they were transparent and clear, then it might be [worthwhile]. However, they are not".

5.44 ILPA cited the points-based system as a cautionary tale:

> This system was designed to bring transparency and clarity. However, the length of the Points-Based System, coupled with its interactions with Guidance and lengthy, complicated Appendices, led to:
>
> a) unnecessary complexity;
> b) rigidity, insofar as Home Office caseworkers are more likely to believe longer rules to be comprehensive and thus will not apply discretion; and
> c) inconsistencies in application.

5.45 For ILPA, the real problem with the current Rules is their structure. They are unwieldy because of an incoherent structure. For Islington Law Centre, the problem is not length but "constant change and poor navigation not only within the Rules themselves, but the linkages between forms, policy guidance and Rules".

5.46 Only the Law Society of Scotland identified brevity as important in its own right. They highlighted its importance for non-expert users, particularly those whose first language might not be English.

5.47 For most respondents, length is not in itself a problem, but equally neither does it necessarily produce clarity. The themes raised concerning structure and repetition are considered in the next chapter.

Views on the advantages and disadvantages of prescription

5.48 Consultation Question 15 asked for views on the advantages and disadvantages of a prescriptive approach to the drafting of the Rules. Strong views were expressed by a range of respondents. Of the 20 who answered the question, 13 emphasised the advantages of prescription, and in particular favoured the protection which prescription offers to applicants. Prescription offers clarity as to what requirements the applicant is required to satisfy, and protects against inconsistencies in decision-making. Many respondents also expressed a lack of trust in the quality and consistency of decision-making.

5.49 Five respondents identified disadvantages of prescription. They focussed in particular on the rigidity and lack of common-sense which can arise from detailed prescription.

5.50 A number of respondents viewed the relaxation of evidential prescription more favourably. They thought that this would allow a common-sense approach to prevail where a document does not fall within a list of specified documents but clearly satisfies the Rules in substance, without losing the protection offered by a prescriptive approach to the Rules more generally.

5.51 These views are considered in more detail below.

Advantages of prescription

5.52 The Law Society of England and Wales saw the advantages of prescription in the following terms:

> We consider that there are considerable benefits to a prescriptive approach to the drafting of the Immigration Rules if it ensures consistency … A version of the Immigration Rules which was numbered simply and numerically in numerical order would be far easier to navigate than what we have now.
>
> … If there is a prescriptive set of Rules then we can be sure that we will be able to follow the Rules when they are drafted. It is not just a benefit to applicants and lawyers, but it is of benefit to those working at the Home Office who actually deal with the Rules and make decisions with reference to them.
>
> From our perspective prescription can provide a necessary degree of protection for applicants against arbitrary and poor decision making, especially where independent appeal rights have been stripped away …
>
> We would be concerned to see wide discretionary powers given to caseworkers in the current environment and urge caution here. This is particularly so whilst the primary underlying policy imperatives include vehement pursuit of the net migration target and the maintenance of a "hostile" or "compliant" environment which in our experience extends to both legal and illegal migrants.

5.53 The Bar Council echoed these concerns:

> There is a concern amongst practitioners … that extending discretion in the Rules beyond simply relaxing evidential prescription would lead to less transparent decision making, and to arbitrary and inconsistent outcomes. Individuals raising these concerns point to criticism of Home Office decision making as indicative of dangers in this regard, and also note, correctly in our view, that this issue cannot be approached without taking into account the very limited appeal rights which exist and the limited nature of challenges by way of judicial review.

5.54 ILPA members harboured significant reservations regarding the Rules being less prescriptive, on the basis that poor decisions by caseworkers would be more difficult to challenge. They gave the example of decisions under the Tier 1 (Entrepreneur) route where, they said, caseworkers without a business background reviewed business plans to decide whether an applicant is a "genuine entrepreneur", and visitor visas, which they said could be refused "on the most spurious of grounds". In the

absence of appeal rights for most immigration applications, ILPA were against any increased discretion which risked leading to difficulty or inability in challenging decisions.

5.55 For Robert Parkin (10 KBW) a prescriptive approach was a necessary evil in circumstances where an applicant has no independent right of review, creating a necessary degree of certainty.

5.56 These concerns were repeated by respondents who work more directly with unrepresented applicants. Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response) referred to long-standing and historic distrust of the Home Office amongst their client group, young vulnerable asylum seekers and migrants, with clients in outreach advice sessions expressing anxiety at the decision-making process and the perception that the Home Office tries to refuse applications rather than looking to allow them. They referred to the high success rate in tribunal appeals.[86] Similarly, the Joint Council for the Welfare of Immigrants ("JCWI") expressed distrust of the culture within the Home Office, and the pressure under which caseworkers operate, saying that "caseworkers have very little training, are often very short term, and are under clear pressure, even if denied by Ministers, to refuse applications".

5.57 Respondents in the education sector had a distinct perspective which also ultimately favoured prescription in the Rules in the interests of clarity. As UKCISA said:

> The main advantage of prescription in the Immigration Rules is that we are usually given three weeks' notice of changes, whereas we do not know what will appear in guidance until it is published. Guidance is not published until the day it comes into force, and often it is published after then. The way in which caseworkers exercise discretion is not known until leave is granted or refused.

5.58 Destination for Education had a similar view:

> Whilst on the face of it a more discretionary approach provides greater flexibility in practice it is likely to reduce clarity for the applicant. All factors should be taken into account such as the high costs of making these applications where the applicant is relying on a discretion and cannot be sure as to the outcome.
>
> [In the] pre-2009 Immigration Rules the decision-making for student visas was discretion based and this left it open to abuse by both students and the decision-makers. Post-2009 the introduction of the Points-Based System gave students a set of clear criteria to meet. This had provided clarity for applicants.
>
> In our experience the discretionary element which is currently in place for … credibility interviews to assess credibility of students poses lack of clarity and introduces subjectivity into the system which is problematic. Given how problematic our experience is of the exercise of this discretion we are very hesitant to support an approach that moved to a less prescriptive approach.

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[86] See the consultation analysis table for Consultation Question 15 for the detailed figures given in this response.

5.59 The UTIAC judges said:

> 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 UK Visas and Immigration 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.

5.60 In the view of the FTT(IAC) judges "discretion for a decision-maker might lead to inconsistency and a lack of clarity for an applicant". David Mills (Home Office Presenting Officer) favoured prescription as the best way to express the intention of Parliament:

> I feel a prescriptive approach remains desirable, as immigration policy should remain in the hands of elected representatives in parliament, and not the judiciary as it had often felt in the past where the broadest possible interpretation of article 8 in particular was routinely given.

Disadvantages of prescription

5.61 The disadvantages of prescription were recognised by a number of respondents, including the Bar Council, ILPA members, Goldsmith Chambers and Robert Parkin (10 KBW). Responses focussed on the need for caution, warning against removing prescription across the board and advocating a more nuanced identification of where, in the words of Goldsmith Chambers, an "exclusively and exhaustively prescriptive approach" is not beneficial.

5.62 Respondents identified as disadvantageous the tendency of rigid prescription to generate refusals where the underlying criteria of the Rules were met, and the need for a common-sense approach which focussed on the purpose of the Rules. The need for constant updating and the complexity generated by prescription were further factors mentioned.

5.63 The Faculty for Advocates were of the view that some parts of the Rules were more amenable to prescription than others:

> We do not consider that the Rules dealing with an immigrant's article 8 ECHR rights, and Appendix FM, have worked well by being highly prescribed. These are matters that require a more nuanced approach, balancing numerous factors in a way that cannot be done satisfactorily within highly prescribed Rules: a more holistic approach is required that a prescriptive system does not allow.

5.64 A number of respondents identified specific disadvantages of prescription in relation to evidential matters. The Bar Council noted:

> Overly detailed prescription, as currently found in (for example) Appendix FM-SE, leads to individuals whose circumstances in fact satisfy the criteria which underpin the Rule being refused on technical grounds for failing to evidence this in the precise form required by the Rules.

5.65 Goldsmith Chambers said:

> Chambers is of the view that discretion is essential as decision-makers currently have not been afforded enough freedom to interpret evidence within the spirit of the Rules and policy, which in turn has led to extensive and expensive litigation on flexibility. This is specifically encouraged in respect of evidentiary matters. Chambers agrees that this would encourage a more 'common sense' approach to decision making, which is currently absent in the Rules.

5.66 Robert Parkin (10 KBW) mentioned difficulties in meeting specific requirements when institutions such as banks did not cooperate with requirements to produce very specific types of document even where the funds needed were held.

5.67 Richard McKee (Respondent A from ILPA) took a stronger line in stating that the removal of detailed prescription was the fundamental reform needed to remove complexity from the Rules:

> This would obviously confer greater discretion on decision-makers, who might well derive more satisfaction from their jobs in consequence. But this would have to be balanced by an adequate system of appealing to an independent tribunal against their decisions. It is not easy to restore rights of appeal once they have been taken away, but it has happened in the past, e.g. when appeals for family visitors were restored by New Labour in 1997.
>
> That really would be a fundamental reform of the Immigration Rules, as opposed to tinkering around the edges, which a lot of the Commission's proposals necessarily are.
>
> I note that the majority of members are not in favour of more discretion and less prescription in the Immigration Rules, considering that this would give even more scope for bad decision-making by caseworkers, with even less opportunity for correcting those bad decisions. That is a powerful argument. But unless the Rules do allow more scope for discretion – perhaps "evaluation" would be a better term – there is little chance of making the Rules significantly shorter and simpler.
>
> Ideally, one would like to go back to the state of affairs before the Points-Based System was introduced in 2008 when, for example, the Rules just required maintenance to be "adequate", without specifying in awesome detail what documents were needed to prove adequacy. Entry clearance officers and Home Office caseworkers just had to decide on the evidence before them whether the applicant could be adequately maintained, with Income Support as a judge-made benchmark of minimum adequacy. Of course, in those days there were full rights of appeal to adjudicators and the Immigration Appeal Tribunal, enabling bad decisions to be challenged before an independent body. The elaboration and expansion of the Rules which followed upon the introduction of the Points-Based System went in tandem with the reduction in appeal rights.

Other causes of complexity are more important

5.68 Finally, some respondents used the question to emphasise that in their view prescription was not in itself the reason for complexity and that other factors were of

greater importance. These themes are addressed in our chapters on structure and maintaining simplification.[87]

Reducing prescription as to evidential requirements

5.69 The issue of prescription in evidential requirements was given specific consideration in Consultation Question 16. This asked for views on whether the Rules should be less prescriptive as to evidential requirements where there is no policy that only specific evidence or a specific document will do. As set out above, respondents have identified this as a possible area for less prescription in the Rules which does not involve the same disadvantages as the introduction of subjective judgement into the substantive eligibility requirements.

Support for reducing prescription

5.70 Twenty of the 25 respondents who answered this question supported, or broadly supported, the reduction of prescription as to evidential requirements. The reservations most commonly expressed related to the need for clear additional guidance to provide non-exhaustive lists of evidence and advice as to the type of document an applicant would be expected to submit. Respondents also highlighted the need for additional training for caseworkers to apply the policy effectively, and, more broadly, the need for a change of culture in decision-making.

5.71 As the Bar Council put it:

> There is a strong case for removing high levels of evidential prescription from the Rules and adopting a more flexible and purposive approach to identifying whether qualifying criteria in the Rules are satisfied.

5.72 Accordingly, they endorsed the "Level 2" level of prescription set out in our consultation paper[88] and at paragraph 5.13 above.

5.73 The UTIAC judges thought that there was "much to be said for the Level 2 approach". The FTT(IAC) judges suggested that "a less prescriptive approach could be achieved by means of indicative lists of items of evidence required to support an application, with examples to guide an application". As a specific example, they looked at the evidential requirements in Appendix FM-SE:

> Taking evidence of wages, outside the Rules employers have been required to provide "real time information" to employees and others since 2013. In relation to the Rules, applicants ought to be able to ask online for current earnings and the duration of employment, with this information available (with consent) to the decision-maker or the Tribunal. There should be no impediment to documents being photographed on laptops or mobile devices and used as evidence. This would result in great savings in time and other resources by applicants, the parties and the Tribunal.

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87 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, chs 5 and 7.

88 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 6.84 to 6.85. Level 2 includes some minimum standards, but leaves elements beyond that to the caseworker's judgement.

> HM Revenue and Customs has introduced quarterly electronic submission of accounting information by self-employed persons. A less prescriptive approach to specified evidence might allow evidence in this form to be relied upon. Some employees now receive e-payslips and bank online and reliance on printed documents should be discouraged where the decision-maker or the Tribunal can receive the evidence.

5.74 Collinson and Manning (University of Huddersfield) instanced the evidentiary requirements relating to income and savings as "an obvious example of where currently rigid and specific rules need to be expressed in more general terms". While required levels of income and/or savings fitted easily within the Rules:

> The ways in which gross annual income is calculated at paragraphs 13-20A Appendix FM SE would sit more appropriately within the guidance. All that is required in the Rules is a reference to the need to calculate gross annual income based on the length of time in employment, the nature of the employment and the type of income. Calculations would then be more accessible in the guidance, with workable examples provided. The current Immigration Directorate Instructions are much more accessible on this and could be cross-referenced. Again, this would not compromise the legal position, but would make the Rules and guidance more accessible.

5.75 UKCISA noted the "absurd results" that can ensue from prescriptive evidential rules, giving the example of a stipulation in previous Rules that paper educational certificates must be provided when they were issued only online. They added that effective consultation in advance of Rule changes would also prevent this. JCWI saw the loosening of evidential requirements as a less prescriptive approach that operated in favour of applicants. They distinguished this from reducing prescription in other areas of the Rules which would allow decision-makers scope to refuse an application where they would not otherwise have been permitted to do so.

5.76 CCLC and Let Us Learn (joint response) and Migrant Voice also thought that a more discretionary approach to evidence would be helpful to applicants. ISM supported a less prescriptive approach to take into account the "subtleties and individual nuances of individual professions and nationalities". The Association of Accounting Technicians pointed to the severity of the impact on an organisation if it is mistakenly omitted from a prescriptive list of evidence. Due to their omission in a recent Rule change from the list of organisations permitted to provide an accountant's certificate, which they believe to have been because of an oversight, their members were no longer able to provide their clients with the information required by the Rules. A more generic description of the organisations permitted to provide a certificate, for example by reference to affiliation to the relevant international federation, would resolve the problem.[89]

5.77 Islington Law Centre looked at the issue of evidential de-prescription from the perspective of the new UK Visa and Citizenship Application Service centres which

[89] See the consultation analysis table for Consultation Question 16 for the full detail given in the example.

provide services including the scanning of documents submitted in support of an application:

> Staff in the new UK Visa and Citizenship Application Service (UKVCAS) centres … do not always scan documents brought by the applicant which the applicant considers relevant but the staff have been advised may be irrelevant. They do not provide the client with a list of which documents they have scanned, and that can place the client and/or their solicitor at a disadvantage if they are asked for further information/documentation without knowing what has already been scanned … (and therefore regarded as acceptable documentation). Also, the check box requirements on the application forms do not always tally with what documentation is expected [by UKVCAS staff].

5.78 They suggested giving centres discretion to accept a broader range of documentation.

5.79 Carter Thomas Solicitors (Respondent B from ILPA) highlighted the need for non-exhaustive lists of evidence in guidance where at present there is no specification of evidence at all. They gave the example of the subjective judgement exercised by officials applying Appendix V (Visitors) in deciding whether visitors intend to leave at the end of their stay:

> Applicants are required to satisfy the decision-maker that they will leave the UK at the end of their visit, however there is no further guidance within the Immigration Rules regarding how an applicant should do this. The vast majority of refusals that we see are due to the decision-maker not being satisfied that an applicant meets this requirement. Many individuals applying alone may think that if they have purchased a return ticket, this should be sufficient to show their intention to return home, when the Home Office would expect to see much more than this such as evidence of work and family ties in their home country. It would be useful for the Immigration Rules to be clear on the type of evidence that is expected where mandatory documents are not specified.

Support for a more nuanced approach

5.80 Some respondents supported a more nuanced approach to the reduction of prescription for evidential requirements. The Law Society of England and Wales observed:

> There are important distinctions to draw here. There is a difference between being prescriptive and being sensibly prescriptive. Many of the prescriptive provisions we have had in relation to Appendix FM-SE for example reflected the ignorance of the drafters in respect of how businesses or accounts work in practice. When FM-SE was introduced we had applicants in self-employment for example who simply could not produce the evidence required because it did not exist. FM-SE has effectively made it unlawful for applicants to be paid their wages in cash where there is no such prohibition in law generally.
>
> A sensible degree of prescription is perfectly reasonable. To ask for six months of payslips and bank statements showing deposits that correspond to those payslips seems to us to be sensible as evidence of income because it not only demonstrates

the income but avoids the possibility of deception. In terms of evidence of what makes a relationship genuine it may be appropriate to be less prescriptive.

5.81 UKCISA stressed the need for a clear steer to be given as to what kinds of evidence will and will not be accepted:

> Guidance must not be removed and changed at short notice, as has previously happened. Guidance should provide examples of evidence which will be accepted and, if relevant, evidence which will not be accepted. The reason for requiring evidence should be made clear so that applicants can attempt to assess whether their evidence meets the stated purpose. Student applicants and many advisers are now anxious when given flexibility, for example English language assessment by higher education institutions. Some have in the past found it difficult to know what is acceptable to caseworkers as practice can be inconsistent, sometimes apparently depending on the applicant's nationality or the sponsoring institution, though this is not made explicit.

5.82 The UTIAC judges referred with approval to the new scheme of tiered evidential requirements in Appendix EU:

> 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 … artificially generate paperwork simply to comply with a rule, the substantive requirements of which they already fulfil.

5.83 The UTIAC judges also considered the role of a policy which allows decision-makers to take a more interactive role in determining applications by contacting applicants where there were errors or omissions in the evidence submitted:

> It may be interesting to examine what the effects might be if UK Visas and Immigration 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.

5.84 The Faculty of Advocates also supported giving the power to decision-makers to seek clarification of evidence, an improved copy, additional or omitted information alongside discretion as to the evidence that can be accepted.

5.85 The Migration Advisory Committee ("MAC") observed:

> The MAC understands the trade-off between the tailored detail required in the system and the ease at which employers and migrants can access the system.

> Wherever possible the MAC would like to see more simplification within the migration system.

5.86 At stakeholder events, there was a suggestion that, if indicative lists of evidence were adopted, a distinction could be drawn in the timescales offered for a decision between those applications which provided specified evidence and those which gave reasons on the application form as to why the evidence provided was not in the specified form. The latter cases would go to a senior caseworker to decide if the evidence submitted was sufficient, and would take longer.

Opposing views

5.87 Of the five consultees opposing any reduction in prescription as to evidential requirements, two were organisations representing the interests of students. Destination for Education commented:

> In relation to students we believe that the Commission should be slow to remove clear evidential requirements which would render the requirements unclear. Indeed we would support a re-drafting of the Rules to ensure that these requirements are made more clear.

5.88 The University of York Immigration Advice Team shared the same concerns:

> The prescriptive approach is better for clarity in my view. I advised students before Tier 4, and although there was far less guidance to worry about, I often encountered students who had been treated differently to friends and peers despite submitting almost identical evidence. If UK Visas and Immigration caseworkers were more plentiful, better trained and more highly paid the less prescriptive approach might work, but I'm not convinced that it would at present.

5.89 David Mills (Home Office Presenting Officer) was also in favour of retaining lists of specified evidence:

> As long as the Rules can be simplified so that the specifications cannot be missed or misunderstood, there is nothing unfair in such a system. The Secretary of State does, after all, retain a residual discretion to waive any requirement if there is compelling reason to do so.

5.90 Sian Pearce (Bristol Law Centre) opposed any reduction in prescription without a more fundamental shift in the approach to decision-making:

> A more discretionary approach would only work if it was accompanied by further training and resourcing in UK Visas and Immigration. At present it appears that a greater level of discretion is likely to lead to a higher level of refusals.

Other areas of the Rules in which prescription could be reduced

5.91 We asked at Consultation Question 17 for views on other areas of the Rules that might benefit from being less prescriptive. We asked consultees to have regard to the likelihood that less prescription means more uncertainty.

5.92 Twenty respondents answered the question and made a number of suggestions as to specific areas of the Rules in which levels of prescription could be reduced. Most examples given were in relation to evidential requirements. Others repeated the warnings against less prescription in areas other than evidential requirements which have already been explored in response to Consultation Question 15.

5.93 Richard McKee and Carter Thomas Solicitors (Respondents A and B from ILPA), the Faculty of Advocates, Nashit Rahman (Taj Solicitors) and Professor Thom Brooks (University of Durham) pointed specifically to Appendices FM and FM-SE as candidates for less prescription, in particular with regard to the evidence required. As noted above at paragraph 5.63, the Faculty of Advocates observed that any applications which raise the article 8 ECHR rights of the applicant do not sit well within highly prescribed Rules.

5.94 Carter Thomas Solicitors (Respondent B from ILPA) also cited the Adult Dependent Relative rules, the Tier 1 Entrepreneur route, and Tier 2 sponsor licences as candidates for less prescription in relation to evidential requirements, and noted that an extension of the Appendix EU cross-departmental checks to other areas would also reduce the evidence an applicant was required to provide.

5.95 MAC pointed to the Tier 2 system, which stakeholders have reported to them is so confusing and complex that they are hindered in their ability to recruit through the scheme. Tier 2 sponsorship was also raised by Universities UK and UCEA (joint response):

> Currently, sponsors must comply with a number of essential duties to track and monitor Tier 2 staff that have become increasingly burdensome and, in some cases, unnecessary. This also contributes to the onerous use of the sponsorship management system. Failure to comply with these duties carries high risk for sponsors which determines the rating of the sponsor and substantiates reason for audit, or in some instances, to revoke a licence. Yet these compliance duties are highly restrictive, affecting academic mobility and career progression within and between Higher Education Institutions.
>
> UUK recommends that the new Rules relating to Tier 2 sponsorship are less prescriptive to ensure that sponsors have greater flexibility in allowing workers to undertake any additional activities that support career progression such as secondment opportunities or conducting research abroad for an extended period. It is important however to find the right balance between being less prescriptive with scope for more subjectivity as this could create more uncertainty.

5.96 Tier 4 sponsorship was raised by UKCISA and by Universities UK and UCEA (joint response). UKCISA identified elements within the scheme which would benefit from less prescription, with which Universities UK and UCEA (joint response) agreed:

> This could include academic progress, which is now ridiculously complicated and can prevent students from applying in the UK to complete a course they have already started. Sponsors should also have greater flexibility in allowing students to take a relatively short break from study, for example, for health or family reasons, without withdrawing sponsorship. The maintenance provisions have become very lengthy and do not accurately reflect the format of evidence to which applicants from

around the world may have access, or the sources of funds, for example family members other than parents. While the Immigration Rules could be less prescriptive, guidance on matters such as maintenance would probably need to be quite detailed in order to avoid subjective refusals on these grounds and to aid advisers.

5.97 Robert Parkin (10 KBW) gave the example of the Turkish Businessperson rules pursued under an early version of the Rules from 1973. Evidential guidelines 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".

5.98 Amnesty International UK advocated having regard to the level of fees and to the purpose of the particular route to determine how prescriptive provisions should be. The higher the level of fees, the more important it was to have clarity and consistency as to eligibility. The more fundamental the purpose of the application, in concerning, for example, long-term family reunion rather than short-term studies, the more pressing the need to ensure that the applicant can understand the Rules.

5.99 David Mills (Home Office Presenting Officer) repeated his preference for specified evidence throughout the Rules, couched in an improved structure.

Is it correct that prescription reduces uncertainty?

5.100 The Bar Council, expressing a view supported by the Faculty of Advocates, took issue with the suggestion in our consultation question that less prescription was likely to produce more uncertainty:

> It is not the case that greater prescription necessarily reduces uncertainty. On the contrary; greater prescription increases the complexity and detail of the Rules and spawns increasingly complex and prescriptive guidance which although it is intended to increase the certainty and consistency of decision-making simply leads to confusion amongst applicants, practitioners and decision-makers as to which provisions and/or guidance should be applied in any given scenario.
>
> It is notable that areas of the Immigration Rules which deal with rights or status being removed (e.g. revocation of leave, deportation, administrative removal) are relatively short and simple; the corresponding guidance is relatively easy to identify and understand without being unduly prescriptive. That does not in practice appear to lead to significant problems with consistency of decision-making or for individuals making representations to decision-makers.
>
> The most complex and prescriptive parts of the Rules are those governing grants of leave to enter or remain in various categories. However, there is no reason why a decision to grant (e.g.) indefinite leave to remain is inherently more complex than a decision to revoke such leave and it is unclear why those parts of the Rules dealing with grants of status are both minutely prescriptive and bewildering in structure.

Factors suggesting that a particular provision should be less prescriptive

5.101 We asked at Consultation Question 18 whether consultees agreed that the nature and frequency of changes to a provision (for reasons other than underlying policy) should act as an indicator that it should be less prescriptive. We also asked whether

candidates could be identified on the basis of whether the provisions concerned matters best left to the judgement of officials, whether on their own or with assistance from extrinsic guidance. Of the 17 respondents who answered this question, 11 agreed, one disagreed, and five answered "other".

5.102 Almost all the respondents who agreed or responded "other" expressed caution at elevating these factors to a status beyond an acknowledgement that they were relevant, and repeated the broader concerns about an unfettered power to make a subjective judgement already expressed in responses to Consultation Question 15 discussed above. They also repeated preferences for greater discretion to attach to evidential matters only.

5.103 Other relevant factors to consider were suggested. The Law Society of England and Wales suggested, in selecting appropriate provisions, that the Home Office should also consider fairness, transparency and consistency in application by decision-makers. ILPA suggested considering who would be likely to be using the Rule. Amnesty International UK pointed to the importance of the underlying policy intent behind a Rule which will influence a decision-maker to lean towards restriction or facilitation of entry or stay.

5.104 The importance of supporting guidance to structure the exercise of discretion was also emphasised. ISM thought that the Rules should not be made less prescriptive at any point without being underpinned by "culturally-informed, understandable and comprehensive guidance". The applicant should be able to see clearly from guidance whether the application is likely to be granted, and the decision-maker should be able to identify what evidence is likely to be available for the particular applicant, and for the particular country the applicant comes from. The importance of clarity in guidance, particularly where the Rule contains less prescription, is discussed in chapter 10.

5.105 The Bar Council expressed disagreement with the factors we had suggested as indicative of a need for a less prescriptive approach. They thought that such an approach would be overly complex, and could itself lead to a proliferation of additional policy documents addressing whether a provision required an approach which was prescriptive to a greater or lesser degree. Their preference was:

> … for the Home Office to consider grants of leave from a purposive rather than a mechanistic viewpoint; to accord greater discretion to decision-makers in relation to evidential matters, and to provide guidance for decision-makers on procedural fairness rather than focusing on specific categories or evidential requirements.

Demonstrating requirements "to the satisfaction of the decision-maker"

5.106 At Consultation Question 19, we asked consultees whether they saw any difficulties with the form of words used in the New Zealand Operational Manual that a requirement should be demonstrated "to the satisfaction of the decision-maker".

5.107 Eighteen respondents answered this question. No respondent endorsed this form of words. Many respondents echoed the concerns of the Law Society of England and Wales, who found the formulation to be "a dangerous form of words … that places discretion by implication almost entirely with the person making the initial decision ... It is a formulation which could be used to cover a multitude of sins". The Bar Council

pointed to the “absence of objective criteria by reference to which the matter in issue can be assessed” and the risk this approach creates of “inconsistent and arbitrary decisions which lack transparency”. The following sections set out particular themes raised by respondents.

Decision-making culture

5.108 Some respondents felt that the Home Office could not be trusted with this level of discretion. Sian Pearce (Bristol Law Centre) expressed “grave concerns regarding this form of words due to the extremely poor standards of decision making in the Home Office”. JCWI concurred:

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

5.109 More positively, the UTIAC judges emphasised the need for such a formulation to operate in a strong context of public law principles:

> 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 … to liaise with applicants, where appropriate.

Need for effective guidance

5.110 Some respondents focussed on the need for effective guidance, available to the public, to accompany such a form of words. This would be needed to give greater certainty and consistency as to how the discretion would be exercised. In the view of Migrant Voice:

> There should be some basic guideline which would give an applicant a good idea of what is required and also enable them to know on what basis/criteria a decision-maker made a decision should they wish to challenge that decision.

Independent avenues of redress

5.111 Some respondents considered the particular impact of such a requirement where there are limited external avenues of redress. The Law Society of England and Wales said:

> If there were effective means of redress and review of the decision such as an appeal to an independent judge rather than an internal administrative review we might be more comfortable with it as an approach.

5.112 The Law Society of Scotland added that:

> The cost for submission of applications is now so high that many applicants simply cannot afford a refusal. Litigation is prohibitively expensive for some applicants, particularly in refusals which do not attract a right of appeal and where administrative review and subsequently Judicial Review may be necessary.

5.113 Collinson and Manning (University of Huddersfield) also thought that such a formulation could only be justified where there was a right of appeal:

> Any form of words which permits decision-making discretion must be accompanied by effective rights of appeal against refusal. In order to support such a form of words, we would require that rights of appeal to an administrative tribunal must be made available for all categories of immigration leave (including where they have been abolished) and the appeal ground of 'not in accordance with the Immigration Rules' must be reinstated.
>
> Discretionary decision-making by the executive must be accompanied by judicial oversight. As well as being a fundamental constitutional principle, it has a practical effect of ensuring good administration of the Immigration Rules at first instance by the decision-maker.
>
> Recourse to Judicial Review is inadequate, expensive and time consuming for individuals and the judicial system. The ground of Wednesbury reasonableness (that the decision is so irrational that no reasonable decision-maker could have come to it) is too high a threshold to effectively prevent irrational decision-making.

Alternative formulations

5.114 Robert Parkin (10 KBW) thought that the formula could only be justified by providing for a threshold of reasonableness:

> 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.

5.115 JCWI proposed an alternative approach, limited to the reduction of prescription as to evidential matters only:

> We would suggest the following approach to both reduce prescription, but also to ensure greater flexibility where it is desirable.
>
> 1. To set out forms of evidence, which if met, require the decision-maker to accept the criterion is satisfied;
>
> 2. In the absence of the specified evidence, to allow any other evidence to be submitted and to require the decision-maker to take a holistic view and decide on the balance of probabilities in line with the Windrush guidance.

DISCUSSION

5.116 Respondents have highlighted a range of risks in applying a less prescriptive approach to the Rules. They have pointed to the risks of unpredictable and inconsistent decision-making, the absence of safeguards in the form of an external merits-based review of non-human rights decisions, and to concerns about the quality of decision-making, particularly where decision-makers lack specialist expertise. They also point to the potential for a less prescriptive system to generate practices and procedures which vary the approach to the application according to perceived risk.

Such systems operate at one remove from the Rules, lack transparency, and can generate bias. The clear message is that respondents favour prescription to the extent that it promotes certainty.

5.117 We have examined the benefits which could flow from less prescription. These include shorter and simpler Rules, ease of navigation, fewer amendments to the Rules and a more common-sense approach. But the risks identified by respondents limit the case for the reduction of prescription as a means of simplifying the Rules. Their views suggest that, unless trust in the quality of decision-making is established and redress mechanisms can be relied upon as independent and effective, prescription in the Rules should only be reduced in specific instances, and should not become the norm.[90]

5.118 Respondents highlighted the benefits which they considered could flow from a more focussed reduction in prescription in relation to evidential requirements only. This could produce a more common-sense, flexible and purposive approach to deciding whether the qualifying criteria set out in the Rules are satisfied, without the disadvantages identified of applying subjective judgement to the substantive requirements of the Rules.

5.119 A reduction in prescription in evidential Rules could produce the benefits of less prescription, without the disadvantages identified. The introduction of a residual, more open-ended, category of evidence would permit decision-makers to adopt a more common-sense approach where it is clear that the underlying purpose of the Rules has been met.

5.120 A less prescriptive approach to evidential requirements could be brought about by the provision of a "Level 2" approach in the Rules to stipulate a minimum standard to be reached, supplemented by indicative or non-exhaustive lists set out in guidance. As long as these lists do not set mandatory requirements, they would not in our view contravene *Alvi* principles. The risk of this approach, however, is that detail is merely shifted into guidance. The user's experience of the system is also made more complex, as there is a greater need to navigate between the Rules and guidance.

5.121 We consider it important that a move to less prescription does not lead to a loss of certainty of outcome for applicants who are able to provide the forms of evidence that the current Rules require. That could be the result if the evidential requirements of the Rules are simply made less specific and a general discretion given to decision-makers to decide whether evidence is satisfactory.

5.122 Instead, we favour making the lists of evidence contained in the Rules non-exhaustive. Where the Home Office considered it appropriate, lists could take the form

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90 We take no view as to the effectiveness of internal mechanisms for the administrative review of immigration decisions, but note that the Independent Chief Inspector for Borders and Immigration ("ICIBI") has published two reports on administrative review processes. These are available at https://www.gov.uk/government/publications/inspection-report-on-administrative-review-processes-may-2016 (last visited 17 September 2019) and https://www.gov.uk/government/publications/inspection-report-on-a-re-inspection-of-the-administrative-review-process-july-2017 (last visited 17 September 2019). In May 2019, the ICIBI commenced a third inspection of the administrative review process, which sought to review the progress made on the recommendations made in previous reports, and also to address a number of additional issues identified within the system. The report will be published in 2020.

either of a list of specified evidence followed by a residual, more open-ended, category, or of tiered evidence stipulating what is preferred, what could be accepted as an alternative, and what is unacceptable. Non-exhaustive lists could in this way set out both specified evidence and less specifically defined categories of evidence. If specified acceptable evidence is provided, the decision-maker would regard the criterion in question as satisfied. If evidence from the less specifically defined category is provided, the decision-maker would determine, taking a purposive approach, whether the minimum standard set out in the Rule has been met. This could be achieved by a formulation such as "any other document which establishes …" This would reduce the need to amend the Rules to cover types of satisfactory evidence that had previously been overlooked (an aspect of the process that we described in our consultation paper as "detail begetting detail").

5.123 Another drafting technique that we suggest in the interests of reducing the need to amend the Rules on points of detail is to avoid descending to unnecessary detail. For example, instead of referring by name to regulatory bodies, whose identity is susceptible to change, a provision could refer to a "regulated institution".[91]

5.124 The introduction of a residual category of evidence would generate less of a need than a "Level 2" approach for the user to refer to guidance in order to understand what evidence was required. Guidance could perform a reduced role in helping an applicant to understand what criteria the decision-maker will apply in deciding whether or not to accept alternative forms of evidence. Such an approach would build on the work done in recent Home Office drafting such as Appendix EU to incorporate a more open-ended approach into the Rules.

5.125 We do not think that a less prescriptive approach to evidence needs to be applied across the board. Individual areas of the Rules could be assessed for suitability for the approach. Factors such as the past record of frequency of amendment for non-policy reasons could be relevant in deciding whether the area of the Rules is a candidate for a less prescriptive approach to evidence. In cases where the policy assessment is that only specified evidence will do, provision can be made accordingly for a specific list. A choice can be made between approaches.

5.126 In reviewing provisions which might be suitable for a less prescriptive approach, we would warn against a "one size fits all" approach. Respondents on behalf of the international student sector have warned against removing clear evidential lists as this would make outcomes less predictable. The same reasoning might apply to worker categories. This is because both are relatively short-term categories of entry where the applicant is exercising choice as to destination. For this reason, they would want to have a clear indication of eligibility at the outset.

5.127 On the other hand, those respondents who have experience of family and private life routes which raise human rights considerations have highlighted that these routes require a more nuanced approach, with numerous factors to be balanced. Applicants

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91 For example, para 10(b)(ii) of Appendix FM, discussed in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 5.46, referred to "a financial institution regulated by the Financial Services Authority", which subsequently needed to be amended to the "Financial Conduct Authority (and the Prudential Regulation Authority where applicable)". It might be sufficient to refer to "a regulated financial institution in the UK".

may have long and complex immigration histories. They are unlikely to have a choice of destination. These routes in particular might benefit from more discretionary categories of evidence to supplement specified lists.

5.128 Another factor which could mitigate the impact of less prescriptive decision-making on certainty is an approach to decision-making by caseworkers which allows an applicant to address concerns or submit further evidence before a decision is made. This could apply, for example, in a situation where evidence has been submitted which is not from the specified list of what is acceptable, and the caseworker is not satisfied with the evidence provided. It could also apply where evidence has been obtained from a cross-departmental check rather than from an applicant directly. The more interactive approach, already under development in caseworker teams across the Home Office, of contacting the applicant prior to a decision where a document is missing or an error has been made in our view fits in well with this approach.

5.129 There is no doubt that decision-making on the basis of non-exhaustive lists of evidential requirements creates a need for additional caseworker training and changes to decision-making processes. This includes, where appropriate, a more holistic, purposive approach to the evidence submitted. If workable, it may be that a triage system of casework could be adopted which allows those applications which fall squarely within the "tick list" of specified evidence to be decided quickly and efficiently. In contrast, those which fall on the margins of the requirements of the Rules could be referred for consideration by a more senior caseworker.

5.130 Consistency in decision-making is an important concern raised by respondents if subjective judgement is to be exercised by caseworkers. The training we have suggested is one element in building consistency. We also think that structuring caseworker teams in such a way as to provide quality assurance at the first level of line management would go some way to resolving problems of consistency within casework teams.[92]

5.131 Respondents have also highlighted the importance of exercising judgement against a standard of reasonableness. It would help to ensure that this standard has been reached if caseworkers are required to give clear reasons in the decision notice where it has been decided not to accept evidence. There is a risk that, if decisions are framed only in terms of the minimum standard set by the Rules, the applicant will not know why a particular piece of evidence submitted has not been accepted.

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[92] See for example the first and second reports on administrative review of immigration decisions by the Independent Chief Inspector for Borders and Immigration ("ICIBI") which recommend improved quality assurance as part of improved administrative review mechanisms in order to identify errors and inconsistencies. Available at https://www.gov.uk/government/publications/inspection-report-on-administrative-review-processes-may-2016 (last visited 17 September 2019) and https://www.gov.uk/government/publications/inspection-report-on-a-re-inspection-of-the-administrative-review-process-july-2017 (last visited 17 September 2019). See also the ICIBI's discussion of quality assurance mechanisms in the entry clearance context: *A re-inspection of the family reunion process, focusing on applications received at the Amman Entry Clearance Decision Making Centre*, 2018. Available at https://www.gov.uk/government/publications/a-re-inspection-of-the-family-reunion-process-focusing-on-applications-received-at-the-amman-entry-clearance-decision-making-centre (last visited 17 September 2019).

5.132 This discussion indicates that the most appropriate approach to prescription in a particular area of the Rules should be determined on a case-by-case basis. There is no “one size fits all” approach. Tiered lists or a residual, more open-ended, category could be included in the Rules or in guidance. There is reason to think that this approach could reduce the level of detail in the Rules, and the need for amendment. We tend towards the view that, in most cases, in the interests of certainty, it is preferable for these more flexible provisions to be incorporated into the Rules.

Recommendation 3.

5.133 We recommend that the Secretary of State considers the introduction of a less prescriptive approach to evidential requirements, in the form of non-exhaustive lists, in areas of the Immigration Rules which he or she considers appropriate.

Recommendation 4.

5.134 We recommend that in those instances where prescription is reduced, lists of evidential requirements should specify evidence which will be accepted, together with a category or categories of less specifically defined evidence which the decision-maker would consider with a view to deciding whether the underlying requirement of the Immigration Rules is satisfied.

Chapter 6: Restructuring the Rules

6.1 This chapter considers how the content of the Immigration Rules can be reorganised in a more rational and consistent fashion.

THE STRUCTURE OF THE RULES

6.2 Our consultation paper looked at the way that the Rules are currently structured. We analysed the contrasting structural approaches to the organisation of material which have been adopted at various stages of the development of the Rules. We termed these the "common provisions" approach, the "multiple parts" approach, and the "booklet approach".[93]

6.3 The "common provisions" or "single set of Rules" approach was the original format of the current set of Rules. It involves Parts containing provisions which apply to multiple categories of applicants. Examples of this approach in the current Rules are Part 1 (Leave to enter or stay in the UK) and Part 9 (General grounds for refusal). The application of these provisions to particular categories of applicants is sometimes excluded or modified. This is done either within the body of the provisions of general application, or in the Part or Appendix to the Rules specific to the category in question.[94]

6.4 The "multiple parts" approach involves spreading the requirements which apply to a particular category of applicant across various Parts or Appendices. An example of this approach is the points-based system.[95]

6.5 The "booklet" approach aims to group every requirement which a specific category of applicant must satisfy into a single category-specific Part. An example of this is Appendix FM, although there is no Part of the Rules where this approach has been fully comprehensive.[96] One consequence of this approach is that provisions of general application have to be duplicated in each booklet. In some cases, the duplication is not exact. There are instances of differences in wording which nevertheless produce the same effect. There are also instances of differences of wording which produce a different effect for policy reasons. In other cases, the wording is different and it is unclear whether a policy-based distinction is intended.[97]

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93 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 7.

94 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 7.9 to 7.16 for examples of the common provisions approach and of the exclusion or modification of common provisions.

95 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 7.17 to 7.21 for examples of the multiple parts approach within the current Rules.

96 Appendix FM quickly ceased to constitute a single booklet with the addition of Appendix FM-SE to the Immigration Rules. See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 7.24 to 7.28.

97 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 7.29 to 7.47 for examples of these types of differences in wording within the current Rules.

The need for a consistent approach to structure

6.6 We recognised in our consultation paper that the simplification project needs to identify a more rational and consistent approach to the content of the Rules. This involves the choice of a single approach to the structure of the Rules which is applied consistently throughout. It also requires the removal of unnecessary inconsistencies of wording. We also acknowledged that taking accessibility into account involves consideration of the extent to which the Rules are accessed online and as part of an online application process.

6.7 We immediately concluded that the "multiple parts" approach could be discarded. It served only to increase complexity by requiring the user to cross-refer across different sections to ascertain eligibility, and to increase the risk that requirements would be overlooked. We could see advantages and disadvantages in both the common provisions and booklet approaches. These are discussed below.[98]

A FRESH DIVISION OF MATERIAL

6.8 Before making a choice between structural approaches, we reviewed the various categories of material that need to be contained in the Rules irrespective of which approach is adopted. We took the provisional view that the organisation of subject-matter should be based on the principle that all eligibility and evidential requirements applying to a particular category of applicant should be in one place. We also considered that provisions applying to more than one category of applicant should be grouped together according to subject-matter. We proposed that Appendices should not contain rules but only subordinate narrative or lists.[99]

6.9 We provisionally proposed a fresh division of material which grouped the content of the Rules into common provisions and specific routes of application.[100] The list was presented as a list of contents for a single document. We explained that if the "booklet" method of presentation were adopted, the specific routes of application that we provisionally identified would each be the subject of a separate booklet. The internal organisation of each booklet would reflect the sequence of the list as a whole, with the omission of any portions that were irrelevant to the particular route.

6.10 We proposed beginning with an introduction containing information about how to use the Rules, including lists of definitions, and other useful general background information. We suggested that this should be followed by common provisions applicable across some or all the categories. We envisaged that the Parts dealing with particular application categories or "routes" would then follow. Each Part would contain all the specific eligibility and evidential requirements for obtaining leave for that particular category or route. We divided applications into 15 categories.

6.11 After the category-specific Parts we proposed a separate section for deportation. This was followed by sections on post-decision matters such as the service of notices and

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98 See paras 6.46 to 6.48 below.

99 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.10.

100 The list of categories was set out after para 8.10 of the consultation paper, with a table of destinations at appendix 5 correlating the location of subject-matter in our proposed division of material to that in the current Immigration Rules.

on administrative review, these being provisions that come into play after a decision. We added Appendices at the end containing only subordinate narrative and lists.

Views on the division of material

6.12 We asked at Consultation Question 20 if consultees agreed with the provisionally proposed division of subject-matter. Of the 15 consultees who answered this question, 12 agreed. Three responded "other". A number of those who agreed had specific reservations or suggestions for improvement.

6.13 Both the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges and UK Council for International Student Affairs ("UKCISA") warned against having a Part for "Other categories" of application. The FTT(IAC) judges observed that: "there is a danger that "Other categories" … might become too easy a location for new rules or categories". UKCISA said: "We would prefer to have more parts labelled clearly than to have unrelated categories 'hidden' together under such a title".

6.14 The FTT(IAC) judges preferred to have the private life Rules grouped together with others that engage article 8 of the European Convention on Human Rights. They also suggested that the "Deportation" section should be renamed "Criminal deportation" to distinguish these Rules more clearly in the public eye from the distinct considerations which usually come into play in the removal of non-criminals.

6.15 Several respondents had concerns about the Parts relating to family members. Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) thought that family members of the former points-based system categories should come within the main categories for these applicants. Amnesty International UK found the division of family members between the proposed Part 12 (Family members of workers, businesspersons, investors and students) and the proposed Part 13 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status) problematic from the perspective of the requirements for those applying under domestic violence provisions. They also noted that the Armed Forces category will include relevant family members.[101]

6.16 UKCISA suggested a new category be created for Exceptional Talent, as this category does not fit easily into the category we had identified as "Business and Investment".

6.17 The Law Society of England and Wales thought that the "Service of notices" might fit better into the common provisions parts rather than in a later post-decision matters section. They thought "Administrative review" might also fit better in the common provisions section.

6.18 The Immigration Law Practitioners' Association ("ILPA") suggested a residual category to contain routes which have been closed to new applicants but under which applicants can still apply for an extension of leave or indefinite leave. They envisaged that when a route closes, as in the case most recently with the Entrepreneur category, it could be moved to the "residual" category. Under this approach, an applicant looking at the Rules would be able to see that the route was no longer open to new applicants, but would still be able to see it for the purpose of an extension of leave or

[101] See the consultation analysis table for Consultation Question 20 for the full detail of responses on this point.

indefinite leave application. ILPA recommended putting a note in the original location of the category to direct the reader.

6.19 More generally, the Faculty of Advocates suggested that the specific applications should be listed alphabetically.

6.20 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges identified five overarching categories: leave to enter/remain for a temporary purpose; settlement (human rights/long residence/those switching from temporary purpose categories/UK ancestry); protection (including asylum, humanitarian protection, statelessness, trafficking); deportation and exclusion; EEA. They also thought a sixth "miscellaneous" category would be necessary for categories such as the armed forces. They thought there would be a case, if the booklet approach were adopted, for the creation of one booklet for each of these overarching categories.

6.21 Professor Thom Brooks (University of Durham), who responded "other", suggested dividing our proposed Part 5 (Knowledge of language and life requirements for indefinite leave applications) into two sections. One would focus exclusively on knowledge of language. The second would focus on knowledge of life in the UK. This approach would highlight that these are two distinct sets of requirements.[102]

6.22 Jonathan Collinson and Gemma Manning (University of Huddersfield), who also responded "other", disagreed with including criteria for refugee status and rules for evaluating asylum claims in the Rules. They proposed instead the incorporation into UK law of the Refugee Convention by way of primary legislation. This is a policy matter outside the scope of this report.

6.23 Other suggestions were made at stakeholder events. One participant noted that curtailment had been omitted. Others suggested that the separate categories of immigration route should appear at the end of the list of contents in order to avoid new lettered insertions (Part 21A etc) appearing as new categories were added.

Discussion

6.24 Respondents provided persuasive reasons for avoiding an "other" category. Users could find it difficult to locate a category if it is grouped together with unrelated categories without a clear title. We agree that it would be a better idea for additional categories to be included with their own separate number and title rather than grouping them as "other". Accordingly, our recommended division of material, contained in appendix 4 to this report, moves most of the routes currently contained in Part 7 (Other categories) into other Parts, and contains a new Part for the remaining category, "Relevant Afghan citizens". A table of destinations giving the detailed reallocation of material is at appendix 5.

6.25 We do not consider the creation of a "residual" category to be the best way of dealing with routes that have been closed but where applications for extensions of leave or indefinite leave can still be made. We fear that this would, over time, make the Rules harder to navigate and to understand. We consider that the best course is to retain the

[102] See the consultation analysis table for Consultation Question 20 for his further examination of problematic areas of the current Immigration Rules. This raises matters of policy on which we do not comment.

relevant provisions in the Rules, with an amendment to indicate that the category is closed to new applicants.[103]

6.26 We agree with the suggestion that the "General grounds of refusal" Part should be entitled "General grounds of refusal or curtailment" to reflect its content more accurately. We also agree that "Criminal deportation" is a clearer title than "Deportation".

6.27 We can see the benefit of suggestions to rearrange the order of the list of contents by placing the list of specific types of application at the end of the list in order to allow additional categories to be added in numerical sequence rather than by inserted letters. Criminal deportation, service of notices and administrative review can be moved so as to follow the common provisions in order to permit this. We have amended our recommended division of material and table of destinations to reflect this.[104]

6.28 We prefer to maintain the ordering of the sections numerically rather than alphabetically. The numbering forms part of our three-level numbering system recommended in chapter 7. Alphabetical ordering would require the insertion of new categories of application in their alphabetical place, creating a need for inserted Part numbers with letters.

6.29 There are advantages and disadvantages to treating family members within the category of the main applicant as opposed to the creation of a separate section for broader groups of family members. We are not persuaded that it would be better to group them with each specific category of applicant, which would in our view generate unnecessary duplication. We consider that, if the list of contents in a paper version of the Rules or the online landing page in the online version of the Rules make the routes of application sufficiently clear, an applicant will be steered in the appropriate direction.

6.30 We leave the further suggestions made by consultees of alternative or additional routes of application to the Home Office to consider when redrafting the Rules. We also note that the substantive routes of application are themselves subject to change. Two new routes, the Innovator and Start Up categories, have been introduced into the Rules since the publication of our consultation paper.[105]

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103 See for example the provision in the current Immigration Rules for the Tier One (Entrepreneur) category stating that the category is now closed to new applicants, but retaining those provisions relevant to extension and indefinite leave applications: para 245D, as amended by the statement of changes to the Immigration Rules, HC 1919, 7 March 2019. In ch 9 we recommend that once a route is no longer open for any purpose, it should only appear in the archived sets of Rules.

104 See appendices 4 and 5 to this report.

105 See Appendix W, inserted by the statement of changes to the Immigration Rules, HC 1919, 7 March 2019. Our table of destinations has been updated to incorporate these categories. See appendix 5 to this report.

Recommendation 5.

6.31 We recommend the division of the subject matter of the Immigration Rules in accordance with the list of subject-matter set out in appendix 4 to this report.

PRESENTATION OF THE MATERIAL IN THE RULES: A SINGLE SET OF RULES INCLUDING ONE SET OF COMMON PROVISIONS, OR BOOKLETS?

6.32 The next question we need to consider is how to present this material. Our consultation paper canvassed three options: a single set of Rules both laid before Parliament and appearing online; statements in booklet form laid in Parliament and made available online; or a statement of a single set of Rules laid in Parliament and then reworked editorially to produce booklets made available online, possibly alongside the online publication of the single set of Rules.[106]

6.33 We envisaged that, if presentation by way of a single set of Rules were adopted, our proposed division of material would become the table of contents. The structure would accordingly incorporate one set of common provisions. If the booklet approach were adopted, the individual routes of application which we identified in our proposed division of material would each be the subject of a separate booklet. The internal organisation of each booklet would reflect the sequence set out in our division of material, beginning with the introduction and including those common provisions, post-decision matters, and Appendices applicable to that route.[107]

6.34 One of the main issues arising in deciding which approach to presentation is preferable is deciding what to do with modifications of common provisions. Some of the common provisions apply universally, but some do not. Some have been modified in their application to particular routes.[108]

An audit of overlapping provisions

6.35 As we mentioned in paragraph 6.5 above, the current Rules are inconsistent and sometimes unclear as to whether different wording of similar Rules produces or is intended to produce a different effect. We proposed in our consultation paper that, as the next step in choosing the best structural approach to adopt, the Home Office should carry out an audit of such "overlapping" provisions. The purpose of this would be to identify inconsistencies of language and to decide in each case whether a difference in effect is desired. Where no difference of effect is desired, we proposed that a uniform wording for the provision should be chosen. The effect of such an audit, in our view, would be to remove unnecessary modification and produce a clearer core of common provisions.

6.36 The audit would also make it easier to see the extent to which the modification of common provisions is required across the Rules. If relatively little "customising" is

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106 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.17.

107 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.8.

108 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.21.

retained, this would strengthen the case for a single set of Rules. If the degree of modification required across different categories remains relatively high, a booklet approach allowing the provision to be stated in its modified form alongside the other material relevant to the case would be preferable.[109]

Views on the need for an audit

6.37 We asked at Consultation Question 21 whether consultees agreed with our provisional proposal that an audit should be undertaken as a first step in deciding which structural approach to choose. Of the 19 respondents who answered this question, 18 agreed and one answered "other".

6.38 In endorsing the proposal, UKCISA commented:

> It is important that alternative terminology is used if meanings differ so everyone can be clear about the desired effect, and conversely that provisions are consistent if the intention is that they should be interpreted in the same way.

6.39 The UTIAC judges said:

> 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.

6.40 Several responses to this question highlighted the benefit of clarifying and disclosing where a policy reason exists for differences in wording. This is discussed in our consideration of Consultation Question 25 below.

6.41 Some respondents commented on the timing of and responsibility for the audit. The Bar Council would have preferred the audit to have been conducted in advance of our consultation paper, given that the outcome is likely to inform the final approach to be taken to the structure of the Rules, and that the question of structure is itself an issue on which we are consulting. Islington Law Centre thought that the Home Office should conduct the audit exercise together with a range of stakeholders such as applicants, legal experts and non-governmental organisations.

6.42 Some respondents looked at specific aspects of the Rules. Robert Parkin (10 KBW), for example, highlighted the way in which differences in wording can lead to incongruous outcomes:

> 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?

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[109] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 8.30 to 8.32.

6.43 Amnesty International UK drew attention to the way in which differences in wording introduced by amendments to provisions may produce unforeseen differences in effect. They use the example of changes in the provisions in Appendix FM for victims of domestic violence to illustrate how complexity in the Rules may lead to error on the part of the policy maker even where no change of policy is intended.[110]

6.44 We appreciate that an audit in advance of the consultation would have provided relevant information for consultees on which to base their expression of preferred options of restructuring the Rules. It would, however, have delayed the consultation, possibly for a considerable time. We understand from the Home Office that they are already working on the process. We recommend that this work is completed before a final decision is taken on the presentation of the Rules.

Recommendation 6.

6.45 We recommend that the Home Office should conduct an audit of provisions in the Immigration Rules that cover similar subject-matter with a view to identifying inconsistencies of wording and deciding whether any difference of effect is intended.

The advantages and disadvantages of the booklet and common provisions approaches

6.46 The audit that we recommend will identify the extent to which overlapping provisions within the Rules can be reduced to a common core. Even without the outcome of this exercise, some advantages and disadvantages of the booklet and common provisions approaches are immediately apparent.

6.47 It is clear that, on the one hand, a single set of Rules would generate significantly less text, as less duplication of common provisions would be required. The most significant disadvantage would be that the reader would be presented with more text not relevant to their particular application. They would need to cross-refer between the provisions for their specific route and the common provisions. They will be at risk of overlooking something relevant. Further complexity is generated by any modification of the common provisions for the particular category of application.

6.48 A booklet approach would generate much more text, as it would repeat all the information and common provisions relevant to the application route in question. Its advantage is that it presents the reader with all the material relevant to their application in one place. There would be no need to cross-refer to other parts of the Rules for common provisions, though the user would still need to consider material other than the criteria of entitlement to leave, such as the general grounds for refusal. There are, however, risks inherent in this approach, as there would be an added need to ensure that inconsistencies are not generated when provisions which appear in multiple locations across different booklets are updated.

[110] See the consultation analysis table for Consultation Question 21 for the detailed example.

Options for the presentation of the Rules

6.49 Our consultation paper identified three possibilities for the presentation of the Rules. The first was that a statement of a single set of Rules which includes one set of common provisions is both laid in Parliament and made available online. The second was that statements in booklet form are both laid in Parliament and made available online. The third presentation option combined the two approaches, involving the laying in Parliament of a single set of Rules which is re-worked editorially in order to produce booklets which are made available online.[111]

6.50 We recognised that the third of these options created additional factors for consideration, as the re-working of the single set of Rules into booklets would demand more resources, and carried an additional risk of the creation of discrepancies between the two versions in the course of the transposition.[112]

6.51 Consultation Question 22 asked whether consultees agreed with our analysis of the possible approaches to the presentation of the Rules set out as Options 1 to 3; it also asked which option they preferred and why. We asked in Consultation Questions 23 and 24 whether consultees could see any other advantages or disadvantages of the booklet and common provisions approach that we had not identified and what they thought of the relative merits of the different approaches.

Views on the best approach to the presentation of the Rules: Option 1, 2 or 3?

6.52 Seventeen consultees responded to Consultation Question 22. Eleven agreed with our analysis. The remaining responses either did not express a view as to whether they agreed with our analysis, but went straight to a view on which option they preferred, or were undecided as to which option would work best. In the case of the Law Society of England and Wales, the "other" response was given on the ground that the choice must await the outcome of the audit discussed above.

Support for Option 1

6.53 Six respondents, the Faculty of Advocates, Islington Law Centre, Destination for Education, Nashit Rahman (Taj Solicitors), Robert Parkin (10 KBW) and Professor Thom Brooks, expressed a clear preference for Option 1. Islington Law Centre commented that this might be "because that is what we are used to using". A majority of the ILPA members who completed their internal survey, 61.5%, preferred Option 1:

> ILPA submit that the most popular form of Rules remains a single set of Rules, in part because of the desire of the Law Commission to ensure internet-friendly Rules. It is submitted that a single set of Rules with an appropriate set of hyperlinks placed online can serve to ensure that applicants are guided to the relevant parts.

6.54 The UTIAC judges were split, with some preferring Option 1:

> 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

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111 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.17.

112 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 8.19 to 8.28.

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.

6.55 The FTT(IAC) judges on balance preferred Option 1. They also relied on the opportunities provided by online presentation (a topic discussed further in chapter 11) to support their choice:

> Overall, we consider that a single set of Rules is preferable to a series of booklets. A single set might present difficulties in navigation but online presentation may overcome these. For example, the Rules might be "filtered" online into a subset containing only those Rules applicable to a particular category.

Support for Option 2

6.56 David Mills (Home Office Presenting Officer) and Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response) were the only respondents to express a preference for Option 2, the booklet approach, over Option 1. CCLC expressed an equal preference for Option 3, the editorial booklet approach. They did so on the basis that booklets would be the most accessible approach for users, particularly the non-expert user:

> From a direct applicant's perspective, it is considerably more straightforward to identify (or be provided with) one 'booklet' which contains all the rules relevant to their application. Leaving it to applicants to cross-reference which parts of the Immigration Rules apply to their case can be overwhelming, and will increase the risk that they miss relevant provisions.
>
> Coram Children's Legal Centre provides advice in outreach settings - we see a number of people who need to make immigration applications but do not know how to find out what Rules apply to their case. Often, we are unable to prepare applications for individuals, but instead signpost them to the relevant section of the Immigration Rules and Home Office guidance and explain how they can make the application themselves. It is normally unrealistic to expect applicants to review the Immigration Rules in their current format. Even if we do provide a link to the webpage with the most relevant Part or Appendix, most of the webpage will not be relevant, and there will be a number of other Immigration Rules which apply to their case in different Parts or Appendices.
>
> If we were able to hand out, or link to, a booklet which contains all the relevant Immigration Rules, that would far better equip those we have seen to review and understand what Immigration Rules will be applied in their case. We notice that generally, individuals are reassured by having a hard-copy document to review, rather than having to click on links to a number of different web pages. Having all the Rules in one document would also allow the advisor to review the booklet with the individual, and answer questions the individual has.

6.57 The UTIAC judges who preferred Option 2 commented:

> Option 2 has the merit of enabling an applicant, caseworker, representative and judge to navigate within a smaller and more manageable physical or digital space.

6.58 Of the ILPA members completing the internal survey, 26.9% preferred Option 2.

Support for Option 3

6.59 Five respondents, the Bar Council, the Law Society of Scotland, Sian Pearce (Bristol Law Centre), UKCISA and the Incorporated Society of Musicians ("ISM"), had an outright preference for Option 3. The Bar Council found the case for Option 3 to be compelling:

> We recognise that this approach has potentially significant resource implications, and that errors in the production of the booklets may result in legal challenges. To attempt this with insufficient resources in place would doubtless increase the risk of such errors. If resources permit this to be undertaken effectively, however, the option seems to us to combine the benefits of Options 1 and 2, with very limited detriment.

6.60 The Bar Council also referred to the future development of an interactive tool which sequences the exact set of Rules which apply to an applicant through a series of drop-down questions, discussed further in chapter 11, as a means of achieving an outcome very close in effect to Option 3 through automation. The tool would operate to order the applicable Rules and common provisions into a tailored booklet.

6.61 The Law Society of Scotland endorsed Option 3 for the following reason:

> Whilst such an approach is likely to lead to repetition and increase the length of the Rules, such an approach is likely to be of much more assistance to applicants when they are able to see all the criteria for satisfying a particular category in one section rather than attempting to cross-reference Rules.

6.62 UKCISA also expressed a clear preference for Option 3:

> The involvement of editors with legal training will help to maintain the pressure on drafters to get their Rules right, and we do not see any disadvantage in applicants being able to rely on the more favourable approach if a booklet and the Rules laid in Parliament contradict one another.

6.63 ISM said of Option 3:

> This seems to be the most clear and understandable route with the only disadvantages based on potential human error in the transposition of the Rules. This should be easily overcome by efficient and thorough editing and auditing.

Opposition to particular options

6.64 Some respondents expressed strong views against a particular option.

6.65 UKCISA thought that Option 1 "seems to do little to improve the current situation, in which an enormous document serves only to deter readers from attempting to tackle it".

6.66 Robert Parkin (10 KBW) disliked Option 2. He commented that "cases are not always hermetically sealed … I would not endorse a system which involved flicking through four different booklets to deal with it". He gave an example of a case involving a

spouse application, a private life claim, and asylum, with elements of the points-based system.

6.67 ILPA cautioned against Option 3, warning that "a series of editorially produced booklets run the risk of turning into Guidance, which increases the risk of complexity and contradictions". Despite this, they also recognised that a potential advantage of editorially produced booklets could be that the repetition of provisions across the booklets could create more opportunities "to spot and remove inconsistencies rather than to let them fester".

6.68 The UTIAC judges also warned against the risk that Option 3 would generate errors and inconsistencies when the Rules were transposed into booklets, and that this could lead to complex and difficult litigation.

A fourth option

6.69 UKCISA suggested a fourth Option:

- one editorially produced booklet dealing primarily with the requirements of a particular category (and containing at the end simple signposts to extra requirements that exist in the common provisions, all of which have potential to be relevant but only some of which actually will be – for example, in the case of Tier 4 these will include the ones on the Academic Technology Approval Scheme, police registration, tuberculosis certificates, dependants etc); and

- a separate editorially produced booklet dealing exclusively with the common provisions that can potentially be applicable to that category of entrant, clearly segmented into different relevant sections, and with simple introductions to each section to help readers identify whether they need to read further or can skip to the next section.

Other advantages and disadvantages of the booklet approach

6.70 Before considering conclusions, we need to look at responses to Consultation Questions 23 and 24. These asked whether consultees could see any other advantages or disadvantages of the single set of Rules or booklet approaches that we had not identified.

6.71 There were 11 respondents to Question 23. Responses identified one possible advantage and three potential disadvantages to the booklet approach which we had not identified in our consultation paper and which were not discussed in the expression of preferences set out above.

6.72 Both the UTIAC judges and the Law Society of England and Wales pointed to the potential for booklets to include relevant guidance, or, if sufficiently simplified and easier to read, to remove the need for guidance aimed at applicants to explain the relevant Rules.

6.73 On the other hand, the Law Society of England and Wales challenged the premise that the booklet approach would assist in providing the applicant with what was relevant to their case. They thought it likely in practice that much of the material in a booklet would still be irrelevant to the application.

6.74 Islington Law Centre observed that the success of the booklet approach depends on the applicant knowing which type of application to make. They pointed to the risk that, in complex cases, the applicant will not be able to do so. They gave the example of a young person who had spent his childhood in the UK and believed himself to be British. Until he accessed legal help, he made a series of futile applications for a British passport. They also pointed to the risk of errors and omissions in updating the booklets over time.

6.75 Goldsmith Chambers thought that the repetition involved in the booklet approach would cause confusion. Ultimately, though, they thought it most important to adopt a uniform approach across all immigration routes. The worst outcome in their view would be a redraft of the Rules which organised some routes into booklets and left others laid out in the main body of the Rules with common provisions.

Other advantages and disadvantages of the common provisions approach

6.76 Twelve respondents answered Question 24. Six could not identify any further advantages or disadvantages other than those we had identified. Three made additional points. These all related to the difficulties in navigation caused by the need to cross-reference from a particular category of the Rules to a common provision.

6.77 The Law Society of England and Wales observed that in their view the common provisions approach would make guidance more necessary, and that guidance would play a more central role. This is because the applicant would need more steering to information relevant to the application type. They warned that a more rigorous approach to preventing inconsistencies in guidance would be needed, and also recommended linking the Rules and guidance online. This is considered further in chapters 10 and 11.

6.78 Goldsmith Chambers favoured a common provisions approach, but was concerned that the common provisions would be overlooked by the user. They recommended the use of “pop ups” online or other means of making the common provisions easily visible and accessible. They thought that hyperlinks alone were not sufficient to resolve the problem of the additional navigation required by a single set of Rules and the risk that users overlook common provisions.

6.79 The FTT(IAC) judges warned against the risk of complexity reappearing as a consequence of the cross-referencing common provisions would require.

Discussion

6.80 It is clear from this review of responses that it is not possible to discern one prevailing view. Each approach has distinct advantages and disadvantages. We are also unable in advance of the Home Office audit to analyse the extent to which it is possible to create a clearer and more broadly applicable core of common provisions and to reduce the extent of modification of common provisions needed.

6.81 The salient features of the consultation responses that we have summarised in this chapter seem to us to be as follows:

(1) consultees approached the issues mainly from the perspective of the "user experience" of the Rules, albeit that some consideration was given to "process" issues such as the propensity of an option to generate errors;[113]

(2) there was almost no support for Option 2 (Rules both made and published in booklet form), and one of its protagonists was equally content with Option 3;[114]

(3) several respondents extolled the advantages of booklets from the point of view of the user;[115] apart from the "process" issues of a propensity to generate errors or inconsistencies, the main disadvantage of the booklet approach from the user's perspective that was identified was the risk that it might conceal the range of application routes potentially available to an applicant;[116]

(4) some responses sounded notes of caution against over-estimating these advantages;[117]

(5) several respondents also expressed the view that the advantages of booklets could also be achieved by sophisticated online presentation of a single set of Rules.[118]

6.82 In formulating our recommendation, our starting point has been to reject Option 2. This is principally on account of its disadvantages from what we have called the "process" point of view, coupled with the lack of support for it. The making and laying in Parliament of Rules in booklet form would generate a substantial volume of largely overlapping text, increasing the burden on the Home Office of producing it, on Parliament and our recommended review committee[119] of reviewing it, and on professional users of the Rules (such as practitioners and the judiciary) of negotiating and assimilating it.

6.83 Importantly, Option 2 would be a recipe for the reintroduction of the inconsistencies that bedevil those parts of the current Rules that follow the booklet approach. With a single set of Rules, the "default" position is that the common provisions are uniform and special provision is necessary in order to depart from the uniform wording. With a booklet approach, by contrast, an additional layer of review would be needed in order to restrain departures from the uniform wording. If separate booklets are laid in Parliament, there would be no overall check on consistency. The Home Office would face a practical challenge in maintaining a consistent approach across booklet categories.

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113 For the latter, see paras 6.54, 6.59, 6.62, 6.63 and 6.68 above.

114 See para 6.56 above.

115 See paras 6.57 and 6.61 above.

116 See paras 6.66 and 6.74 above.

117 See paras 6.73 and 6.74 above.

118 See paras 6.53, 6.54, 6.60 and 6.78 above. See also the responses to Consultation Questions 51, 52 and 54 discussed in ch 11 of this report.

119 See ch 8.

6.84 That conclusion leaves two options: the making of a single set of Rules, either with or without editorially produced booklets (Options 3 and 1 respectively).

6.85 We have already concluded in chapter 2 that the simplification of the Rules should be underpinned by principles which include accessibility, and that the Rules should be accessible to the non-expert user. This leads us to favour Option 3, as an approach which includes the structuring of material into booklets in order to realise the benefits of the booklet approach for non-expert users highlighted in the discussion set out above.

6.86 We do not think that there should be a need for a separate booklet of common provisions, as in the proposed Option 4. Any separate booklet for common provisions, definitions or other information would re-introduce the need to cross-refer.

6.87 We agree that the booklet approach will not in itself equip the non-expert applicant to know under which route to apply. This is particularly the case for those with long and complex immigration histories, and with vulnerabilities. The booklets are more suitable for the non-expert user, but do not replace legal advice. This is well illustrated by the situation of many of those of the "Windrush generation" entitled to reside in the UK but who did not have the documentation to prove their status and did not know which route of application was open to them.[120]

6.88 We recognise that the Option 3 approach can only succeed if it is well-resourced, as it requires the editorial production of booklets which are consistent with the single set of Rules. We consider that this work should be undertaken by a team of experienced officials and checked to ensure legal and policy compliance by a suitably qualified person conversant with the subject-matter. If the work is carried out simultaneously with the production of the single set of Rules and of subsequent changes to them, there is no reason why there should be any variation in the text between the two versions. We recognise in chapter 7 the benefit which could be gained from appointing an official or team of officials at the Home Office with responsibility for maintaining drafting consistency in the Rules.[121] Oversight of the coherence, consistency and accuracy of booklets could form part of the work of this team.

6.89 If sufficient resources are not allocated to the Option 3 approach, there is a clear risk that the booklets could quickly become outdated, inaccurate, and operate as an inferior form of guidance for applicants. There is also a risk that under-resourcing could generate the kind of fragmented approach to structure we have observed in the current Rules, with booklets for some categories and not for others.

6.90 We agree with the view expressed by many respondents that the impact of the choice of structure will be reduced by the opportunities presented by online presentation. If

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120 See the case of Anthony Bryan, a Commonwealth citizen who arrived in 1965 and had "deemed leave" under the Immigration Act 1971, who first applied for leave to remain on human rights grounds in 2015, and was refused and detained: Joint Committee on Human Rights, Windrush generation detention, Sixth Report of Session 2017 – 2019, HC 1034 and HL 160, 29 June 2018, available at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf (last visited 17 September 2019).

121 See 7.107 below. See also para 10.55 for discussion of the need for centralised oversight of guidance.

the single set of Rules is also available online, its presentation can be designed with hyperlinks between specific application routes and common provisions to ease navigation. This is explored further in chapter 11, where we note the broad agreement of respondents to our Consultation Questions 51, 52 and 54 that hyperlinks and other technological innovations could enable a single set of Rules to function as effectively as booklets. They also agree with our suggestion that this could eventually lead to the creation of "mini-booklets" drawing attention to those Rules that are relevant to an applicant's case in the light of their answers to questions on a digital application form. Once that stage is reached, editorial production of booklets may no longer be necessary.

Recommendation 7.

6.91 We recommend that a statement of a single set of Immigration Rules and subsequent changes to them should be laid in Parliament and made available on paper and online.

Recommendation 8.

6.92 We recommend that, pending the identification of technology that directs an applicant to Rules relevant to their application, the Rules should be reworked editorially by a team of experienced officials and checked to ensure legal and policy compliance by a suitably qualified person conversant with the subject-matter so as to produce booklets for each category of application which are also made available on paper and online.

GIVING REASONS FOR MODIFICATIONS OF COMMON PROVISIONS

6.93 At the beginning of this chapter we referred to the incidence in the current Rules of provisions covering the same subject-matter but containing differences of wording.[122] These are a product of the booklet approach to drafting but also an obstacle to the accessibility of a single set of Rules, because of the need to incorporate the modifications of them for particular routes of application. The differences in wording create uncertainty as to whether a difference in effect is intended. Earlier in this chapter we recommended an audit with a view to eliminating differences in wording that are not intended to produce a difference in effect.

6.94 Differences in wording and effect between Rules covering the same subject-matter add to the complexity of the Rules. It may not be clear what, if any, difference in effect is intended; the coexistence of similar but different Rules adds both to the length of the text and to the sum total of Rules contained in it. In order to address these difficulties, our consultation paper provisionally proposed that any surviving departures from a common provision within any particular application route should be highlighted

[122] See para 6.5 above.

in guidance and the reason for it explained. We asked at Consultation Question 25 whether consultees agreed with this proposal. Fifteen respondents answered this question; of whom 13 agreed and two responded "other".

6.95 Respondents in general observed that the proposal was sensible and of assistance to non-expert users. The Law Society of England and Wales suggested that in order for the explanations to be accessible, hyperlinks and footnotes would be needed. UKCISA elaborated:

> We currently have to query with the policy team whether such departures are deliberate. A requirement to highlight and explain departures would be very helpful, as it is not always acknowledged that they exist and can create difficulties.

6.96 The Bar Council agreed, but warned that a requirement that guidance provide a gloss to the Rules might give rise to difficulties in practice. The Faculty of Advocates agreed with the proposal to highlight the departure from the common provision, but did not think it appropriate to require the reason for the departure, as this lay within the preserve of the Government as the author of the Rules.

6.97 The UTIAC judges, in responding "other", warned that "if the suggestion were accepted but then not followed in a particular case, it might raise questions as to the enforceability of the Rule in question". The FTT(IAC) judges, who also responded "other", agreed with the need to highlight and explain, but warned more globally against modifying provisions unless unavoidable, as this in itself adds to complexity.

6.98 There was no dissent from the view that departures of this sort should be highlighted in guidance. This would serve as a warning, to those familiar with a common provision, that it applies in a modified form in a particular case. In a single set of Rules it would also assist readers generally by alerting them to the modifying provision.[123]

6.99 We proposed the additional discipline of explaining such departures both as a check on unnecessary customisation and in order to promote clarity.[124] While this cannot be guaranteed to succeed, we continue to regard it as a salutary discipline. We agree with the Faculty of Advocates that it is a matter for the Secretary of State whether to make the departures but do not regard a requirement to explain (rather than to justify) the departure as encroaching on his or her prerogative. We do not envisage words of explanation as amounting to a gloss on a Rule or as being burdensome to draft. The possible legal effect of a failure to explain a departure would need to be considered case by case.

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123 We discuss the need for clear links between the Rules and guidance in chs 10 and 11 of this report.

124 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.32.

Recommendation 9.

6.100 We recommend that any difference in wording and effect between Immigration Rules covering the same subject-matter should be highlighted in guidance and the reason for it explained.

THE LOCATION OF DEFINITIONS

6.101 As a final aspect of the restructuring of the Rules, we looked at how to deal with definitions. The current Rules do not provide a straightforward or consistent approach to the location of definitions. We provisionally proposed grouping all definitions into one alphabetical section, either at the outset of a single set of Rules, or in each booklet. We also proposed marking defined terms as they appear in the text of the Rules with a symbol such as #, and the use online of hyperlinks to direct the reader to the definition, or of hover boxes to provide the definition itself.[125]

6.102 We asked consultees at Consultation Question 26 if they agreed with both aspects of our provisionally proposed scheme. Nineteen respondents answered this question. Fifteen agreed with both aspects of the scheme. One, the Faculty of Advocates, agreed with the first part but disagreed with the second part of the scheme. Two responded "other".

Location of definitions sections

6.103 Several respondents noted as an additional issue the question of how to deal with definitions which are relevant only to a particular Part or Parts. The Bar Council observed that it would need to be decided whether the complete definitions section in the Rules should be replicated in each booklet, or the list tailored to include only those relevant to the booklet.

6.104 Migrant Voice, which answered "other", commented:

> It would be good to have definitions in one section and identify them with a symbol. However it is equally helpful to have definitions that are relevant to one kind of application or a particular section explained in that section or in the guidance accompanying that type of application. This sectional definition could be a quick list that is hyperlinked to the definitions. Scrolling down a long list of general definitions could prove tedious if that's the only reference applicants have to use.

6.105 The UTIAC judges also thought that key terms relating to a particular category should be set out at the beginning of that section, as lay users would be likely to overlook at general definitions section at the beginning of the Rules. This would be the case particularly if they could not access the Rules on a system which permitted use of hyperlinks or hover boxes.

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[125] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 8.39 to 8.49.

6.106 CCLC and Let Us Learn (joint response) observed:

> Should the booklet model be adopted, it would be important for all terms in need of clarification used within that booklet to be defined within the same document - and not in a separate 'definitions' booklet.

6.107 We agree that, if the booklet approach is adopted, the list of definitions should be within each booklet and should contain those terms relevant to that booklet. We think that, in a single set of Rules, if our additional recommendations as to the identification of a definition are adopted, the difficulty of accessing definitions can be reduced by the provision of hyperlinks or hover boxes.

6.108 We fear that providing additional lists of definitions within some individual sections, as opposed to providing a tailored list in a booklet relating to an application route as a whole, would generate confusion. We think it better to have one uniform and consistent approach across the Rules.

Identification of definitions

6.109 While support for the proposal to identify a definition with a symbol was almost unanimous, there were additional observations as to the best way of doing this. The Bar Council thought that the use of a symbol could cause confusion where a phrase rather than an individual word was defined. They gave the example from our redraft at appendix 3 of the consultation paper of the Part 9 general grounds of refusal:

> It may be unclear to a non-expert user whether, in the phrase "being an illegal entrant#", the term for which a formal definition exists is "illegal entrant" or "entrant". This could be addressed by combining the symbol with, e.g., the use of bold type to identify the word or phrase.

6.110 They had doubts about the use of the # symbol, because of its association with social media platforms. They also thought that the use of hover boxes in the online version of the Rules would provide the best approach, removing the need to consult a separate definitions provision.

6.111 Robert Parkin (10 KBW) thought that a capital letter rather than a # symbol would work better. CCLC and Let Us Learn (joint response) also thought that a symbol might clutter the Rules and make them harder to read. They preferred alternative text or colour. On the other hand, UKCISA thought a symbol better than the use of bold text, as in Appendix EU. They thought that the bold text created confusion, and noted that the bold type was not carried over into the online version.

6.112 The Faculty of Advocates opposed any symbol, as it would disrupt the readability of the text. They preferred a built-in link from the word to the definition in the online version of the Rules.

6.113 We agree that there are drawbacks in the choice of any symbol or other method of identification, and that it will inevitably impact on the readability of the document. But we consider that the value to the user of signposting the existence of a definition, particularly in a paper version of the Rules, outweighs these disadvantages.

6.114 A symbol is in our view preferable to a change in font or presentation of text, such as bold type or italics, as these can be lost or changed when the online version of the Rules is accessed via different operating systems. In our assessment, changes of font or type extending to the whole defined term are more cluttering than a single symbol.[126] We consider that on balance the # symbol is sufficiently distinct to make it a good choice, though others could be considered. A possible solution to the problem identified by the Bar Council would be to place the symbol at the beginning of the defined word or phrase, thereby taking the reader to the correct place in the alphabetically ordered definitions section. The symbol could be accompanied, if technologically feasible, by a shading or underlining feature to show what word or phrase is included in the definition.

6.115 We agree that hyperlinks to the definitions section should be provided online wherever a term is defined. We also agree that, technology permitting, hover boxes would be the best solution to the presentation of definitions online. This is addressed further in chapter 11.

Other suggestions for definitions

6.116 Islington Law Centre suggested that the Home Office should consult with stakeholders on which terms should be included in the definition. Professor Thom Brooks (University of Durham) suggested that a guide to the Rules could be created to operate as an equivalent to the citizenship test handbook. This contains a glossary of key words. These suggestions are matters for the Home Office.

[126] See the guidance on accessible formats in https://www.gov.uk/government/publications/inclusive-communication/accessible-communication-formats (last visited 17 September 2019) and the amendment to our drafting guidance in relation to the identification of definitions in appendix 6 to this report and discussed at para 7.99 below.

Recommendation 10.

6.117 We recommend that:

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

(2) if the terms are defined in a booklet, only terms which are used in that booklet should be included;

(3) terms defined in the definitions provision should be identified as such by a symbol, such as #, when they appear in the text of the Rules; and

(4) in the online version of the Rules, hyperlinks to the definitions section or, technology permitting, hover boxes should be provided where a defined term is used.

Chapter 7: Internal organisation and drafting

7.1 Once the overall structure of the Immigration Rules is settled, the next step in combatting complexity is to decide the best approach to the identification, internal organisation and drafting of each Part. Our consultation paper looked at a number of topics and made proposals around what we thought might work best. This chapter considers consultees' responses to our consultation questions and provisional proposals on the organisation of material within Parts of the Rules, their drafting style and our specimen redrafts of two portions of the Rules.

A CONSISTENT APPROACH TO TITLES AND SUBHEADINGS

7.2 Titles and subheadings help people to find what they are looking for. Our consultation paper looked at the way in which many of those used currently in the Rules and Appendices tend to confuse rather than to assist accessibility.[127]

7.3 At Consultation Question 27 we asked if consultees agreed with our provisional proposals as to the principles to be applied in drafting titles and subheadings in order to make them as clear, brief and consistent as possible. These were, in summary, abandoning subtitles and using shorter titles, not normally exceeding one line of text, that are consistent between the Index and the Rules themselves; keeping subheadings reasonably short; and avoiding initials and acronyms in both titles and subheadings. We also asked, in Consultation Question 28, for consultees' views as to whether there are currently too many subheadings, and whether they should be used (as they sometimes are at present) within the body of an individual Rule.

The principles to be applied in drafting titles and subheadings

7.4 Of the 16 respondents who answered Consultation Question 27, 15 agreed with our provisionally proposed principles. Some commented that the proposals would support readability and accessibility. One, Carter Thomas Solicitors (Respondent B from the Immigration Law Practitioners' Association ("ILPA")), partially disagreed, objecting to our proposal that there should only be one title, not a title and a subtitle, and to a condition that titles should not run to more than one line. They thought that the correct criterion was the clarity of the title, not the length.

7.5 Our provisional proposal was that titles should not run into a second line of text unless necessary. We continue to consider that that should be the general rule: lengthy headings are off-putting to the reader and not exceeding one line of text seems to us to be a good discipline for drafters. But we did not intend this to be an immutable rule. We agree that giving a clear indication of the contents should be the benchmark and have slightly modified our proposal to refer to the interests of clarity.

7.6 One caveat, suggested by Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")), was to include a provision in the Rules that the title of a rule or set of rules

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[127] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 9.3 to 9.9.

does not affect their interpretation. We have decided not to recommend this as we do not foresee any substantial risk of a briefly expressed heading distorting the interpretation of a Rule or Rules.[128]

Recommendation 11.

7.7 We recommend 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 in the interests of clarity; and

(5) titles and subheadings should avoid initials and acronyms.

Subheadings

7.8 The consensus among the 13 respondents who answered Consultation Question 28 was that subheadings can be useful, but they should not be overused or misused. Most respondents considered that limited use aided clarity and understanding and made navigation easier. Migrant Voice commented that subheadings can serve as "extra markers and breaks to the eye".

7.9 The Bar Council suggested that if the individual Rules, as simplified and redrafted, are short enough, there would be no need for subheadings.

7.10 The UK Council for International Student Affairs ("UKCISA") warned that:

> New paragraphs for new content are preferable to subheadings as it can become too easy to insert text which is not directly related to current contents, but doesn't seem to fit anywhere else, if it has a subheading. The attempt to avoid subheadings, unless the relevant section really cannot be split and is very long, could help with the organisation more generally of a whole section.

7.11 Others thought that unnecessary subheadings would only serve to add more length and complexity.

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[128] In primary legislation the titles of Parts, Chapters, clauses and Schedules cannot be amended in Parliament; they are settled by the drafter and can be changed as a matter of printing by agreement between the drafter and the House authorities. As a result of this, their role in interpretation is limited: *Craies on Legislation* (9th ed, para 26.1.9) suggests that the courts will have regard to headings to obtain support for an interpretation that is indicated by other factors, but would be unlikely to rely on them to go against substantive provisions.

7.12 Robert Parkin (10 KBW) again favoured a proviso that it should be made clear that a subheading does not contribute to the meaning of the Rule; we do not consider this necessary for the reason already given.

Recommendation 12.

7.13 We recommend that subheadings should be used in the Immigration Rules only where necessary in the interests of clarity and understanding.

OVERVIEWS AND TABLES OF CONTENTS

7.14 In our consultation paper we looked at the general index page in the Rules, and the use, in some Parts and Appendices, of overviews.[129] We thought that overviews could be helpful in providing a panoramic view of content and in flagging up the relationships between provisions. But we acknowledged that there were risks of misuse: they could be used simply to repeat headings, or might be relied on by the courts as an aid to interpretation and given unintended effect. Also, when Rules are amended, the need to amend the overview might be overlooked.[130] We also considered whether a table of contents at the beginning of each Part would be helpful. We asked for views.

7.15 Consultation Question 29 asked whether tables of contents or overviews would aid accessibility. Consultation Question 30 asked for preferences between the two.

Do tables of contents and overviews aid accessibility?

7.16 Of the 17 respondents who answered Consultation Question 29, 11 agreed that tables of contents or overviews would aid accessibility. Six respondents answered “other”. Almost all of those agreeing expressed a preference for tables of contents over overviews. Most of the “other” responses endorsed the use of tables of contents, but did not favour overviews.

Preferences between tables of contents and overviews

7.17 Fourteen of the 17 respondents to Consultation Question 30 expressed a preference for tables of contents.

7.18 The Law Society of England and Wales observed that, if an overview approach were adopted, the content should be limited to factual matters. They pointed to the risk that an overview could be used as a means of expressing a particular Home Office aim or policy objective, which they considered undesirable.

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129 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 9.16 to 9.17.

130 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 9.18 to 9.19.

7.19 Most others gave strong support to tables of contents. Respondents considered that a clear unambiguous list of contents would assist navigation in a practical and objective way. It would be easy to keep them up to date.

7.20 Respondents noted a range of objections to overviews. Several, including the Faculty of Advocates, Carter Thomas Solicitors (Respondent B from ILPA) and Robert Parkin (10 KBW), thought that overviews could generate further complication, cause confusion and become overly wordy. Destination for Education thought that overviews were less user friendly. Others agreed that there was a risk, as suggested in our consultation paper, that an overview could be overlooked when Rules are amended and become inaccurate.

7.21 Both the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges and Carter Thomas Solicitors (Respondent B from ILPA) observed that if the Rules are clearly headed and worded, with a comprehensive table of contents, there should be no need for overviews.

7.22 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges noted that if the booklet approach to the restructuring of the Rules were adopted, tables of contents would be the "obvious and straightforward" means of introducing the content and assisting users in finding the relevant paragraphs.

7.23 Those who did not have a preference between the two suggested that both approaches could be combined. The Law Society of Scotland advocated the use of both at the beginning of Parts. Professor Thom Brooks (University of Durham) saw a limited role for overviews, but warned against including them in each sub-part, as this would recreate "the verbosity and obscurity that this review is attempting to reduce".

Overviews as an aid to interpretation

7.24 The second part of Consultation Question 29 asked whether, if overviews were used, it would be worthwhile to include a provision that overviews were not to be treated as an aid to interpretation. Only one respondent expressly supported this proposal. One of those who did not agree, Professor Thom Brooks, instead suggested marking the difference in status by drafting the overview as an accessible summary with a set number of words in a different font. Jonathan Collinson and Gemma Manning (University of Huddersfield) considered that not only overviews but all other parts, including tables of contents, titles, and headings, should be considered as aids to interpretation.

7.25 A number of others commented that, if the overviews were not to be used as an aid to interpretation, there was even less cause to use them.

7.26 In our report on the Form and Accessibility of the Law Applicable in Wales we considered the Welsh Assembly's practice of including overviews at the beginning of a piece of legislation, of which consultees were in favour.[131] We concluded that a properly drafted overview clause could aid understanding of the intention behind a piece of legislation, but cautioned against the risk of one being used as an aid to interpretation. In the different context of individual Parts of the Immigration Rules, we

[131] Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, para 9.40.

are persuaded, for the reasons given by respondents and in the light of the risks identified in our consultation paper, to recommend the use of tables of contents at the beginning of each Part of the Rules, and to recommend against the use of overviews.

Recommendation 13.

7.27 We recommend that a table of contents should be placed at the beginning of each Part of the Immigration Rules.

NUMBERING SYSTEM

7.28 Our consultation paper provisionally proposed a three-level numbering system which would re-start in each Part. We considered that this would help with navigation. It would be possible to identify from the numbering within which Part a paragraph fell, and the different sections within a Part would be distinguished by the second level digit. We proposed that letters should be used only for sub-paragraphs, with Roman numerals used for sub-subparagraphs.[132]

7.29 We also considered the need for a uniform system in numbering the reformulated Appendices created as a result of our restructuring of the Rules.[133] We did not think that the use of initials or letters would be helpful. We also considered when renumbering should be carried out. One possibility was to do this immediately. Another would be to await the redrafting of the Rules in their entirety in line with our simplification proposals.[134] We asked for consultees' views on each of these aspects of the proposed new numbering system.

Views on a three-level numbering system

7.30 In Consultation Question 31 we asked for views on our proposed three-level numbering system. Of the 16 who answered this question, 14 agreed with the proposed system, subject to two partial objections; one respondent disagreed, and one respondent answered "other", expressing no preference save that any system should be followed consistently. The agreement of one of the respondents, ILPA, was based on the response of 93.1% of members responding to their internal survey.

7.31 Those supporting the suggested scheme expressed a strong dislike of the current combinations of letters and numbers, in particular the use of abbreviations such as "LTRP" in Appendix FM. Respondents urged the need for a uniform, sequential and consistent system. This view was strongly endorsed in consultation events, when many respondents expressed despair at the current system of "alphabet soup".

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132 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 9.32.

133 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 9.33. For a discussion of the proposed division of material in restructured Immigration Rules, see the discussion in ch 6 above.

134 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 9.34.

7.32 Destination for Education opposed the proposed scheme. They opposed any use of letters and Roman numerals in the sub-paragraphs, advocating the use of numbers only and a restriction on how many sub-paragraphs could be introduced.

7.33 One of the two partial objections to the scheme expressed by those otherwise in agreement was an objection by the Law Society of Scotland to the use of Roman numerals.

7.34 We recognise the potential for re-introducing complexity with the use of letters and Roman numerals for sub-paragraphs and sub-subparagraphs. But we consider that, on balance, and if our other proposals for improved drafting are accepted, these problems could be kept in check by the additional provisions set out in our drafting guide to limit the use of sub-subparagraphs.[135] They would also be restrained by our recommendations as to the treatment of insertions.[136] We think that some sub and sub-subparagraphs are inevitable. We also think it important to control the number of possible numerical sub-divisions (for example, numbering such as 1.2.3.4.5.6) as appears in some styles of contract drafting. We find this unwieldy.

7.35 The other partial objection, from Robert Parkin (10 KBW), expressed a preference for a letter to identify each Part at the outset, for example A.1.1.1. The reason given was that there might be scope for confusion between identically numbered Rules in different Parts. Our proposal is for numbering to re-start in each Part. This should ensure that there are no identically numbered paragraphs.

7.36 We see intractable difficulties with the introduction of letters at the outset of each three-level number. Letters have their own order and finite sequence. If they are used in alphabetical order, they do not add anything to the first level number identifying the Part. If they are not used in sequence, and are used for example to identify the category of applicant (such as “V” for Visitor), they will disrupt the sequence of numbers. This would also re-introduce the mix of numbers and letters for which respondents have expressed such dislike.

7.37 We recommend the three-level numbering system as originally proposed in our consultation paper, coupled with the guidance on numbering contained in our drafting guide and included in our recommendation below. We think that it is a substantial improvement on the current system which has been supported by almost all respondents to our consultation.[137] We have added recommendations for additional user-friendly approaches to be integrated into online presentation in our chapter on online presentation.[138] Our scheme is also subject to our recommendations below on the management of subsequent insertions.

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135 See the drafting guidance at appendix 6 to this report.

136 Insertions are discussed at para 7.50 below.

137 We did not receive suggestions of alternative schemes. We note that one possible qualification to the scheme, which would reduce the complexity caused by insertions, is to leave space for insertions. In other words, provisions are initially numbered 10, 20, 30, and so on, in order to leave space between them. This is not an approach which has generally been employed in UK legislation, but it has been used in some other jurisdictions.

138 See ch 11 of this report.

Recommendation 14.

7.38 We recommend 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-subparagraphs.

Numbering of Appendices

7.39 Our next question, Consultation Question 32, asked for views on our provisional proposal that Appendices should also be numbered in numerical sequence. Of the 15 respondents who answered this question, 12 agreed, one disagreed, and two responded "other".

7.40 The reasons given for supporting our proposal included further objections to the mixed use of numbers, letters and abbreviations as confusing. Some respondents flagged up the need, addressed in our consultation paper and set out in our proposed division of material,[139] for the Appendices to be confined to lists which do not contain substantive Rules.

7.41 The UTIAC judges reported differing views. Some of their judges objected to the proposal on the ground that the numbers would not assist the users to identify which Appendices were relevant to their case, and that this could lead to confusion. They noted that if the booklet approach were adopted to the restructuring of the Rules, each booklet could contain the Appendices relevant to the given category.

7.42 Islington Law Centre suggested that the Appendices should be hyperlinked to the Rules. We adopt this suggestion; it would assist, in the online version of the Rules, with the issue of navigation identified by some of the UTIAC judges. We do not think it likely that identifying relevant Appendices will be a major problem and have difficulty identifying a better way of resolving it. Our recommended division of material in the redrafted Rules[140] contains only seven Appendices, and we envisage them as being short and having titles that identify their content. A reference in a Rule such as to "the

[139] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 8.10.

[140] See appendix 4 to this report.

list of sports governing bodies in Appendix 6" will, we think, send as clear a signal to the reader as any other system for identifying Appendices.

Recommendation 15.

7.43 We recommend that:

(1) Appendices to the Immigration Rules should be numbered in a numerical sequence;

(2) in the online version of the Rules, references to Appendices should be in the form of hyperlinks; and

(3) to the extent that booklets are produced, these should also use hyperlinks to refer to Appendices.

An interim renumbering?

7.44 Once the numbering scheme is settled, the next issue to resolve is when the renumbering of the Rules should take place. We asked respondents at Consultation Question 34 whether the Rules should be renumbered as an interim measure. Fourteen respondents answered this question. Six agreed with the suggestion. Seven disagreed; one responded "other".

7.45 The UTIAC judges supported the suggestion; they were of the view that, although renumbering would be confusing to practitioners, the needs of unrepresented users who would prefer a more straightforward numbering system should be put first. Professor Thom Brooks saw this proposal as "a simple way of getting a quick, significant win".

7.46 Of those who disagreed, most highlighted the unnecessary confusion that would be caused, and asked that renumbering be part of a complete systematic rewriting of the Rules. Respondents pointed out that interim renumbering was likely to be followed by a fresh renumbering exercise when the Rules were eventually re-written in their entirety. This could produce three successive sets of numbering within a short space of time.

7.47 The Bar Council described the exercise as "resource-intensive and potentially confusing … with no long-term benefit". The Law Society of Scotland thought the measure was "likely to add unnecessary complexity and confusion". The Faculty of Advocates saw no advantage in a mere process of renumbering, adding that "renumbering as a consequence of a systemic approach in recasting the Rules has obvious utility".

7.48 The Law Society of England and Wales, who responded "other", also saw the additional work as unnecessary and would prefer the focus to be on a complete overhaul of the Rules, but did not have a strong view either way.

7.49 On balance, we are persuaded that the risks and disadvantages identified by those opposing the proposal outweigh the short-term advantages of an interim renumbering exercise. We agree that such a resource-intensive task should only be carried out alongside the systematic redrafting of the Rules. In those circumstances the effort required on the part of users to familiarise themselves with the new numbering system will be a worthwhile long-term investment of time. We do not recommend that an interim renumbering exercise be undertaken.

SCHEME FOR SUBSEQUENT INSERTIONS

7.50 We acknowledged in our consultation paper that future amendment of the Rules is inevitable, and suggested that a consistent numbering scheme for subsequent insertions was essential. We provisionally proposed a system for future insertions based on standard legislative drafting practice.[141] This uses combinations of letters and numbers to sequence inserted Rules. We asked in Consultation Question 33 whether consultees agreed with our proposed system.

Views on our proposed scheme for insertions

7.51 Fourteen respondents answered Consultation Question 33. Nine agreed with the proposed insertion system. Three disagreed with it. Two labelled their response as "other". While agreeing, the Bar Council warned:

> It seems to us inevitable that the more new material is inserted into the Rules, the more the clarity of the structure of the revised Rules will suffer. Any gains that are achieved by restructuring the Rules may be undermined if there are extensive future amendments.

7.52 The UTIAC judges, who disagreed with the system, observed that:

> 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.

7.53 Another respondent, Robert Parkin (10 KBW), disagreed with aspects of the insertion numbering system itself, proposing that an insertion before A1 should be "AA1" rather than "ZA1". He also proposed that a continuation after Z or z should be used cautiously. Migrant Voice thought that adding letters before or after numbers would add to confusion, and suggested investigating whether symbols such as delta or beta could be used instead.

7.54 Although we do not think that one scheme is intrinsically better than another, we have concluded that it is better to remain consistent with drafting practice familiar to judges and practitioners.

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[141] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 9.36, and see the Office of the Parliamentary Counsel, Drafting Guidance (2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727629/drafting_guidance_July_2018.2.pdf (last visited 17 September 2019).

Dealing with heavily amended portions of the Rules

7.55 We asked more about how to deal with heavily amended portions of the Rules at Consultation Question 35, asking if the Rules should be renumbered in a purely numerical sequence when they have come to contain substantial quantities of insertions. Of the 14 respondents who answered this question, 13 agreed. There was one response, from the Bar Council, of "other". Where reasons were given for agreement, the respondents echoed the views set out above that indefinite alphabetical insertions are confusing and that the sequence is inherently limited. Destination for Education emphasised that the whole section should be replaced where a threshold was met.

7.56 Two of those disagreeing with our proposed numbering system, the UTIAC judges and Destination for Education, pointed in their answers to Consultation Question 33 to the need for a threshold point at which amendment should trigger the replacement of the relevant section, Rule or Part. Their suggestion was that this threshold should be reached when insertions would otherwise require double lettering as well as numerals, such as 1AA, 1AB or 1ZA, 1ZB.

7.57 The Bar Council thought that renumbering should be a last resort. They expressed concerns about the impact of renumbering on tracing amendments to a Rule back through multiple versions. These concerns are picked up in our discussion of archiving below in chapter 9.

7.58 We share the concerns expressed that frequent insertions under the proposed system could generate fresh complexity, though renumbering has its own disadvantages. We do not consider that there should be a hard-edged rule triggering a renumbering; whether it is desirable or not will depend in part on the amount of awkwardly numbered text that would otherwise be created. Our recommended drafting guide, set out in appendix 6, contains within paragraph 10 a requirement to consider renumbering a portion of text when inserting new paragraphs into text which has been heavily amended.[142] We draw attention to this in the light of the concerns raised in these consultation responses. While this generates its own problems in constructing an archiving system, we think that these can be overcome with the development of a more sophisticated "point in time" search facility as discussed in chapter 9.

7.59 We also emphasise that provision of a system for insertions is not to be taken as support for frequent amendment of the Rules. Managing the frequency of amendments is considered further in chapter 8. One of the key objectives of the simplification project is to reduce the need for frequent amendment.

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[142] The provision originally appeared in para 11 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

Recommendation 16.

7.60 We recommend that text inserted into the Immigration Rules should be numbered in accordance with the following system:

(1) new sections or paragraphs inserted at the beginning of a Part or section should have a number preceded by a letter, starting with "A" (A1, B1, C1 and so on); a section or paragraph inserted before "A1" should be "ZA1"; for example, 1.A1.1 or 1.1.A1;

(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 sections or paragraphs inserted between existing sections or paragraphs should be numbered as follows:

(a) new numbering inserted between 1 and 2 should be 1A, 1B, 1C and so on; for example, 1.1A.1 or 1.1.1A;

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

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

(d) (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.

ORDERING OF ELIGIBILITY AND EVIDENTIAL REQUIREMENTS WITHIN EACH CATEGORY OF APPLICATION

7.61 We recognised in our consultation paper that the task of understanding what is needed to apply under a particular category is made more difficult when the reader has to read through long sections of text, or refer back and forth across text, to pick out what sections are relevant. We suggested that clear headings and subheadings and a logical structure could assist.[143] The subsequent sections of our consultation

[143] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 9.44 to 9.50.

paper looked at drafting techniques which could, when taken together, help to present requirements in a way which is easier to assimilate.[144]

DEFINITIONS

7.62 Our consultation paper noted that provisions in the current Rules presented as definitions sometimes contain substantive eligibility requirements. In other words, they impact on the applicant's entitlement to stay. They are sometimes difficult to find, creating a risk that they may be overlooked. We referred to the Office of the Parliamentary Counsel's Drafting Guidance to support our provisional proposal that it was best to avoid using a definition as a vehicle to import requirements into the Rules.[145]

Should definitions contain substantive eligibility requirements?

7.63 We asked at Consultation Question 36 whether consultees agreed with our provisional position. Of the 19 respondents who answered this question, 18 agreed. Respondents who agreed with our proposal were firmly of the view that definitions should aim to clarify meaning, not add new requirements. The main reason given for this view was the risk that the non-expert user would not locate the requirement within the definition as they would not be expecting to find it there. The approach also increases the need to cross-refer, which users find confusing.

7.64 UKCISA pointed to the process by which subsequent amendments intended to clarify a definition can change quite fundamentally the conditions imposed on an applicant. In the example given of the definition of a "professional sportsperson", this included changing the actions permitted of a would-be applicant over significant periods of time prior to their application.[146]

7.65 Coram Children's Legal Centre gave the example of provisions within Appendix EU to bring "*Zambrano* carers"[147] into the EU settlement scheme. These use provisions in the definitions section, set out as a separate Annex, to impose conditions not otherwise found in Appendix EU which could make an applicant ineligible. They pointed to the risk that the applicant may not look at the Annex.[148]

7.66 Clarity in the presentation of definitions is another approach to this problem. ILPA favoured the use of a hover box over a definition to avoid the need to cross-refer. This idea is discussed in chapter 11 of this report.

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144 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 10.2 to 10.43.

145 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.9.

146 See the consultation analysis table for Consultation Question 36 for the full example.

147 These are people not having an EU nationality who derive a right to remain in an EU country from having caring responsibilities for a child who has an EU nationality in accordance with Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-1232.

148 See the consultation analysis table for Consultation Question 36 for the full example.

7.67 The UTIAC judges responded "other" but their comments disagreed with our proposal, arguing that there was nothing inherently wrong with using definitions to import requirements as long as they are clear.

7.68 We agree with the majority of respondents that the potential for applicants to overlook a requirement is much greater if a requirement is included in a definition. We also fear that it will be confusing for non-expert readers if some of the requirements for obtaining leave are found not in the category-specific portion of the Rules but set out, possibly at some length, in a separate definitions section. These risks seem to us to be too great to be overcome by our recommendation to identify definitions with a # and/or the use of hover boxes.[149] We recommend that definitions are not used in this way.

Recommendation 17.

7.69 We recommend that definitions should not be used in the Immigration Rules as a vehicle for importing requirements.

SELF-STANDING CLAUSES

7.70 Our consultation paper found that one of the most significant barriers to navigation and understanding is the use of cross-referencing in the Rules. Many Rules cannot be read in isolation. The reader may need to locate and understand a whole sequence of other Rules in order to understand a particular Rule. We suggested that the use of cross-referencing hinders accessibility.[150] We provisionally proposed that clauses should be self-standing wherever possible, and state more directly what they intend to achieve. We considered that cross-references to other paragraphs should be avoided entirely unless strictly necessary.[151] We asked in Consultation Question 37 whether consultees agreed.

Should clauses be self-standing?

7.71 There was unanimous and emphatic agreement with our proposal by the 19 respondents who answered Consultation Question 37. Respondents noted that cross-referencing creates "almost impenetrable levels of complexity" which cause difficulties even to experienced practitioners. Professor Thom Brooks (University of Durham) suggested that the proposal could benefit not only the public and their legal representatives, but also drafters in making amendment easier.

7.72 Islington Law Centre drew attention to the provision in our drafting guide which supplements this proposal by stipulating that if cross-referencing is necessary, it

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149 See para 6.117 above.

150 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 10.12 to 10.23.

151 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.24.

should always contain a hyperlink.[152] They agreed, but warned that hyperlinks are risky as any change to the website may render them unusable.

Recommendation 18.

7.73 We recommend 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.

SIGNPOSTING

7.74 We provisionally proposed in our consultation paper that signposting to other parts of the Rules or to relevant legislation was desirable in assisting the reader to navigate the Rules. It can help to remind the reader looking at a specific route of application that there are other provisions such as general grounds of refusal which also need to be taken into account. But such a signpost must be drafted in such a way that it only draws the reader's attention to the provision, rather than purporting to make the other provision applicable, as this can create doubt as to its legal effect. We added that where portions of the Rules use signposting, they should do so consistently.[153] We asked in Consultation Question 38 whether consultees agreed with our proposals.

Views on signposting

7.75 There was unanimous agreement with our position on the part of the 18 respondents who answered Consultation Question 38. The FTT(IAC) judges added a note of caution in warning that the Rule in which the signpost appears should whenever possible contain all the provisions relevant to it to avoid the need for cross-referencing.

7.76 UKCISA noted that signposts to external legislation should take the user directly to the legislation itself rather than general references to the gov.uk website "where it can be difficult to find the relevant information".

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[152] See para 14 of our recommended drafting guide at appendix 6 of this report. The provision originally appeared in para 16 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

[153] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 10.27 to 10.35.

Recommendation 19.

7.77 We recommend that appropriate and consistent signposting to other portions of the Rules and relevant extrinsic material should be used in the Immigration Rules.

REPETITION WITHIN PARTS

7.78 We have already looked at the effect on the length of the Rules of adopting a structure which relies on duplication of material across booklets.[154] We considered whether it was better to duplicate material in order to allow the user to find all relevant material in one place. Similar questions arise when considering how far material should be repeated within portions of the Rules relating to specific categories of application.

7.79 In our consultation paper, we looked, as an example of this problem, at how to approach the lists of requirements in each route of application for entry clearance, leave to enter, limited leave to remain and indefinite leave to remain respectively.[155] One approach is for each list to be comprehensive, despite the increased length which results from the fact that the lists will contain much repeated material. The alternative is to set out all those requirements which apply to all types of application, then set out those additional requirements which apply to specific types of application only. The result is a shorter text, but the reader is required to go to more than one paragraph to pull together all the provisions which apply to their case. We adopted the latter approach in our proposed redraft of the general grounds of refusal contained in appendix 3 to the consultation paper.

7.80 We asked in Consultation Question 39 for consultees' views on which approach they prefer.

Views on repetition

7.81 Sixteen respondents answered Consultation Question 39. Almost all were in favour of repetition as a "necessary evil" if it avoided the need to cross-refer and promoted clarity. Those adopting this view appreciated that there is a balance to be struck. In the view of the Law Society of England and Wales:

> If the elimination of repetition carries a risk of the applicable requirements not being apparent, then repetition would be preferred. Removing repetition requires clear drafting.

7.82 The Bar Council observed:

> The key benefit of eliminating or reducing repetition is the consequential reduction in the overall length of the Rules. On balance, however, we are of the view (a) that increased length is a price worth paying for increased clarity, and (b) that, in any event, with appropriate drafting and organisation, and a well-designed online portal

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154 See ch 6 above.

155 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 10.37 to 10.43.

> for accessing the Rules, the overall length of the Rules should have little or no impact on an individual user consulting them in the context of a particular case.
>
> … whilst the repetition undoubtedly adds to the length of the Rules, it aids understanding for a user seeking to identify the provisions which apply to a particular case by limiting the number of Rules that they have to consult. This benefit outweighs any benefit that would flow from reducing the overall length of the Rules.

7.83 ILPA's view was that "some repetition is preferable to falling down the rabbit hole of multiple cross-references".

7.84 The four respondents who preferred the more concise drafting that can be achieved where repetition is reduced or eliminated, as in our proposed redraft of the general grounds of refusal, thought that cross-referring was better if it made the Rules shorter. The Faculty of Advocates pointed to drafting techniques which can make cross-referring less difficult for the user:

> Requirements which apply to multiple types of applicant should be contained in a single clearly identifiable section, stating what Rules they apply to. This aids clarity and prevents unnecessary lengthening of the text.

7.85 In addition, the minority of ILPA members surveyed who did not consider that repetition was beneficial (30%) thought that a clear system of hyperlinks could eliminate the need for repetition.

7.86 We found the views expressed by respondents as to the benefits of repetition compelling. They accord with the approach of prioritising clarity for the user over concise drafting that we adopted in our report on the Sentencing Code, which recommended a new code of criminal sentencing procedure. Our report noted that repetition of material can be preferable in the interests of clarity.[156]

7.87 We are persuaded that repetition is a means of increasing accessibility and of avoiding the need for the reader to look at more than one Rule in order to find, for example, the eligibility requirements applying to particular form of leave. We have therefore altered the view provisionally expressed in our consultation paper to reflect this.

Recommendation 20.

7.88 We recommend that repetition within portions of the Immigration Rules should be adopted where desirable in the interests of clarity.

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156 "Where the effect of a provision can be made clearer and simpler, but to do so involves drafting a greater number of subsections or multiple provisions, we have chosen to adopt this approach. We have prioritised clarity over brevity", Sentencing Code (2018) Law Com No 382 at para 9.10.

OUR DRAFTING GUIDE

7.89 Our consultation paper contained a drafting guide to assist drafters to maintain clear and consistent drafting as the Rules change over time. Our intention was that the guidance in it should not be binding but should operate as a benchmark from which to evaluate drafting.[157]

7.90 As a starting point, we incorporated guidance on general drafting style from the Home Office Consultation Paper on Simplifying Immigration Law published in 2009. This also recommends consideration of other guidance: the Plain English Campaign Guide to legal phrases, the Plain English Campaign A – Z of alternative words, the UK Border Agency A-Z of Simpler Words and Phrases and the Home Office and UK Border Agency House style guide for communications. We provisionally proposed adopting this framework. We made further proposals to supplement it, including the adoption of a clear method to show whether paragraphs are intended to operate cumulatively or as alternatives.

7.91 The next section in the guide made proposals for the formatting of the Rules to make them easier to navigate, for example by splitting up the text, increasing font size for subheadings, using double spacing in the text, and making more space between paragraphs. We went on to set out our proposals for titles and subheadings, overviews and contents pages, numbering, insertions, definitions and cross-referencing which have been discussed above.

Views on our drafting guide

7.92 In Consultation Question 40, we asked whether consultees agreed with our provisionally proposed drafting guide, and, if not, what should be changed. We also asked for views on whether there were other sources or studies which could inform such a guide.

7.93 Fourteen out of 15 respondents approved our drafting guide. The Bar Council commented that "it establishes core principles which, if properly applied, should significantly improve the overall clarity of the Rules".

7.94 The Law Society of England and Wales welcomed it as an "extremely useful tool" to ensure a consistent drafting style across the Rules and to avoid the encroachment of disorganisation as provisions are amended. They answered "other" rather than expressly approving the guide, because of a disagreement with one aspect of the guide, the provision for overviews. As noted in paragraphs 7.14 to 7.26 above, many others share this perspective on overviews. We agree, and have amended the section in the drafting guide originally relating to overviews and contents pages to endorse the use of tables of contents at the beginning of some or all of individual parts, and to remove reference to overviews.[158]

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157 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

158 See para 12 of our recommended drafting guide at appendix 6 of this report. The provision originally appeared in para 13 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

7.95 Some respondents stated other specific preferences. The Bar Council advocated adopting a clearer approach to whether paragraphs are intended to operate cumulatively or alternatively. As the Rules should be accessible to a non-expert audience, they suggest that "and" or "or" be used at the end of each paragraph rather than, as our guide suggests, using this approach only where a list is exceptionally long. The FTT(IAC) judges also suggested this approach. The Faculty of Advocates shared the same concern, and proposed using, in all cases where the requirements in a list are cumulative, "if all of the following apply" at the beginning of the list, or, where the requirements are alternative, "if any of the following apply".

7.96 We agree that these approaches would make it clearer whether paragraphs are intended to operate cumulatively or alternatively. We have amended this section of our guide to propose the use of either or both of these approaches in all cases, removing the reference to exceptional cases.[159]

7.97 The Bar Council also noted that although, as recommended in the guide, non-technical language should be used as far as possible, it was inevitable that legal terms of art would have to be used from time to time. In their view, this could be mitigated by a well-drafted definitions section, with appropriate flagging of the terms in the text as set out in the section at the end of the guide. They rejected our suggestion that replacing unfamiliar terms such as "at port" with a phrase such as "immigration control point" would be any clearer to the non-expert reader.[160]

7.98 We acknowledge the role of a good definitions section, but maintain at paragraph 3(o) of the guide that it is helpful where possible to avoid "jargon" terms. Words used in their natural meaning will be clearer to a non-expert user than words given a strained or unnatural meaning.

7.99 Also in relation to definitions, some respondents expressed a preference for a symbol rather than italics to designate a definition in the text. We have amended the drafting guide to propose the use of a symbol such as # rather than the use of italics.[161] There are also accessibility issues with italics.[162]

7.100 The Bar Council agreed with the guide that lengthy blocks of text should be avoided, but did not consider that this would necessarily require each sentence in a provision to appear as a separately numbered sub-paragraph. We accept that this need not follow.

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159 See paras 5 and 6 of our recommended drafting guide at appendix 6 of this report.

160 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.51.

161 See para 19 of our recommended drafting guide at appendix 6 of this report. The provision originally appeared in para 21 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54. In this respect, there was an inconsistency in our consultation paper, as we use the # symbol to identify a definition in our specimen redrafting work. See paras 8.46, 10.5 and 11.10 of the consultation paper for other suggestions that the # symbol be used. Para 8.45 explained that the use of bold for definitions can produce a very cluttered text, and can make reading difficult for some readers. See also the discussion in this report at 6.109 to 6.115 above of the best way to identify a definition, and our recommendation of the # symbol at para 6.117 above.

162 See the guidance on accessible formats in https://www.gov.uk/government/publications/inclusive-communication/accessible-communication-formats (last visited 17 September 2019).

7.101 The section of the guide dealing with cross-referencing also invited comments. One suggestion arose in relation to the suggestion that drafters avoid multiple cross-references and present information in a more self-contained way. Islington Law Centre proposed that if a common provisions approach to structure is adopted, every Rule affected by a common provision should contain an alert to the user to refer to the common provision. They did not think it sufficient simply to state within the common provision, as we suggested, that it applies across the board, subject to any category-specific modification.[163]

7.102 We are concerned that this proposal could produce a very cluttered text, as it would involve references to the common provisions at many points. Our discussion in chapter 11 of the use of hyperlinks where one Rule refers to another, coupled with a practice of signposting the common provisions at appropriate points in the category-specific Parts, would alleviate this problem.

7.103 Islington Law Centre welcomed the paragraph of the guide which alerts drafters to the fact that not everyone will have access to the online version, and as a result will not be able to use hyperlinks to make cross-references easier to navigate[164]. They warned that:

> We have real concerns that, with the government promoting transferring to a fully online system, clients like ours who are especially vulnerable are at risk of being left behind and suffering further disadvantage. There is a significant risk that if the Rules are only available online and therefore only updated online, any other versions will quickly be out of date – a situation that would not be clear to all applicants.

7.104 We agree that it is important that users of the Rules have access to a printable version of the latest version of the Rules.[165]

7.105 The FTT(IAC) judges added that where material contains hyperlinks, the hyperlinks should always take the reader directly to the relevant material rather than merely to the document in which the relevant material appears. We agree that this is important. It is time-consuming for any reader to have to look through the document to find what is relevant. The non-expert user may also lack the skills to do so. We have added to paragraph 14 of our guide that where possible the hyperlink to external material should take the reader directly to the relevant material.[166] This is also picked up in our discussion of online presentation in chapter 11.[167]

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163 See para 13 of our recommended drafting guide at appendix 6 of this report. The provision originally appeared in para 15 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

164 See para 16 of our recommended drafting guide at appendix 6 of this report. The provision originally appeared in para 18 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54.

165 The Home Office does not publish a hard copy version of the consolidated Immigration Rules. We discuss other attributes required of a printable version of the Rules at paras 9.15 and 9.19 below.

166 The provision originally appeared in para 16 of the proposed drafting guide in Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54

167 See the discussion at paras 11.12, 11.13 and 11.15 below in relation to Consultation Question 51.

7.106 One of the principles we identified in chapter 2 to underpin the redrafting of the Rules is consistency. Our drafting guide is intended to assist drafters to ensure that the Rules are drafted as clearly and consistently as possible. But UKCISA has pointed out that the guide alone may not be sufficient to achieve this:

> We very much hope that someone in the Home Office will have responsibility for ensuring that any guide which is adopted is applied at all times and that this is enforced before publication, including testing of hyperlinks. Over the years, we have observed many different writing styles in guidance and the Immigration Rules, to which we have had to adapt, which is not an ideal approach. Any drafting guide should be made publicly available so that others can query drafting which is not clear and/or suggest alternatives, in line with the guide.

7.107 We agree that the appointment of an official or team of officials at the Home Office with responsibility for maintaining drafting consistency in the Rules could be of substantial value in maintaining the simplification of the Rules. We also endorse the suggestion that the guide should be publicly available. Although this may require the allocation of additional resources, we think that the benefits over time of improved coordination would justify the investment.[168] We suggest that the Home Office could consolidate the UK Border Agency A-Z of Simpler Words and Phrases and the Home Office and UK Border Agency House style guide for communications into one updated document.

7.108 Finally, we have removed the reference in the "General drafting style" section of the drafting guide to the use of bullet points.[169] Although consultees did not make any comments about this provision, we have concluded that their use is inconsistent with our recommended scheme for the use of letters and Roman numerals to identify sub-paragraphs and sub-subparagraphs. We also think that bullet points make cross-references to items in the list more difficult than they would be with a sequential numbering system. We have inserted instead at this point of the guide provision for the use of sub-paragraphs to break up dense text.

7.109 Our recommended drafting guide is reproduced in appendix 6 incorporating the amendments to the consultation draft that we have discussed in this chapter.

Recommendation 21.

7.110 We recommend the adoption of the drafting guide set out in appendix 6 to this report.

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168 The need for centralised systems to control consistency was also discussed in para 6.88 above in relation to the possible presentation of the Immigration Rules in booklet form, and is considered further in paras 10.55 and 10.66 below in relation to the oversight of guidance.

169 See para 3(e) of the drafting guide at appendix 6.

SPECIMEN REDRAFTING WORK

7.111 In our consultation paper we applied our proposals for reorganising and redrafting the Rules in specimen redrafts of the current Part 9 (Grounds for Refusal) and the part of Appendix FM (Family members) dealing with partners.[170]

7.112 Our redraft presented the Grounds for Refusal as a set of common provisions of general application. We acknowledged that these might be subject to qualifications for particular categories of applicant; we envisaged that if a single set of Rules were adopted, the qualifications would be contained in category-specific Parts. This is illustrated by the approach taken to the specimen redrafting of Appendix FM. Where the current suitability provisions duplicated the general grounds, we removed them. Alternatively, if the booklet approach were adopted, we envisaged that the general grounds would be included in each booklet in a form incorporating any modifications of the general grounds that applied to the immigration route in question.

7.113 We asked in Consultation Question 41 for consultees' views on the general approach adopted in the specimen redrafts. We also asked at Consultation Question 42 for specific views on what worked well and what could be improved.

Views on our specimen redrafting

7.114 Of the 14 respondents to Consultation Question 41, all found, on the whole, that our general approach to redrafting was successful, with some reservations expressed in more detail in their responses to the next question. Many commented that the drafting improved clarity, readability and navigation. UKCISA noted that some of the drafting approaches we had proposed in our consultation paper appeared to have been followed in the new Appendix W published in a statement of changes in March 2019.[171] They commented that "this new appendix is much easier to navigate and understand than other recent additions to the Immigration Rules". They expressed one specific reservation about Appendix W, in preferring the use of a # symbol rather than italics to identify a defined term.

What worked well and what did not

7.115 In terms of specific areas of the redrafts which either worked well or which could be improved, respondents to Consultation Question 42 had a range of observations and suggestions. A number of respondents also pointed out errors in our redraft.[172] We acknowledge these errors and are grateful to our respondents for the care and time taken in their analysis of our work.

7.116 In terms of disagreement with the substantive content of the redrafts, the FTT(IAC) judges objected to our formulation at 12.1.8 of the requirement that any previous relationship of the applicant or partner must have broken down permanently, as in

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170 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 11 and appendices 3 and 4.

171 Statement of Changes to the Immigration Rules, HC 1919, published 7 March 2019.

172 These included the use of Roman numerals in place of letters in sub-paragraphs, contrary to our drafting guidelines (for example in 4.3.1 and 4.3.3 in the redrafted Grounds for Refusal), and numbering errors in the cross-references in the redrafted sections of Appendix FM (for example in 12.3.3).

their view it should make it clearer that a previous marriage must have been dissolved.

7.117 The Joint Council for the Welfare of Immigrants also listed areas where they considered that inaccuracies had appeared. For example, they thought that it was not sufficiently clear in our Appendix FM redraft that the higher income threshold applies to each applicant's non-EEA child, rather than to any child of the applicant or sponsor.[173]

7.118 The Law Society of England and Wales cautioned that simplification could risk removing differences between grounds of refusal applicable to different cases where the policy intention was that the applicants were to be treated differently. This is an issue covered in our discussion of the restructuring of the Rules in chapter 6, where we have recommended an internal audit of overlapping provisions.[174]

7.119 Respondents also repeated their respective preferences for either repeating provisions in full for entry clearance, leave to enter, limited leave and indefinite leave, or removing repetition in order to shorten the text. We have discussed this earlier in this chapter.[175]

7.120 The Faculty of Advocates repeated their preference for the use of "any of the following" at the outset where there is a list of disjunctives rather than using "or" at the end of each paragraph.[176] They also disliked the use of the plural pronoun "they" to refer to a single person, preferring "he/she".

7.121 Destination for Education thought that overall there was still room for improvement. They highlighted sections of our redrafted text where there were lists of paragraph references or which contained "cross-references bunched together".

7.122 Our redrafts were produced for illustrative purposes as part of the consultation process. We are not providing any redrafts as part of this report, but draw the attention of the Home Office to respondents' suggestions.[177]

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173 See the consultation analysis table for Consultation Question 42 for full detail.

174 See paras 6.35 to 6.45 above.

175 See paras 7.78 to 7.88 above.

176 See para 7.95 above.

177 These are set out in full in the consultation analysis table for Consultation Question 42.

Chapter 8: Maintaining the improved presentation of the Rules

8.1 This chapter considers the steps we recommend to ensure that, once the Immigration Rules are redrafted in accordance with the recommendations set out in this report, their improved presentation is maintained over the course of successive changes. It also looks at ways of introducing more clarity into the presentation of changes and of limiting their frequency.

KEEPING THE RULES UNDER REVIEW

8.2 Our consultation paper considered what mechanisms might be effective to combat complexity in the long term.[178] We looked first at the current machinery for oversight of the Rules. This is provided by section 3(2) of the Immigration Act 1971, which creates a unique mechanism for parliamentary oversight of the Rules. It requires "statements of the Rules" to be laid before Parliament. During a period of 40 days a resolution may be passed by either House disapproving the statement. This is somewhat akin to the negative resolution procedure for introducing statutory instruments.[179]

8.3 In practice, statements of changes to the Rules are scrutinised by the Secondary Legislation Scrutiny Committee in the House of Lords. This is a select committee that refers to the House secondary legislation that it considers interesting or important. If the instrument is selected, it is included in a weekly report prepared within 12 to 16 days of the laying of the statement of change. This allows members to pursue issues raised by asking questions or tabling a motion for debate within the 40 day period.[180] The specific criteria used by the Committee in deciding whether to refer legislation to the House include whether the legislation: is politically or legally important or gives rise to issues of public policy likely to be of interest to the House; may be inappropriate in view of changed circumstances since the enactment of the parent Act; may imperfectly achieve its policy objectives. The Committee also refers instruments where the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.[181]

8.4 Our consultation paper noted that the increase in the length and complexity of statements of changes to the Rules, as occurred in particular after the decision in *Alvi*,[182] could hinder Parliamentary scrutiny. Parliamentary time is inevitably limited. The form in which statements of changes are produced also makes scrutiny more

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178 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 12.

179 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 12.3 to 12.8. The related issue of the legal status of the Rules is discussed at paras 3.3 to 3.21.

180 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 12.10.

181 See https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/ (last visited 23 September 2019).

182 *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208.

difficult, as we explain further below. We provisionally concluded that the 1971 Act oversight mechanism was not apt to provide a means of controlling the complexity of the Rules and maintaining clarity of drafting.[183] In Consultation Questions 43 and 44 we sought consultees' views on whether the Rules had benefitted from informal consultation and whether informal consultation or review of their drafting would help reduce complexity.

The impact of the unique status of the Rules

8.5 Earlier in the consultation paper we had characterised the Rules as a unique form of legal text, not equating exactly to delegated legislation but having some of its characteristics. We did not consider that this unique status made any difference to applicants in practice, and asked respondents at Consultation Question 6 whether they agreed.[184] Of the 18 consultees who responded, 10 agreed. Three consultees answered "other" and the remaining five disagreed.[185] Among those who disagreed with our view, the most common reason provided related to the machinery for parliamentary oversight created by the 1971 Act.

8.6 Four out of the five respondents who disagreed argued that the unique status of the Rules permits frequent changes to be made without adequate accountability or scrutiny. Destination for Education believed that this causes difficulties for applicants not only because they struggle to keep up to date, but also because it makes them more susceptible to being adversely affected by short term political agendas:

> The constant changes make it difficult for applicants to keep up to date and also means that the adequate scrutiny, discussion and debate does not always happen leaving there an increased chance of errors or mistakes that then later have to be corrected with further statement of changes. This happened frequently in 2015. Our view is that this has the potential to leave migrants at a heightened risk of being adversely affected by individual biases, or topical political agendas, in this area. This unusual status might also go some way to explaining the high volume of changes that have been made to the Immigration Rules in recent years in further statements of changes.

8.7 The Joint Council for the Welfare of Immigrants ("JCWI") was also concerned that applicants were susceptible to constant changes which are often made "for political gain, or to circumvent court rulings which the Secretary of State finds inconvenient".

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183 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 12.11 to 12.14. See also ch 5 of our consultation paper at paras 5.12 to 5.24 and the graph at para 5.35 for illustrations of the volume and complexity of some statements of changes. More recently, the statement of changes HC 1919, laid on 7 March 2019, numbered 296 pages. This included provision to close the entrepreneur route to new applicants, and introduced two new routes, the start-up and innovator routes.

184 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 3.21.

185 Migration Watch was one of those who neither agreed nor disagreed. They did not express a view as to the impact of the status of the Immigration Rules specifically on applicants, but noted more generally that judicial disagreement as to the status of the Rules was not satisfactory and needs to be resolved more authoritatively. In their view, the Immigration Act 1971 should be amended by stating in explicit terms that the Immigration Rules are delegated legislation. See the consultation analysis table for Consultation Question 6 for other views on this question, which was interpreted in different ways by different respondents.

8.8 Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) argued that the lack of parliamentary scrutiny creates a number of difficulties for applicants:

> 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 and poorly considered requirements.

8.9 Migrant Voice was also concerned at the consequences of a low level of scrutiny for the level and adequacy of impact assessment undertaken. They believed that the lack of wider social input and feedback means that "the immense impact the Rules can have on an individual's life is not discovered until the Rules are live and play out in the real world".

Alternative proposals for scrutiny

8.10 In response to Consultation Question 44 the Institute for Government proposed the creation of a select committee in Parliament tasked with examining proposed Immigration Rule changes. The committee would decide whether the changes should follow a negative or affirmative procedure, replicating the role currently played by the European Statutory Instruments Committee in considering secondary legislation brought forward under the EU (Withdrawal) Act 2018.[186] The Institute also thought that there should be a fundamental re-evaluation of what changes can and cannot be made through secondary legislation.

8.11 Amnesty International UK were of the view that consultation with stakeholders should include consultation on policy, and that the Home Office should adopt an approach to policy-making that puts avoiding complexity as a principle to underpin policy, not merely drafting.

8.12 These proposals fall outside the terms of reference of the project; we relay them without comment. We confine our recommendations to the informal review mechanism, limited to matters of drafting and presentation, provisionally proposed in the consultation paper and discussed below.

Whether informal consultation has benefitted the Rules

8.13 We noted in our consultation paper that while there is no general duty to consult on changes, the Home Office has consulted expert stakeholders informally in the past on some proposed changes to the Rules. It appears that this has worked well in practice. The Home Office has also amended the Rules on occasion in response to feedback from legal practitioners about how drafting could be improved or to ensure that the Rules work better in practice.[187] We therefore sought views in Consultation Question

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186 The 2018 Act allows Ministers a choice of procedure in making regulations. Most regulations are first laid as "proposed negative instruments". Committees in each House "sift" these proposed negative instruments in order to determine whether they contain material that would be more appropriate to the affirmative procedure. In the House of Lords, the sifting work is done by the Secondary Legislation Scrutiny Committee. See https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/stage-1-scrutiny-sifting/ (last visited 23 September 2019).

187 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 12.15 to 12.18.

43 on whether consultation had benefitted the drafting of the Rules, before exploring in Consultation Question 44 whether informal consultation or review might help reduce complexity on an ongoing basis.

8.14 Eleven respondents answered Consultation Question 43. Respondents drew from examples of Rules which were made following consultation, but some stressed that many Rule changes occurred with little or no consultation.

Some examples of the effect of consultation

8.15 Views on the experience of consultation were mixed. The UK Council for International Student Affairs ("UKCISA") gave an example of beneficial interaction with the Home Office in relation to changes to the Tier 4 Rules on higher education providers where they had concerns about inconsistent wording:

> We set out our questions in writing, discussed the matter with the policy team member of staff and provided sample redrafting of the provisions. Many of our suggestions were adopted and we, and hopefully others, were clearer about the policy intention.

8.16 Robert Parkin (a barrister at 10 Kings Bench Walk) was not able to give an example of consultation on the Rules themselves, but cited an example of consultation on immigration bail guidance which, in his view, indicated the potential beneficial impact of informal consultation:

> 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.

8.17 Migrant Voice had a less positive experience of consultation:

> Some of the consultations we have taken part in in the past have been of questionable quality. One got the sense that there was no actual intention to seek public opinion and input either by limiting the knowledge of the consultation taking place, the time frame it was open in, lack of guidance, and worst of all the kinds of responses available, for example by having leading questions or limited options for answers: yes, no, with no possibility of writing an explanation or selecting other. The family migration rules consultation is an example of the latter.
>
> So while consultation is important, if it is an inadequate consultation it does not adequately inform the Immigration Rules. If furthermore the Rules are not subjected to proper parliamentary scrutiny, it feels like rubberstamping of inadequate Rules. It felt like the government had already decided what it wanted to do and just wanted to be seen to consult.

8.18 Other respondents noted a lack of consultation. The Law Society of England and Wales observed:

> In our recent experience there has been virtually no consultation on the formulation of the Rules. The last significant change to the Rules of which we had proper advance notice was the introduction of Appendix V and the administrative review provisions.

> Subsequent to that consultation there has been little formal or informal consultation about the formulation of the Rules. At the time of writing a statement of changes was published which ran to nearly 300 pages which replaced Appendix EU and effectively closed the entrepreneur visa route and introduced replacements for it. Whilst we had some awareness that the Home Office was planning to do this there had been no consultation with the Law Society, formal or otherwise. Accordingly, there can have been no benefit from such consultation as it simply did not take place. When there are changes introduced in this way there is inevitably litigation within a period of time which results in further reformulation to the Rules to ensure that they are fair. Proper consultation could avoid significant problems and significant litigation.

8.19 These responses indicate that consultation can be beneficial, but much depends on the way in which it is conducted.

Informal consultation or review of the drafting of the Rules as a means of reducing complexity

8.20 Seventeen respondents answered Consultation Question 44 with views as to whether informal consultation or review of the drafting would help reduce complexity. All welcomed the suggestion of a more consultative approach. Some respondents looked further at the advantages of consultation at the drafting stage. Others were concerned that overly informal consultation led to a risk of stakeholder exclusion, and that consultation needs to be genuine and timely. A few also stressed the need for feedback mechanisms after new Rules come into effect. Some commented specifically on our suggestion that a review committee be established to put consultation on a more regular footing.

Advantages of consultation at the drafting stage

8.21 The Bar Council thought that an open and transparent consultation process on significant amendments is likely to promote clarity and minimise complexity. The Law Society of England and Wales shared that view, stressing that consultation would not only reduce complexity, but also minimise mistakes and increase certainty for applicants. But the Law Society stressed that the Home Office would need to be receptive to both positive and negative feedback.

8.22 Robert Parkin (10 KBW) also highlighted the impact of consultation on avoiding errors:

> 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.

8.23 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges thought that practitioners and other users would be "well-placed to advise drafters on whether a rule is intelligible, and therefore workable". Migrant Voice thought that informal consultation would help to ensure more user-friendly Rules.

Disadvantages of overly informal or sporadic consultation

8.24 Some respondents were concerned about the exclusion of stakeholders in informal consultation. The Bar Council observed:

> It is important ... that any consultation process which is established in future with a view to improving the clarity of the Rules be transparent, and that certain stakeholders are not given access to the … Home Office that is not available to other stakeholders.

8.25 Islington Law Centre observed that law centres working with particularly vulnerable asylum and immigration applicants do not appear to have been invited to take part in informal stakeholder consultation. The Incorporated Society of Musicians also noted that they were not invited to participate, although they would very much like to do so. Coram Children's Legal Centre, at a meeting during the consultation period, expressed the view that smaller organisations are often excluded from such consultation.

8.26 Destination for Education highlighted the need to include organisations other than lawyers and professional advisers accustomed to dealing with lengthy rules and legislation. This would help to ensure that the Rules were accessible to non-expert users. The University of York Immigration Advice Team also emphasised the need to get the views of a variety of different users on how the Rules were working.

8.27 Amnesty International UK commented:

> Much depends on with whom there is consultation and how real and effective is any consultation. If consultation is 'informal' or 'ad hoc', however, there is some risk that either what is undertaken is or, over time, becomes of less substance and more a matter of mere presentation.

8.28 Other respondents highlighted the need for consultation to be timely and comprehensive. UKCISA observed:

> It could help reduce complexity if consultation takes place in a timely fashion and comments are given serious consideration. We are currently asked for comments on drafting, not policy, on occasion and usually at very short notice. Although we can point out when definitions or defined terms are needed, when references to paragraphs are incorrect or query what the intended outcome is in order to assess the effectiveness or otherwise of the drafting, there is no real discussion and it is usually too late to make changes we might have been assured on a previous occasion would be incorporated, but which have been overlooked again. Consultation or review of all provisions would be needed. When we see draft Rules (and this largely depends on who is in the policy team at any time), we are shown only study-related changes. However, other provisions, including validity and general grounds, may have at least as great an impact on our work and on our members' clients.

8.29 Destination for Education thought that "increased, or earlier, consultation with sector bodies would allow ... issues to be rooted out earlier in the drafting process, to universal benefit". Migrant Voice suggested that wider consultations could be held

every few years to get feedback from the wider public on overall changes to the Rules over longer periods. This could bring in the views of unrepresented applicants.

Better post-implementation feedback mechanisms

8.30 The Law Society of England and Wales pointed to the need for a mechanism for the Home Office to receive and react to errors, inconsistencies and anomalies in the Rules after they come into effect. Without such a mechanism "it can take months or longer to rectify simple inconsistencies or errors". They suggest a "dedicated arena for feedback" with procedures in place to ensure that feedback is acted upon quickly. They thought that it would also help to put the various types of clarifications currently provided by the Home Office business helpdesk on a dedicated blog or website with indexing to allow practitioners and applicants to access them.

8.31 Procedures to consolidate feedback would, in their view, not only assist practitioners and applicants. They thought it would help the Home Office to build a picture of the seriousness and impact of errors, and help to promote consistency and transparency in the interpretation of guidance and Rules and reduce time spent by the Home Office on individual queries. They gave an example of the way in which the Home Office can be reluctant to change a provision even where an error or unlawful disadvantage has been created in the Rules:

> The residence changes which took effect on 11 January 2018 severely disadvantaged certain applicants and were applied without grandfathering provisions (a basic legal concept ignored).[188] It took extensive lobbying to have the unfair consequences mitigated in the Immigration Rules which took up to six months to effect. The Home Office almost immediately accepted the fact that the change had been unfair, but initially invited applicants to seek discretion rather than to change the rules so that they were fair.

The possible benefits of a review committee

8.32 Controlling complexity and maintaining clarity in the face of what might be frequent and significant rule changes in the future is a challenging and time-consuming task. We suggested in our consultation paper that there might be merit in putting the existing informal and ad hoc consultation onto a more regular footing by establishing an informal review committee.[189] We considered that the committee could be composed of stakeholders such as civil servants, legal practitioners and members of the judiciary. We cited the composition of the Social Security Advisory Committee ("SSAC") as an example. This includes members with experience in social security law, academia, policy, business, employment and the voluntary sector.[190]

8.33 The role of the proposed informal review body would be advisory only. It would apply the principles we have identified to underpin the drafting of the Rules[191] in order to review drafting clarity for the benefit of the user. It would also be concerned with the

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188 A grandfathering clause is a provision in a new rule which allows an old rule to continue to apply to some existing situations while the new rule will apply to all future cases.

189 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 12.21.

190 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 12.21

191 Discussed in ch 2 of this report.

interaction between the Rules and extrinsic guidance. If the Rules were made less prescriptive, and supported by non-exhaustive guidance as to how eligibility could be established, the committee could consider the balance between the Rules and guidance. It would not consider or review immigration policy.[192]

8.34 As an alternative, we considered whether an ad hoc forum could be established to advise on the implementation of the recommendations for simplification arising from this report. The forum could itself decide how best to embed drafting clarity in the future.[193]

Views on a review committee

8.35 Eight of the respondents to Consultation Question 44 specifically commented on our suggestion of putting consultation and review on a more regular footing. All the comments welcomed the proposal.

8.36 The Bar Council expressed "strong support" for the creation of a review committee to consider "the simplicity, accessibility and coherence of the Rules, and their interaction with extrinsic guidance, including, where necessary, the balance between the Rules and guidance". Professor Thom Brooks (University of Durham) also strongly endorsed the creation of a review mechanism such as an advisory group. He approved the proposed membership of our committee, but was of the view that "other stakeholders" should be reformulated expressly to include legal academics with expertise in immigration law and policy. The Faculty of Advocates, the UTIAC judges, the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges, the Institute for Government, UKCISA and JCWI also saw merit in a more regular structure for review.

8.37 The Institute for Government was in favour of a committee with a function similar to that of SSAC:

> The SSAC reviews regulation that is introduced into the benefits system, with the remit not of proposing changes to policy but rather assessing whether the proposed regulation is coherent and clear and how it will be operationalised. Something similar at the Home Office, where Immigration Rules are scrutinised by a multidisciplinary group – including lawyers and those who have worked on the front line – would help to ensure that Immigration Rules do not become unworkable again.

8.38 The UTIAC judges endorsed the suggestion of more structured consultation, but did not think that judicial involvement in an advisory committee tasked with considering specific proposed Rules would be appropriate. This view was also expressed by other members of the judiciary at consultation events. The Faculty of Advocates welcomed a formal consultation process on the proposed comprehensive redrafting of the Rules, but noted that the need for consultation should be lessened if the drafting style proposed in our consultation is adopted.

8.39 JCWI proposed that:

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192 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 12.22.

193 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 12.23.

> An independent body should be formed to monitor changes or proposed changes to the Immigration Rules, and to make recommendations for consolidation and simplification.

8.40 A further respondent, the Migration Advisory Committee, commented favourably in a more general response to our consultation, adding that:

> One of our recommendations to government in the EEA Migration in the UK: final report (September 2018) was to "Consult more systematically with users of the visa system to ensure it works as smoothly as possible".

Discussion

8.41 The views expressed by respondents to these questions suggest that consultation could play an important role in controlling complexity and promoting consistency and certainty. The responses show that, where it occurs, consultation, as long as it is timely and sufficiently broad in scope, can help to ensure that the Rules are intelligible and workable, and suited to the needs of the non-expert user. It can help to avoid anomalies and mistakes. It can also in the long term save resources in reducing time spent on queries and litigation. Respondents also expressed concern that an overly informal process of consultation can exclude relevant stakeholders. They thought that a transparent consultation process which is representative of a wider range of different groups of non-expert users as well as legal practitioners would capture a broader range of interests. It would also build trust. They welcomed the suggestion that consultation and review should occur in a more structured and regular fashion.

8.42 We have concluded that the formation of an informal review committee is a preferable approach to ad hoc consultation. A small standing committee would develop familiarity with the Rules and could in our view be an effective mechanism for review of their drafting from the perspective of the principles we have identified.[194] The committee could also review the balance between the Rules and guidance. It could also monitor the frequency of changes in a particular area, and form a view on whether a different drafting technique, such as a reduced level of prescription, could be a solution. We think that such a mechanism could play an important part in building trust by providing reassurance that Rule changes undergo a rigorous process of review.

8.43 It would be important to ensure that the remit of the review committee is clearly defined. It would be advisory only. It would not consider or review immigration policy.

8.44 To be an effective body, the committee should be relatively small in size; we recommend that its membership not exceed a dozen members. Its composition is a matter for the Home Office, on which we do not make firm recommendations, but we suggest that it would be useful for it to include Home Office civil servants, immigration practitioners and organisations representative of non-expert users of the Rules, including those representing vulnerable applicants. Legal academics might also provide a wider and more detached perspective. We agree that it would not be appropriate to include serving members of the judiciary whose independence could be compromised, but this would not apply to retired judges.

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194 See ch 2 of this report.

8.45 It would not be practicable for the committee to include a representative of every group affected by the Rules; part of its task could be to ensure that the suitability of proposed Rules was checked with representatives of the affected sector.

8.46 We also see merit in the suggestion of more structured mechanisms for feedback after new Rules come into effect. We think that an online area for user feedback and Home Office responses could work well. This would allow users to flag up errors, inconsistencies and anomalies in a more ordered way. The site could be structured to consolidate these comments and responses and to index them so as to provide an additional resource for applicants. A more structured process of Home Office response could help to speed up the rectification of the problems identified. It would also allow the Home Office to build up a composite picture of errors made in order to learn from what went wrong and relay this information to individual teams.

Recommendation 22.

8.47 We recommend that:

(1) the Home Office should convene at regular intervals a committee to review the drafting of the Immigration Rules in line with the principles that we recommend in this Report;

(2) the committee should review the interaction between the Rules and guidance;

(3) the committee should be advisory only; and

(4) the terms of reference of the committee should exclude consideration or review of immigration policy.

Recommendation 23.

8.48 We recommend that the Home Office should design a more structured process for receiving and responding to user feedback to speed up rectification of problems identified in the Immigration Rules, make responses accessible to other users, and create an internal mechanism to relay learning to teams.

CLEARER PRESENTATION OF CHANGES

8.49 In our consultation paper we analysed the complexities of the incorporation of changes in the Rules over time, with or without transitional provisions, and arrangements for access to earlier versions of the Rules. We also looked at the impact of frequency of change. Taken together, these factors add a further dimension to the difficulties in navigating the Rules.[195] This section of our report considers responses to the discussion in our consultation paper of possible ways to reduce the complexities

[195] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 13.

which arise as a result of current approaches to updating. We are concerned to prevent the benefits of simplification being eroded as time passes.

The presentation of statements of changes

8.50 The publication of changes solely as a list of amendments and additions contributes to making the effect of changes difficult to understand. There is no document to show how they alter the existing Rules.[196] Explanatory memoranda accompany the changes but do not detail all the changes and may be generalised in their description.[197] We considered first how to improve understanding of the effect of a statement of changes.

8.51 The text of the Rules currently in force is published on the gov.uk website. But this does not allow the amended version of the Rules to be readily compared with its predecessors or the current version to be compared with a future version. One idea that we thought might assist would be to publish the full amended version of a Rule with the amendments clearly identified. This is the approach taken in a Keeling schedule.[198] The amended version could be available either alongside or instead of the statement of change. Other suggestions in our paper were to include more detail in explanatory memoranda, and to replace whole paragraphs in statements of changes rather than individual words.

How to make it easier to understand the effect of statements of changes

8.52 Consultation Question 45 sought views on how the effect of statements of changes could be made easier to assimilate and to understand. We asked in particular whether consultees thought that Keeling schedules would assist, and whether explanatory memoranda should contain more detail as to the changes being made, even if as a result they become less readable.

8.53 There were 16 respondents to the question. Before giving views on how to make the effect of changes easier to understand, the Bar Council expanded on the importance of the effect of changes being clear:

> The statements of changes are the means by which amendments to the Rules are made subject to Parliamentary scrutiny. If the text of the amendment itself is incomprehensible when divorced from the context of the Rule it is amending, and the explanatory memoranda lack sufficient particularity to explain the precise effect of the amendment, Parliament is necessarily hampered in its ability to scrutinise the changes. Similarly, the ability of applicants and their advisors to grasp the substance of pending amendments to the Rules is hampered. Anything that increases

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196 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.5 to 13.6.

197 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 13.7.

198 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 13.10. A Keeling schedule is a schedule to a piece of amending legislation setting out the text of the legislation being amended with the amendments incorporated. For a discussion of the advantages and disadvantages of Keeling schedules, including issues of cost and technological requirements, see the 14th report of the Select Committee on the Constitution: https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/17306.htm (last visited on 23 September 2019) paras 88 to 98. Alternatives such as the incorporation of the amended legislation into the explanatory memorandum are also discussed.

transparency and clarity in this regard is to be welcomed as both consistent with Rule of Law principles and consistent with reducing complexity in the Rules more generally.

Keeling schedules

8.54 Eleven respondents expressly endorsed Keeling schedules. No respondent opposed the suggestion. The Law Society of England and Wales commented:

> A Keeling schedule would be helpful, for the sake of ease, and would provide a clear view of the amendment without the need for manual cross-referencing. This would be particularly useful where there has, for example, been a change in a conjunction, such as a change from "or" to "and", which could significantly impact the meaning of the Rule.

8.55 They also commented favourably on the recent statement of changes HC 1919, laid before Parliament on 7 March 2019, which provided the full text of the substituted and original paragraph to show the context of an amendment:

> **Changes to the Introduction**
>
> Intro1. In paragraph 6, for:
>
> > ""**Employment as a Doctor in Training"** means employment in a medical post or training programme which has been approved by the Postgraduate Medical Education and Training Board, or employment in a postgraduate training programme in dentistry.",
> >
> > substitute:
> >
> > ""**Employment as a Doctor or Dentist in Training"** means employment in a medical post or training programme which has been approved by the General Medical Council, or employment in a postgraduate training programme in dentistry.".

8.56 The Bar Council favoured a Keeling schedule "in order that those who need to understand the impact of the proposed amendments in advance of the amendments being made can do so without having to engage in time-consuming cross-referencing". The Law Society of Scotland, the UTIAC and FTT(IAC) judges and David Mills (Home Office Presenting Officer) all agreed that Keeling schedules would be helpful. Goldsmith Chambers saw a further benefit of Keeling schedules in the period after changes have come into effect in highlighting the substantive difference between current and previous versions of the Rules. They found quick access to tracked versions of changes particularly important when onward appeals are being lodged and the Rules change between the original decision and the appeal date. Migrant Voice cautioned that Keeling schedules would help legal practitioners, but might confuse the general public.

Explanatory memoranda

8.57 The Law Society of England and Wales, the Bar Council and UKCISA expressly supported the suggestion of more detailed explanatory memoranda. The Law Society thought that setting out the intended purpose of the change would not make the memoranda less readable. UKCISA said that they:

very rarely find enlightenment in the memorandum and instead have to contact the policy team. It would save time if the memorandum explained the policy intention, which we could then more easily test against the reworded Rules.

8.58 Robert Parkin (10 KBW) opposed including further detail, but favoured providing a non-technical explanation of the effect of the changes, the objective behind them, and a basic history of the rule. Migrant Voice thought that explanations should be kept brief unless more was needed in the interests of clarity or to provide necessary information. Destination for Education thought that more detail was probably not necessary and could make the memoranda more difficult to read.

8.59 Carter Thomas Solicitors (Respondent B from the Immigration Law Practitioners' Association ("ILPA")) thought that memoranda are already generally easy to read and contain sufficient information to give an overview of changes. The UTIAC judges observed that very detailed explanations should not be necessary if the redrafted rule is clearly expressed.

Other mechanisms to aid comprehension

8.60 Several respondents proposed alternatives to our suggestions. These mainly focussed on the need to alert users to pending amendments. As the Faculty of Advocates observed, "if the reader is not aware that the specific HC paper is pertinent he/she will not be looking at it in the first place". They proposed instead the online publication of the consolidated Rules in annotated form to identify the specific statements of change and the specific paragraphs of those statements relevant to each particular Rule. This is discussed in chapter 9 as part of a consideration of how to improve understanding of the temporal application of the Rules.

8.61 The Bar Council suggested making pending amendments accessible via whatever online portal is used to display the Rules. In the same way that it should be possible to move backwards in time from the version of a Rule currently in force, they suggested that it should be possible to move forward to see the form that the Rule will take once pending amendments have been implemented, with a clear date to show when this would take effect.[199]

8.62 Universities UK and the Universities and Colleges Employers' Association (joint response) highlighted the importance of sponsors knowing of changes, as they often engage with the Rules in more detail than applicants and need to be alerted to changes to allow them to update their own guidance. They also asked for updates to be reflected in the alerts posted on the Sponsorship Management System.

Discussion

8.63 We considered the use of Keeling schedules in our report on the Form and Accessibility of the Law Applicable in Wales, where we recommended "informal" Keeling schedules contained in the explanatory notes to a Bill.[200] In the case of

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199 The Bar Council looked further at the potential of technology to transform presentation of the Immigration Rules in response to our consultation questions concerning archiving and online systems. See para 9.39 below.

200 (2016) Law Com No 366 paras 8.71 to 8.90. In practice there is a distinction between "formal" and "informal" Keeling Schedules. In primary legislation a formal Keeling Schedule forms part of the Bill, and eventually of

statements of changes to the Rules, we consider that in many cases the changes could more usefully be presented in a form that presents the text in its amended form, as in the example at paragraph 8.55 above. We recommend that more use of this technique be made in statements of changes, in order to help readers to understand the effect of the changes.

8.64 There was little support for more detail in explanatory memoranda. In our view, if in future Rules are more clearly expressed, it should not be necessary for an explanatory memorandum to explain their meaning, but we agree with consultees that background information and a statement of the policy intention can be helpful.[201] What is important in our view is that the effect of a change be clear to the reader. While this can be achieved by a description of the effect of a change in the explanatory memorandum, a Keeling schedule strikes us as the best means of conveying it comprehensively.

8.65 Respondents also pointed to the importance of alerting those affected to pending amendments. In that regard, it might be helpful for an alert to appear alongside the current Rules to draw the attention of the user to pending changes. This would be feasible only in the online version of the Rules, but could provide a link to the Keeling schedule with an indication of the date when the change would come into effect. It would require more radical changes to the presentation of the Rules to permit the user to view pending changes as part of a more sophisticated online portal. The potential to use technology to allow pending amendments to be viewed online is considered in chapter 9.

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the Act. (For example, the Charities Act 1992 amended sections 4 and 20 of the Charities Act 1960. The substantive amendments were made by sections 2 and 8 of the 1992 Act, and versions of sections 4 and 20 of the 1960 Act as so amended were set out in a formal Keeling Schedule: Schedule 1 to the 1992 Act.) Our report mentioned that formal Keeling schedules were not popular with legislators and parliamentary counsel because of the work involved in amending them where a Bill is amended during its passage and of the risk of inadvertent inconsistency between the Bill's clauses and the schedule. We noted that in 2004 the House of Lords Select Committee on the Constitution recommended that, rather than Bills having a Keeling schedule in the strict sense, an "informal Keeling-type schedule" should be included in the explanatory notes to a Bill.

201 In 2014 the Office of the Parliamentary Counsel's Good Law Project considered how to make explanatory notes more useful to readers: see The Office of the Parliamentary Counsel, Cabinet Office, Results and analysis of the explanatory notes survey July 2013 (June 2014). They found that people want practical information to help them understand the purpose and the effect of legislation, and set out steps as to how to make explanatory notes more useful to readers. Their approach was endorsed in the Law Commission report on the Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366 para 8.102.

Recommendation 24.

8.66 We recommend that:

(1) where appropriate, statements of changes to Immigration Rules should set out the affected portion of the text in its amended form in the style of an informal Keeling schedule;

(2) an alert should appear in the online version of the current Rules to draw attention to pending changes, with a link to the Keeling schedule and an indication of the date when the change would come into effect; and

(3) explanatory memoranda should contain sufficient detail to convey the intended effect of a proposed amendment to the Rules in language accessible to a non-expert user.

FREQUENCY OF CHANGES

8.67 The difficulties created by statements of changes are compounded when changes are numerous and frequent.[202] We noted in our consultation paper that the frequency of changes to the Rules was in part due to the need to respond to judicial rulings, and in part for policy and operational reasons. We also noted that oversights and omissions in new Rules may emerge, sometimes in response to feedback from users. Our paper analysed in particular the impact of the policy of prescription adopted from 2008 onwards. We found that detailed prescription had a tendency to generate frequent amendments.[203]

8.68 Changes have been very frequent at certain points over these years. In 2013, there were 12 sets of changes. We showed in our paper that the frequency of changes dropped from 2015. As part of efforts to make changes more manageable, the Home Office policy intention has been to confine statements of changes to two each year, generally in April and October. Since December 2018, however, there have been six statements of changes to the Rules, amounting to 548 pages of text.[204] This reflects significant policy changes in anticipation of the departure of the UK from the EU. This rate of change represents a considerable challenge to the simplification project. Consultation Questions 49 and 50 sought views on the impact of frequent Rule changes and on our provisional proposal that these should be limited to no more than two major changes a year.

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202 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.53 to 13.56.

203 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.53 and 5.42 to 5.47.

204 HC 1779, published 11 December 2018, 40 pages; HC 1849, published 20 December 2018, 16 pages; HC 1919, published 7 March 2019, 296 pages; HC 2099, 1 April 2019, 8 pages; HC 2631, published 9 September 2019, 102 pages; and HC 170, published 24 October 2019, 86 pages.

The impact of frequent changes

Issues which arise due to frequent changes

8.69 We asked in Consultation Question 49 for consultees' views on the issues which arise as a result of the frequency of changes to the Rules, and for their views on how these might be addressed. Respondents were unanimous in their view that frequent changes make using the Rules more difficult. There was a widely shared view that such changes make it harder for users to know what the current Rules require. This increases confusion and the incidence of errors. Robert Parkin (10 KBW) observed that the impact on users is worse where "very subtle, but important, changes are made with little clarity, explanation or announcement".

8.70 Respondents noted in particular the impact on non-expert applicants. Carter Thomas Solicitors (Respondent B from ILPA) observed that frequent change makes it harder for applicants to plan for the future, particularly where changes come into force in the same month as the statement is published. Applicants may already have read the Rules several months in advance of their application and have been preparing documents and ensuring that they meet the requirements.

8.71 The Law Society of England and Wales described "the domino effect of an application being refused with far-reaching implications for the applicant and any associated dependants". Islington Law Centre thought that "the constant changing of the Rules results in grave injustices". Robert Parkin (10 KBW) referred to the "perverse and unfair results" which occur when a Rule changes between an application and the decision upon it. The Faculty of Advocates commented on the specific issues which can arise when there is a delay in making changes to the Rules in order to take account of judicial rulings. Organisations representing the interests of students reported the specific impact of frequent change both on international students and educational institutions. UKCISA observed:

> At its most extreme, recruitment to education institutions can suffer. Refusals can rise, which is obviously unacceptable for students, but also affects the Tier 4 sponsor licence of institutions. For example, the way in which limits on periods of student leave is calculated was changed in the month of August, and English language assessment became a requirement for all courses in April, in neither case with transitional provisions although students can be recruited a year or more before they apply for leave. Students need to be able to plan their lives and immigration applications well in advance and changes to key requirements at short notice can have a serious effect on them and the UK's reputation. The cost to sponsors of having to keep up with all changes to the Immigration Rules and their accompanying guidance is huge and missing important changes can lead to the loss of their Tier 4 sponsor licence.

8.72 The University of York Immigration Advice Team pointed to the impact of changes made during the period of a student's stay in the UK:

> Tier 4 students have often entered the UK under visa conditions which change during their period of leave …. For example, many students chose the UK as a study destination because of the attractive prospect of the Post-Study Work visa. When this was suddenly abolished, with no transition period, students felt they had been misled. More recently, the Immigration Health Surcharge has been doubled at short

> notice. While I appreciate that this is not part of the Immigration Rules, it still affects those on visas. Again, because there was no transition period for those already in the UK, students who applied on 7 January paid half the cost to those applying on 8 January, and we were left with little time to warn them because of the Christmas holiday.

8.73 The Institute for Government thought that the high volume of changes in the Rules contributed to a disconnect between policy and operations and the development of inconsistencies in the operation of the system. They cited their recent report which found that policy makers step away once agreement has been reached on a policy change, and that those in operations are left unsupported. As a result, they can simply fail to keep track of the constant changes in the Rules.[205]

8.74 More broadly, the Bar Council suggested that the frequency with which the Rules change undermines the rule of law. Migrant Voice highlighted legal certainty as a core component of the rule of law:

> Laws/rules are meant to be fair, clear and predictable to enable people to order their lives accordingly. When Immigration Rules are changed frequently they undermine all these core principles of legislation or a judicious governance system. Frequent or arbitrary/unpredictable changes can be similar to changing rules on people mid-game. The impact this can have on people's lives could be enormous, life changing or irreparable. For example, if they came into the country on certain criteria which is changed within the year or even a few years, they might have ordered their affairs in a way that is difficult to change.

Reducing the impact of frequent changes

8.75 Respondents suggested a number of avenues of reform to address these issues. The Bar Council thought that an accessible online "point in time" database would help to mitigate the impact of frequent changes. The Law Society of Scotland thought that it would help if the Home Office gave examples of the impact of any major changes in practice in the form of case studies in guidance.[206] The UTIAC judges recommended clear signposting in the Rules wherever a change has been introduced.

8.76 UKCISA suggested that "meaningful consultation, carried out well in advance of any proposed changes" would help. JCWI also focussed on the need for review, suggesting that all changes should be subject to scrutiny by an independent committee, a topic that we have already discussed. The University of York Immigration Advice Team saw the need for a culture shift within the Home Office:

> UK Visas and Immigration need to appreciate that visa holders are real people, not merely numbers. The Home Office, despite its new motto of 'World Class Customer

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205 See the consultation analysis table for Consultation Question 50 and Institute for Government, *Managing Migration after Brexit*, 2019, pp 35 to 39 and 47 to 48, advocating more systematic oversight of operations and formal feedback mechanisms. Available at https://www.instituteforgovernment.org.uk/publications/managing-migration-after-brexit (last visited 23 September 2019).

206 They gave the example of those contained in the Immigration Directorate Instruction for Appendix FM 1.7.

> Service' still thinks of all migrants as a burden to the system, instead of skilled people who bring huge economic benefits to the UK.

Fixed points in time for statements of changes

8.77 We asked in Consultation Question 50 whether consultees agreed with our provisional proposal that there should be, at the most, two major changes to the Rules per year, and whether these should follow common commencement dates in April and October[207] or follow some other cycle.

8.78 Twenty-two respondents answered this question. Fifteen agreed with a maximum of two major changes to the Rules per year. Two disagreed. Five responded "other". Three thought that there should be only one main review of the Rules annually. The Bar Council agreed that the number of major changes in a given year should be as limited as possible, but had no view on the specific timing of statements of changes. Two consultees considered the question to be one of policy on which they did not want to give a view.

Annual limits on the number of changes

8.79 Some of those who agreed with the proposal to limit the number of changes per year gave more specific reasons for supporting the proposal. Two thought that the issue was tied to the question of consultation and the amount of notice given to stakeholders of forthcoming changes. Migrant Voice commented:

> Restricting rule changes to a certain number per year will make the executive arm of government/ Home Secretary consider more carefully what changes are essential and most beneficial to the immigration system. It would give the government more time to consult fully (and wider) and carry out better impact assessments of the rule changes. Limiting the number of changes also give those who are likely to be affected by proposed Rules time to question, challenge or lobby against the Rule changes.

8.80 UKCISA said that "commencement dates are perhaps of less concern in relation to education than the length of notice of significant changes". Islington Law Centre highlighted the amount of additional work which frequent change creates:

> Currently, we are obliged to check every aspect of the client's case whilst pulling together the application, and then again just before submitting it – in case we inadvertently neglect to recognise a change in the Rules, Form or policy Guidance. A more regular and predictable timetable would help prevent this.

8.81 No consultee opposed the idea of a limit on the number of major changes to the Rules each year. Amnesty International UK was the only organisation not to endorse some limit expressly, save for those who chose not to comment on policy. In Amnesty's view, the issue was of lesser concern than the content of transitional provisions, and

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[207] For the use of common commencement dates in bringing statutory instruments into force, see The National Archives, *Statutory Instrument Practice*, 5th ed, 2017, http://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf at 3.12.19 and 3.12.20. Common commencement dates are 6 April and 1 October each year.

how provision is made for people to prepare for or to mitigate how any change applies.

Urgent changes

8.82 Several respondents considered how more urgent amendments could be dealt with. The Law Society of England and Wales thought that, where changes were needed to give effect to a judgment, the effect of the decision should be implemented on a case by case basis until a change date falls due. The Bar Council took the opposite view, observing that decisions of the court or the need to address lacunae or errors in the Rules might necessitate amending outside the timetable. Islington Law Centre also thought that some flexibility was required where changes became unavoidable as a result of litigation.

Commencement in April and October

8.83 A few consultees (the Bar Council, the Faculty of Advocates, and Carter Thomas Solicitors (Respondent B of ILPA)) qualified their agreement with our proposal for a fixed annual maximum number of changes to say that they did not think that the date of the changes within the year mattered. Of those who proposed a fixed limit of one change per year, one, Sian Pearce (Bristol Law Centre), stated a preference for April.

8.84 Consultees representing students had specific observations to make on the timing of changes. UKCISA thought that April and October generally worked well with the academic year:

> Tier 4 confirmations of acceptance for studies (CAS) are usually assigned about three months before a student's course start date, which is most often around September or February, meaning CAS are assigned in large numbers in June and November. This means that changes coming into effect in April and October generally work with the academic year, but at other times can create significant difficulties in recruitment and in explaining changes to students in time for their applications

8.85 The University of York Immigration Advice Team thought that December would work better than October:

> Given that many users of the Rules are educational institutions, the October changes are highly inconvenient and should ideally be put back to December. Often students applying in September receive different information to those applying just a couple of weeks later due to Rule changes.

Discussion

8.86 There is a clear consensus among respondents that frequent changes to the Rules have a detrimental impact on users, particularly non-expert users. They make the system more confusing to navigate, and make errors more likely. They have a wider impact on applicants' lives and can contribute to operational disconnects within the Home Office.

8.87 There can be impacts which are specific to individual groups of applicants. Students, for example, need to coordinate with the academic year, and need to plan well in advance. Abrupt changes can have an impact both on the recruitment of international

students, and on the educational institutions who sponsor international students. Measures to make changes easier for users of the Rules to handle have been canvassed earlier in this chapter. Coupled with earlier notice of proposed changes, these ought to lessen the difficulties. But a lower frequency of change would assist as well. A clear majority of respondents welcomed our provisional proposal of an annual limit on the number of major changes in the Rules; most thought a limit of two major changes would be workable.

8.88 The most that we can recommend is that the Home Office observe a self-imposed discipline that major changes to the Rules should be limited to one or two occasions per year. We consider that two changes per year would strike an appropriate balance between minimising the disruption of change and allowing for the evolution of immigration policy, and suggest that these should be in April and October to follow common commencement dates. The Home Office may, however, wish to consult further with educational and student organisations to ensure that October changes are workable for them.

8.89 Respondents were not in agreement about how to deal with urgent amendments needed, for example, to give effect to a judgment or to remedy an oversight or an error. Some favoured applying the necessary change on a case by case basis until the next fixed date of amendment, with others accepting unscheduled statements of changes confined to implementing the decision or remedying the error. Where urgent changes become necessary, we consider it better to issue a statement of changes outside the fixed timetable, because of the uncertainty that would be created if the Rules remained at odds with a judgment or continued to contain an identified error or oversight. Non-expert users in particular would not know that the Home Office would apply an approach that differed from the terms of the Rules.

Recommendation 25.

8.90 We recommend that the Home Office should follow a policy that there should be, at most, two major changes to the Immigration Rules per year, unless there is an urgent need for additional change.

Chapter 9: Transitional provisions and archiving

9.1 The process of amending the Immigration Rules necessarily creates successive versions of the Rules. Complexity can arise in the process of discerning which version of the Rules applies to an application, and in alerting and directing the user to a relevant earlier version. This chapter looks at the steps that might be taken to simplify both these aspects of the system.

TRANSITIONAL PROVISIONS

The temporal application of Rules

9.2 The decision in *Odelola* established that where a statement of changes is silent on whether new Rules apply to existing applications yet to be decided, they will apply to such applications.[208] Transitional provisions are commonly introduced to mitigate the effect of the changes on those who have been already been granted leave under the particular route affected by the change or who have made applications under that route on the basis of the Rules in force at the time of their applications. These transitional provisions can themselves become complex.[209] There may be a number of implementation dates for one set of changes. Some Rule changes apply to all decisions made after the implementation date, others only to applications made after that date. Other formulas are also employed; for example, a change may apply to applications to which a Certificate of Sponsorship has been assigned after the implementation date.[210]

9.3 Our consultation paper noted this complexity, and the importance of clarity and consistency in the transitional provisions. We considered whether it would assist to explain the relationship between a statement of changes and a provision in the Rules more clearly. We also looked at the need to ensure that an implementation provision which amends a previous implementation provision explains this clearly.[211] We thought that this could be done either in the explanatory memorandum or in the implementation provisions of the statement of change itself.[212]

9.4 We also considered whether to adopt a more radical approach by including information on the temporal application of changes within the body of the Rules. One possibility we identified would be to include an "effective from" date at the foot of each distinct set of requirements. Alternatively, the relevant section could be replaced in its

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208 *Odelola v Secretary of State for the Home Department* [2008] EWCA Civ 308, [2009] 1 WLR 126; see also *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230.

209 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.13 to 13.33, which includes discussion of case law concerning transitional provisions.

210 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 13.3.

211 It is unusual for this to be done but it has occurred, and has provoked litigation: see Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.23 to 13.24.

212 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.34 to 13.37.

entirety when any substantial change occurs with a clear introductory statement to stipulate the date from which the amended section applies.[213]

Clarifying the temporal application of statements of changes

9.5 We asked in Consultation Question 46 for views on how the temporal application of statements of changes to the Rules could be made easier to ascertain and understand. There were 13 respondents to the question. They made a range of suggestions.

Signalling in the Rule itself

9.6 Four respondents, the Bar Council, the UK Council for International Student Affairs ("UKCISA") and the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") and First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges, favoured signalling the date that the change comes into effect within the Rules or in the online location of the Rules. The FTT(IAC) judges also supported an "effective from" date in the specific section of the Rule. The Bar Council did not think it important whether the temporal application of a Rule was signalled in the Rule itself, or in some other way, as long as the information was visible online on the same page as the Rule.

9.7 UKCISA added that "effective from" dates should make it clear whether the commencement date relates to decisions, applications or the date of assignment of a certificate of sponsorship or a confirmation of acceptance for studies. Islington Law Centre thought that a hyperlink to the date of change would serve the same purpose.

9.8 Some respondents expressed concern that adding this information would make the Rules more complex. Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")) and David Mills (Home Office Presenting Officer) both thought that dates in the Rules would add complexity. UKCISA thought that care should be taken not to obscure the text. Goldsmith Chambers were against using a hyperlink, which would be confusing to non-expert users.

Explaining dates of change in annotated versions of the Rules

9.9 The Faculty of Advocates pointed to the professionally annotated Rules published in practitioner guides such as *Macdonald's Immigration Law and Practice*[214] or Phelan and Gillespie's *Immigration Law Handbook*.[215] These provide citations and footnotes to identify the relevant statement of change and when it was made, and to explain to which cases the Rule applies. They proposed the creation of an equivalent online resource. The FTT(IAC) judges suggested a publicly available up-to-date track-changed version of the Rules, which could be located in the same place as the current Rules.

9.10 Destination for Education saw a twofold benefit in a consolidated annotated version of the Rules showing all changes between iterations of the Rules and giving the dates when each change applied. Such a version would enable users to see changes to

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213 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.38 and 13.39.

214 I Macdonald and R Toal, *Macdonald's Immigration Law and Practice* (9th ed 2015).

215 M Phelan and J Gillespie, *Immigration Law Handbook* (10th ed 2018).

individual Rules. It would also create a “macro-perspective” to see changes in a general sense without having to refer to an entirely different, historical version of the Rules.

Alterations to previous implementation dates

9.11 The Law Society of England and Wales and the Bar Council considered the problem of an implementation provision in a statement of changes that alters the implementation provisions contained in a previous statement of changes. They proposed that the effect of the provision should be explained clearly in the implementation provision itself as well as in the explanatory memorandum.

Principles for transitional provisions

9.12 Islington Law Centre recommended a principle that a Rule change should not apply to an application submitted before the Rule changed unless the new Rule was more favourable to the application. This exception would avoid the need to re-submit, which adds to caseworker workload and leads to further delay in the decision. Amnesty International UK thought that principles of justice and fairness should underpin the drafting of transitional provisions. They acknowledged that whether and how changes to Rules affect applicants is a matter of policy, but thought that if these principles are disregarded, simplifying transitional provisions is more likely to produce hardship. This was because the complexity of transitional provisions is often aimed at mitigating the impact of a change on an outstanding application.

Discussion

9.13 There was clear support for a system to signpost the date a change comes into effect, either within the Rules or as part of the online presentation of the Rules. Respondents made a range of suggestions as to how it should be done: whether within a Rule, alongside a Rule and/or by way of a hyperlink. Respondents highlighted that the signpost would have to explain whether the commencement date related to decisions, applications or, for example, the date of assignment of a certificate of sponsorship or a confirmation of acceptance for studies. Others preferred a consolidated annotated version of the Rules giving information as to when a change became effective.

9.14 We have concluded that the applicability of a Rule in point of time should in some way be signalled in the presentation of the Rules. The suggestion which appears to us to be the most workable is the provision of an “effective from” date in the online version of the Rules, possibly together with links to previous versions of the Rules. It will be important to include the information in a way which is readable and clearly distinguishable from the text of the Rule. The indication would need to make it clear whether the date relates to applications or decisions or applies any alternative formula.

9.15 We therefore recommend that statements of changes should indicate the date of application of a new Rule alongside the text of each new Rule, rather than (as at present) setting out lists of new Rules that apply from particular dates. This would make it easier for readers of statements of changes to assimilate the dates of application of new Rules than it is at present. When the amended Rules are published, this information should then be presented alongside each Rule. The precise manner of doing so is a technical matter, but we consider it important that the

method of presentation should be such that, if a Rule is downloaded and printed, the information should appear on the printed copy.

9.16 Retrospective alterations of dates of effectiveness have been rare but have proved problematic when they have occurred. Where an implementation provision in a statement of change alters the implementation provisions in a previous statement of changes, we agree that both the new implementation provision and the explanatory memorandum should explain this clearly.

9.17 We note the views expressed that annotated versions of the Rules, whether on paper or online, are helpful. We agree that this would provide a very useful "macro-perspective", although there is a risk that updating the consolidated version could fall behind.

9.18 The proposals for a more sophisticated online portal which displays consolidated Rules showing the source and timing of all changes, commencement dates and relevant transitional provisions could provide a longer-term solution to clarifying the temporal application of Rules. This could also provide a solution to the need for an improved facility to search through different versions of the Rules. This is considered more fully below in our discussion of archiving.[216]

9.19 We note the suggestion that transitional provisions would be easier to understand if they applied more consistent principles. The decision as to whether changes should apply only to applications made after a Rule change is a policy decision, and is outside the scope of this report. It may be, however, that the adoption of a consistent approach of the sort suggested by Islington Law Centre would make the temporal application of the Rules easier for users understand.

Recommendation 26.

9.20 We recommend that:

(1) a statement of the date from which a Rule has effect should be provided in the online version of the Immigration Rules, explaining whether the commencement date relates to decisions or applications or applies any alternative formula; and

(2) the indication should be provided in such a way that it appears on the printed copy if a Rule is downloaded and printed.

ARCHIVING

9.21 Another difficulty for users, including practitioners and the judiciary, is that they are not made aware of the existence of an earlier version of a Rule which may remain

[216] See paras 9.43 to 9.46 below.

applicable to a case. This difficulty arises particularly when a decision under the Rules is challenged in proceedings which extend over a considerable period of time.

9.22 An archive of previous consolidated versions of the Rules is available on gov.uk. This shows the Rules as they were on the date before a particular statement of changes came into effect. It is accessed via a hyperlink at the top of the Rules page. We noted in our consultation paper, however, that there are difficulties with the current system. There can be delays in archiving previous versions of the consolidated Rules. There is no facility to allow comparison of different sets of Rules. There is also nothing at present in the Rules themselves to prompt the user to look for an earlier version of a Rule.[217]

9.23 We considered whether a new archiving system containing a search facility would assist. The purpose of such a system would be to allow users to search for a given Rule and access all previous versions with their dates of application.[218]

Improvements to the archiving system

9.24 We asked in Consultation Question 47 whether the current archiving system is sufficient. We asked in particular if the system would become sufficient if dates of commencement were contained in the Rules themselves, or whether a more sophisticated archiving system was required. There were 17 respondents to this question. Four were of the view that the current system is sufficient. Six thought that it was not. Seven responded "other". Some of those agreeing also made suggestions for improvements, including the adding in of commencement dates. Of those who responded "other" or "no", most thought that the existing system was helpful in providing access to previous consolidated versions of the Rules, but had suggestions for further improvements.

Views on the existing system

9.25 The UTIAC judges described the current system as "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.

Suggestions for improving the existing system

9.26 Various suggestions were made for improving the existing system. One was to avoid delay in updating the archive by making online versions of the previous version of the Rules available until a pdf version was available. Another was to make the archived

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217 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.42 to 13.45.

218 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 13.48 to 13.49.

document more navigable by providing it in a form which permits hyperlinks rather than simply presenting it as a pdf document.

9.27 UKCISA suggested that at the start of each archived version of the Rules there should be a link to the statement(s) of change which amended the previous version, and a reference to the relevant paragraph numbers and categories of leave affected. This would make it easier to see where changes had been made. Nashit Rahman (Taj Solicitors) thought the system was adequate because he had made his own archive of the Rules and statements of changes since 2012, but appreciated that for lay users and new practitioners this was not an option.

Incorporating dates of commencement into the Rules

9.28 Improvement of archiving by incorporating dates of commencement in the Rules was specifically endorsed by six respondents. This has been discussed in the section above in considering ways to improve understanding of the temporal application of changes. With reference specifically to archiving, inclusion of the dates of commencement within the Rules would alert the user to the need to consult an earlier archived version of the Rules, although it would not tell them which version to look for.

9.29 The Law Society of England and Wales thought that incorporating dates of commencement would add further clarity and ease of reference in the short term. The Bar Council described this as an incremental improvement. Both bodies thought that more was required. Their further suggestions are discussed below.

9.30 Destination for Education thought that commencement dates would make the archiving system sufficient, but added that because the archived versions of Rules were so difficult to navigate, links should be provided directly from the relevant Rule to relevant previous version of the Rules. They suggested that the archived version should state:

> This version of the Rules was in force from X date to X date and applies to applications which were made between X date and X date and to decisions made by UK Visas and Immigration on X date to X date.

Annotated versions of the Rules

9.31 Two respondents commented on the benefit of annotated versions of the Rules showing when specific changes were made. The Faculty of Advocates repeated their proposal for the creation of consolidated annotated versions of the Rules, and their view that this would serve as an alternative to searching an archive to identify when wording changed.[219] The Bar Council noted that the Upper Tribunal library maintains its own version of the Rules with changes annotated, and suggested that this work could be shared with the Home Office.

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[219] The benefits of annotated versions of the Immigration Rules in identifying the specific statements of change and the specific paragraphs of those statements relevant to each particular Rule are discussed in relation to the temporal application of the Rules at paras 9.9 to 9.10 above.

Hover boxes

9.32 The UTIAC judges suggested that hover boxes could be used to show where a Rule had been subject to amendment, and link the reader to the earlier version of the Rules.[220]

Reference in decisions to the version of the Rules applied

9.33 The UTIAC judges also suggested that the system as a whole could be improved if decision letters made clear which version of the Rules had been applied, with a statement of the date that those Rules came into effect: "This decision was made applying the Rules in version XXXX, which came into effect on …"

A more sophisticated archiving system

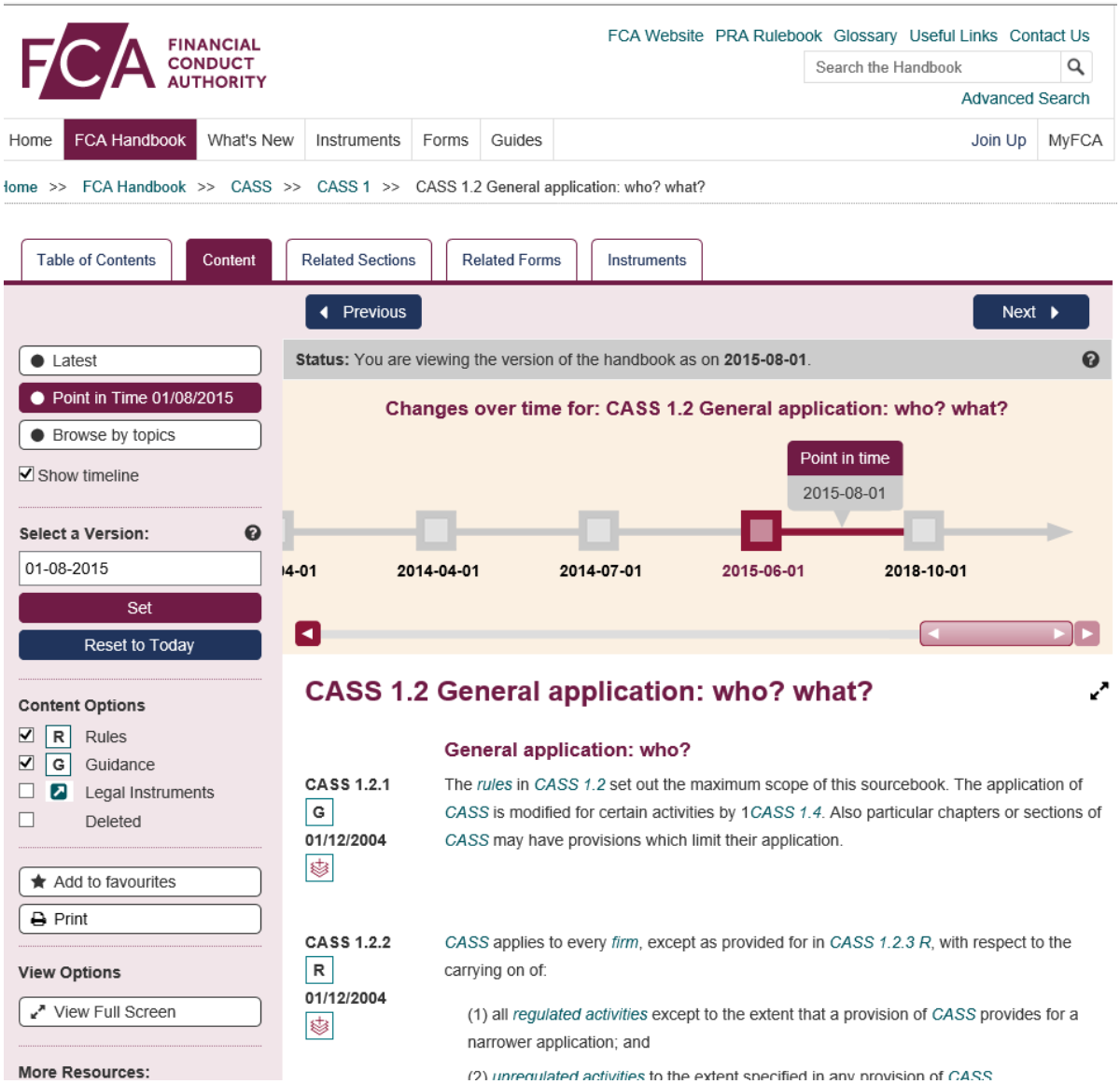
9.34 Some respondents were adamant that more comprehensive changes to the archiving system were required. The Law Society of England and Wales noted the need "to be able to seamlessly cross-reference various versions of the Rules". The Law Society of Scotland also commented on the lack of a facility to compare different sets of historic Rules, and suggested the use of digital tools to permit this. The FTT(IAC) judges noted the limitations of the "enormous pdf's" provided in the existing archive.

9.35 Seven respondents had specific proposals for or supported a new form of searchable archive. The Bar Council, the UTIAC and FTT(IAC) judges, the Law Society of Scotland, Robert Parkin (10 KBW) and Migrant Voice all suggested a dynamic "point in time" online database. Robert Parkin described a "key in a date" system "whereby a user types the date to be taken to the version of the Rules applicable at that date". The Bar Council further proposed "a dynamic online database in the style of legislation.gov.uk or the Westlaw immigration service, which permits users to move back and forward in time through different versions of a given provision".

Point in time searches

9.36 The FTT(IAC) judges gave the example of the Financial Conduct Authority ("FCA") Handbook website which permits a "point in time" search. This provides what are known as "*timeline"* options to allow the user to see versions of a particular provision as they stood at a past date or (where changes are pending) will stand at a future date. This is illustrated below.

[220] Hover boxes are explained and discussed further at 11.1 below.



9.37 The UTIAC judges compared such a search function with the way in which "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".

9.38 Others thought more generally that the archive should be searchable. Migrant Voice suggested this should not only be by date, but also by numbering, by topic or by reference to the statutory instrument which brought a provision into force. Professor Thom Brooks (University of Durham) commented that provision of a public search facility might be costly in the short term, but would be cost-effective in the medium to long term in providing clarity.

A more sophisticated online portal

9.39 The Bar Council proposed a more radical solution to the difficulties considered in relation to both the incorporation of changes to the Rules and the need to be able to search previous versions of the Rules. They suggested the presentation of the Rules

using a more sophisticated online portal similar to legislation.gov.uk or Westlaw, combining the benefits offered by consolidated Rules and searchable archives. They summarised the advantages of using such an online portal:

(1) the provision is displayed in the form that is currently in force;

(2) amended portions of the provision are identified (for example by being placed in square brackets), including parts of the provision where text has been repealed, and the source and timing of each amendment is identified (and linked to in a footnote);

(3) commencement dates are identified;

(4) pending amendments and provisions which are not yet in force are identified;

(5) relevant saving and transitional provisions are identified;

(6) the entire piece of legislation can be downloaded in PDF format, and it is also possible to download a selection of provisions (including, for example, a whole Part); and

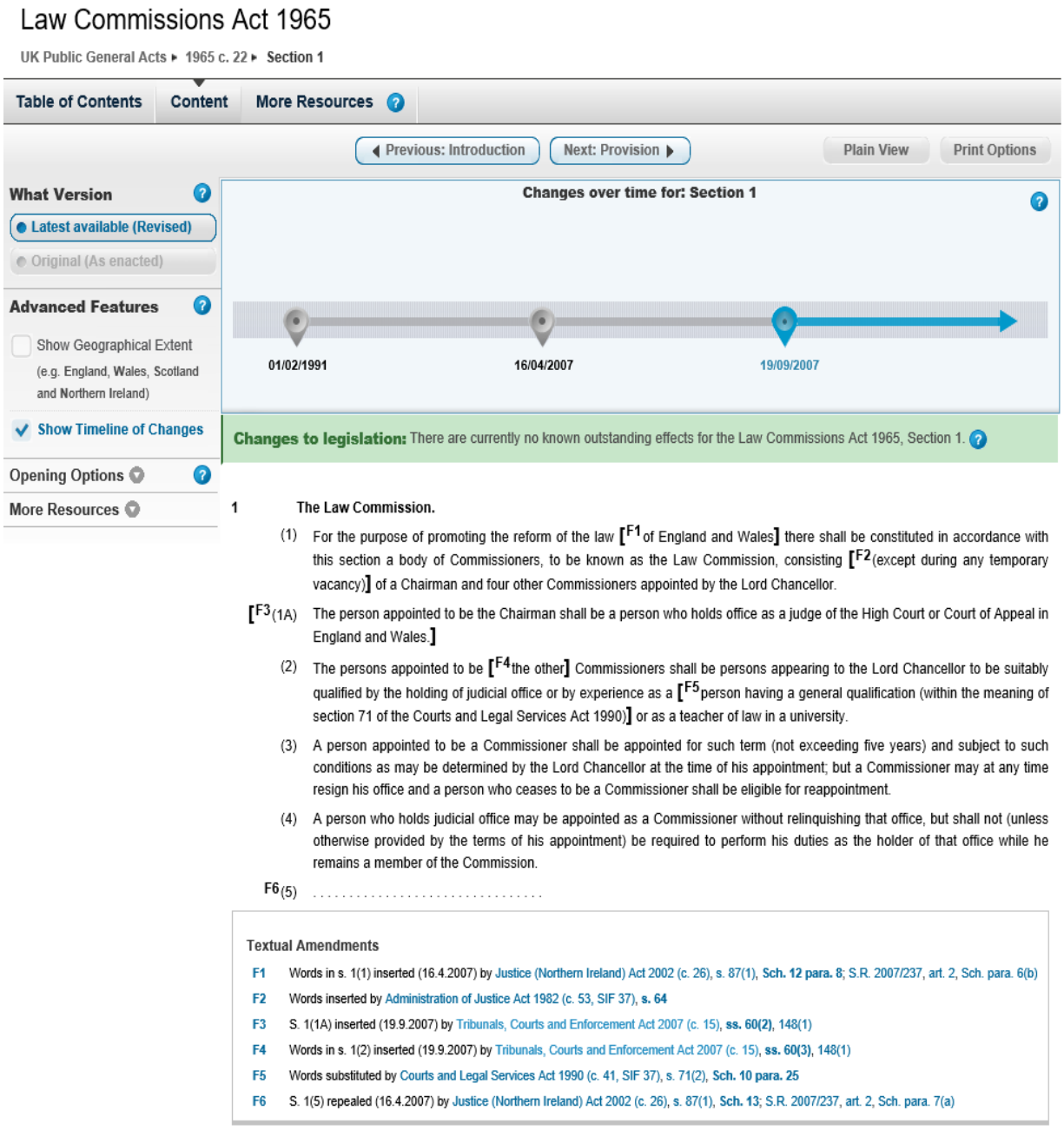
(7) there is a facility to scroll through earlier versions of each provision, clearly indicating the period in which these provisions were in force.

9.40 The Bar Council noted that in order for the portal to be effective in achieving these benefits, it would have to be updated contemporaneously to ensure users are confident that they are accessing Rules that are currently in force. They observed that in their experience, the updating of legislation.gov.uk is not always prompt.[221] Our consultation paper explained that the Home Office is not currently able to use legislation.gov.uk to host the Rules for reasons of technical incompatibility.[222] Nevertheless, a more streamlined approach to their drafting might make this possible.

[221] We understand that the updating of primary legislation on legislation.gov.uk is almost complete, but that some updating of secondary legislation remains outstanding.

[222] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.6.

9.41 An example of consolidated annotated legislation from legislation.gov.uk is provided below. It also provides a timeline search facility.



Law Commissions Act 1965

UK Public General Acts ▸ 1965 c. 22 ▸ Section 1

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Previous: Introduction | Next: Provision | Plain View | Print Options

What Version

Latest available (Revised)

Original (As enacted)

Advanced Features

Show Geographical Extent (e.g. England, Wales, Scotland and Northern Ireland)

Show Timeline of Changes

Opening Options

More Resources

Changes over time for: Section 1

01/02/1991 16/04/2007 19/09/2007

Changes to legislation: There are currently no known outstanding effects for the Law Commissions Act 1965, Section 1.

1 The Law Commission.

(1) For the purpose of promoting the reform of the law [F1 of England and Wales] there shall be constituted in accordance with this section a body of Commissioners, to be known as the Law Commission, consisting [F2 (except during any temporary vacancy)] of a Chairman and four other Commissioners appointed by the Lord Chancellor.

[F3 (1A) The person appointed to be the Chairman shall be a person who holds office as a judge of the High Court or Court of Appeal in England and Wales.]

(2) The persons appointed to be [F4 the other] Commissioners shall be persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a [F5 person having a general qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990)] or as a teacher of law in a university.

(3) A person appointed to be a Commissioner shall be appointed for such term (not exceeding five years) and subject to such conditions as may be determined by the Lord Chancellor at the time of his appointment; but a Commissioner may at any time resign his office and a person who ceases to be a Commissioner shall be eligible for reappointment.

(4) A person who holds judicial office may be appointed as a Commissioner without relinquishing that office, but shall not (unless otherwise provided by the terms of his appointment) be required to perform his duties as the holder of that office while he remains a member of the Commission.

F6 (5) . . . . . .

Textual Amendments

F1 Words in s. 1(1) inserted (16.4.2007) by Justice (Northern Ireland) Act 2002 (c. 26), s. 87(1), **Sch. 12 para. 8**; S.R. 2007/237, art. 2, Sch. para. 6(b)

F2 Words inserted by Administration of Justice Act 1982 (c. 53, SIF 37), **s. 64**

F3 S. 1(1A) inserted (19.9.2007) by Tribunals, Courts and Enforcement Act 2007 (c. 15), **ss. 60(2)**, 148(1)

F4 Words in s. 1(2) inserted (19.9.2007) by Tribunals, Courts and Enforcement Act 2007 (c. 15), **ss. 60(3)**, 148(1)

F5 Words substituted by Courts and Legal Services Act 1990 (c. 41, SIF 37), s. 71(2), **Sch. 10 para. 25**

F6 S. 1(5) repealed (16.4.2007) by Justice (Northern Ireland) Act 2002 (c. 26), s. 87(1), **Sch. 13**; S.R. 2007/237, art. 2, Sch. para. 7(a)

Discussion

9.42 The ability to search an archive is particularly important for applicants with complex immigration histories who have been subject to the Rules for long periods of time, or where an application has remained outstanding over an extended period of time. It may also be important where the refusal of an application has been challenged. The existing archiving system providing links to all previous consolidated versions of the Rules is helpful when a user of the Rules knows that a Rule has been changed, but is not able to provide an indication to the user of the current Rules that there was a previous version of a Rule.

9.43 Some respondents thought that incorporating commencement dates into the Rules[223] would be useful to alert the user to the fact that the Rule has changed, and to provide a guide as to what version to search for in the archive. But they did not think that these benefits were in themselves a sufficient improvement to the archiving system. They went on to consider a more radical change, advocating the development of a search facility such as the "point in time" system. They thought that such a facility could be of great benefit in easing navigation of different versions of the Rules. Alternatively, the presentation of the Rules using a more sophisticated online portal could combine the benefits offered by consolidated Rules and searchable archives. Some respondents were less specific about the way in which a search function would operate, but in general thought that a searchable archive would be beneficial.

9.44 We are impressed by the various suggestions as to how a database or searchable archive could be designed. The FCA handbook and legislation.gov.uk websites provide good illustrations of the possibilities. We think that an online search facility could be developed which allows a search of versions of a Rule by keying in a date. We think that this may be a particularly good approach for non-expert users, as it provides a clear and accessible approach.

9.45 The proposal to develop an online portal which presents the Rules with the level of information currently provided by legislation.gov.uk would provide an alternative solution to a search facility. It would at the same time offer a solution to the difficulties posed by the incorporation of changes to the Rules, and the need to clarify their temporal application. The annotations allow the reader to see precisely how the text has been amended, although the footnotes and brackets might possibly distract a non-expert user. While we think that such presentation would be beneficial, it is dependent on the ability of a digital platform such as legislation.gov.uk to host the Rules. Further thought is also required as to how to combine such an approach with our proposals for hyperlinks both to connect provisions within the Rules and to connect the Rules with Appendices, guidance and application forms.

9.46 Systems such as those used in the FCA handbook and legislation.gov.uk websites would be capable of taking the user to the Rules as they stood at a particular point in time or over a particular period. In order for them not to mislead users, it would also be necessary for the Rules to indicate on their face whether their commencement date affects decisions or applications, or operates in some other way, as we have recommended in the section above.[224]

9.47 We also think that the suggestion that decision letters specify the version of the Rules applied and the date these provisions came into effect could work well. This would make it more straightforward to navigate an archive by allowing the user to type in the version of the Rules they were searching for. We suggest that the Home Office investigate whether this would be feasible.

9.48 We agree with the suggestion that it would improve the existing archive to include a link at the start of each archived version to the statement of changes which introduced the version in question. We also agree that the link should refer to the relevant

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223 Discussed at paras 9.13 to 9.15 above.

224 See para 9.20 above.

paragraph numbers and categories of leave affected by the changes. This would make it easier to see where changes have been made.

Recommendation 27.

9.49 We recommend that improvements to the system for archiving previous versions of the Immigration Rules should be made, with consideration given to adopting either an online archive search facility which allows a search of versions of a Rule by keying in a date, or the presentation of the Rules in an annotated form which provides links to previous versions of the Rules.

Recommendation 28.

9.50 As an interim solution, as a way of improving the existing archive, we recommend that a link to the statement of changes which introduced the version of the Immigration Rules should be included in each archived version of the Rules. The link should refer to the relevant paragraph numbers and categories of leave affected by the changes.

SUPERSEDED RULES

9.51 A further aspect of our discussion of archiving systems is whether there is any place within the Rules for provisions which are no longer in force. Our consultation paper set out our view that Appendix F (Archived Immigration Rules), which contains the text of some superseded Rules, was anomalous and served no useful function. Similarly, we thought that the old Armed Forces rules in Part 7 (other categories) could be removed. The earlier versions of the Rules might still need to be consulted in relation to indefinite leave applications in routes which were otherwise closed, but these versions could be accessed in the archive.[225]

Removing superseded provisions from the Rules

9.52 We asked in Consultation Question 48 whether consultees agreed with our provisional proposal that these specific provisions could be deleted. All eleven respondents who answered this question agreed. Respondents agreed that superseded Rules need to be accessible, but should not form part of the Rules.

9.53 The agreement of the Immigration Law Practitioners' Association ("ILPA") to the proposal was generated by 79.3% of those responding to the members' survey. The 20.7% of members who disagreed cited the difficulties for those with long procedural histories where reference to the old Rules was unavoidable. ILPA stressed this as an illustration of why it is imperative that superseded Rules remain accessible. They suggested that the Rules should provide a hyperlink to the archived Rules for ease of access. They also thought that it should be explained clearly in the Rules to non-

[225] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 13.51.

expert users when it may be necessary to refer to earlier versions of the Rules to find Rules relevant to their application.

9.54 We conclude that Appendix F (Archived Immigration Rules) and paragraphs 276DI to 276AI in Part 7 (Other categories) can be omitted from any redrafted Immigration Rules. This recommendation should be read together with the recommendation[226] above for improved archiving.

9.55 We have considered in chapter 6 ILPA's suggestion that there should be a "residual" category of Rules applying to routes that only remain open for the purpose of extensions of leave or indefinite leave.[227] We recommended instead that the route should remain within the main body of the Rules, but with an indication that it is closed to new applicants. We similarly consider that provision for such extensions must be in the current Rules, not in archived Rules which, by definition, are superseded. To the extent that current Rules refer to superseded Rules, provision should be made to direct the user to the archived version.

Recommendation 29.

9.56 We recommend that Appendix F (Archived Immigration Rules) and paragraphs 276DI to 276AI in Part 7 (Other categories) should be omitted from the redrafted Immigration Rules.

226 At para 9.49 above.

227 At paras 6.18 and 6.25 above.

Chapter 10: Complexity in the interaction between the Rules, guidance and application forms

10.1 Previous chapters of this report have considered causes of complexity which are intrinsic to the drafting of the Immigration Rules, and how these can be overcome. This chapter looks at complexity caused by factors extrinsic to the Rules. These arise from the system of guidance and application forms in which the Rules, from the perspective of the user, are embedded.

10.2 We looked in our consultation paper at the place of the Rules within this broader system. We observed that the guidance which accompanies the Rules is extensive, running to hundreds of individual documents. Some of the guidance is directed at Home Office officials to guide them as to how to decide applications. There are many categories of such operational guidance. Some, for example, are called "Immigration Directorate Instructions". Other guidance documents are directed at applicants and sponsors to help them to understand how applications will be decided.[228]

10.3 Material extrinsic to the Rules can produce legal effects. This material, following *Alvi*,[229] must not add to the restrictive conditions in the Rules. It may, however, contain concessionary policies which adopt a more flexible or relaxed approach than the Rules. Legal principles, such as those enunciated in *Mandalia* and *Lumba,* hold the Secretary of State to his or her policy. Where a public authority has adopted a policy as to how it proposes to act, the law ordinarily requires the policy to be followed. The policy should not be a blanket policy admitting of no exceptions. If unpublished, it must be consistent with published policy. It should be published if it will inform discretionary decisions where the object of such a decision has a right to make representations.[230]

10.4 Although a policy may allow a more generous decision than a Rule, guidance must not be inconsistent with the Rules. Equally, provisions in guidance should not be inconsistent with each other.[231]

10.5 In considering the *Alvi* decision, we noted that one impact of the judgment was an increased focus on the interaction between the Rules and the guidance which underpins them. We looked at the difficulties caused where there are inconsistencies

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228 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.1 to 4.4.

229 *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208.

230 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.6 to 4.9, and see *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32, [2012] I WLR 2192, *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29] and [36] and *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671 at [28 to 30].

231 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.10 to 4.16.

between the Rules and the guidance, and the complexities caused by the interplay between the two.[232]

10.6 Application forms are another form of material extrinsic to the Rules. They are an important part of the immigration process. The Rules may require completion of a specified form. Sections of the forms are designated as mandatory. Failure to use the specified form or to complete the form correctly will lead to the rejection of the application as invalid.

10.7 Online application forms have been the norm in entry clearance applications for a number of years. In-country application forms have also been moving from a paper-based to an online system. A new streamlined online application process was introduced for more straightforward applications from the end of 2018.[233]

10.8 Complexity may arise from navigating the system in order to locate and complete application forms. The interaction between the Rules and the application forms can also generate complexity in relation to legal effect. We noted that it is possible for application forms to give apparently contradictory information to the Rules. We observed that it was possible, if worded sufficiently clearly, for this to operate to waive requirements of the Rules.[234]

10.9 We concluded in our consultation paper that the simplification of the Rules could not sensibly be considered in isolation from this additional material. Users need to access all three parts of the system. Difficulties in the interplay and integration of the parts is a key element in the users' experience of complexity. We decided that it was an important aspect of simplification to consider how best the guidance can support the Rules, and whether the guidance itself could be simplified. Similarly, we considered that we needed to examine the accessibility of application forms and the application process.[235]

10.10 We asked at Consultation Question 7 for consultees to consider the extent to which guidance is helpfully published, presented and updated. We also asked them at Consultation Question 8 to let us know of any instances where guidance contradicts the Rules or causes difficulties in practice. At Consultation Question 9, we asked for views on the accessibility of application forms, and whether the process of application could be improved.

10.11 We noted the significant impact of online presentation on the way in which Rules connect with guidance and application forms and on the accessibility of the system as a whole. This is explored further in chapter 11.

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232 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.10 to 4.31.

233 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.32 to 4.45.

234 See *Hossain* v *Secretary of State for the Home Department* [2015] EWCA Civ 207, [2015] 3 WLUK 368 and Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 4.17.

235 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 4.27 and 4.32.

THE PUBLICATION, PRESENTATION AND UPDATING OF GUIDANCE

10.12 Twenty-five respondents answered Consultation Question 7 with views on the current system for the publication, presentation and updating of guidance. They identified a number of difficulties with the system. They also highlighted some benefits provided by guidance.

10.13 By way of introduction, the Law Society of Scotland quoted an extract from Sir Ernest Ryder's evidence to the House of Lords' Constitution Committee in 2016:

> The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in – if I may say so – rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant … your chances of accessing any of that material and putting it together in a coherent way are negligible.

10.14 Specific areas of difficulty, as well as benefits, encountered by respondents, are examined below.

Difficulties with volume and scope

10.15 Many of the respondents reported that the sheer volume of guidance, coupled with areas of poor internal drafting and organisation into cross-cutting categories, caused problems. These difficulties were summarised by the Law Society of England and Wales:

> For any one immigration category there can be multiple sources of guidance, sometimes cross-cutting over a number of categories (e.g. calculating continuous residence for indefinite leave to remain purposes), or sometimes approaching the immigration category from different perspectives (e.g. Tier 2 guidance, Tier 2 and 5 sponsorship guidance) of those involved in the same immigration category process. For a legal adviser, not to mention an applicant, the risk of missing crucial guidance is always a factor, as there is no cross-indexed list of all relevant guidance pertaining to each immigration category in one place.

10.16 The Bar Council described guidance as "verbose, repetitive and voluminous". Destination for Education described its volume as "overwhelming", with some points-based system documents exceeding 100 pages:

> The diverse range of guidance, the different formats and locations combines to add to the complexity of the Rules rather than provide clarity and assistance, the main aim of guidance.

10.17 Some respondents commented that it would be more helpful if the guidance did not seek to reproduce the Rules. This would reduce their volume. The UK Council for International Student Affairs ("UKCISA") thought that guidance should instead illustrate how the Rules are applied through examples based on casework.

10.18 The contents of the guidance documents can be hard to follow. Two respondents reported that organisations are creating their own guidance in an attempt to clarify the

guidance provided by the Home Office. The Joint Council for the Welfare of Immigrants ("JCWI") has drawn up its own guide to spouse and partner rules under Appendix FM. Universities UK and the Universities and Colleges Employers' Association (joint response) noted that higher education institutions increasingly produce their own guidance to help international staff and students.

10.19 Respondents gave some specific and helpful examples of the experience of a user in accessing guidance. The Bar Council described guidance on applications for leave to remain:

> A web search for "guidance leave to remain" produces a primary link to guidance on validation, variation and withdrawal of applications for leave to remain; that guidance (25 pages) has been updated 9 times since it was published in 2013. The Home Office publishes separate guidance on various aspects of leave to remain (which is not immediately apparent on a search) including on discretionary leave to remain (26 pages), refugee leave (11 pages), settlement protection / indefinite leave (47 pages), revocation of indefinite leave to remain (21 pages), calculating the continuous period of residence for the purposes of indefinite leave to remain (19 pages), restricted leave (35 pages), considering human rights claims (33 pages), Appendix FM family life (partner or parent) (125 pages), etc. More than one guidance document may be relevant to any given application. Finding most of this guidance requires prior (expert) knowledge of the difference between various categories of leave and the basis on which applications may be refused.[236]

10.20 The Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges offered the following analysis:

> 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.

10.21 The "visas and operational guidance" and "modernised guidance" tabs described by the UTIAC judges are reproduced below:

[236] See the Bar Council's full response set out in the consultation analysis table of responses to Consultation Question 7 for the further example given of the complexity of guidance on Appendix FM provided to caseworkers.

GOV.UK Search

Home

Visas and immigration operational guidance

- Asylum policy
- Business and commercial caseworker guidance
- Enforcement
- Entry clearance guidance
- Fees and forms
- Immigration directorate instructions
- Immigration rules
- Modernised guidance
- Nationality guidance
- Non-compliance with the biometric registration regulations
- Rights and responsibilities
- Sponsorship
- Stateless guidance
- Visitors
- Windrush caseworker guidance

GOV.UK Search

Home > Visas and immigration operational guidance

Visas and immigration operational guidance

Modernised guidance

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A to Z

- Appeals (modernised guidance)
- Applications (modernised guidance)
- Armed forces (modernised guidance)
- Common travel area (modernised guidance)
- Criminality and detention (modernised guidance)
- EEA, Swiss nationals and EC association agreements (modernised guidance)
- Enforcement and criminal investigations (modernised guidance)
- Family of people settled or coming to settle (modernised guidance)
- General grounds for refusal (modernised guidance)
- Identity checks (modernised guidance)
- Immigration intelligence
- Other cross-cutting guidance (modernised guidance)
- Other immigration categories (modernised guidance)
- Returns and removals (modernised guidance)
- Studying (modernised guidance)
- Working in the UK (modernised guidance)

Difficulties in locating guidance

10.22 Many respondents said that guidance was hard to find. The Law Society of England and Wales said:

> The Home Office efforts to flag relevant guidance on their immigration category website pages are haphazard and often reference entirely incorrect or irrelevant guidance.

10.23 The UTIAC judges report that the internal search engine on the UK Visas and Immigration website sometimes directs users to another government department. Because the information on guidance is presented so inconsistently on gov.uk website pages, users rely on search engines such as "Google" to identify relevant guidance. The UTIAC judges told us:

> Home Office Presenting Officers and counsel alike regularly resort to typing words into a general internet search engine in the hope that a relevant policy will appear.

10.24 This can generate further problems, as the search may pull up out-of-date versions of guidance.

10.25 In some cases, relevant guidance is found only by following a trail which requires specialist knowledge. The UTIAC judges observed:

> 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.

10.26 In their joint response, Coram Children's Legal Centre ("CCLC") and Let Us Learn reported that, in their experience, many young people who have made applications to the Home Office unassisted did not know that guidance for particular routes existed. They attributed this to the difficulty in locating guidance. They also constructed an example.

> Sarah and David, a couple who came to the UK 11 years ago as students, who have two children born in the UK aged 6 and 10, one of whom is now a British citizen, and who wish to apply for leave to remain in reliance on article 8 ECHR rights under Appendix FM, would experience the following in finding their way to the two guidance documents most relevant to their application:
>
> If they wanted to find the relevant guidance on the gov.uk website, they would need to navigate from the home page > "Visas and immigration" > "Family in the UK" > "Visas and immigration operational guidance". Visas and immigration operational guidance then provides links to 15 different policy and guidance topics, none of which state that they relate to applications based on family and private life.
>
> If Sarah and David click on each link, they will eventually find that the page on "Immigration directorate instructions" provides links to two pages about family

migration: “Chapter 08: appendix FM family members (immigration directorate instructions)” and “Chapter 08: family members (immigration directorate instructions)”. Maybe they will know that Appendix FM applies to their application, and so go to that page. Or maybe they will try and navigate the various pages on Chapter 08: family members (immigration directorate instructions) - which include links to six pages, such as “spouses” and “children born in the UK who are not British citizens”. If they do, for example, select the link to “children born in the UK who are not British citizens” (which would, on the face of it, appear to be very relevant to their application), they may (if they are paying attention) notice that it only applies to applications made before 9 July 2012. If they do not notice that caveat, and open the guidance, they will be reading a guidance document which does not state that it does not apply to applications made after 9 July 2012, but which is entirely irrelevant to their application.

Even if they do select the first page (Chapter 08: appendix FM family members (immigration directorate instructions)), they will be directed to a page with links to 14 different guidance documents. One of these documents is relevant to their application (Appendix FM 1.0a: Family Life (as a Partner or Parent): 5-year routes and exceptional circumstances for 10-year routes), but the other [relevant document] (Appendix FM Section 1.0b: family life (as a partner or parent) and private life: 10-year routes) [is not provided].

To find the other (more relevant) guidance document, they would have to go back to Visas and immigration operational guidance, and keep clicking through each of the 15 links on that page until they select “Modernised guidance”. There are 16 links on that page, one of which is relevant to their application: Family of people settled or coming to settle (modernised guidance). On that page, they will find a link to Appendix FM 1.0b: family life (as a partner or parent) and private life: 10-year routes.

Another way they may be able to navigate to the guidance from the home page is by following “Visas and immigration” > “Family in the UK” > Family visas: apply, extend or switch. They would then need to work through this guide, and hopefully notice that on the page on “Apply as a parent”, there is a suggestion that they should “Read the guidance for parents before applying”. That is the only page where it suggests that the applicant should read guidance (there is no link to the guidance on the pages for applying as a partner or spouse, a child, an adult coming to be cared for by a relative or on the basis of your private life). The “guidance for parents” again takes applicants to the page with the link to one of the guidance documents (Appendix FM 1.0a: Family Life (as a Partner or Parent): 5- year routes and exceptional circumstances for 10-year routes), but not the other guidance document (Appendix FM Section 1.0b: family life (as a partner or parent) and private life: 10-year routes).

10.27 CCLC and Let Us Learn found it “clearly unrealistic for applicants to be able to find the guidance documents relevant to their application, unless they are given the direct link”. In the words of Olayinka, Let Us Learn campaigner:

I had to make a Home Office application by myself and gathered the information I needed online which was really difficult as the information online is neither clear nor

> easy to understand. Information about the application process is completely inaccessible, there's too much information online and no way of knowing what's true and relevant to your case. I have made two applications, but through all my research I never once knew that there was any online guidance.[237]

10.28 The First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges suggested a simple solution to these issues: "the guidance should be available in the same place as the Rules with archives of previous guidance also available".

Confusion between different sets of guidance

10.29 The Law Society of England and Wales looked at the difficulties posed by the creation of one set of guidance for caseworkers (the immigration directorate instructions) and one set for applicants (the modernised guidance):

> The modernised guidance approach may make the information more readily accessible to the general public, and the layout is preferable, but drafting guidance towards caseworkers is the easiest way to ensure that a harmonised message is conveyed to all that might have access to the guidance (caseworkers, legal representatives, the public) instead of the current situation where anyone attempting to interpret the guidance has to go through possibly three sets of guidance (for example Tier 2 guidance for applicants, Tier 2 caseworker guidance, and Tier 2 and 5 sponsorship guidance). The caseworker's information must be definitive as it informs the casework decision-maker, so it should be possible to reduce sources of guidance to that which is made available to the caseworker. This would also help to eliminate slightly different interpretations of Immigration Rules (for example Tier 1 Entrepreneur job creation). It would also reduce the scope, or at least make it readily apparent if the caseworkers had access to restricted guidance which was not available to applicants and their legal representatives. (The modernised guidance format identifies the areas and often the reasons for the omissions. This supports greater transparency in caseworker decision-making because if there is a disparity in the interpretation the applicant/legal representative knows where the source of the disparity lies.)

10.30 A number of other respondents (including the Immigration Law Practitioners' Association ("ILPA"), UKCISA, Destination for Education, Nashit Rahman (Taj Solicitors) and the Incorporated Society of Musicians ("ISM")) also emphasised the need to condense guidance into one coherent document for use by applicants and caseworkers, or at least to provide links between the two. ISM pointed to discrepancies between the two sets of guidance for visitor visas:

> The Home Office internal guidance is much more thorough and complete than the external guidance for applicants. Essentially, the information in the guidance for applicants about the required documents is very limited, and does not fit with the tests given in the guidance to the Home Office decision-maker. The two sets of guidance do not match which leaves the applicant at a disadvantage in not knowing what documents they will need to fulfil the genuineness test needed for a successful application.

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[237] This response was provided as part of the CCLC and Let Us Learn joint response.

Confusing titles

10.31 Another aspect of the difficulties caused by different sets of guidance is the confusion which can arise from the titles given to the documents. Destination for Education gives the example of the title of the Tier 4 guidance as “policy guidance” which appears to be exhaustive when it is in fact not the only relevant policy guidance. It is presented in the introduction as providing comprehensive policy guidance to a student coming to the UK under Tier 4. It advises the student to read the relevant Rules, indicating where they can be found, where to find the application form, and information on how to apply. There is nothing in the title or in the content to refer to the existence of the other relevant guidance document, the Tier 4 guidance for caseworkers, which sets out how Tier 4 decisions are made.

Difficulties caused by frequency of updates, failure to update or delays in updating, updating at short notice, and in identifying the relevant version to use

10.32 Many of the respondents who answered this question highlighted the difficulties caused by the frequency of updates to guidance, often at short notice, and in knowing what version of the guidance is in use. Some noted that there is no system for consultation or scrutiny of guidance, or any requirement to give advance warning of changes. They also reported problems with delays in updating guidance following Rule changes.

10.33 The Bar Council said:

> It can be hard … to track changes to guidance… It changes frequently for reasons which are unclear, and even for experienced practitioners it can be difficult to keep track of which version is operational.

10.34 The Law Society of Scotland observed that “some guidance is … yet to be archived despite being completely unfit for purpose and out of date”. The UTIAC judges added that:

> 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.

10.35 Respondents representing the interests of international students focussed in particular on delays or failures in updating guidance following changes to the Rules, and the absence, once the guidance has been changed, of explanation or warning. UKCISA gave the following examples:

> Guidance does not always reflect the latest Rule changes. For example, the Immigration Health Surcharge (IHS) increased on 8 January 2019 but the Tier 4 policy guidance published after this date, on 11 January 2019, did not include the revised IHS fee. Similarly, paragraph 245ZX(b)(i) of the Immigration Rules changed in January 2019 to permit part-time Tier 4 (General) students to extend their leave in the UK, but this was not reflected in the Tier 4 policy guidance either, even though there were few other amendments which came into force on that date.
>
> Recently, it has sometimes taken over a week for guidance to be updated following Immigration Rules changes, which means that guidance relied on by applicants and

caseworkers is often out of line with the legal requirements in force. For example, the Immigration Rules changed on 6 April 2019, but as of 17 April no Tier 4 guidance documents for sponsors, applicants or caseworkers have been updated. When changes came into force on 6 July 2018, the Tier 4 sponsor guidance was not amended until 13 July and the Tier 4 policy guidance for applicants was out of date until 19 July, without explanation or warnings.

10.36 The University of York Immigration Advice Team reported:

> The guidance is often updated at very short notice for Rule changes which have serious and highly inconvenient consequences for our students. The best (or worst) example of this was the change in Academic Progression rules. As advisers, we couldn't understand which cohorts it affected because it was so unclear. UK Visas and Immigration were clueless also - many of the staff members there have not been through higher education so have no understanding of the differences between a BEng and MEng for instance. Finally, we had to identify and email individual students who were affected due to course transfers, with no UK Visas and Immigration support, almost a month after the Rules had changed to advise them that they must now return to their home country at considerable expense and inconvenience to get new Tier 4 visas, when they had expected to simply renew in the UK.

10.37 CCLC and Let Us Learn (joint response) also highlighted the impact that changes in guidance can have on an application, and the need to indicate in current guidance what has changed from the previous version. Using their example given above of Sarah and David,[238] they examined the changes in the guidance applicable to the family's situation. In a previous version of the guidance, the family would have been likely to qualify to stay under the express terms of the guidance. In the current version, they would need to provide evidence that it would not be reasonable for their British citizen daughter to leave.[239]

10.38 Some respondents suggested solutions. Carter Thomas Solicitors (Respondent B from ILPA) suggested that "better highlighting of the changes from the previous guidance document would be helpful". Islington Law Centre for its part suggested that "that new or updated volumes of policy guidance are issued in line with changes in the Rules in April and October".

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238 See para 10.26 above.

239 See the consultation analysis table for Consultation Question 7 for more detail of this example**.** In summary, in deciding whether it is reasonable for a child to leave the UK, guidance applicable in February 2018 made a distinction between a child who has been in the UK for 7 years or more, and a child who is a British citizen. In the case of a British citizen child, it was stated that it would not be reasonable to expect them to leave the UK. The presence in the UK of another carer was given as a relevant factor in deciding whether the parent should be removed. In the updated guidance published in April 2019, the distinction between the two categories of children is removed, and the guidance reformulated to state that, as a starting point, such children would not normally be expected to leave the UK, but that other factors will need to be weighed which may make it reasonable for the child to leave the UK. The guidance refers more generally to the need for evidence that it would not be reasonable for the child to leave the UK.

Archiving: difficulties in locating previous versions of guidance

10.39 The need for a better archiving system for out-of-date versions of guidance was raised by many respondents. It can be of particular importance in conducting an appeal or administrative review for a practitioner to have access to a previous version of guidance, and to know the period of time for which it was valid. The Bar Council noted that "there is no consolidated, indexed archive of previous versions of guidance" and the FTT(IAC) judges said:

> As with the Rules, some care is needed in relation to archiving guidance, so that the version in effect when a decision was made can be found easily.

10.40 Migrant Voice suggested:

> It would be useful to have old guidances that have been superseded by newer guidances being easily accessible in one area/tab. They can be grouped by subject matter and date. A central place for old guidances is useful where a decision takes several months to reach and in the meantime the rules might have changed.

10.41 Destination for Education similarly proposed:

> Where there have been previous versions of the guidance all of these should also be made available at the hyperlink/hover box. They should also be clearly labelled as to which application and refusal dates they apply and the dates they were in force. For example: "This guidance was in force from X date to X date and applies to applications which were made between X date and X date and to decisions made by the UK Visas and Immigration on X date to X date". The reason why the insertion of the dates is important is that it is often difficult for the user to identify any transitional provisions which sometimes use application dates and sometimes use decision dates. At present it is very difficult to locate previous versions of guidance.

The positive aspect: where guidance makes it easier to understand the Rules

10.42 Respondents pointed to instances where the publication and presentation of sections of the guidance is helpful or has been improved. According to the Law Society of Scotland:

> Some guidance is helpfully published and updated on a very regular basis … In respect of presentation, guidance is frequently laid out in a format which is easy to read, text searchable and hyperlinked.

10.43 The Bar Council noted:

> The efforts to group relevant guidance, for example for employers/educational providers, or prevention of illegal working are better examples of how the Home Office have organised and grouped relevant up-to-date guidance.

10.44 The University of York Immigration Advice Team found the Tier 4 Policy Guidance and accompanying Sponsorship Guidance "mostly useful and far more clear than the Rules". In UKCISA's view:

> The glossary of terms and the table confirming changes made to the preceding Tier 4 policy guidance near the beginning of the document are helpful. However, the table of changes would be even more helpful if it were complete - we usually identify additional amendments which have not been noted, which means we have to check the whole document every time in spite of the table of changes.

10.45 David Mills (Home Office Presenting Officer) commented:

> I still sometimes struggle to find the correct guidance and, when I do, to be absolutely sure which version was in force at the relevant date. I imagine it is even harder for those outside of the department, However, in fairness to my colleagues, I do consider that there has been some progress on this in recent years, with an attempt to standardise the format of guidance documents, and to publish online archives. I think there is still some way to go on this though.

10.46 Some practices within guidance were noted as helpful. Destination for Education mentioned case study examples and flow charts as crucial in understanding guidance, but noted that they do not appear consistently. The Law Society of England and Wales highlighted how useful it is when the Home Office notes out-of-date guidance as "archived".

The relationship between guidance and the Rules

10.47 Respondents were clear that guidance needs to be clearly linked to the relevant Rules. The Law Society of England and Wales described this as "vital to avoid missing relevant criteria and information". ISM added that, in presenting guidance together with the Rules, there should be an explanation as to how they relate to each other. The FTT(IAC) judges saw the potential for the simplification of the Rules to reduce the complexity of the guidance:

> If the Rules are clear and complete there should be no necessity for guidance save where there is discretion to be exercised.

10.48 Professor Thom Brooks (University of Durham) also emphasised the need to get the Rules clear. Guidance is intended to help apply the Rules. If the Rules are clear "this will give the right focus and balance to getting the guidance right".

Discussion

10.49 It can be seen from the themes raised by respondents that many of the issues raised in considering simplification of the Rules are mirrored in the guidance. Many of the respondents suggested solutions, particularly in terms of structure, internal organisation and archiving, which have already been discussed in this report as ways of resolving complexity in the Rules. There is a consensus that a clear and consistent approach across all guidance would improve the accessibility of the system. Our consideration of the online presentation of the Rules in chapter 11 includes the possibilities offered by technological developments for the provision of a single reference source for applicants with improved navigation between Rules and guidance.[240]

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[240] See paras 11.19 to 11.30 below.

10.50 The most pressing aspect of the problems with the guidance system appears to us to be the lack of a central index. Respondents have emphasised the need for all relevant guidance to be cross-indexed so that there is a clear list of all guidance relevant to each immigration category. This index needs to be conspicuous to a user of the Rules.

10.51 Respondents also suggested that guidance should not repeat the Rules, as this makes them longer and more complex. Guidance is intended to supplement the Rules, not to reproduce them. If the Rules are clearly drafted, and the guidance is clearly linked with the Rules, we agree that repetition should not be necessary. The guidance could instead serve more clearly as a vehicle to illustrate how the Rules will be applied, with illustrative worked examples and flow charts to aid understanding. We agree with the implicit suggestion that the difference in the status of the Rules and guidance should be explained at the point where the guidance is signposted.

10.52 Many respondents highlighted the difficulties caused by the many different sets of guidance. We consider that, as they suggested, consideration needs to be given to rationalising the number of guidance documents, with a view to condensing guidance on any topic into a single coherent document which incorporates guidance both for the caseworker and the applicant. This, in combination with clear titles and a full central index, will make it easier to find all relevant guidance in one place.

10.53 Respondents also noted the complexity caused by changes to guidance. This parallels the responses we have already considered in relation to the complexities caused by amendments to the Rules. Respondents suggest improvements to the system for updating guidance and a comprehensive archiving system for out-of-date versions of the guidance.

10.54 We are attracted by the suggestion that, where a new version of a guidance document is published, changes from previous versions of guidance could be highlighted to make it easier to understand what has been changed. We also think that it would be helpful, as proposed by one respondent, to have a link in the current guidance to previous versions. A comprehensive archiving system for out-of-date guidance would also assist accessibility. If a more sophisticated "point in time" archiving system were developed, as discussed in chapter 9, this could usefully apply also to guidance.

10.55 We suggest that work to simplify the guidance could be carried out alongside the simplification of the Rules, and that a system of coordinated ongoing oversight of the content of guidance be introduced. This could ensure that coherence is maintained over time, and in particular safeguard against delays or omissions in the updating of guidance to reflect changes in the Rules.

10.56 If a system is adopted for major Rule changes to be issued in accordance with common commencement dates in April and October,[241] respondents have suggested that updated volumes of guidance could be issued alongside such changes. We agree that this would increase predictability for users, particularly for those users needing to plan large-scale service provision for groups such as international students.

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[241] As discussed at paras 8.77 to 8.90 above.

10.57 We agree with respondents that guidance could become less complex if the Rules were to be drafted more simply. If guidance no longer needed to repeat the Rules, this would have an impact on its length. It would also reduce complexity if the guidance for each immigration category were contained in one or a few coherent documents. We also agree that the simplification exercise we recommend for the Rules will offer an opportunity to simplify guidance.

10.58 But there is also a risk that some of the recommendations we have made to simplify the Rules could tend to increase the volume and complexity of guidance. This could occur, for example, if there is a shift away from detailed prescription of evidential requirements within the Rules towards non-exhaustive lists whose operation might be illustrated in guidance.

10.59 We therefore consider it important that a number of additional steps are taken to improve the structure and organisation of guidance alongside the recommendations we have made for the simplification of the Rules.

Recommendation 30.

10.60 We recommend that an exercise of simplification of guidance should be undertaken in tandem with the simplification of the Immigration Rules.

Recommendation 31.

10.61 We recommend that the aim of the exercise to simplify guidance should be to rationalise the number of guidance documents with a view to reducing the guidance on any topic into a single document incorporating guidance both for caseworkers and applicants.

Recommendation 32.

10.62 We recommend that an index should be created listing the guidance documents relevant for each immigration category, and giving each document a clear and informative title. This index should be located in one place and clearly conspicuous to a user of the Immigration Rules. It should be accompanied by an explanation for non-expert users as to the difference in the status of the Rules and guidance.

Recommendation 33.

10.63 We recommend that guidance should not repeat the Immigration Rules, but instead serve to illustrate how the Rules will be applied. Consideration should be given to the use of illustrative worked examples and flow charts to aid understanding.

Recommendation 34.

10.64 We recommend that where a new version of a guidance document is published, changes from previous versions of guidance should be highlighted to make it easier to see what has changed.

Recommendation 35.

10.65 We recommend that an archive of guidance should be created with links to previous versions of the guidance and an indication of the period during which a particular guidance document operated.

Recommendation 36.

10.66 We recommend that a system of coordinated oversight of the content of guidance should be introduced.

Recommendation 37.

10.67 We recommend that consideration should be given to the adoption of a practice of limiting the frequency of publication of guidance so as to coincide with the publication of statements of changes to the Immigration Rules.

INSTANCES WHERE GUIDANCE CONTRADICTS THE RULES OR CAUSES DIFFICULTY IN PRACTICE

10.68 We asked at Consultation Question 8 for examples of specific instances where the guidance contradicts the Rules and where aspects of guidance cause difficulties in practice. Respondents provided us with examples of inconsistencies and of outright

errors. A selection of these responses is discussed in this section with a view to illustrating some of the pitfalls.[242]

Guidance contradicting the Rules

10.69 The Law Society of England and Wales gave the example of the financial requirements for more complex applications under Appendix FM. The relevant Immigration Directorate Instruction refers to lettered categories of financial support which do not exist in the Rules. It indicates that documents will be accepted as alternatives to bank statements when this is not stipulated in the Rules. It also makes statements as to the treatment of income from a limited company which contradict the way in which the Rules state that such income will be treated. The UTIAC judges told us that there were many instances of contradiction, 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.

Guidance misinterpreting the Rules

10.70 David Mills (Home Office Presenting Officer) cited the recent decision of the UTIAC in *JG (section 117B(6): "reasonable to leave" UK) Turkey*,[243] which found that the interpretation in Home Office guidance of the "reasonableness" test in EX.1(a)(ii) was not consistent with the wording of the Rules. He commented that over the years there had been too many examples to list but that "most are usually remedied once caselaw brings them to wider attention".

Guidance importing requirements not found in the Rules

10.71 UKCISA referred to instances "where care hasn't been taken to ensure that the Rules as they apply to the different strands of the route are accurately reflected in the guidance". They gave this example:

> For example the guidance says that a person with Short-Term Student (Child) leave must intend to leave within 30 days of the end of their study. However, this is not stipulated in the Rules.

Erroneous cross-references

10.72 CCLC and Let Us Learn (joint response) pointed to typographical errors, for example in Appendix FM 1.0b, one of the guidance documents applicable to certain routes under Appendix FM. This mistakenly refers to paragraph 276ADE(1)(iii) as setting out

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242 For all the responses, see the consultation analysis table of responses for Consultation Question 8.

243 [2019] UKUT 00072 (IAC)

the relevant criteria to be applied in assessing whether to grant leave to remain to an applicant aged between 18 and 24 on the basis of their private life. The paragraph cited should in fact be paragraph 276ADE(1)(v).

Absence of guidance for applicants

10.73 Islington Law Centre highlighted the problem of the absence of accessible guidance, giving the example of applications made outside the Rules, often on human rights grounds, such as for refugee family reunion. Practitioners look at the specific instructions to caseworkers, which offer detailed information but have not been designed to be accessible to non-expert unrepresented users. These users are unlikely to be aware that the guidance exists.

Causes of error and inconsistency

10.74 Some consultees offered thoughts on the causes of such errors and inconsistencies. The Faculty of Advocates thought that mistakes were inevitable given the volume of guidance produced. UKCISA thought that problems arose because provisions were rewritten to reflect the policy intention of the official writing the document, without noticing that the wording conflicts with the wording of the Rules. Professor Thom Brooks (University of Durham) noted that one rule change can require extensive changes across many sets of guidance, increasing the risk of inconsistencies.

Overlooking of guidance

10.75 In the eyes of the Faculty of Advocates, the principal difficulty lay in guidance simply being overlooked by decision-makers and other users.

THE ACCESSIBILITY OF APPLICATION FORMS AND THE APPLICATION PROCESS

10.76 We asked at Consultation Question 9 for the views of consultees on the extent to which application forms are accessible, and whether the process of application could be improved.

10.77 Twenty-seven respondents answered this question. Respondents identified a number of distinct issues which impede accessibility.

Finding application forms

10.78 Destination for Education thought that it was not made clear how to access application forms. They pointed in particular to the difficulties, when applying from outside the UK, in locating Access UK, and confusion caused by the availability of the visas4uk site, which is still operating as a beta site.[244] They thought it essential to link a paragraph or section of the Rules to the relevant application form to assist in identifying the correct form to use. The University of York Immigration Advice Team similarly mentioned problems with accessing the new forms on Access UK, and having to revert to the visas4UK form. They too thought that there was a lack of clarity in how to access the

[244] A beta site is a pre-release of new software that is given out to users to try under real conditions. The beta label on a website shows that it is still being tested: see https://www.gov.uk/help/beta (last visited 25 October 2019).

application forms, giving the example of the difficulties students encounter in accessing the Tier 4 application:

> You have to first select “extend your visa” from a list of options on the General Student Visa (Tier 4) page on gov.uk. Not all students understand what “extend” means in relation to renewing a Tier 4 visa. They then scroll and select “Apply online” and scroll again to select “Apply now”. These last two options are easy to miss because they are on pages which contain a lot of information. It's also not clear why the gov.uk page isn't called Tier 4 (General) Student visa, which is surely more accurate. However, once in the application it is mostly very straightforward with useful explanations by each question.

10.79 Others, such as UKCISA, ILPA and Robert Parkin (barrister at 10 King’s Bench Walk (“10 KBW”)) thought that the application forms were sufficiently clearly accessible, particularly if accessed online.

Knowing which is the right application form to use

10.80 Some respondents pointed to difficulties in finding the correct form as more of an issue than accessing the forms themselves. Some thought that a contributing factor was the use of confusing names for the forms. Robert Parkin (10 KBW) reported:

> 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.

10.81 CCLC and Let Us Learn (joint response) described difficulties, particularly for unrepresented applicants:

> Application form titles are obscure, and often do not indicate clearly which kinds of valid applications can be submitted on them. For example, “Application to extend stay in the UK: appendix 1 FLR(FP) FLR(O)” was previously the correct form to submit if applying for a fee waiver, and “Application to extend stay in the UK: form FLR(FP)” was the correct form for an initial application under several Immigration Rules in Appendix FM, and not just for renewal applications.

10.82 ILPA recommended listing all the forms in one place and giving them meaningful names which do not simply relate to the category of permission for which the applicant is applying. This may be obscure for unrepresented applicants. Robert Parkin (10 KBW) suggested reducing the number of forms to provide one form for each type of application. This would mean, for example, one form for any kind of application under Appendix FM. Coventry University London International Student Advice thought that using the wrong form accounted for many mistakes made by students:

> First and foremost the mistake that I find our students sometimes make is in using the wrong application form ... Without the help of a legal practitioner, the applicant is prone to incomplete (invalid) applications or incorrect applications.

10.83 In their view, mistakes arise in particular as a result of expanded lists on some online applications forms which are not at first visible. This may lead applicants to choose the wrong form.

10.84 The constant updating and replacement of forms creates difficulties for applicants, according to Islington Law Centre. Applicants find it hard to be sure that they are using the correct version of the form. The Centre suggested updating forms once a year, either in April or in October. Destination for Education thought that it would be useful for practitioners if previous versions of the application forms were available with the specific dates on which they were in use. This would show where information required by UK Visas and Immigration has changed over time, or help to resolve disputes as to whether the correct form has been used.

10.85 A user's experience of confusion as to the correct form to be used was described by Ijeoma, a Let Us Learn campaigner:

> Recently, when making a renewal application, I printed off the wrong form and this could have been a terrible waste of money if I wasn't corrected by a friend who had already been through the application process. It wasn't clear what form was needed or the fact that they change every so often.[245]

Lack of an appropriate application procedure

10.86 The Law Society of England and Wales commented on the problems caused where an appropriate application form is not provided, such as where an application does not meet the requirements of any Rule and the applicant wishes to apply for consideration of the application under article 8 of the European Convention on Human Rights ("ECHR"):

> The applicant is required to apply under the closest applicable Rule, pay the relevant fee for that application and rely on the decision-maker to correctly consider the application under article 8 ECHR when the "application under the Rules" is invariably refused.

10.87 They gave the example of a vulnerable Syrian national seeking to apply for entry clearance as the mother of a British child resident in the UK. Her difficulties extended beyond the absence of an application form to an absence of accessible arrangements to make the application, for example to overcome the applicant's inability to attend an entry clearance post. In the Society's view, the absence of specified forms, fees, fee waiver provisions and guidance for entry clearance applications relying on article 8 ECHR was itself a breach of article 8. They also referred to the absence of an accessible procedure for applying for a fee waiver in entry clearance applications.[246]

Inability to view the online version of the application form in full

10.88 The need to see a full version of the application form online, in order to allow applicants to look ahead at all the questions they will need to answer, was raised by

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[245] This response was provided as part of the CCLC and Let Us Learn joint response.

[246] See the consultation analysis table for Consultation Question 8 for the full detail of this response.

many respondents. This is discussed in chapter 11 as part of our consideration of accessibility and online systems.

Design

10.89 JCWI found that application forms were "overly complex, demand unnecessary information, and are hard to understand. They should be simplified and made more user-friendly". Professor Thom Brooks (University of Durham) found a lack of coherence and consistency in their design:

> 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.

Linking the Rules, guidance and application forms

10.90 Many respondents commented on the need to link Rules, guidance and application forms more clearly together to form one streamlined system. UKCISA thought that a coherent structure would help to create more coherent application forms. They also recommended consultation with users to gain insight into their experience, but reported that, even where research is conducted, user views are not taken into account:

> If all relevant Immigration Rules and guidance were grouped together, this could benefit the structure of, and questions in, the forms. Hopefully, it would help those who create the online forms to know which questions are needed for different applicants, and which are redundant or risk leading an applicant down the wrong route. Our experience of being consulted is that we have spent many hours attending meetings and collating screen shots to show where forms go down the wrong route or ask questions which are incorrect or not clear, but our feedback and that of our many institutional members is regularly not taken into account.

10.91 Islington Law Centre observed that the link from online forms to online guidance on completing the form could be a source of confusion, since there is no additional link to the policy guidance for the relevant category of application:

> Although very different in content and purpose, both are called "guidance" which could make a layperson who has been told that guidance exists simply refer to the guidance available on the form.

10.92 They added that:

> The streamlined system needs to link the relevant Rule(s), which needs to link to the relevant form, which needs to link to the relevant policy guidance and published instructions to Home Office caseworkers.

10.93 Professor Thom Brooks (University of Durham) pointed to the practical need to "stress test" the application of the Rules, their guidance and the application process, adding that:

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.

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.

10.94 The accessibility of application forms online, and the potential to link Rules, guidance and application forms into a coherent system, are discussed in chapter 11, which considers the way in which technology could be harnessed to reduce complexity.

Discussion

10.95 Respondents identified improvements to the internal coherence of application forms and the process of locating the correct form as important factors in enhancing the accessibility of the system as a whole. They also saw the current complexity of the system as a reason for many errors by applicants. A mistake in the choice of form results in the rejection of the application as invalid, with serious consequences for the applicant. One of the main issues identified was the need for the forms to have clearer names which give a better indication of what types of application can be submitted on them.

10.96 We recommend that the Home Office give consideration to taking the following steps with a view to improving the accessibility of application forms.

10.97 We suggest first a review of the titles of forms to make them clearer and more informative for applicants. Secondly, we suggest a review of the material explaining to users the type of application that a form is to be used for, so as to make the explanation clear and non-technical.

10.98 There was a suggestion that a central list of forms could make the system clearer. We think that a central list of forms might be helpful, particularly if titles were clearer, but we are concerned that there is a risk that a non-expert user could use the central list to select an incorrect form as they would not be guided by the location of the form relative to the Rules and guidance. We think that, on balance, a better solution is to link the forms directly from the relevant section of the Rules and the guidance.

10.99 The issue of whether more application forms should be created, for example for applications outside the Rules, is outside the scope of our project. But we suggest that it increases the complexity of the system as a whole if there is no clear and accessible form for a particular type of application.

10.100 Respondents also raised concerns about the frequency with which forms are updated and replaced. They thought that this increased the risk that an applicant will make a mistake. We also suggest that consideration be given to updating the forms in accordance with a timetable running alongside that for changes to Rules and guidance.

10.101 We also suggest that consideration be given to establishing an archive of former versions of forms.

10.102 Respondents also commented on the need to consult with users to gain insight into their experience of using forms and to “stress test” the way in which Rules, guidance and application forms interact. We recommend that consideration be given to user testing of the forms and their interaction with Rules and guidance.

Recommendation 38.

10.103 We recommend that the Home Office should give consideration to the following steps with a view to improving the accessibility of application forms:

(1) a review of the titles of application forms with a view to making them clear and informative;

(2) clear and non-technical guidance on selecting and completing application forms, which is distinguished from policy guidance;

(3) links from the Immigration Rules and guidance to the appropriate application form;

(4) a review of the coverage of application forms, with a view to providing an appropriate form for any application;

(5) a timetable for the updating of applications forms, to coincide with major Rule changes;

(6) an archive of superseded application forms; and

(7) user testing of application forms and of the interaction between forms, Rules and guidance.

Chapter 11: Accessibility and online systems

11.1 Our consultation paper acknowledged that the concept of the Immigration Rules under the Immigration Act 1971, namely a single set of hard copy rules, no longer reflects the reality that the Rules are often, if not primarily, accessed online.[247] It considered the opportunities presented by online presentation of the Rules.[248] The current presentation which requires users to scroll through a sequence of provisions could be developed so as to simplify navigation and access. For example, an initial "route map" of the Rules could guide users to the Parts relevant to them. Moreover, the Rules could be displayed with smaller portions on the screen, accompanied by hyperlinks or sidebars to navigate between requirements.[249] Hyperlinks could also be used to take users to definitions applicable to the category in which they are applying.[250] Alternatively, a hover box displaying a definition where it occurs in the text could remove the need to cross-refer entirely.[251] Before we consider these opportunities further, it is important to recognise that measures to increase the accessibility of the Rules through their online presentation are not a substitute for simplification.

11.2 A feature of presenting the Rules online is that, with imaginative use of how the Rules are displayed, their overall length is less of an accessibility issue. Our consultation paper reflected on how the different approaches to restructuring the Rules might be affected by improvements in their online presentation. We asked consultees at Consultation Question 51 whether they thought that a single set of Rules adopting a common provisions approach could work as effectively as the booklet approach through the use of hyperlinks.

11.3 We also looked at how the Rules and guidance could be linked together more effectively, again to ease navigation and improve accessibility.[252] We looked at the possibility of combining the Rules and guidance into one interface and making better use of hyperlinks or sidebars. We asked consultees at Consultation Question 52 for their views on whether and how guidance can be more clearly linked to the relevant Rules.

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247 See Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 14.

248 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 14.3 to 14.7.

249 A hyperlink is a piece of text which, when clicked upon, takes the user (commonly) to another document. A sidebar is a column, placed on the right or left-hand side of a computer screen, containing a particular category of information. A common example in an email system is a column displaying the contents of the user's inbox while the main part of the screen displays the text of a selected email. Sidebars can also be used to contain lists of hyperlinks.

250 The Home Office introduced hyperlinks in Appendix W which direct users to defined terms in Annex 1. This development also works on mobile phones. The hyperlink does not open a new page. The defined terms are underlined and in a different colour (blue) to the rest of the text.

251 A hover box is a box containing text which appears while the cursor is placed over particular words on a computer screen.

252 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 14.8 to 14.9.

11.4 Our paper also looked at the opportunities offered by new technology to simplify the process of application for users.[253] Online application forms now have intuitive in-built functions intended to channel applicants to questions relevant to their circumstances. A new streamlined application process came into effect in early 2019, incorporating in-person appointment centres which upload documentation. We asked consultees at Consultation Question 53 about their experience of the online application process and in-person appointment system.

11.5 In the longer term, our consultation paper suggested that it may be possible to use data analysis and insights to create "smart forms", in the sense of an interactive tool which sequences the exact set of Rules which apply to an applicant within a particular route.[254] Answers to a series of drop-down questions would draw together the relevant Rules and guidance into an individual booklet.

11.6 We also suggested that it may be possible to develop a more flexible system that enables easier interaction where information or evidence is missing from an application and alerts applicants to defective applications at the submission stage.[255] This can save time and costs both for the applicant and the decision-maker.

11.7 Consultation Question 54 asked consultees if they agreed with the areas we identified as the principal ways in which future technology can be used to help simplify the Rules, and asked if there were other possibilities we had not considered.

11.8 This chapter considers consultees' views on all these issues, and discusses the way in which technology and legal design can amplify the benefits offered by the simplification project.

THE EFFECT OF HYPERLINKS ON THE CHOICE OF STRUCTURE FOR THE RULES

11.9 We asked consultees at Consultation Question 51 whether they thought that, through hyperlinks, a common provisions approach to the presentation of the Rules could function as effectively as the booklet approach. Of the 13 respondents to this question, five agreed outright. Seven respondents were in broad agreement and one disagreed.

11.10 The respondent who disagreed, Robert Parkin (a barrister at 10 King's Bench Walk ("10 KBW")), reminded us of the need to have access to a coherent paper version of the Rules:[256]

> 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.

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253 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 14.11 to 14.15.

254 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.17.

255 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.16 to 14.21.

256 This is also discussed at para 7.104 above, when we observed that the version of the Immigration Rules which appears on gov.uk is in a format which is not easy to print.

11.11 Those respondents who were in broad agreement supported the use of hyperlinks to navigate the Rules. They nevertheless expressed some qualifications which are discussed below.

Effective operation of hyperlinks

11.12 Six of the respondents identified that it would be essential to ensure that the hyperlinks operated effectively. The UK Council for International Student Affairs ("UKCISA") suggested "regular checks" to ensure that the hyperlinks function and direct users to the right place. Such regular checks could also address Islington Law Centre's concern that any changes made to a website, or to the relevant document, might render the hyperlinks "unusable".

11.13 The First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges insisted that the hyperlinks should "take an applicant to the relevant material and not merely to a document in which such material appears". A potential risk was identified by the Upper Tribunal (Immigration and Asylum Chamber) judges who believed that users might regard the hyperlinks as directing them to the only relevant provisions when this was not the case. Others suggested that the hyperlinks should open the relevant material in a new tab to ensure that users do not get lost, echoing a suggestion in our proposed drafting guide.[257] As noted by Islington Law Centre:

> Any hyperlink needs to open as a new tab in a browser to prevent people losing where they are in the Rules as it seems likely there may be a number of tabs open at once as someone seeks to navigate across the Rules, Definitions, Guidance and Forms.

Index page

11.14 Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response) and the Bar Council believed that, through hyperlinks, the common provisions approach could function as effectively as the booklet approach. Nevertheless, they stressed the importance of a "separate index page" or "centralised landing page" for each category of leave which provides links to all sections of the Rules relevant to that category.

Discussion

11.15 The majority of respondents agreed that a single set of Rules might function as well as booklets through the use of hyperlinks, subject to concerns about their effective operation. The links need to take the user directly to the relevant material and to open in a new tab. We agree with the suggestions made. It will be important to ensure that these practical considerations are taken into account and regularly tested with users. What is required is the creation of a hypertext document.[258] While this discussion has considered the use of hyperlinks, our recommendation would extend equally to other

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257 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 10.54, at para 16. This proposal is maintained at para 14 of our recommended drafting guide at appendix 6 to this report.

258 A hypertext document contains links referring to other parts of the document, or to other external documents. It does not have to be read serially; the fragments of information can be accessed directly via the links contained in the document. The links embedded in a hypertext document are hyperlinks.

more sophisticated techniques for improving a digital interface which may be developed in the future.

11.16 We agree that a clear, user-friendly approach to indexing in order to connect all sections relevant to a category of leave, and techniques for distinguishing categories of leave, are necessary. We suggest that recent thinking on legal design as a means of making legal services more user-focussed could provide helpful material to assist with directing users to different routes of application.[259]

11.17 In chapter 6 we recommended the laying in Parliament of a single set of Rules, coupled with editorially produced booklets, pending the development of technology that enables a single set of Rules to function as effectively online as booklets. Consultees' confidence that that could be achieved through hyperlinks leads us to recommend pursuing technological solutions of that sort.

Recommendation 39.

11.18 We recommend that the Home Office should work towards producing a single set of Immigration Rules that function as effectively online as booklets through the use of hyperlinks. To the extent that booklets are produced, they should also include hyperlinks as an aid to navigation.

INTERFACE BETWEEN THE RULES AND GUIDANCE

11.19 Our consultation paper suggested that better coordination between the Rules and guidance could assist users to access all material relevant to their applications.[260] Consultees were asked at Consultation Question 52 whether and how guidance could be more clearly linked to the relevant Rules. There were 16 respondents to this question. Overall, respondents believed that guidance should be accessible from the Rules and provided suggestions on how this can be achieved effectively. One respondent, Carter Thomas Solicitors (Respondent B from the Immigration Law Practitioners' Association ("ILPA")) expressed the opinion that the guidance and Rules are quite well linked already, but suggested that guidance would benefit from being simpler and more condensed.[261]

Impact of the approach taken to the structure of the Rules

11.20 A few respondents argued that the scope for linking the Rules and guidance depends on whether a single set of Rules or booklets are produced. The Bar Council

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259 See, for example, the work of the Legal Design Lab at Stanford University, which seeks to bring together law, technology and design in order to build more human-centred legal products and services. These approaches emphasise the use of visual design to transform how legal information is presented to lay people, and set out principles for effective visuals which combine discrete sections of text with strategic accents such as colour and bold type. See http://www.legaltechdesign.com/ (last visited on 23 September 2019).

260 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.9.

261 For more detail on this point, and the need to ensure consistency between Rules and guidance, see the discussion on reducing complexity in guidance in ch 10 of this report.

commented that if a single set of Rules is displayed in smaller portions on the screen, each individual Rule should provide links to potentially relevant guidance. On the other hand, if booklets are produced, it might be sufficient to flag relevant guidance in the contents page or as part of the overview. They thought nevertheless that the ability to link to relevant guidance while viewing any given Rule relevant to an application under a particular category was still likely to assist in simplifying the process.

11.21 The Law Society of England and Wales believed that guidance was "more necessary" with a single set of Rules. They questioned the need for guidance to explain the Rules in simpler terms if booklets are produced which are designed to be easier for applicants to read. They highlighted that guidance would still exist for caseworkers and to address some practical considerations for applicants, such as the step-by-step process for making an application, where discretion might apply, and the process for providing documents.

Approaches to linking

11.22 Our consultation paper proposed that the Rules and guidance could be combined into one interface using the existing gov.uk platform and making better use of hyperlinks or sidebars.[262]

11.23 A majority of respondents thought it beneficial to use hyperlinks to assist applicants to access both the Rules and guidance relevant to their application. Some respondents suggested that the hyperlinks should take users from the Rules to the guidance while others said that the guidance should also contain hyperlinks to the Rules. Respondents provided some suggestions on how to ensure hyperlinks provide effective coordination between the Rules and guidance. The Bar Council maintained that the linked guidance should be presented in html format so as to be more user-friendly:

> Whilst guidance documents should be available in pdf format, we would suggest that the default format when linking to guidance from the Rules should be html. This will avoid users having to switch between different programmes when considering a Rule alongside relevant guidance, which could cause particular difficulties when using a mobile device.

11.24 The Bar Council also suggested that the link should be to the specifically relevant portions of the guidance, not the entire guidance document. They nevertheless thought that this suggestion would only be practicable if the guidance was drafted with both precision and discipline:

> If guidance relevant to a particular provision spans multiple paragraphs located at various points in a lengthy guidance document (or multiple documents), this will not be practicable.

11.25 The Faculty of Advocates and Robert Parkin (10 KBW) provided examples of useful hyperlink facilities. The Faculty of Advocates said that the Immigration Directorate Instructions and Asylum Policy Instructions contain hyperlinks "internally within the guidance and externally to the Rules". Robert Parkin observed that the Bar Standards

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262 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.9.

Board, the Solicitors Regulation Authority, and Her Majesty's Revenue and Customs ("HMRC") all provide hyperlinks at the foot of individual pages on their websites.

Additional mechanisms

11.26 Rather than directing the user from one source to another as in the case of hyperlinks, some respondents identified mechanisms to allow the Rules and relevant guidance to be displayed alongside each other. Destination for Education proposed the use of hover boxes, which we had identified as a user-friendly method for displaying definitions over text.[263] Robert Parkin (10 KBW) mentioned that the Bar Standards Board, the Solicitors Regulation Authority, and HMRC all use hover boxes, albeit for definitions. The Bar Council suggested that a link to the relevant guidance could be displayed alongside the Rules at the foot of the webpage or in a sidebar.

11.27 A distinct suggestion was advanced by the Law Society of Scotland who thought that it might be useful to display the relevant guidance, including a brief overview of its purpose, as an appendix to the relevant section of the Rules. A hyperlink could then direct the user from the relevant Part of the Rules to the appendix.

Discussion

11.28 Overall, respondents believed that guidance should be more directly accessible from the Rules. A few of the respondents argued that the scope for linking the Rules and guidance is dependent on whether a single set of Rules or booklets are produced. They made a range of useful suggestions as to how to make hyperlinks with guidance as effective as possible. These supplement the suggestions already made in the section above for improving the operation of hyperlinks within the Rules.

11.29 We agree that the use of hyperlinks to link guidance to the Rules would make a significant contribution to the accessibility of the system as a whole, if designed in conjunction with the recommendations made in chapter 10 for improving the presentation and publication of guidance.[264] We hope that the additional suggestions made by respondents as to the effective operation of the links will assist in making them as user-friendly as possible.

Recommendation 40.

11.30 We recommend the use of hyperlinks to link guidance to the Immigration Rules in the online presentation of the Rules. Where Rules are produced in booklet form, these should provide links to the guidance relevant to the immigration category dealt with by the booklet.

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263 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 8.49 and 14.5.

264 See paras 10.60 to 10.67 above.

ONLINE APPLICATION FORMS

11.31 Consultation Question 53 asked consultees about the ways in which the online application process and in-person appointment system are an improvement on the paper application system, and to identify any areas where the system is problematic.[265] There were many responses to this question, 34 in total, reflecting the urgency of concerns arising from the roll-out of a new system. Some of these relate to systemic matters and others to more immediate teething problems. In this section we highlight the main themes raised by respondents. We make only one recommendation arising out of this discussion but hope that the following summary of the main themes raised in responses (the detail of which is set out in the consultation analysis table for this question)[266] will be of value to the Home Office in reviewing the design of the new system.

Benefits of the online application system

11.32 A number of respondents, including ILPA and the Law Society of England and Wales, recognised that, where there were no technical issues and the system worked as intended, the online application system offered the potential to work in a simpler and more efficient way. In particular, the ability to upload copy documents rather than collating originals was considered a vast improvement.

11.33 UKCISA observed that when student applications moved from a paper to an online process in 2014, they immediately saw a reduction in the number of applications rejected as invalid for non-payment of a fee or failure to complete mandatory sections. Coventry University London International Student Advice reported that students found the application forms easier to understand and to complete. They liked directional tools such as the ? symbol which applicants could use to clarify a question on the form. Migrant Voice remarked on the benefits of allowing multiple people to access a form as long as they were in possession of the username and password.

Problematic aspects of the system

Digital exclusion

11.34 Many respondents expressed concerns that the Home Office's decision to make online applications mandatory is disadvantaging those who are digitally excluded.[267] This argument was summarised by Migrant Voice:

> Many of the forms are online and while this is easier for some people to access, there are some individuals who have no online access and some who may struggle

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265 For an analysis of the legal and practical aspects of the online application system, see J Kingham, "'Computer says no': facing up to the full implications of a digitised immigration system" (2019) Free Movement blog, available at https://www.freemovement.org.uk/computer-says-no-digitised-immigration-system/ (last visited 1 November 2019).

266 See the consultation analysis table for Consultation Question 53.

267 Recent research by the Law Society, published since our consultation, identifies the extent of barriers to effective internet use in the UK due to inadequate connectivity or lack of digital literacy: The Law Society, *Technology, Access to Justice and the Rule of Law: Is technology the key to unlocking access to justice innovation*? (September 2019) at pp 14 to 15: available at https://www.lawsociety.org.uk/support-services/research-trends/technology-access-to-justice-rule-of-law-report/ (last visited 17 September 2019).

with computers or new technology thus cannot access forms and end up being unintentionally marginalised or discriminated against.

11.35 CCLC and Let Us Learn (joint response) also expressed their concerns surrounding digital exclusion, explaining that a majority of their client group do not have regular access to computers. This presents "obvious practical barriers to accessibility" when individuals are expected to complete their applications online without the support of a solicitor. Although the Home Office does provide support for digital access, the response identified a limitation:

> Although support for digital access for Home Office applicants is offered through a third party called "We Are Digital"[268], there is some cost incurred in accessing their helpline, and there is no evidence that any support can be provided for applicants who are both digitally excluded and who do not speak English. Considering the demographics of the potential users of this service, no obvious or advertised language support seems to be a serious omission.

11.36 Islington Law Centre also feared that a move to an online system could present access barriers to those who do not have access to a computer. They did not believe that it would be an adequate response to suggest that applicants could use public computers in local libraries:

> We would resist a shift to a wholly online system. Many of our clients have very limited or no access to computers and some come into our office in order to be able to fill in their forms. Suggesting applicants can use public computers in local libraries or other public buildings is not an adequate response. Where library computers are available, they are subject to a booking system often limiting that person's access to an hour at a time. On average, we have found that filling in an online form can take between 3 and 6 hours. Asking vulnerable people to fill in personal forms in a public space may also give rise to security risks.

11.37 LUL 8 and Arkam, a Let Us Learn campaigner, thought that the online application process might be particularly challenging for older applicants. Research undertaken by the Migration Observatory at the University of Oxford relied on data from the Labour Force Survey (2017) to show that one of the groups most likely to say that they have not used the internet over the last three months were older people.[269] Arkam believed that a visual representation of how to apply online might be beneficial for older applicants:

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268 "We are Digital" is one of the third-party providers of the Assisted Digital service provided by the Home Office. See https://www.gov.uk/government/collections/assisted-digital-service-uk-visas-and-immigration and para 11.40 below.

269 https://migrationobservatory.ox.ac.uk/resources/commentaries/internet-use-by-country-of-birth/ (last visited 23 September 2019). Migration Observatory also directed us in their consultation response to further research to show that digital exclusion is particularly prevalent among older people: Low Incomes Tax Reform Group, *Digital inclusion* (2012) p 7, at https://www.litrg.org.uk/sites/default/files/digital_exclusion_-_litrg_report.pdf (last visited 23 September 2019). For the full Migration Observatory consultation response, see the consultation analysis table for Consultation Question 53. For a recent account of the difficulties experienced by an older person in completing an online EU settlement application, see https://www.theguardian.com/politics/2019/oct/08/ive-been-here-50-years-the-eu-citizens-struggling-for-the-right-to-stay-in-britain (last visited 10 October 2019).

> I feel for the older generation because the online application is a huge change and it would be good to have a visual presentation of how to use the system. For example, video/ YouTube explanation of how to use the system would be great. The system is simple for young people like me because we're used to navigating computers, but my dad and his friends are not.

11.38 ILPA and Carter Thomas Solicitors (Respondent B from ILPA) also suggested that videos showing applicants how to complete applications would be helpful.

11.39 In addition to potential challenges faced by the older generation, the Incorporated Society of Musicians identified the risk of mandatory online applications creating particular difficulties for individuals applying from countries where "technology and internet access is not as prevalent as in the UK".

Mechanisms to avoid exclusion

11.40 We understand from the Home Office that they take the issue of digital exclusion very seriously. They have highlighted to us that they provide support for applicants in the UK who have difficulty using online services.[270] The Assisted Digital service offers support through a number of mediums: telephone support; face-to-face support at a library; and face-to-face support at home.

11.41 In relation to the use of videos, the EU settlement scheme provides some useful recent innovations. The Home Office has created a number of videos to support applicants. One of these includes a step-by-step guide on "how to use the EU Exit ID". Accessing these videos might, however, be difficult for those who do not have regular access to a computer or internet, and they have other drawbacks.[271] The Home Office has also relied on other methods to provide support to EU citizen applicants. For example, they have created an "employer toolkit" which contains a briefing pack, flowcharts, factsheets, leaflets, and posters.

11.42 We agree that it is important that systems support those who are unable to use online services, and who may have other vulnerabilities such as age or inability to speak English.

Practical issues raised by online application forms

11.43 In addition to wider accessibility concerns surrounding digital exclusion, respondents raised a number of practical concerns in relation to current online application forms. We have already identified that applicants sometimes struggle to locate the correct application form because of, for example, confusing titles, and have addressed other

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270 Available at https://www.gov.uk/government/collections/assisted-digital-service-uk-visas-and-immigration (last visited 23 September 2019). There is also specific help for applicants under the EU settlement scheme: see https://www.gov.uk/contact-ukvi-inside-outside-uk/y/inside-the-uk/eu-settlement-scheme-settled-and-pre-settled-status (last visited 11 October 2019).

271 At a meeting with the Government Digital Service, UK Visas and Immigration Customer Insight, and Home Office Digital Communications on 4 June 2019, we were told that the use of videos as a tool to assist applicants is problematic due to accessibility issues, and because they are difficult to amend, do not come up well on internet searches, and users report that they find them frustrating because it is not possible to scan them to find the part they need.

aspects of the application system which may impede accessibility.[272] The themes addressed in the following sections relate specifically to practical problems with the online system.

11.44 Even before accessing the forms, LUL 3 thought that the complexity of the gov.uk platform adds to the user's difficulties:

> When you try to navigate the gov.uk page, there are so many acronyms and codes, and so many things you have to get through to get to the right application. It would be nice if there was a tick list to narrow this down and get to something that applies to you.

Inability to view forms before completion

11.45 Before the mandatory use of online forms, application forms could be downloaded as PDF files which allowed applicants to view and print forms in their complete version. Online application forms now have intuitive in-built functions intended to channel applicants to different questions based on the answers they provide. Users are therefore unable to download application forms to view all questions from the outset.

11.46 A number of respondents believed that the inability to download forms to view all questions before starting to complete the form creates two main difficulties. First, they argued that it creates an uncertain and stressful situation for applicants. CCLC and Let Us Learn (joint response) said that applicants are "unable to think about the questions they might have in advance". Secondly, respondents told us that the inability to view all questions creates difficulties when applicants seek legal advice. Islington Law Centre provided further insight:

> Currently, we can neither print off nor download the forms, which gives us no opportunity to share and discuss them with the client before we have to start filling them in. In our experience, this is likely to increase the amount of time we have to spend with clients to complete the form. We strongly recommend that changes. Other government online systems, including HM Revenue and Customs' tax forms and guidance, provide both downloadable versions of the relevant forms as well as the option to complete the form online, allowing people time to prepare their online response before having to fill it in.

11.47 The Bar Council presented the same argument, explaining that the inability to download online forms made it "disproportionately expensive to work through an entire application form" when clients simply want advice on one part of the application. Goldsmith Chambers identified an additional benefit of having downloadable forms for applicants seeking advice, namely enabling advisers to provide support to applicants without having to rely on online access. CCLC and Let Us Learn added that they are no longer able to go through the forms with individuals at drop-in services because of the lack of computers there.

The need for "dummy answers"

11.48 Some respondents criticised the need for applicants to provide answers to all questions on online forms before being able to proceed through the application.

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[272] See paras 10.78 to 10.103 above.

Respondents told us of the practice of inserting some form of answer to a question, simply in order to be able to progress to the next question; they referred to these as "dummy answers". The Law Society of England and Wales also maintained that applicants are sometimes asked questions to which no accurate answer can be given in their case and are required to provide incorrect answers.

11.49 LUL 7 found paper forms easier because of the ability to skip inapplicable questions and simply attach a cover letter to explain why. UKCISA added that the need for applicants to provide answers to questions which are not fully accurate or relevant to their case can be "extremely anxiety-inducing". In addition to having to give "placeholder" answers, the inability to progress to the next stage of the form might also lead applicants to "give up". This was stressed by LUL 6:

> The online form does not let you go to the next step if you do not put in the right or relevant information. Also, every time you go to the next stage, the system reminds you that everything must be accurate. And some things aren't straightforward, such as knowing whether the head of the household is the landlord or an individual who resides in the household. I had to go back to change things that were not completely correct before I could carry on. Some people might just start completing the form and say, "I don't have this information, I can't go forward" so they give up at that point if they don't have a caseworker or a lawyer. It is a good thing that there is no time limit on the form once you have started completing it.

11.50 Migrant Voice thought that the inputting of "dummy answers" to proceed to the next question could increase the number of "unrectified errors". The Law Society of England and Wales believed that there should be more use of free text boxes on forms to allow applicants to address reasons for any inability to answer a question accurately:

> What is needed more than anything are free text boxes on the form to allow legal advisors and applicants to provide further case specific information that can address the inconsistencies and inaccuracies in the form … As we are aware that the document scanning process does not sufficiently flag cover letters which would normally clarify issues, we are concerned about the ability of applicants to accurately present their situation via the on-line application system and therefore avoid adverse credibility issues against applicants that the forms encourage.

11.51 CCLC and Let Us Learn (joint response) also supported free text boxes in order to protect against adverse credibility findings. Having a free text box would allow applicants to explain, for example, that they were unable to remember an exact date and were providing a best estimate instead. This view was supported by UKCISA who argued that every online form should have a free text box to allow applicants to "fully explain why they have answered questions in the way they have and not later be accused of having lied".

Misleading information

11.52 Another criticism of the online application system concerned misleading and/or incorrect statements which could prejudice an applicant's chances of a successful application. CCLC and Let Us Learn (joint response) identified a number of statements on the landing page for the online fee waiver application which they

considered misleading.[273] These included a statement that applicants must use the paper form for their leave to remain application if they were making their fee waiver request using the paper form (at Appendix 1). They objected that "the paper form (Appendix 1) is no longer available, and it is not possible to apply for leave to remain using a paper form".

11.53 Some respondents found the online forms misleading because they do not reflect the Rules and/or guidance. The Law Society of Scotland referred to occasions when the list of documents generated by online forms has not reflected the Rules or guidance, creating further uncertainty for applicants.

Technical issues

11.54 Some respondents commented on technical issues encountered by applicants and advisers when completing the online application forms. CCLC and Let Us Learn (joint response) reported that some of the online forms are overly sensitive to additional spaces, giving the example of the need to input a fee waiver code into an application. If additional spaces are inadvertently entered, the online system will not accept the code. They commented:

> This is the kind of technical glitch that someone who is not particularly digitally literate will really struggle to overcome – especially when working against tight deadlines and at risk of becoming undocumented.

Communication with the Home Office

11.55 Many respondents raised the difficulties they had experienced in contacting the Home Office about their applications. LUL 1 reported spending about two weeks calling the Home Office about her application for a biometric residence permit, explaining "if you have to call the Home Office for help about anything, you have to call about 10 different numbers". She said that being redirected to several different contacts when making an enquiry made it "feel like a game of pass the parcel". LUL 5 added that the Home Office is unable to give advice on individual cases and she felt her "voice was heard louder and quicker" by going to her MP.

11.56 ILPA suggested that there should be a "quick point of contact within the Home Office to deal with technical issues" related to online forms. They explained the importance of having such help readily available:

> If there are technical issues and no other method of submitting an application, this can cause serious issues if an applicant needs to submit that day due to their leave expiring. If technical issues cannot easily be resolved, this could result in out of time applications.

11.57 The FTT(IAC) judges suggested that this support could be provided "in the form of FAQs and a live help line to assist applicants". During a meeting with the UK Visas and Immigration customer insight team, we were told that a web chat was trialled a

[273] See the consultation analysis table for Consultation Question 53.

couple of years ago but that more preparatory work and testing is required to ensure that this would be practicable in the long run.[274]

11.58 The Home Office pointed out to us that there is a "contact us" link at the bottom of all the pages of an application which allows applicants to receive support on technical problems when applying online.[275] Applicants can send the Home Office an email describing their problem. Applicants applying from outside the UK must pay a charge of £5.48 to do so.[276]

11.59 The Law Society of Scotland noted the absence, after an application is made, of "points of contact for contacting caseworkers to provide subsequent documentation or to clarify aspects of an application".

11.60 A further complaint made by respondents related to inadequate or delayed confirmations of payment. LUL 1 had not realised that a communication received from the Home Office was confirmation of payment for a biometric card, saying "it wasn't really a receipt". LUL 4 said that she did not receive confirmation from the Home Office for weeks after submitting her leave application. LUL 7 complained of a relative having to screen shot the relevant page and call the Home Office to ask if they had her money. LUL 6 explained that this is particularly important, as proof that an application has been made and is being considered is needed in a wide range of situations; for example, to show to employers or universities. Delay in receiving it can cause significant problems.

11.61 Respondents argued that an online application system should make it fairly straightforward for the Home Office to send automatic confirmations. LUL 4 said that "an online system could be great if the acknowledgement was instant, even before they took my money". LUL 9 explained that an automatic acknowledgement already applies for the EU settlement scheme, but believed this discriminated against other routes:

> The EU settlement scheme works so much more smoothly. They get an automatic acknowledgement as soon as they apply. It shows that the system discriminates against people of colour.

In-person appointment system: document upload

11.62 As part of the new streamlined immigration application process, applicants can attend in-person appointments at the new UK Visa and Citizenship Application Service ("UKVCAS") service points, operated by a private-sector company, Sopra Steria. Core service centres are located in six major cities and offer both free of charge appointments and out-of-hours appointments for which a fee is payable. In addition to core service points, applicants can pay a fee to use enhanced service centres located

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274 Meeting with the Government Digital Service, UK Visas and Immigration Customer Insight, and Home Office Digital Communications on 4 June 2019.

275 The "contact us" link points here: https://visas-immigration.service.gov.uk/contactUs (last visited 23 September 2019) which leads here: https://www.gov.uk/contact-ukvi-inside-outside-uk (last visited 23 September 2019).

276 Applicants can also telephone the Home Office. If calling from outside the UK, the designated telephone number charges £1.37 per minute on top of standard network charges.

throughout the country which offer extra services, including document checking in advance of the appointment. For a higher fee, applicants can attend a premium lounge for an upgraded service.[277]

11.63 At the appointment, applicants can enrol their biometric information, either at a self-service kiosk or a counter. Applicants can also scan and upload their supporting documents either before or during the appointment. There is also an option for applicants to select a document checking service if they would like the team to check that they have uploaded their documents correctly and that the documents meet the required quality standards.

11.64 Consultees identified a number of benefits stemming from the process of scanning personal documents at the appointment. UKCISA believed that this will result in fewer documents being lost by the Home Office. Migrant Voice added that applicants will now be able to retain their documents after the interview and therefore use them for other purposes, such as identity verification. LUL 10 noted that the system also works well if an applicant has not brought all the necessary documents to the in-person appointment centre, as it is possible to upload them later. [278]

11.65 Respondents nevertheless raised a number of concerns in relation to the document upload service. For example, Nashit Rahman (Taj Solicitors) said that Sopra Steria had failed to send the scanned documents to the Home Office "many times". LUL 8 added that the appointment centres can sometimes mislay documentation, referring to an occasion when a passport went missing for three hours. The Law Society of England and Wales mentioned that some applicants had been unable to upload large volumes of evidence in advance of their appointment, as the system simply timed out part way through uploading the documents. The Society also criticised the limited capacity for applicants to check the documents once they have been uploaded to this platform:[279]

> A worrying development in the new on-line application system worth mentioning is that applicants, once they have uploaded documents on the application website, have limited, if not no ability at all to check the uploaded version is intact. With the lack of means to communicate with the Home Office, and the fact that much of the scanning could be done by its third-party partner agency (Sopra Steria, VFS, TLS) who could easily introduce errors (for example by refusing to scan each page of a passport which has actually happened to two clients in the Sopra Steria run London premium lounge) the risk to applicants against having their application fairly assessed on the documents they believe they have submitted is substantial.

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277 See UKVCAS website at https://www.ukvcas.co.uk/home-internal for more information on the service centres (last visited 3 September 2019).

278 If applicants are missing required documents when they attend the service point, they are able to upload these to their account on the UKVCAS website until 10pm on the same day. After this point, the application will be sent to UK Visas and Immigration as it is.

279 At a meeting with the Croydon UKCVAS core service point in May 2019, we were told that applicants can now view the uploads for a short while.

Booking appointments

11.66 Respondents discussed the availability and cost of appointments. Arkam, a Let Us Learn campaigner, explained that attending an appointment can be difficult for applicants as they are required to take a day off work. CCLC and Let Us Learn (joint response) added that children often have to take a day off school to attend an appointment.

11.67 Booking appointments can also be difficult for applicants depending on their location. Appointments can be incredibly expensive unless applicants are able to travel to a "core centre" and this still requires applicants to pay for travel. Michelle, a Let Us Learn campaigner, discussed the challenges her mother faced when having to travel to an appointment centre:

> My mum lives in Portsmouth and she had to go all the way to Cardiff. Her application is complicated and she has anxiety therefore she couldn't go alone – she was so terrified she would make a mistake. Because of the complication of her application she then had to pay extra money for her lawyer to go with her all the way to Cardiff and for them to stay there because it's so far. It was also hard booking a date for the centre as some are more booked up than others forcing people to have to go really far and spend even more money on top of their fees.

11.68 UKCISA also commented on the lack of appointment centres in some towns and cities where there are many international students, including Edinburgh and Oxford:

> Some Tier 4 sponsors feel that they are being forced into paying thousands of pounds to have pop-up services so that their students do not waste time and money travelling to attend appointments when they should be studying.

11.69 An additional university-specific concern was raised by the University of York Immigration Advice Team. The lack of core centres, and the limited number of appointments, can be a particular concern during the surge period in September and October.[280]

11.70 Respondents also criticised the difficulties applicants face when attempting to book a free appointment. Although core service points offer free appointments, Carter Thomas Solicitors (Respondent B from ILPA) explained that "applicants are often left with little choice but to pay" because of the lack of available free appointments at these centres. Migrant Voice and CCLC and Let Us Learn (joint response) criticised the appointment booking costs as these must be paid "above and beyond" extremely high Home Office application fees. Carter Thomas Solicitors added that applicants are already required to pay "a biometric enrolment fee and should not therefore be charged an additional fee to attend an appointment".

11.71 Respondents raised other difficulties with booking appointments. The Law Society of England and Wales stated that technical issues sometimes prevent applicants from progressing through the online booking process. UKCISA added that in some cases,

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[280] When we visited the core service centre in Croydon, we were told that service centres will make special provisions for this surge period. Some potential options include extending opening hours or opening on a Sunday.

applicants were unable to book appointments because the Home Office failed to send them a security code following payment of their application, and the helpline was not answered for many days. UKCISA also criticised the online booking system for requiring applicants to "choose the type of service (and level of fee) before they can see the availability of appointments in different locations".

11.72 An additional criticism related to the £2.50 per minute cost of contacting the appointment centre's support line.[281] CCLC and Let Us Learn (joint response) argued that "in practice, this means that many applicants simply cannot speak to anyone at the Home Office or even via the designated third-party supplier if there are problems". LUL 1 noted that "a lot of people can't afford lawyers on top of everything else. But if you have to pay £2.50 per minute for a helpline, you may as well get a lawyer".

Discussion

11.73 Respondents identified benefits stemming from the online application and in-person appointment system, particularly the ability for applicants to retain their documents after the appointment. Nevertheless, there were reservations.

11.74 Some of these related to more immediate technical issues. It appears that these could be eased with improved, freely available points of contact within the Home Office. As a long-term objective, we agree with the suggestion that a web chat facility could be the most effective and accessible approach.[282]

11.75 Some of the issues raised were more systemic, relating to digital exclusion, the design of intuitive forms, and the operation of the in-person appointment system.

11.76 We are persuaded that the inability to view all questions before completing an application form, or to print a blank application form, creates difficulties. We also agree that the addition of free text boxes can mitigate the problem of online forms not catering for the particular circumstances of an applicant.

11.77 We appreciate the difficulty that the online form will channel the applicant to relevant questions based on the answers provided, with the result that a printable version of the entire blank form would contain more questions than any applicant will be required to answer. Nevertheless, we recommend that consideration should be given to designing a function to provide the applicant with an overview of the form prior to completion. This could include the creation of a printable version of the blank application form, or a facility to navigate through the form online in a version which the system would not allow to be submitted. Appropriate wording on the form could indicate where the need to answer a question depended on the terms of a previous answer.

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281 See https://www.ukvcas.co.uk/contact-us (last visited 6 November 2019). This equates to £150 per hour.

282 This is a service to provide instant communication with website visitors. HMCTS has recently agreed a contract with an IT company to make it easier for the public to contact courts for case updates and enquiries. The service will include a live chat facility. See https://www.lawgazette.co.uk/news/hmcts-strikes-16m-deal-with-tech-company/5101643.article (last visited 3 October 2019).

11.78 We also suggest that consideration be given to greater use of free text boxes to allow applicants to explain where their circumstances do not allow them to provide an accurate answer to a question.

Recommendation 41.

11.79 We recommend that provision should be made for a facility to view an application form prior to completion, either through provision for a printable version of the form or a facility to navigate through the form online in a version which the system would not allow to be submitted. The wording on this version of the form should indicate where the need to answer a question depends on the terms of a previous answer.

FUTURE TECHNOLOGY

11.80 Consultation Question 54 asked consultees if they agreed with the areas we identified as the principal ways in which modern technology could be used to help simplify the Rules in the future. These included the suggestion of a smarter digital platform which could eventually merge the applications process so that it channels applicants into the correct provisions, directs the reader into a "mini booklet" providing the relevant Rules and guidance, prompts the provision of the necessary evidence, and alerts the applicant if there is something missing.[283]

11.81 Of the 19 respondents to this question, 12 agreed with our analysis of the principal ways in which future technology could help simplify the Rules. Seven respondents did not agree or disagree with our analysis. In many cases it was hard to determine from their response whether they agreed with the areas we identified in our consultation paper. Many respondents responded to the latter part of the Consultation Question which asked for other possible approaches which we had not considered. ILPA, for example, suggested that where possible, the Rules, guidance and application forms should be made "mobile accessible and device agnostic".

Signposting alternative application routes

11.82 Our consultation paper pointed out that "smart forms" could signpost alternative application routes.[284] The Joint Council for the Welfare of Immigrants ("JCWI") and LUL 9 were in favour of an online application portal which informed applicants that other routes might be available to them. JCWI were "extremely concerned" with the use of tools channelling applicants to particular routes or questions:

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283 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, paras 14.16 to 14.21.

284 Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, para 14.12; See the findings of the National Audit Office in its report on the Windrush situation: "The Department should develop a Department-wide strategy to support potentially vulnerable customers across the immigration system as a whole. Specific actions might include allowing one claim to be considered under multiple application routes, as well as simplifying forms and guidance", Report on the Handling of the Windrush situation (2017-2019) HC 1622, available at https://www.nao.org.uk/wp-content/uploads/2018/12/Handling-of-the-Windrush-situation-1.pdf at p 13 (last visited 3 September 2019).

> A form that is too tailored may prevent an applicant from ever realising what other information he or she could have provided or whether there was an alternative route which may have been open.

11.83 LUL 9 added:

> Online application systems could be risky if they just tell you to go down one route and don't also explain that there might be another. If you are under 18, you might be able to apply for citizenship. The system should show all the alternatives, or tell applicants to seek legal advice.

11.84 UKCISA criticised the current process for not showing applicants alternative routes that might be more appropriate, or recognising that there might be a number of reasons why an applicant might be seeking to come to the UK:

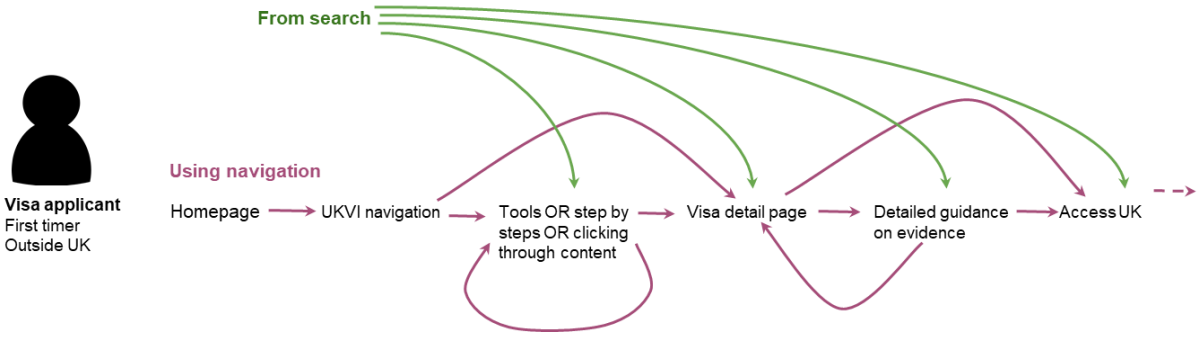
> Current tools are not sufficiently sophisticated. For example, people who say they want to study in the UK for six months or less are given only the option of applying for a short-term student visa, whereas Tier 4 may be more appropriate. Similarly, the tool does not take into account that applicants often have more than one purpose in seeking to come to the UK.

Improvements to the end-to-end process

11.85 The Law Society of England and Wales and the Bar Council expressly welcomed the more streamlined end-to-end process offered by smarter digital platforms that we outlined in our consultation paper, but pointed to the need for significantly more preparatory work, modelling and testing of systems before release.

11.86 One example of the difficulties in implementing just the first step of this process, the need to channel the applicant to the correct provision under which to apply, was provided to us by the Government Digital Service.[285] They have tracked the online journey of an applicant who is seeking information as to how to make an application. The applicant may experience difficulties even before accessing the system of Rules, guidance and application forms analysed in this chapter. The following diagram, created by the Government Digital Service, shows how the end-to-end journey presently looks for an individual who makes an initial search using an online search engine:

[285] Meeting with the Government Digital Service, UK Visas and Immigration Customer Insight, and Home Office Digital Communications on 4 June 2019.



11.87 The diagram shows that applicants might enter the journey from an online search at different points. It presents the application process as one which is not consistent or linear. Applicants may get stuck in a loop, either failing to get past a step, missing a step or returning to a previous one. Rather than channelling the applicant to the correct provision under which to apply, it can take the applicant into a frustrating closed circuit.

Assisted decision-making

11.88 The Institute for Government argued that better data and improved online systems could assist caseworkers to "make better decisions". They explained that a "digital decision tool" was tested in children's social care cases to highlight risky decisions to caseworkers, allowing them more time to spend on these particular cases and escalating them to more senior caseworkers of managers if needed. The respondent explained how this could apply to immigration decisions:

> A similar approach could be taken with immigration decisions. Highlighting cases most likely to go to appeal would prompt caseworkers to spend more time on applications, preventing them from going through an even longer and more expensive process of appeal. It could flag cases for a second look, using the layer of senior caseworkers to review and confirm. Any trends could be fed through into training, alerting new caseworkers to common issues and providing them with greater support.

Discussion

11.89 Most respondents agreed with our analysis of the principal ways in which future technology could help simplify the Rules, and some suggested other possibilities. In terms of the future development of smart forms, respondents were concerned that those designing online systems should ensure that they are "stress tested" with users to ensure connectivity and logical progression, and that policy-makers should be alive to the possibility that new technology can introduce bureaucratic rigidity. In particular, they were concerned that applicants might be channelled into inappropriate routes of application.

11.90 Overall, our discussion of respondents' views illustrates both the potential of technology to improve the accessibility of the immigration system, and the risk of creating new barriers and new forms of exclusion. As modern technology is used to improve online presentation, we suggest that these considerations could help to shape a system which remains accessible and appropriate to the needs of the user.

Chapter 12: Recommendations

Recommendation 1.

12.1 We recommend that the Immigration Rules be overhauled.

Paragraph 1.21

Recommendation 2.

12.2 We recommend that the following principles should underpin the redrafting of the Immigration Rules:

(1) suitability for the non-expert user;

(2) comprehensiveness;

(3) accuracy;

(4) clarity and accessibility;

(5) consistency;

(6) durability (a resilient structure that accommodates amendments); and

(7) capacity for presentation in a digital form.

Paragraph 2.58

Recommendation 3.

12.3 We recommend that the Secretary of State considers the introduction of a less prescriptive approach to evidential requirements, in the form of non-exhaustive lists, in areas of the Immigration Rules which he or she considers appropriate.

Paragraph 5.133

Recommendation 4.

12.4 We recommend that in those instances where prescription is reduced, lists of evidential requirements should specify evidence which will be accepted, together with a category or categories of less specifically defined evidence which the decision-maker would consider with a view to deciding whether the underlying requirement of the Immigration Rules is satisfied.

Paragraph 5.134

Recommendation 5.

12.5 We recommend the division of the subject matter of the Immigration Rules in accordance with the list of subject-matter set out in appendix 4 to this report.

Paragraph 6.31

Recommendation 6.

12.6 We recommend that the Home Office should conduct an audit of provisions in the Immigration Rules that cover similar subject-matter with a view to identifying inconsistencies of wording and deciding whether any difference of effect is intended.

Paragraph 6.45

Recommendation 7.

12.7 We recommend that a statement of a single set of Immigration Rules and subsequent changes to them should be laid in Parliament and made available on paper and online.

Paragraph 6.91

Recommendation 8.

12.8 We recommend that, pending the identification of technology that directs an applicant to Rules relevant to their application, the Rules should be reworked editorially by a team of experienced officials and checked to ensure legal and policy compliance by a suitably qualified person conversant with the subject-matter so as to produce booklets for each category of application which are also made available on paper and online.

Paragraph 6.92

Recommendation 9.

12.9 We recommend that any difference in wording and effect between Immigration Rules covering the same subject-matter should be highlighted in guidance and the reason for it explained.

Paragraph 6.100

Recommendation 10.

12.10 We recommend that:

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

(2) if the terms are defined in a booklet, only terms which are used in that booklet should be included;

(3) terms defined in the definitions provision should be identified as such by a symbol, such as #, when they appear in the text of the Rules; and

(4) in the online version of the Rules, hyperlinks to the definitions section or, technology permitting, hover boxes should be provided where a defined term is used.

Paragraph 6.117

Recommendation 11.

12.11 We recommend 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 in the interests of clarity; and

(5) titles and subheadings should avoid initials and acronyms.

Paragraph 7.7

Recommendation 12.

12.12 We recommend that subheadings should be used in the Immigration Rules only where necessary in the interests of clarity and understanding.

Paragraph 7.13

Recommendation 13.

12.13 We recommend that a table of contents should be placed at the beginning of each Part of the Immigration Rules.

Paragraph 7.27

Recommendation 14.

12.14 We recommend 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-subparagraphs.

Paragraph 7.38

Recommendation 15.

12.15 We recommend that:

(1) Appendices to the Immigration Rules should be numbered in a numerical sequence;

(2) in the online version of the Rules, references to Appendices should be in the form of hyperlinks; and

(3) to the extent that booklets are produced, these should also use hyperlinks to refer to Appendices.

Paragraph 7.43

Recommendation 16.

12.16 We recommend that text inserted into the Immigration Rules should be numbered in accordance with the following system:

(1) new sections or paragraphs inserted at the beginning of a Part or section should have a number preceded by a letter, starting with "A" (A1, B1, C1 and so on); a section or paragraph inserted before "A1" should be "ZA1"; for example, 1.A1.1 or 1.1.A1;

(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 sections or paragraphs inserted between existing sections or paragraphs should be numbered as follows:

(a) new numbering inserted between 1 and 2 should be 1A, 1B, 1C and so on; for example, 1.1A.1 or 1.1.1A;

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

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

(d) (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.

Paragraph 7.60

Recommendation 17.

12.17 We recommend that definitions should not be used in the Immigration Rules as a vehicle for importing requirements.

Paragraph 7.69

Recommendation 18.

12.18 We recommend 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.

Paragraph 7.73

Recommendation 19.

12.19 We recommend that appropriate and consistent signposting to other portions of the Rules and relevant extrinsic material should be used in the Immigration Rules.

Paragraph 7.77

Recommendation 20.

12.20 We recommend that repetition within portions of the Immigration Rules should be adopted where desirable in the interests of clarity.

Paragraph 7.88

Recommendation 21.

12.21 We recommend the adoption of the drafting guide set out in appendix 6 to this report.

Paragraph 7.110

Recommendation 22.

12.22 We recommend that:

(1) the Home Office should convene at regular intervals a committee to review the drafting of the Immigration Rules in line with the principles that we recommend in this Report;

(2) the committee should review the interaction between the Rules and guidance;

(3) the committee should be advisory only; and

(4) the terms of reference of the committee should exclude consideration or review of immigration policy.

Paragraph 8.47

Recommendation 23.

12.23 We recommend that the Home Office should design a more structured process for receiving and responding to user feedback to speed up rectification of problems identified in the Immigration Rules, make responses accessible to other users, and create an internal mechanism to relay learning to teams.

Paragraph 8.48

Recommendation 24.

12.24 We recommend that:

(1) where appropriate, statements of changes to Immigration Rules should set out the affected portion of the text in its amended form in the style of an informal Keeling schedule;

(2) an alert should appear in the online version of the current Rules to draw attention to pending changes, with a link to the Keeling schedule and an indication of the date when the change would come into effect; and

(3) explanatory memoranda should contain sufficient detail to convey the intended effect of a proposed amendment to the Rules in language accessible to a non-expert user.

Paragraph 8.66

Recommendation 25.

12.25 We recommend that the Home Office should follow a policy that there should be, at most, two major changes to the Immigration Rules per year, unless there is an urgent need for additional change.

Paragraph 8.90

Recommendation 26.

12.26 We recommend that:

(1) a statement of the date from which a Rule has effect should be provided in the online version of the Immigration Rules, explaining whether the commencement date relates to decisions or applications or applies any alternative formula; and

(2) the indication should be provided in such a way that it appears on the printed copy if a Rule is downloaded and printed.

Paragraph 9.20

Recommendation 27.

12.27 We recommend that improvements to the system for archiving previous versions of the Immigration Rules should be made, with consideration given to adopting either an online archive search facility which allows a search of versions of a Rule by keying in a date, or the presentation of the Rules in an annotated form which provides links to previous versions of the Rules.

Paragraph 9.49

Recommendation 28.

12.28 As an interim solution, as a way of improving the existing archive, we recommend that a link to the statement of changes which introduced the version of the Immigration Rules should be included in each archived version of the Rules. The link should refer to the relevant paragraph numbers and categories of leave affected by the changes.

Paragraph 9.50

Recommendation 29.

12.29 We recommend that Appendix F (Archived Immigration Rules) and paragraphs 276DI to 276AI in Part 7 (Other categories) should be omitted from the redrafted Immigration Rules.

Paragraph 9.56

Recommendation 30.

12.30 We recommend that an exercise of simplification of guidance should be undertaken in tandem with the simplification of the Immigration Rules.

Paragraph 10.60

Recommendation 31.

12.31 We recommend that the aim of the exercise to simplify guidance should be to rationalise the number of guidance documents with a view to reducing the guidance on any topic into a single document incorporating guidance both for caseworkers and applicants.

Paragraph 10.61

Recommendation 32.

12.32 We recommend that an index should be created listing the guidance documents relevant for each immigration category, and giving each document a clear and informative title. This index should be located in one place and clearly conspicuous to a user of the Immigration Rules. It should be accompanied by an explanation for non-expert users as to the difference in the status of the Rules and guidance.

Paragraph 10.62

Recommendation 33.

12.33 We recommend that guidance should not repeat the Immigration Rules, but instead serve to illustrate how the Rules will be applied. Consideration should be given to the use of illustrative worked examples and flow charts to aid understanding.

Paragraph 10.63

Recommendation 34.

12.34 We recommend that where a new version of a guidance document is published, changes from previous versions of guidance should be highlighted to make it easier to see what has changed.

Paragraph 10.64

Recommendation 35.

12.35 We recommend that an archive of guidance should be created with links to previous versions of the guidance and an indication of the period during which a particular guidance document operated.

Paragraph 10.65

Recommendation 36.

12.36 We recommend that a system of coordinated oversight of the content of guidance should be introduced.

Paragraph 10.66

Recommendation 37.

12.37 We recommend that consideration should be given to the adoption of a practice of limiting the frequency of publication of guidance so as to coincide with the publication of statements of changes to the Immigration Rules.

Paragraph 10.67

Recommendation 38.

12.38 We recommend that the Home Office should give consideration to the following steps with a view to improving the accessibility of application forms:

(1) a review of the titles of application forms with a view to making them clear and informative;

(2) clear and non-technical guidance on selecting and completing application forms, which is distinguished from policy guidance;

(3) links from the Immigration Rules and guidance to the appropriate application form;

(4) a review of the coverage of application forms, with a view to providing an appropriate form for any application;

(5) a timetable for the updating of applications forms, to coincide with major Rule changes;

(6) an archive of superseded application forms; and

(7) user testing of application forms and of the interaction between forms, Rules and guidance.

Paragraph 10.103

Recommendation 39.

12.39 We recommend that the Home Office should work towards producing a single set of Immigration Rules that function as effectively online as booklets through the use of hyperlinks. To the extent that booklets are produced, they should also include hyperlinks as an aid to navigation.

Paragraph 11.18

Recommendation 40.

12.40 We recommend the use of hyperlinks to link guidance to the Immigration Rules in the online presentation of the Rules. Where Rules are produced in booklet form, these should provide links to the guidance relevant to the immigration category dealt with by the booklet.

Paragraph 11.30

Recommendation 41.

12.41 We recommend that provision should be made for a facility to view an application form prior to completion, either through provision for a printable version of the form or a facility to navigate through the form online in a version which the system would not allow to be submitted. The wording on this version of the form should indicate where the need to answer a question depends on the terms of a previous answer.

Paragraph 11.79

Appendix 1: LIST OF CONSULTEES

Respondent	Respondent information
Zaman Amin	Member of the public
Amnesty International UK	Amnesty International is a global membership organisation of over 7 million people and is the world's largest grassroots human rights organisation. Amnesty International UK is one of over 50 national Amnesty sections based in countries around the world.
Anonymous consultee 1	
Anonymous consultee 2	
Association of Accounting Technicians ("AAT")	The Association of Accounting Technicians is a leading professional body for accounting technicians with around 140,000 members in more than 100 countries, including over 4,250 licensed accountants who provide accountancy services to more than 400,000 British businesses.
Bar Council	The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
Professor Thom Brooks (Durham Law School, University of Durham)	
Jonathan Collinson and Gemma Manning (University of Huddersfield)	
Coram Children's Legal Centre ("CCLC") and Let Us Learn (joint response)	Coram Children's Legal Centre, part of the Coram group of charities, is an independent charity working in the UK and around the world to protect and promote the rights of children. They do this through the provision of direct legal services; the publication of free legal information online and in guides;

	research and policy work; law reform; training; and international consultancy on children's rights. The Migrant Children's Project at CCLC provides specialist advice and legal representation to migrant and refugee children and young people on issues such as access to support and services. The CCLC response was jointly prepared with Let Us Learn. Let Us Learn is a youth-led campaign group made up of more than 900 migrants aged 16 to 24. Let Us Learn campaigns for young migrants with insecure immigration status to access higher education, and on the high cost of leave to remain and citizenship applications. It has recently been re-named We Belong. The joint response included the views and experiences of named members of Let Us Learn. These members are identified by their first name only.
Coventry University London, International Student Advice	
David Mills (Senior Presenting Officer, Specialist Appeals Team, UK Visas and Immigration, Home Office)	
Destination for Education	Collaborative response by Destination for Education provided on behalf of INTO University Partnerships, Kaplan, and Study Group.
Faculty of Advocates	The Faculty of Advocates is the professional body to which Advocates, qualified lawyers who have been admitted to the office of Advocate in Scotland, belong.
First-tier Tribunal (Immigration and Asylum Chamber) ("FTT(IAC)") judges	
Goldsmith Chambers	Goldsmith Chambers is a multi-disciplinary chambers located in the Temple, London.
Hackney Migrant Centre visitor 1 ("HMC 1")	Hackney Migrant Centre is a small charity running a weekly drop-in advice service for

	vulnerable migrants, asylum seekers and refugees in Stoke Newington, London. Anonymous individual response from a visitor to the Hackney Migrant Centre Drop-in Centre.
Hackney Migrant Centre visitor 2 (“HMC 2”)	Anonymous individual response from a visitor to the Hackney Migrant Centre Drop-in Centre
Hackney Migrant Centre visitor 3 (“HMC 3”)	Anonymous individual response from a visitor to the Hackney Migrant Centre Drop-in Centre
Immigration Law Practitioners' Association (“ILPA”) Respondent A from ILPA: Richard McKee Respondent B from ILPA: Carter Thomas Solicitors	The Immigration Law Practitioners’ Association is a professional association with over 850 members (organisations and individuals), encompassing more than 3,400 individual contacts in the immigration sector. These include barristers, solicitors, advocates, academics, NGOs and others who work on all aspects of immigration, asylum and nationality law. ILPA’s main aims are to promote and improve the advice and representation of immigrants, to disseminate information on developments in the law and to secure a just, equitable and non-discriminatory system of immigration, asylum and nationality law. Two ILPA members provided responses annexed to the main ILPA response as Respondents A and B.
Incorporated Society of Musicians (“ISM”)	The Incorporated Society of Musicians is an independent not-for-profit professional body for musicians with almost 9,500 members across the UK and Ireland. They provide legal advice and representation, insurance and specialist services, and campaign in support of musicians' rights, music education and the profession as a whole.
Institute for Government	The Institute for Government is a charitable think tank working to make government more effective. They provide research and analysis, topical commentary and public

	events to explore the key challenges facing government.
Islington Law Centre	Response provided by Islington Law Centre on behalf of the Immigration Team, and two hosted projects within the Centre: the Migrants' Law Project, and the Migrant and Refugee Children's Legal Unit (MiCLU).
Joint Council for the Welfare of Immigrants ("JCWI")	The Joint Council for the Welfare of Immigrants is an independent national charity which exists to campaign for justice in immigration, nationality and refugee law and policy.
JUSTICE	JUSTICE is an all-party law reform and human rights membership organisation working to strengthen the justice system and composed largely of legal professionals.
Law Society of England and Wales	The Law Society of England and Wales is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law. The response was prepared by the Society's Immigration Law Committee.
Law Society of Scotland	The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. The Society works in the public interest to set and uphold standards for the provision of legal services and engages with the Scottish and United Kingdom Governments, Parliaments, and wider stakeholders. Their response was prepared by the Immigration and Asylum sub-committee.
Let Us Learn individual responses (LUL 1 – 12)	Let Us Learn is a youth-led campaign group made up of more than 900 migrants aged 16 to 24. Let Us Learn campaigns for young migrants with insecure immigration status to access higher education, and on the high cost of leave to remain and citizenship applications.

	Individual members of the group gave verbal responses during a workshop attended by the Law Commission on 24 April 2019. These are referred to by the letters LUL and a number. The group has recently been re-named We Belong.
Ehren Mierau, York College International Student Support (personal and organisational capacity)	
Migrant Voice	Migrant Voice is a migrant-led organisation established to develop the skills, capacity and confidence of members of migrant communities, including asylum seekers and refugees.
Migration Advisory Committee ("MAC")	The Migration Advisory Committee is an independent, non-statutory, non-time limited, non-departmental public body, sponsored by the Home Office, that advises the government on migration issues. The Committee provides evidence-based advice to Government on immigration issues.
Migration Observatory at the University of Oxford	Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent evidence-based analysis of data on migration and migrants in the UK, to inform debate and to generate research on international migration and public policy issues.
Migration Watch	Migration Watch UK is an independent research organisation which seeks to make suggestions as to how immigration might be reduced.
Robert Parkin, barrister at 10 King's Bench Walk Chambers ("10 KBW")	
Sian Pearce, Bristol Law Centre	
Nashit Rahman, Taj Solicitors	
UK Council for International Student Affairs ("UKCISA")	UKCISA is a charity and membership organisation supporting international students and those who work with them,

	including by the provision of advice and training.
University of York Immigration Advice Team	
Universities UK and Universities and Colleges Employers Association ("UCEA") (joint response)	Universities UK is the collective voice of 136 universities in England, Scotland, Wales and Northern Ireland. Their member universities' core purpose is to maximise their positive impact for students and the public, both in the UK and globally through teaching, research and scholarship. The Universities and Colleges Employers' Association is the employers' association for universities and colleges of higher education in the United Kingdom. UCEA runs an immigration network for Higher Education Institution ("HEI") members with a mailbase and regular network meetings.
Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") judges	

Appendix 2: CONSULTATION EVENTS

This appendix presents a list of events and meetings that the Law Commission attended during the consultation period (21 January to 3 May 2019) and those held after the consultation period ended.

Date	Event	Location
05/02/2019	Upper Tribunal (Immigration and Asylum Chamber) training event	Midhurst
26/02/2019	Meeting with the Law Society of England and Wales' Immigration Law Committee	London
08/03/2019	Meeting with Immigration Law Practitioners' Association	London
11/03/2019	Meeting with the senior judiciary	London
13/03/2019	Meeting with the National Audit Office	London
18/03/2019	Meeting with Dr Joseph Tomlinson, Lecturer in Public Law, King's College London	London
20/03/2019	Meeting with Coram Children's Legal Centre and Let Us Learn	London
22/03/2019	Meeting with the Bar Council	London
01/04/2019	Meeting with the Public Law Project	London
04/04/2019	Meeting with the First-tier Tribunal (Immigration and Asylum Chamber), Taylor House judges	London

08/04/2019	Meeting with the First-tier Tribunal (Immigration and Asylum Chamber), Hatton Cross judges	London
09/04/2019	Meeting with the Joint Council for the Welfare of Immigrants	London
11/04/2019	Meeting with the Institute for Government	London
24/04/2019	Let Us Learn workshop	London
25/04/2019	Public Law Project annual conference	Cardiff
30/04/2019	Meeting with HM Courts & Tribunals Service (Luc Altmann, Deputy Head of Insight)	London
31/05/2019	Meeting at Croydon Core Service Point (UKVCAS)	London
03/06/2019	Visit to family casework teams (UK Visas and Immigration)	Sheffield
04/06/2019	Meeting with Government Digital Service, UKVI Customer Insight, and Home Office Digital Communications	London
05/06/2019	Meeting with the Independent Chief Inspector of Borders and Immigration	London
05/08/2019	Law Commission – Home Office workshop	London

Appendix 3: Poster

Law Commission
Reforming the law

The Law Commission wants to make the Immigration Rules simpler and needs your help

The Immigration Rules have been criticised for being complicated, including by senior judges

We want to find out what makes the Immigration Rules difficult to understand

We want to help make the Immigration Rules clearer and easier to use

We are not making changes to immigration policy

YOU CAN HELP US. WE WANT TO KNOW:

What is your experience of using the Immigration Rules? Do you think that they should be made easier to understand?

What type of mistakes do you think are made by people making applications?

What is your experience of using application forms? Do you think that online application forms help? What would make application forms and the online system better?

Our public consultation on the Immigration Rules is now open

Please send your answers to **immigration@lawcommission.gov.uk** by 26th April 2019. We will make our recommendations after this date.

You do not need to give your name if you do not want to, but it would help if you tell us your age and where you heard about our consultation.

Appendix 4: Recommended division of material

Introduction

Index

Part 1: How to use the Immigration Rules, to include definitions

Part 2: Leave to enter, entry clearance, leave to remain and variation of leave to enter or remain

Common provisions

Part 3: Making applications for leave to enter, entry clearance and leave to remain

Part 4: General grounds for refusal of leave and curtailment

Part 5: Knowledge of language and life requirements for indefinite leave applications

Part 6: Common conditions of leave

Post-decision matters: service of notices and administrative review

Part 7: Service of notices

Part 8: Administrative review

Deportation

Part 9: Criminal deportation

Specific routes of application

Part 10: Visitors

Part 11: Students

Part 12: Work

Part 13: Short-term work and work experience

Part 14: Business and investment

Part 15: Family members of workers, businesspersons, investors and students

Part 16: Family members of British citizens, settled persons and persons with refugee/humanitarian protection status

Part 17: Long residence and private life

[286] European Community Association Agreement with Turkey.

Appendix 5: Table of destinations

Table of destinations	
Current Parts and Appendices to the Rules	*Our provisionally proposed structure*
Index	Retained
Introduction	Retained and moved to Part 1 (How to use the Immigration Rules)
Part 1 (Leave to enter or stay in the UK)	Split: paras 7 to 23, 31 to 33A moved to Part 2: Leave to enter, entry clearance and variation of leave to enter or remain Paras 23A and 23B, 24 to 30C, 34 to 34K, 34Y, 35 to 39B, 39C to 39D), 39E moved to Part 3: Making applications for leave to enter, entry clearance and leave to remain Paras 34L to 34Y moved to Part 8 Administrative review
Part 2 (Transitional provisions)	Omitted
Part 3 (Students)	Merged into Part 11 (Students)
Part 4 (Work experience)	Omitted
Part 5 (Working in the UK)	Merged into Part 12 (Work) Provisions on dependants of Part 5 migrants (paras 193A to 199B) merged into Part 15 (Family members of workers, businesspersons, investors and students)
Part 6 (Self-employment and business people)	Omitted
Part 6A (Points-based system)	Separated into Part 11 (Students), Part 12 (Work), Part 13 (Short-term work and work experience), Part 14 (Business and investment)

Part 7 (Other categories)	Categories are omitted or moved as follows: • retired persons of independent means: omitted • EEA Nationals and their families: omitted • long residence moved to Part 17 (Long residence and private life) • private life moved to Part 17 (Long residence and private life) • HM Forces merged into Part 18 (Armed forces) • rights of access to a child moved into Part 16 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status) • parent of a Tier 4 (Child) student moved to Part 15 (Family members of workers, businesspersons, investors and students) • relevant Afghan citizen moved to Part 21 (Relevant Afghan citizens)
Part 8 (Family members)	Separated/merged into Part 16 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status) and Part 15 (Family members of workers, businesspersons, investors and students)
Part 9 (General grounds for refusal)	Retained and moved to Part 4 (General grounds for refusal of leave and curtailment)
Part 10 (Registering with the police)	Merged into Part 6 (Common conditions of leave)
Part 11 (Asylum)	Retained and moved to Part 22 (Asylum)
Part 11A (Temporary protection)	Retained and moved to Part 23 (Temporary protection)

Part 11B	Merged into Part 22 (Asylum)
Part 12 (Procedure and rights of appeal)	Merged into Part 22 (Asylum)
Part 13 (Deportation)	Retained and moved to Part 9 (Criminal deportation)
Part 14 (Stateless persons)	Retained and moved to Part 24 (Stateless persons)
Part 15 (Condition to hold an ATAS clearance certificate)	Merged into Part 6 (Common conditions of leave)
Appendix 2 (Police registration)	Merged into Part 6 (Common conditions of leave)
Appendix 6 (Academic subjects that need a certificate)	Merged into Part 11 (Students)
Appendix 7 (Overseas workers in private households)	Merged into Part 13 (Short-term work and work experience)
Appendix A (Attributes)	Separated into Part 11 (Students), Part 12 (Work), Part 13 (Short-term work and work experience) and Part 14 (Business and investment)
Appendix AR (Administrative review)	Retained and moved to Part 8 (Administrative review)
Appendix Armed Forces	Retained and moved to Part 18 (Armed forces)
Appendix B (English language)	Separated into Part 11 (Students), Part 12 (Work), Part 13 (Short-term work and work experience), Part 14 (Business and investment)
Appendix C (Maintenance (funds))	Separated into Part 11 (Students), Part 12 (Work), Part 13 (Short-term work and work experience), Part 14 (Business and investment)
Appendix D (Highly skilled migrants)	Omitted
Appendix E (Maintenance (funds) for the family of Relevant Points Based System Migrants)	Retained and moved to Part 15 (Family members of workers, businesspersons, investors and students)
Appendix F (Archived Immigration Rules)	Omitted

Appendix FM (Family members)	Retained and moved to Part 16 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status)
Appendix FM-SE (Family members – specified evidence)	Merged into Part 16 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status)
Appendix G (Youth mobility scheme)	Merged into Part 13 (Short-term work and work experience)
Appendix H (Tier 4 documentary requirements)	Merged into Part 11 (Students)
Appendix J (Codes of practice for skilled work)	Retained and moved to Appendix 4 (Codes of practice for work (sponsors))
Appendix K (Shortage occupation list)	Retained and moved to Appendix 5 (Shortage occupation list)
Appendix KoLL	Retained and moved to Part 5 (Knowledge of language and life requirements for indefinite leave applications)
Appendix L (Tier 1 competent body criteria)	Merged with Part 14 (Business and investment)
Appendix M (Sports governing bodies)	Retained and moved to Appendix 6 (Sports governing bodies)
Appendix N (Authorised exchange schemes)	Retained and moved to Appendix 7 (Authorised exchange schemes)
Appendix O (Approved English language tests)	Retained and moved to Appendix 2 (Approved English language tests)
Appendix P (Lists of financial institutions)	Retained and moved to Appendix 3 (Lists of financial institutions)
Appendix SN (Service of notices)	Retained and moved to Part 7 (Service of notices)
Appendix T (Tuberculosis screening)	Retained and moved to Appendix 1 (Tuberculosis screening)
Appendix V (Visitors)	Retained and moved to Part 10 (Visitors)
Appendix W (Start Up and Innovator)	Retained and moved to Part 14 (Business and investment)

Appendix 6: Guidance for the drafting of the Immigration Rules

GUIDANCE FOR THE DRAFTING OF THE IMMIGRATION RULES

1. This is a drafting framework for the Immigration Rules. It is intended to assist drafters to ensure that the Rules are drafted in a way that is as clear and consistent as possible.

2. Drafters should have regard to this framework when drafting the Rules. However, it is not binding. The framework is intended to be a benchmark from which to evaluate drafting. Everything in the framework is subject to the fundamental requirement that the Rules must be accurate and effective, and drafters need to take these requirements into account.

General drafting style

3. When drafting the Rules, officials should have in mind the need, where possible, to:

   a. get straight to the point, using a direct, active style;

   b. remove any words or phrases that are not essential;

   c. keep sentences short, aiming for a maximum of 20 words;

   d. keep pages and sections short;

   e. use sub-paragraphs to break up dense text;

   f. avoid where possible paragraphs which contain 10 sub-paragraphs or more;

   g. use active verbs instead of abstract nouns;

   h. avoid double negatives and passive sentences;

   i. draft Rules so that they are gender-neutral;

   j. say “must” where something is required and “will” where something is inevitable;

   k. say “can” or “could” where there is choice or when something is not inevitable;

   l. where “can” or “could” are used, explain the circumstances in which this might or might not be true;

   m. use simple, everyday English. Opt for short, common words. Avoid old fashioned, formal words (for example, “acquire” or “by virtue of”);

n. avoid using everyday words with an alternative meaning (for example, “furnish” meaning provide);

o. avoid using “jargon” terms that may confuse readers who are unfamiliar with them; for example, say “at an immigration control point” rather than “at port”;

p. avoid acronyms;

q. use terminology only where it is necessary or has no short alternative. Define all terminology in the glossary;

r. consider the visual impact of the Rules;

s. highlight key words; and

t. link the Rules to other relevant information.

4. In addition, when drafting the Rules the following should be considered:

a. the Plain English Campaign guide to legal phrases;

b. the Plain English Campaign A-Z of alternative words;

c. the UK Border Agency A-Z of Simpler Words and Phrases;

d. the Home Office and UK Border Agency House style guide for communications; and

e. the Government Digital Service style guide.

5. It is important to be clear whether sub-paragraphs are intended to operate cumulatively or instead as alternatives. “And” or “or” should be used at the end of each sub-paragraph. In addition, or as an alternative, consider using words preceding the list in a way that makes it clear whether the items are cumulative or alternative (for example “if all of the following apply ….” or “if any of the following apply” or “you must satisfy every one of the conditions in this list” or “it is enough if you can satisfy any one of the conditions in the list”).

6. However, conjunctions should not be mixed. In other words, drafters should not put different conjunctions at the ends of different paragraphs in the same provision.

Formatting

7. The imaginative use of formatting can help to improve the clarity of the Rules. Drafters should consider:

a. splitting up the text to make it easier to read and navigate, particularly in the online context (for example by more use of subheadings and new paragraphs);

b. increased font size for subheadings;

c. use *** font with a font size of ** pt;

d. the use of double spacing in the text itself; and

e. greater space between paragraphs.

Numbering

8. Paragraphs should be numbered using a three-level numbering system (such as 8.1.1, 8.1.2 and so on). The first level number should correspond to the number of the Part in which the paragraph appears. Use the second level number to identify a section in the Part relating to a particular topic and the third level number to number each paragraph within the section.

9. In addition, the following should apply when numbering the Rules:

    a. lettered sub-paragraphs should be used in all cases first ((a), (b), (c) and so on);

    b. avoid sub-subparagraphs, but where they are unavoidable use lower case Roman numerals.

10. The following should apply to future amendments and insertions into the Rules:

    a. when inserting a new section or paragraph at the beginning of a Part or section, the number should be preceded by a letter, starting with “A” (A1, B1, C1 and so on); a section or paragraph inserted before “A1” (or “ai”) is “ZA1” or (“zai”); for example 1.A1.1 or 1.1.A1;

    b. in the case of lettered paragraphs, new paragraphs inserted before paragraph (a) should be (za), (zb) and so on, and paragraphs inserted before (za) should be (zza), (zzb) and so on;

    c. where adding a provision at the end of an existing series of provisions of the same kind (for example, a new paragraph at the end of a Part or a sub-paragraph at the end of a paragraph), the numbering should continue in sequence;

    d. the following should apply when inserting whole sections or paragraphs between existing sections or paragraphs:

        I. new numbering inserted between 1 and 2 should be 1A, 1B, 1C and so on; for example, 1.1A.1 or 1.1.1A;

        II. new numbering inserted between 1A and 1B should be 1AA, 1AB, 1AC and so on;

III. new numbering inserted between 1 and 1A should be 1ZA, 1ZB, 1ZC and so on (and not 1AA and so on); and

IV. new provisions inserted between 1A and 1AA should be 1AZA, 1AZB, 1AZC and so on;

e. a lower level identifier should not be used unless necessary (for example, a new provision between 1AA and 1B should be 1AB not 1AAA, however a new provision between 1AA and 1AB should be 1AAA);

f. the above should apply equally to sub-paragraphs with Roman numerals and lettered paragraphs, for example:

I. new sub-paragraphs between sub-paragraphs (i) and (ii) should be (ia), (ib), (ic) and so on;

II. new paragraphs between paragraphs (a) and (b) should be (aa), (ab), (ac) and so on; and

III. new paragraphs between paragraphs (a) and (aa) should be (aza), (azb), (azc) and so on;

g. after Z, the following sequence should be used: Z1, Z2, Z3 and so on (for example, after paragraph 360Z the sequence should be 360Z1, 360Z2 and so on, and after paragraph (z) the sequence should be (z1), (z2), (z3) and so on);

h. when inserting a series of paragraphs, consider identifying them by a new second level number, for example 8.1A.1, 8.1A.2 and so on; and

i. when inserting new paragraphs into text which has been heavily amended and contains a potentially confusing quantity of inserted numbering, consider re-numbering the portion of text in question, even if this entails changing the numbers of existing paragraphs.

Titles and subheadings

11. The following principles should be applied in the future to the use of titles and subheadings:

a. the titles given in the Index and the Rules should be consistent;

b. the Parts and Appendices should always be numbered;

c. titles and subheadings should give as full an explanation of the contents as possible, consistent with keeping them reasonably short;

d. titles and subheadings should not run into a second line unless necessary in the interests of clarity;

e. subheadings be used only where necessary in the interests of clarity and understanding;

f. subheadings should not need to repeat the descriptive work done by the Part title;

g. titles and subheadings should avoid initials and acronyms; and

h. use *** font with a font size of ** pt.

Contents pages

12. A table of contents should be placed at the beginning of each Part of the Rules.

Cross-referencing

13. The default position of drafters should not be to include multiple cross-references but to consider how the information might be presented in a straightforward and self-contained way. For example, it would be possible to provide that a common provision applies across the board, subject to any qualification of it contained in a category-specific rule.

14. Any internal and external cross-reference should always include a hyperlink. In the case of internal cross-references to other Rules, the hyperlink should take the reader directly to the relevant Rule. In the case of external references, the hyperlink should take the reader directly to the relevant webpage on HM Government's "legislation.gov.uk" website, and, where possible, directly to the relevant material. This should also open as a new tab on a browser because otherwise the reader will lose where they are in the Rules.

15. In cases where the Rules are being amended to include a reference to separate legislation which is not yet publicly available, the Home Office will endeavour to provide a hyperlink to an alternative site or supply the text of the relevant legislation on its website and provide the appropriate hyperlink.

16. It is important to remember that not everyone will have access to the online version of the Rules. It is therefore important that drafters should clearly signpost and explain the cross-references.

Definitions

17. If making amendments to Part 1 of the Rules (as identified in our recommended division of material set out in appendix 4 to this report) – which contains the common definitions – it is important to remember that the terms should be arranged alphabetically.

18. All definitions should be grouped in the introduction, thus making them easier to locate, and should not be spread out in the different Parts and Appendices. This approach should apply even if certain definitions apply only for the purposes of one Part.

19. All defined terms should be identified with a hash symbol (#) in order to make the reader aware that the term is defined elsewhere. In addition, all defined terms should include hyperlinks to the definition.

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