ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA response to the UK Border Agency consultation – Simplifying Immigration Law: a new framework for Immigration Rules

1. ILPA is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

General Comments

2. Some initial general comments are first set out here, before further observations are offered in respect of the discrete consultation questions.

3. The consultation document is very general. While this is not a criticism in and of itself, since the consultation concerns a general matter (the framework for the rules rather than their substance), this does mean it is not possible to address some of the consultation questions fully or with finality. Certain of the consultation questions are unsuitable for consultation because too little of substance is provided in the document to allow for a meaningful response, yet the question all but demands affirmation – e.g. it is difficult to understand how someone could answer 'no' to the question "*Should we modernise and simplify the Immigration Rules?*" (presumably nobody would prefer that the rules be archaic and complex?). Yet the document reveals or commits to far too little for somebody to be appropriately confident about what he or she would be agreeing to by an answer of 'yes'.

4. The consultation document rightly highlights the significance of the relationship between the rules and the governing Act, e.g.:

   > "*2.4 The Immigration Rules will set the practices to be followed in administering the new Immigration Act… They should provide a clear and accessible set of rules on matters where this degree of clarity and formality is necessary.*"

   However, there is no consultation question on this relationship. The draft Immigration Bill provides the power for making the rules at clause 20. A comparison of clause 20 with sections 1(4) and 3(2) of, and paragraph 1(3) of Schedule 2 to, the Immigration Act 1971 reveals significant difference between the current regime and that proposed in the draft legislation. Firstly, clause 20 does not provide for the timeframe within which

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Parliament may disapprove of the rules and require their amendment (cf. section 3(2)). Secondly, clause 20 provides greater specification as to what may be expected to be included within the Rules (see clause 20(3)). The first difference is a significant omission, which should be remedied.

5. The second difference appears to be a modest improvement – but it highlights a broader problem. The legislation (now and in the draft) has over time included wider and very general power to the Secretary of State in relation to such things as cancelling immigration permission/leave and imposing conditions on immigration permission/leave. It has been assumed (and sometimes positively asserted[1]) that the rules will set out how such powers are to be exercised, but the legislation permits (perhaps encourages) but does not require that. With recent introductions of increased powers to impose conditions of residence[2], of reporting[3] and on studies[4] this becomes of greater concern. Whereas clause 20 should not be drafted so as to restrict the Secretary of State's discretion to grant permission outside the rules, it should be amended so that it is clear that the exercise of certain of the wide powers contained in the draft Immigration Bill (e.g. to impose conditions[5], cancel permission[6]) will be made subject to the rules, unless the legislation is to be redrafted so as to include appropriate constraints within the body of its provisions.

6. The consultation document makes dubious assertions regarding retrospection:

> "*3.8. When the Rules are changed they do not retrospectively affect applications. This avoids confusion and hardship to people whose applications have been decided.*"
>
> "*3.9. The relevant Immigration Rules (those used to decide the application) will continue to be those in force at the time of the decision, not the time of application.*"

Paragraph 3.9 makes clear that what is meant is that there will be no retrospective effect to those whose applications have already been decided. That is not what paragraph 3.8 says. That paragraph states that changes to the rules do not retrospectively affect applications. This, as a matter of current practice, is incorrect and, having particular regard to the ever-increasing immigration application fees, is something that should be addressed. Retrospective effect to outstanding applications currently means that someone can apply at a time when he or she meets the rules only to find that he or she is refused and loses a large fee because the rules change before a decision is made on the application. This lacks transparency, and where a fee is forfeited is especially unjust since had the

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[1] e.g. '*…it is usual practice for the overall architecture of the immigration system to be set out in primary legislation, with the Immigration Rules containing the detail of how the power will apply.*' *per* The Lord West of Spithead, *Hansard* 4 Mar 2009 : Column 777

[2] section 16, UK Borders Act 2007

[3] section 16, *op cit*

[4] section 52, Borders, Citizenship and Immigration Act 2009

[5] clauses 11 & 12, draft Immigration Bill

[6] clauses 15 & 19, draft Immigration Bill

person known what rules were going to apply to the application he or she may well have chosen not to make it. It is vital that there should be transitional provisions for Rule changes, to ensure that applications are decided under the rules in force at the time they were made.

7. As regards retrospective effect to persons after the decision on their application, it was not merely the HSMP cases where this happened (these were merely among those examples which the courts held to be unlawful[7]). A very recent example of retrospective effect is provided by the imposition of conditions on studies to those already granted leave when the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") was enacted[8].

8. As regards archiving, whereas paragraph 3.14 of the consultation document rightly acknowledges the need for archiving of rules, it is also necessary that there be archiving of guidance. It must also be clear, within each document, the dates between which it was in force.

9. The reference at paragraph 5.3 of the consultation document to a "*target operating model*" is not a good advertisement for the stated aims of simplification expressed elsewhere in the document. What is a target operating model? The term is far removed from everyday language. And the invention of the term 'immigration product' is unhelpful; what is wrong with the current 'immigration status'?

Q1. Should we modernise and simplify the Immigration Rules?

10. The question is opaque (see general comments, above), though the consultation document sets out a number of intentions regarding the content, style and format of the rules.

11. The following appear to be good intentions:

> "*4.7. …We will make it easier to navigate around, and between, Rules and guidance on our public website.*"
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> "*6.4. We will minimise the guidance required. We will also minimise the use of appendices to the Rules…*"
>
> "*6.5. We will ensure there is a single glossary for the Rules…*"
>
> "*6.8. …We will format the Rules to minimise the need to scroll.*"
>
> "*7.3. We will… Get straight to the point, using a direct, active style… Remove any words or phrases that aren't essential… Keep sentences short… Keep pages and sections short… Use active verbs instead of abstract nouns… Avoid double negatives and passive sentences… Draft Rules so that they are gender-neutral… Say 'must' where something is required and 'will' where something is inevitable… Say*

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[7] *HSMP Forum (UK) Ltd v SSHD* [2009] EWHC 711 (Admin); *HSMP Forum Ltd v SSHD* [2008] EWHC 664 (Admin)

[8] section 52, *op cit*

> *'can' or 'could' where there is choice or when something is not inevitable… Ensure if we say 'can' or 'could' we explain the circumstances in which this might or might not be true… Use simple, everyday English… Avoid using everyday words with an alternative meaning… Consider the visual impact of the Rules. Highlight key words… Link the Rules to other relevant information… Avoid acronyms…*"

However, as regards these, some caveats are needed as follows. Minimising the need to scroll may be helpful, but it is less helpful if this is done simply by producing several links so that to read a relevant rule the reader must move through several pages. For those who will want or need to print out something, it will be more important that as much as possible is included on one page rather than their having to print out several distinct pages. Short sentences may be more important than removing non-essential words or phrases or maintaining short pages or sections. It is not that these other aims cannot be useful, but that sometimes a series of short sentences may add to length. However, short sentences are generally easier to follow, and if what is written is clear and easily digestible that will be better than it being short in total but concise to the point of being less easy to understand. Additionally, it is necessary to recall the nature and purpose of these rules. While, as the consultation document states, the rules sit somewhere between delegated legislation and a policy document, they constitute sophisticated legal rules, which demands that their drafting provides for precise meaning. This may require the use of words with an accepted, technical meaning rather than an everyday, but looser alternative.

12. As for using everyday words, the 'simplification' record to date is not good – e.g. 'probationary citizenship' and 'immigration bail' are plainly terms (in Borders, Citizenship and Immigration Act 2009 and Draft Immigration Bill respectively) that do not comply with the stated aim of "*avoiding using everyday words with an alternative meaning*". This document itself includes 'register an application', para 2.5, and 'immigration product', para 5.1 et seq.. .In any event, changing terminology, which has been used over many years, risks introducing new uncertainty into immigration law and practice regarding the meaning of the rules, since existing, longstanding terminology will generally be very familiar to practitioners, immigration judges and the courts (and ought to be familiar to others, including UKBA officials). This may lead to confusion, inconsistency and litigation, with attendant costs.

13. Additionally, the numbering of the rules could usefully be reconsidered. Paragraph numbers such as have recently been introduced are far from simple, and by rethinking how the rules are numbered (e.g. allowing for individual number series to begin within each section of the rules) it ought to be possible to avoid the worst of what has been created. One of our members suggests that the Dewey Decimal System may provide a useful model. Certainly, it is an example of a system that avoids the need for such numbering as has resulted in the inclusion of paragraphs 245ZZA to 245ZZD in the current rules.

Q2. Should we make Rules change more predictable and transparent e.g. scheduling routine Rules changes and listing potential Rules changes?

14. The following proposals are reasonable:

> "*3.10. …We would like to increase transparency by listing areas of potential Rules change, wherever possible.*"

> "*3.11. We will schedule routine Rules changes for April and October… Genuinely urgent changes… will continue to be laid when needed…*"

It would be useful, and aid transparency, if the governing Act or the rules set out provisions on how changes are to be made. We note that the table on the structure of the rules[9] suggests this will be included in the rules. The consultation document also rightly identifies that urgently needed changes (e.g. in response to a court judgment) need to be made without waiting for a scheduled event. Whereas concessions outside the rules may provide an immediate solution in some cases, this cannot provide a satisfactory solution since it is plainly lacks transparency to continue to have published an unlawful rule. Where a concession is temporarily introduced pending replacement of a rule, it would be appropriate to immediately withdraw the rule (itself a change in the rules) and provide a clear link in the rules document on the UKBA website to that concession.

15. Whereas the following proposal may be useful, no detail of what may be developed is provided.

> "*3.12. We will develop a new* [] *process for testing draft Rules changes in advance of laying the changes before Parliament…*"

It would also be useful to ensure consultation on changes to the rules in advance of their introduction. This would help to ensure that the rules remain clear and accessible. It would also help to avoid situations where the impact of a change is misjudged. It would be in keeping with the Ministerial assurance given during the passage of the 2009 Act[10].

Q3. Should we reduce the amount of guidance, ensure any remaining guidance is better quality, and refocus our energy and effort from creating and maintaining guidance into ensuring the Immigration Rules are simple and clear in the first place?

16. The need for guidance will be likely to depend upon the degree of clarity and comprehensiveness in the rules. However, there is considerable unnecessary duplication of guidance at present. Generally, duplication is unnecessary. However, where a general or underlying point of guidance applies across several areas of UKBA operations it may be more useful to

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[9] see page 12 of the consultation document

[10] '*…we take seriously our duty to consult widely before making changes to the Immigration Rules…*' *per* The Lord West of Spithead, *Hansard* 4 Mar 2009 : Column 777

include the same or similar statements in a number of guidance documents. This may reduce the number of guidance documents relating to any particular type of application or the work of any individual UKBA official.

17. The general aim to reduce the amount of guidance and improve its quality, therefore, is the correct one. That said, having regard to the range of powers that would be available under the draft Immigration Bill it seems that energy and effort will continue to be needed to produce, in particular, clear guidance about how and when such powers are to be exercised – particularly where the rules do not provide any or any sufficient constraint upon these powers. Without such guidance, the exercise of significant immigration powers by UKBA officials will be lacking in transparency and may result in inconsistency and arbitrariness. The recent judgment of the European Court on Human Rights in relation to anti-terror powers of stop and search gives example of how this may be unlawful (and in any event may lead to costly litigation)[11].

18. Guidance, like the rules, may also be improved by consultation.

4. Is our suggested future Immigration Product and Rules structure clear and simple?

19. The general structure is set out in the table in the consultation document (at page 12); and as a general structure it is a reasonable one.

20. As regards the term "immigration product", this appears to be another example of inappropriate language usage. Others have highlighted to us that this is the language of consumerism and inappropriate to describe the exercise of statutory and prerogative powers relating to rights and entitlements. We agree.

5. We are planning to modernise and simplify UK Ancestry and Representatives of Overseas Business and create new Rules and any guidance (if required) that reflects this framework. Have you got any specific suggestions on how we could modernise and simplify these areas?

21. Some discrete suggestions are offered here. As no indication is given of why change is proposed in these rules alone, or how it is possible to 'modernise and simplify' the birth of a grandparent, we see no need for change in the substance of the rule. However, we would be content to comment on drafts of the rules for these categories prior to their adoption, and our comments here should not, therefore, be anticipated as comprehensive or final.

22. Paragraph 144 of the rules provides example of where breaking down a lengthy sentence into shorter sentences would make the rule more readily understood by the reader. Additionally, the language may be made easier for the reader if:

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[11] *Gillan & Quinton v UK* (Application No. 4158/05)

a. “*The requirements to be met by a person seeking…*” is amended to “*A person will be granted permission* [if that is the term that is to be used] *if he or she meets the following requirements…*”.

b. Distinct paragraphs are provided for category 144(ii)(a) and category 144(ii)(b) since the former has a number of further requirements set out in the paragraph, which do not apply to the latter.

23. The discrete comment at paragraph 22a. (above) applies equally to paragraph 186 of the rules.

Immigration Law Practitioners’ Association

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