Amnesty International UK response to Law Commission consultation

***Simplification of the Immigration Rules*, Consultation Paper No 242**

May 2019

Consultation Question 1: Do consultees agree that there is a need for an overhaul of the Immigration Rules?

◉ Yes ○ No

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

◉ Yes ○ No ○ Other

Please expand on your answer:

We broadly agree with the proposed principles. We would emphasise that drafting needs to ensure rules are accessible, which we understand to mean understandable to the target audience or audiences. Several of the principles have potential to contribute to that, albeit we acknowledge the potential tension between clarity and precision (paragraph 1.20 of the consultation document). Some of the answer to such concern lies outside the strict remit of the Law Commission's review, but is something we would encourage the Law Commission to draw to the attention of the Home Office - i.e. that the purpose of simplification (and principles to underpin it) should be a primary consideration in policy-making. See our response to Questions 10, 44, 46 & 49 and final comments.

Consultation Question 3: We provisionally consider that the Immigration Rules should be drafted so as to be accessible to a non-expert user. Do consultees agree?

◉ Yes ○ No ○ Other

Please expand on your answer:

We generally agree 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.

Consultation Question 4: To what extent do consultees think that complexity in the Immigration Rules increases the number of mistakes made by applicants?

Please share your views:

We consider that complexity is a cause for error including by applicants (whether on their own part or the part of their advisers). However, we consider it is also a cause for error by decision-makers (both officials and judicial decision-makers); and a cause for error made by policy-makers in drafting the rules. For example, complexity was introduced both by the points-based system and the introduction of Appendix FM (each of which are discussed in the consultation document). That complexity (at least) may provide some explanation as to how the rules applying to survivors of domestic violence ceased to apply to everyone granted leave on the basis of their relationship to a settled partner - we provide further information on this in response to Question 21.

Moreover, complexity is not merely a cause for error. It undermines confidence. If an applicant cannot understand the rules, it is less likely that she, he or they will have confidence in a decision to refuse her, his or their application or appeal. Indeed, the greater the complexity, the harder it will be for the applicant to understand or be satisfied that an interpretation or application of the rules that does not accord with their own aspirations is correct, fair or consistent with how they believe the rules to have been applied in others' cases. The unfairness and/or sense of unfairness is only compounded by high and increasing fees. It is unlikely to assist an applicant to accept a decision or the consequences of a decision, whether or not the decision is legally correct.

Consultation Question 10: We seek views on the correctness of the analysis set out in this chapter of recent causes of increased length and complexity in the Immigration Rules.

Please share your views:

We do not disagree with the analysis. However, we consider it necessary to add, with emphasis, that policy and policy change is a cause of complexity. We understand the Commission's role is not to review or make recommendation on policy, and acknowledge the terms of reference (as discussed in paragraphs 1.8 to 1.10 of the consultation document). Nonetheless, if the aim of simplification is to be achieved (and if the principles proposed regarding the drafting of the rules are to be secured), it is necessary that the Home Office (Ministers and officials) 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 can and is a significant source or cause of complexity. We would urge the Commission to make this clear to Ministers and officials; and in its final report. The aim of simplification (and/or of realising such principles as accuracy, accessibility, consistency and durability; and of securing justice and confidence in this) ought to be a primary consideration in the making of policy. Even a cursory consideration of the many judicial comments on the complexity of the rules (some of which cited in the consultation document) indicates that complexity is bad for policy and bad for confidence in that policy. This is not the only reason, but is sufficient reason, why avoiding complexity ought to be a primary consideration in policy-making; and it would be useful and appropriate for the Commission's report to raise this.

Consultation Question 14: We seek views as to whether the length of the Immigration Rules is a worthwhile price to pay for the benefits of transparency and clarity.

Please share your views:

We agree that reduced length is not in and of itself a sufficient or necessary goal. If the rules are clear and accessible (see previous responses), whatever length is necessary to achieve that will likely be worthwhile.

Consultation Question 15: We seek consultees' views on the respective advantages and disadvantages of a prescriptive approach to the drafting of the Immigration Rules.

Please share your views:

See responses to following Questions relating to prescription. A prescriptive approach may ensure consistency and provide greater clarity. Insofar as it leads to decision-making that promotes and is seen to promote fairness, rather than arbitrariness, that may be advantageous. However, if prescription serves to give effect to arbitrary distinctions between applicants with equal claims to leave to enter or remain, this will promote a lack of confidence, be unfair and be disadvantageous. The purpose of any particular rule and the way it is implemented may, as discussed in responses to following Questions, have a bearing on whether prescription is appropriate or desirable.

Consultation Question 16: We seek views on whether the Immigration Rules should be less prescriptive as to evidential requirements (assuming that there is no policy that only specific evidence or a specific document will suffice).

Please share your views:

We generally agree. It may be appropriate in some cases to specify evidence that will normally satisfy a particular requirement without prescribing that the requirement can only be satisfied by production of the specified evidence. That is at least an option for providing greater predictability and consistency while leaving room to accommodate circumstances that are not covered within the scope of what is prescribed (i.e. for where someone does not have and cannot obtain easily or at all the prescribed evidence but does have evidence to show that she, he or they meet the relevant requirement). In general terms, we think the rules should be drafted in ways best designed to facilitate the applicant who meets whatever requirements (subject to those requirements being lawful, reasonable and human rights-compliant) may be set. While that aim is not within the scope of the Commission's review, we note that the underlying direction given to decision-makers (from Ministers, senior officials, supervisors and policy guidance) is liable to greatly influence how effective may be any discretion and flexibility (or conversely prescription) in practice.

Consultation Question 17: We seek views on what areas of the Immigration Rules might benefit from being less prescriptive, having regard to the likelihood that less prescription means more uncertainty.

Please share your views:

Certainty is an important quality in relation to the rules. There are factors that may emphasise its importance. For example, policy on fees influences this. If fees continue to be high (or are increased), there is likely to be a greater need for certainty and consistency. This is because the more it has cost the applicant, then the perception or reality of unfairness or injustice (see our response to Question 4) of a refusal is likely to be greater where it was unclear what the applicant needed to show or provide for her, his or their application to be granted. Another consideration may be the purpose (rules' category) of the application and whether the application is to come to the UK or to stay in the UK. There may be greater injustice arising if someone cannot understand the rules permitting family reunion in the UK than an opportunity to study in the UK. This may be because the impact of family separation is more unjust than the absence of opportunity to study in the UK; or because the opportunity to study elsewhere mitigates the absence of opportunity while the family separation cannot be mitigated adequately or at all. There may be greater injustice arising if someone cannot understand the rules permitting continued stay (after the applicant has made significant financial, emotional and/or familial investment in the UK) than entry to the UK. There may be other relevant factors.

Consultation Question 18

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

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

Do consultees agree?

○ Yes ○ No ◉ Other

Please expand on your answer:

We consider there are further considerations. We refer to our response to Questions 16 & 17. There are policy, leadership and cultural questions that arise because flexibility in one context (such as where decision-makers are or feel encouraged to generally obstruct or refuse applications) will have a different impact than in another (such as where decision-makers are or feel encouraged to

facilitate and grant applications). In short, a primary question in relation to flexibility or prescription is what is it for (or what is it understood by decision-makers to be for) - is it e.g. to restrict entry or stay per se or to facilitate entry or stay of people with good claims to enter or stay? While these are not matters for the questions of drafting to which the review is directed, we suggest they need to be addressed in the report of the Commission for reasons similar to those touched on in our response to Question 10.

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

○ Yes ○ No ◉ Other

Please expand on your answer:

Please see our response to Question 21. We do not disagree with the proposed division of subject-matter. However, it is not without its complications.

For example, the division of family members into proposed Part 12 (Family members of workers, businesspersons, investors and students) and proposed Part 13 (Family members of British citizens, settled persons and persons with refugee/humanitarian protection status) may entail more complication than is immediately appreciated in relation to survivors of domestic violence. In this regard, we do not intend to indicate any satisfaction with the current policy position under which no protection is provided to many survivors on grounds that they do not have leave of a type providing an expectation that they will in due course be eligible for indefinite leave to remain. However, as highlighted in our response to Question 21, that policy position if properly understood and applied may nonetheless be relevant to survivors in each of the proposed Parts.

Proposed Part 15 (Armed Forces) is another part that may (as now) include relevant family members - see Part 6 to Appendix AF of the existing rules.

Consultation Question 21: Do consultees agree that an audit of overlapping provisions should be undertaken with a view to identifying inconsistencies and deciding whether any difference of effect is desired?

○ Yes ○ No ◉ Other

Please expand on your answer:

We agree with the proposal for an audit. We agree that this should seek to identify overlapping provisions. However, we consider it should further address other real or potential inconsistency. For

example, we draw attention to Appendix FM (victim of domestic abuse), paragraphs DVILR.1.1. to D-DVILR.1.3., in particular, paragraph E-DVILR.1.2.

The relevant wording in the original drafting of paragraph E-DVILR.1.2.(a) stated:

"The applicant's last grant of limited leave must have been as a partner of a person settled in the UK"

Statement of Changes in Immigration Rules (HC 693) amended paragraph E-DVILR.1.2. such that it now reads:

"The applicant's first grant of limited leave under this Appendix must have been as a partner... [and certain paragraphs are then specified]"

The Explanatory Memorandum to HC 693 stated:

"Changes to Domestic Violence

"7.50. There are a number of changes to the provisions of the Rules which enable certain categories of applicant whose relationship breaks down as a result of domestic violence to apply for indefinite leave to remain. These changes clarify the existing eligibility criteria. There has been no change in policy."

This explanation strongly indicated that in drafting the amended rule, it was considered there would be no substantive change in policy and none was intended. However, the change did make a substantive change. This may not have been appreciated because the substantive change was to (or included) persons whose first grant of leave was under paragraph 319B and whose prospective eligibility for indefinite leave to remain lay under paragraph 319E of the rules in Part 8 relating to 'Family members of Relevant Points Based System Migrants'.

Under the original drafting of paragraph E-DVILR.1.2. a partner of a 'relevant points based system migrant', who was granted leave to enter or remain (whether a first or later grant of leave) with that 'relevant points based system migrant' would be eligible if that 'relevant points based system migrant' had become settled. This was in keeping with the underlying policy that survivors of domestic violence with leave, which was both dependent on their abusive relationship and expected to lead to their being eligible for indefinite leave to remain, would be eligible for indefinite leave to remain under the 'domestic violence rule' - i.e. permitting them to escape the abuse without losing their opportunity to become settled in the UK. The change made by HC 693 changed that. The explanatory memorandum indicates that this change was not intended, indeed was not understood.

It is not desirable. It is an example of how complexity may lead to error on the part of the policy-maker.

As stated elsewhere, our purpose in highlighting this matter is to draw attention to an error in policy arising from complexity and consequent error in drafting. It is not to indicate any satisfaction with the underlying policy that more widely restricts the protection given under the rules to survivors of domestic violence.

Consultation Question 44: We seek views on whether informal consultation or review of the drafting of the Immigration Rules would help reduce complexity.

Please share your views:

Consultation could do. However, 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. Moreover, for reasons we have given in response to other Questions, we remain concerned that complexity is not merely a matter of poor drafting (it is in part a matter of that) – it is also a product of bad policy and bad policy-making. We would encourage the Law Commission to encourage the Home Office to be more open to consultation on policy; and to adopting an approach to policy-making that puts avoiding complexity as a principle to underpin policy (not merely drafting).

Consultation Question 46: How can the temporal application of statements of changes to the Immigration Rules be made easier to ascertain and understand?

Please share your views:

The aim of simplification raises particular concerns in relation to this question. That is particularly so if simplification is only understood or considered in terms of the drafting of rules as distinct from the policy behind them and their effect. These matters cannot be appropriately disaggregated because the simplest approach in terms of drafting is to dismiss considerations of justice and fairness that should underpin transitional measures, which by their nature are likely to add drafting complexity. In this regard, we consider there to be two distinct areas of concern.

Firstly, which is expressly highlighted in the consultation document, there is the matter of whether a change in the rules is to have effect in relation to an application that is outstanding at the time of its introduction. If the change is to introduce some new restriction or requirement (which the applicant cannot or the application does not meet), there is real potential for unfairness. The overall effect is not a simplification - even if the drafting of the rules at any particular point in time is very easy to understand - since the overall effect is that an applicant (and those advising her, him or them)

cannot with confidence know the rules as they apply to her, him or them at the time of considering, making and paying for an application. Not all changes may have such an effect. Some changes may simply clarify or relax requirements of the rules, in which case there will be no reason not to apply a more favourable rule to any outstanding application.

Secondly, there is the matter of applications for leave to remain by applicants who have made considerable investment in the UK (meeting previous rules, paying for previous applications, moving themselves and their families etc.). Whether and how changes to rules affect whether applicants can stay in the UK are matters of policy. Nonetheless, they too are matters of complication (as well as justice and fairness). If the ambition of simplification is merely focused upon drafting, this again risks further promoting unfairness and injustice for it may be most simple to implement changes all at once and with equal effect to everyone to whom they do or will in future apply. Such an approach would mean applying changes to all applicants, including applicants who have no opportunity to make any preparation or adjustment for a change they cannot have anticipated or satisfy. Again, these concerns will not apply where a change is merely to bring clarity or relaxes requirements in the rules.

Consultation Question 47: Is the current method of archiving sufficient? Would it become sufficient if dates of commencement were contained in the Immigration Rules themselves, or is a more sophisticated archiving system required?

○ Yes ○ No ◉ Other

Please expand on your answer:

Our primary concern is to emphasise - as is identified in the consultation document including by the citation from the judgment of Underhill LJ in Singh v SSHD [2015] EWCA Civ 74 - that it is necessary for applicants, their advisers and decision-makers to be able to access the rules (also guidance) that applied in the past - in some instances, even years or decades previously. We note that the current archiving system makes it difficult to locate and identify a particular change without knowing in advance when the change was made. This may be especially problematic where the relevant rule or rules have been subject to multiple changes made at different times all of which may be relevant to understanding the circumstances of a particular applicant – e.g. because she, he or they have been living in the UK subject to the rules over an extended period of time (or even because her, his or their application has remained outstanding over an extended period of time).

Consultation Question 49: What issues arise as a result of the frequency of changes to the Immigration Rules, and how might these be addressed?

Please share your views:

Our concern is not merely at the frequency of change, it is also the speed of change. Thus, many changes take effect with no greater notice than their publication in a new statement of changes, often to take effect in a matter of days or weeks. This coupled with not making transitional arrangements to respect the circumstances of people already embarked on, and invested in, immigration 'routes' may have a devastating impact on their lives. Again, this is a matter of policy, but it is one way by which confidence is lost in the immigration system and that system proves complex, in ways that people cannot anticipate, plan for or mitigate. In addition to these concerns, particularly for legal advisers and decision-makers, the frequency of changes to the rules increases potential for error and/or cost as it is more difficult to maintain familiarity with the rules.

Consultation Question 50: Do consultees agree that there should be, at most, two major changes to the Immigration Rules per year, unless there is an urgent need for additional changes? Should these follow the common commencement dates (April and October), or be issued according to a different cycle?

○ Yes ○ No ◉ Other

Please expand on your answer:

We consider this is a lesser concern to questions about whether or how provision is made for transition and/or for people to prepare for or mitigate how any change applies to them - see our responses to Questions 46 & 49.

Additional comments

Please use the space below if you have any additional comments:

We have raised concerns of both drafting/presentation and policy. We appreciate that the Law Commission's remit for this consultation concerns the former and not the latter. However, we are concerned that the two cannot readily be divorced. 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 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 have briefly explained our views on these matters in the body of our responses to specific Questions. We emphasise that simplification, on which there is broad consensus that it is a legitimate and necessary aim, cannot or will not be achieved merely by improved drafting and presentation of the rules. We invite the Law Commission, therefore, to draw attention in its report to the need for principles of or relating to simplification to be given wider effect in policy-making so that potential gains through improved drafting and presentation of the rules are realised and maintained. The many judicial comments concerning

complexity of the immigration rules (and wider system), to some of which the consultation document makes reference, provide sufficient justification for a recommendation by the Law Commission that securing and maintaining 'simplification' (by which we mean broadly those principles and purposes associated with that aim by the Law Commission and others) should be an objective of policy.

The Law Commission may also wish to consider recommendations concerning provision of legal aid and appeal rights. Complexity of the rules is one significant factor in the injustice done by widespread removal of legal aid and appeal rights. It is noteworthy that in relation to legal aid, officials and Ministers have repeatedly claimed that the rules are simple in seeking to justify their policy that legal advice and representation is generally unnecessary in non-asylum immigration matters. Such claims are belied by the rules and the many judicial observations as to their complexity (and of wider immigration law and policy). The rules and their application have dramatic impact on people's lives - determining whether families can be or stay together, whether people who've made considerable investment in moving to the UK can continue their lives here, whether people are made vulnerable to exploitation and abuse and whether people are made subject to immigration powers (to detain, remove and exclude them from the UK) and exclusions from various vital public services (e.g. to healthcare or social assistance) and social opportunities (e.g. to rent accommodation or work). We encourage the Law Commission in its final report to recognise the considerable complexity in the current rules and the substantial harms and injustice this may cause applicants or prospective applicants - made worse where legal assistance and independent judicial remedies are unavailable or inaccessible.

Finally, 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."

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.