Simplification of the Immigration Rules

Response to the Consultation by the Law Commission

Faculty of Advocates

Question 1

Yes

Question 2

Yes

We have nothing to add to paragraph 1.27 of the consultation document.

Question 3

Yes

We consider that the principal difficulty that any user of the Immigration Rules has is not in the wording used but in the structure of the Rules and in the other sources of law such as guidance and instructions.

Question 4

We consider it to be self-evident that the complexity of the Rules and other sources of law will increase the number of mistakes made by applicants and those advising them. Our experience confirms this view.

Question 5

We largely agree with the impact assessment but would make the following observations:

1 We consider that the current state of the law must involve some reputational risk for the United Kingdom. In particular, there must be a risk that the matrix of statute, statutory instrument, Immigration Rule, guidance and instruction does not satisfy the requirement for legality that pervades all justifications for interference with fundamental rights protected by the European Convention on Human Rights:

> "In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." (*Sunday Times* v *United Kingdom* (1979-80) 2 EHRR 245 paragraph 49)

The Faculty has concerns whether either of the requirements of lawfulness is met. We consider that this is a powerful consideration in favour of the comprehensive redrafting proposed and a significant non-monetary benefit of the proposal.

2 The Faculty is concerned that the likely cost of the comprehensive redrafting that it supports may not be adequately set out in the impact assessment. The current state of the law is either a result of a lack of resources or of misplaced effort. In either event, a substantial reorganisation is likely to be required to put new Rules in place and maintain a consistent regime. Recognising that the Law Commission have already done a great deal of excellent work in the current paper, we are not convinced that the proposed review committee of unpaid volunteers will be an adequate mechanism with which to secure the necessary outcomes.

Question 6

Yes.

We do not consider that there are compelling reasons for changing the established nature of Immigration Rules.

Question 7

This is a rather ambiguously expressed question. It is in principle helpful to have guidance and, insofar as it adds to the transparency of the immigration process, its publication is welcome. On the other hand, it adds to the complexity of the exercise. In order to minimise the pitfalls for the user, we consider that links to the relevant Rules would be helpful. It would also be useful if each version were to bear a date from which it is in effect. The same applies to instructions.

For the avoidance of doubt, we do not regard this question as relating to CPIN information on country conditions which we view as in general satisfactory and outwith the scope of the current exercise.

Question 8

With the amount of law being put out, such contradictions are inevitable. Our principal experience of difficulties in this regard is of guidance being overlooked by decision-makers and other users.

Question 9

Being a referral bar, our direct experience with application forms is limited. We do, however, observe that the application form AR for administrative review is rather clunky.

Question 10

We broadly agree with the analysis set out. In our view, while other causes of increased length and complexity are the need to adjust the Rules to take account of case-law and the need to refine evidential requirements in light of the experience of decision makers (both of which are plainly

desirable), the primary cause of this increased length and complexity has been ever greater prescriptiveness.

We make two supplementary points at this stage.

First, the length of the Rules is not necessarily a difficulty in itself. As we go on to state in response to question 14, length is not the primary consideration: that the Rules should be easy to navigate and understand is more important.

Second, we do not take the view that prescriptiveness is always a difficulty, nor do we take the view that it is always desirable. As our responses to questions 15-18 make clear, different parts of the Rules are more amenable to prescription than others. In some areas, prescriptive rules will allow precise applications to be made (and defective decisions in those areas to be challenged more effectively). In other areas, such as Article 8 and Appendix FM, balancing numerous factors cannot be done satisfactorily within highly prescribed Rules: a more holistic approach is required that a prescriptive system does not allow.

Question 11

We agree with this analysis.

Question 12

We consider that the Consultation paper's analysis of the evolving evidential requirements in Appendix FM-SE is reflective of 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. Whether the purpose of the change is to modify evidential requirements or to refine definitions, the effect has been the same: to increase the detail in, and prescriptiveness of, the relevant Rules. What may be said about Appendix FM's changing evidential requirements may therefore be said about the Rules generally.

Question 13

The Faculty does not have the caseload experience necessary to be able to comment on this.

Question 14

The question raises the issue of whether the current Immigration Rules do provide transparency and clarity. As the consultation recognises, many parties find the Rules very difficult to navigate.

The current detail allows for errors in decision making to be identified more easily than a less prescriptive system: in some cases the error can be pointed to with clarity resulting in a withdrawal of the incorrect decision. It may be thought that errors may be more difficult to identify if the Rules were more discretionary.

Our view is that the length is not the primary consideration: that it is more important that the Rules should be easy to navigate and understand. Were that to be achieved, it may be that length, along with ease of use and clarity, is the best way to ensure fair and equal outcomes.

Question 15

In our view, some parts of the Rules are 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.

Question 16

Yes.

The consultation paper highlights instances where so little discretion is allowed to case workers that it is clear inefficiencies and indeed miscarriages of justice are occurring.

We support the idea of more discretion to decision-makers, along with non-exhaustive lists as guidance.

We also support the discretion of a decision-maker to seek clarification of evidence; a better copy; additional information or omitted information.

We recognise that in some instances certain prescribed evidence will be required in an inflexible form.

This does raise issues of training caseworkers to apply such a policy effectively and fairly. It may raise issues of a change of culture within the Home Office.

Question 17

In our view it does not automatically follow that less prescription means more uncertainty.

In our view, some areas of greater prescription in immigration law have benefited users of the system by allowing precise applications to be made. Further, it has allowed defective decisions to be challenged more effectively.

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.

Question 18

Yes.

However, in our view it is difficult to know where to strike the balance. We are aware of situations where the Rules seek to chase after a situation with frequent changes, but the provisions still lend themselves to a prescribed system.

While we agree that both matters ought to be taken into account, we consider that the considerations at (2) are more important.

Question 19

We cannot think of any preferable form of words.

Question 20.

Yes, save that it would be more convenient for users, and therefore preferable, to see the Specific Applications listed alphabetically.

Question 21

Yes.

Question 22

Yes. We prefer Option 1. We prefer an approach that reduces the length of the Immigration Rules. The consultation document does not disclose a significant advantage of referring to defined terms in a booklet over a reference to a common set of provisions.

Question 23

We identify no other material advantage or disadvantage.

Question 24

We identify no other material advantage or disadvantage.

Question 25

We agree that departures from a common provision could usefully be highlighted. However, the reasons for such a departure, and the extent to which they are (or are not) explained, seem to us to

be matters for the Government as the author of the Rules and ought not to be subject to a requirement for explanation.

Question 26

(1) Yes. We consider that this would be convenient for users.
(2) No. A built-in link from the word to the definition would be helpful in an online version. On the other hand, we would be keen to avoid anything that would disrupt the readability of the text.

Question 27

Yes.

We consider that these proposals would aid readability.

Question 28

We welcome the use of sub-headings. We consider that sub headings provide valuable sign-posts to aid comprehension.

Question 29

Tables of contents would assist in locating relevant provisions. Overviews, particularly if not an aid to interpretation, would not be desirable: their inclusion is likely only to lengthen the Rules.

Question 30

Our preference would be for tables of contents. See our response to the previous question.

Question 31

We agree.

Question 32

We strongly agree.

Question 33

We agree.

Question 34

No. We see no advantage to a simple process of renumbering. Renumbering as a consequence of a systemic approach in recasting the Rules has obvious utility.

Question 35

Yes, this would aid comprehension.

Question 36

Yes.

Question 37

Yes.

Question 38

Yes.

Question 39

Repetition within the same part of the Rules should be avoided, especially where the provisions are identical or common to various situations. As per the example at 10.38, 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.

Question 40

We agree with the suggested drafting guide at pages 141-146.

With regard to paragraph 10.51, we agree with the addition of paragraphs (1) to (4) as desirable drafting outcomes.

In relation to the use of conjunctives, we favour the expression "if all of the following apply" followed by a numbered list of the multiple requirements. For the use of disjunctives we favour the use of "if any of the following apply" followed by a numbered list of the options.

More studies on legal drafting can be found at:

- McLeod, Ian. *Principles of legislative and regulatory drafting*. Oxford : Hart, 2009.
- Parliamentary Counsel Office. *Drafting matters!* Edinburgh : The Scottish Government, 2018;[1]
- Office of the Parliamentary Counsel. *Drafting Guidance.* London : UK Government Cabinet Office, 2018.[2]

Question 41

Yes albeit it can be the subject of improvement (See next question).

Question 42

In general terms the redrafting in Appendices 3 and 4 successfully deals with the issues of multiple cross-referencing, lack of clarity, extreme complexity and superfluous repetition present in the original versions of the Rules at Appendices 1 and 2.
The new drafting presents information in a logical, coherent, clear and succinct way.

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1 https://www.gov.scot/publications/drafting-matters/

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727629/drafting_guidance_July_2018.2..pdf

With regard to Appendix 3:

- The use of disjunctives works better with "any of the following" (see 4.2.2) than with adding "or" at the penultimate item of a list of items (4.3.3).
- Numbering should be consistent: It is not immediately obvious why at 4.2.1 and 4.2.2 the paragraphs are lettered (a), (b), (c) and so on, but at 4.3.1 the paragraphing opts for Roman numerals, when these are more traditionally left for sub-paragraphing (see 4.2.1(c) and 4.4.1(a) where this works).
- We consider that the use of the plural pronoun with the singular verb is not yet acceptable in formal use. We would prefer s/he and his/her where a pronoun cannot be avoided.

Question 43

As an institution, we have not been informally consulted about changes to the Rules and thus cannot express a view on whether the Rules have benefitted from such consultations.

Question 44

We would certainly welcome a formal consultation process on any proposed wholesale re-drafting of the Immigration Rules, if this results from the Commission's project or subsequently. For informal consultation on proposed changes to individual rules, it may be that this will reduce complexity, though we recognise too that there will be practical limitations on consulting before the changes are announced. However, when changes are announced, we would welcome any consultation that seeks views on whether the drafting of the changes could be improved whilst retaining the same policy objective. We should think that any need for such consultation on the drafting of rules would be lessened if the drafting style that the Consultation Paper proposes is adopted.

Question 45

Professional practitioners have access to annotated versions of the Rules such as are published in Macdonald's 'Immigration Law and Practice' or in Phelan's 'Immigration Law Handbook'. Those

publications are replete with citations and footnotes that identify the specific HC paper numbers and the specific paragraph of the HC paper relevant to the specific paragraph of the Rules under consideration. As the Consultation recognises, the pace of changes to the Immigration Rules is quite often faster than the print sources mentioned. The Home Office website already publishes the consolidated Rules but shorn of the sources and citations that make the hard copy publications referred to so useful. Without signposting to the sources of the law, consolidated materials can be unhelpful or even misleading. Keeling schedules of the kind described in the paper would assist in understanding the HC paper but 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. Online publication of the Rules themselves in the format achieved by Macdonald or Phelan would be more beneficial to all users of the Rules than tinkering with the HC papers.

As for the explanatory memoranda, these are seldom referred to in practice by professional practitioners, and insofar as they are, a succinct rather than expansive description of the intended purpose of the Rules is preferable.

Question 46

See previous answer. Those with access to the professionally annotated Rules published in Macdonald's 'Immigration Law and Practice' or Phelan's 'Immigration Law Handbook' seldom have much difficulty ascertaining which version of a Rule applies, and the creation of an equivalent online resource would extend that benefit to non-professional users.

The specific issues identified in the paper are illustrated by the case of *LA (Iraq)* [2016] CSOH 147 where a recipient of discretionary leave under published guidance was caught out by changes, not to the Rules, but to Guidance that changed his status to one attracting an immigration fee for an extension application.

The requirement for a fee was entirely unclear even to professional advisors.

An annotation of the Rules which captures transitional periods for the Rules themselves might also usefully signpost changes in the applicable fees order, given that the making of an application without an appropriate fee renders it void.

Question 47

There is the same difficulty with the online archiving of the Rules as there is with the online publication of the consolidated Rules, namely the absence of footnoting and citations makes it difficult to identify when a specific historical change was made. Currently there is no alternative to going through the archive and comparing archived versions of the Rules so as to identify when a given wording changed. Sometimes that is most effectively done by looking at previous versions of Macdonald's 'Immigration Law and Practice'. The publication of an online resource with footnoting and citation would resolve this difficulty.

Question 48

The Faculty has insufficient practical experience of Appendix F to comment.

Question 49

We have not encountered practical problems as a result of irregularly timed changes in the Rules. Professional advisors receive advance notice of changes through ILPA and the Free Movement website (http://freemovement.org.uk). One of us has had a case where difficulties were occasioned by a change, not in the Rules, but in the fees regulations, in June 2015, i.e. outwith the usual annual uprating of fees each April, albeit in that case the Home Office took a pragmatic approach to the resulting problem. We might observe that changes in the fees are almost more important in practice than changes to the substance of the Rules and require better signposting.

Issues can equally arise from any delay in the Rules taking account of judicial rulings.

Question 50

We agree with this proposal except to the extent that it institutionalises a greater degree of uncertainty than is desirable in an ideal world. The exact dates of the cycle are not important provided that there are not more than two.

Question 51

This seems to us a genuine and useful simplification which we support.

Question 52

Immigration Directorate Instructions and Asylum Policy Instructions published online already contain a very useful hyperlink facility internally within the guidance and externally to the Rules, so reciprocal facility from the Rules to the policy would not seem to be a difficult thing to introduce and would be beneficial.

Question 53

As counsel, we seldom have direct involvement with the making of applications.

We are sometimes instructed to draft applications for Administrative Review, given the similarity of that remedy to judicial review and the fact it may be a precursor to that. Our experience of online AR procedure is that it is clunky and difficult to back up and save, and impossible to draft and send in draft form to instructing solicitors. Similar problems appear to afflict the PBS online application form.

Counsel are more often involved in completing applications to the First-Tier Tribunal and Upper Tribunal for permission to appeal. The online form for those applications is an interactive pdf format. It is not clear to us, and it is not explained in the Consultation, why online immigration applications cannot be completed in pdf format. PDF allows the user to read through the whole form before completing it, thereby avoiding duplication of information. It is easy to save and back up and easy to transmit electronically both to the Home Office and to colleagues. We are not clear why this option appears to have been excluded from consideration.

There has been recent discussion of the requirement of EU nationals to apply for settled status from a certain type of smartphone. It is foreseeable that this incomprehensible and unexplained requirement will exclude large numbers from making an application.

So far as Premium Centre applications are concerned, again as counsel we have only encountered this indirectly but we are aware of examples where applicants have had an in-time Premium Centre application refused and have been enabled to collate such additional material as has

enabled a successful re-application. The facility is expensive but appears to be useful.

Question 54

We are lawyers, not IT experts. It may be there are good IT reasons for the possibilities we canvas above to not be mentioned in the Consultation. For ease of reference, our observations come down to two points:

1. It would be helpful if the Home Office could maintain on its website a rolling consolidation of the Rules (as opposed to the Statements of Changes to the Rules) footnoted with citation of the HC Paper relevant to each Rule and showing commencement dates. If professional publications such as Macdonald's 'Immigration Law and Practice' or Phelan's 'Immigration Law Handbook' are able to do this, it is unclear why the Rule maker cannot.

2. It should be possible for online applications to be made by interactive pdf which can be saved, backed up, and shared between solicitors and counsel and the applicant himself.