



LEGISLATION

The Border and Immigration Agency of the Home Office (successor to the Immigration and Nationality Directorate) recently published a consultation paper which can be seen on its website at www.bia.homeoffice.gov.uk and policy/consultation documents. The following Acts of Parliament are directly concerned with asylum and immigration:

Immigration Act 1971
Immigration Act 1988
Asylum and Immigration Appeals Act 1993
Special Immigration Appeals Commission Act 1997
Immigration and Asylum Act 1999
Nationality, Immigration and Asylum Act 2002
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
Immigration, Asylum and Nationality Act 2006

The latest addition, the UK Borders Bill, is another substantial piece of legislation currently going through the House of Lords, having passed all its stages in the Commons. Since 1993 successive Acts have been passed in attempts by the government to cope with the ever increasing problems posed by the rising tide of immigrants, legal and otherwise, and asylum seekers. Successive Acts invariably contain substantial amendments and repeals of provisions in earlier Acts, making it increasingly difficult to ascertain just what the law is on a particular topic. The fifth edition of the Handbook of Immigration Law, published in 2007 and referred to in paragraph 5 below, runs to over 1200 pages.

Apart from statutes there is also a considerable volume of subordinate legislation, notably the Immigration Rules, made under the Immigration Act 1971, which currently run to over 200 pages and are constantly being amended. There are many other statutory instruments dealing with various topics including procedural rules relating to asylum and immigration appeals.

Clearly there is an urgent need for a major tidying up of all this legislation, hence the consultation paper to which we have now replied in the submission which follows. We are very concerned at the emphasis in the consultation paper on simplification, which by its nature involves much rewriting of the laws, a process which must take time. In the submission we have therefore pressed the case for a conventional consolidation of the Acts of Parliament, without ruling out simplification

at a later stage. Consolidation entails putting into one Act in tidy form all the various provisions presently scattered around the Acts listed above. Its purpose is to make the law more readily accessible and comprehensible, but without changing anything. It re-enacts existing legislation “warts and all”.

Following is the text of our submission to the Home Office:

SIMPLIFICATION OF IMMIGRATION LAW

1 I am submitting this response to the Consultation Document on behalf of Migration Watch UK. I am its Honorary Legal Adviser. Between 1992 and 2002 I was a part time Immigration Adjudicator and disposed of some hundreds of asylum and non-asylum appeals. I joined Migration Watch at the end of 2002, on retirement from that position, and since then have endeavoured to keep up to date with immigration legislation and case law.

2 The need for consolidation of the primary legislation has been very apparent for some time and with new Acts of Parliament being passed almost every year is now urgent. Such a consolidation must in my opinion be the first and most important step and should be done in the traditional and well tried manner long established in the fields of tax and company law, where there is new legislation at frequent intervals and it rapidly becomes difficult to identify with clarity the law on any particular subject. In line with past practice the actual consolidation Bill should be preceded by a tidying up Bill, repealing those sections of existing Acts which are redundant, and otherwise clearing the way for consolidation. Such a Bill could for example include provisions revising sections 19-25 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, dealing with marriages to which one party is subject to immigration control and which has recently been found by the Court of Appeal to be incompatible with Article 12 of the European Human Rights Convention, unless of course such revision has already taken place beforehand. Such a Bill would have to go through the normal stages in both Houses of Parliament. Once it was enacted the way would be clear for a consolidation measure which would rearrange and place in logical sequence all provisions in the existing Acts. The measure would not seek to change the substance of the law in any fashion but would simply re-enact it in tidy form. It would also include tables of derivation and destination so that it can readily be seen from which previous section of which Act a section of the Consolidation Bill is derived. The Rules of both Houses of Parliament enable a consolidation measure to be treated in an uncontentious manner. As I understand it, though I have no personal experience, the Committees which consider the details of a consolidation Bill are guided by the Parliamentary draftsman so that they can satisfy themselves that there are neither omissions nor additions.

3 I am not happy about the emphasis on simplification. Consolidation should make legislation tidier and more readily accessible but is never designed to make it simpler. As successive Acts have been passed the law on asylum and immigration has inevitably become more complex in order to give effect to the government’s policy decisions. It is difficult to see how simplicity is to be achieved unless the government is prepared to dismantle some of the elaborate machinery and procedures which have been created. We now have, to take random examples, the Asylum Support Service, the office of Immigration Services Commissioner with responsibility for regulating immigration advisers and the identification of safe countries in relation to asylum applications and appeals. None of these existed 10 years ago and presumably the

government would not wish to scrap them. Equally, it would surely not wish to completely rewrite the legislation, keeping all its complexities but aiming at simpler language. The language of statutes is closely construed and there is now a considerable and growing body of case law based on the Immigration Acts as presently drafted. Substantial rewriting would give rise to considerable uncertainty and would give plenty of scope to lawyers to pursue new avenues for appeal and judicial review. This would not in my view be in the public interest. If particular legal provisions are to be retained it is essential that the language in which they were originally drafted should also be retained. We do not oppose simplification but the first and urgent priority is consolidation. Any attempt to combine the two in the same exercise would cause much confusion and delay. Simplification is a desirable long term objective but a conventional consolidation is the immediate necessity. It may be followed by simplification measures over a longer period if that is still the government's intention.

4 So far as subordinate legislation is concerned, there is less of a problem. Immigration Rules and the various statutory instruments can be and are frequently amended and are not subject to the same degree of Parliamentary scrutiny as primary legislation. The Immigration Rules are frequently amended, but many paragraphs on basic subjects such as leave of entry for spouses or students, have been in the succeeding versions of the Rules unchanged for many years and have been subject to much judicial interpretation. The Immigration Rules have the merit of usually being in clear and plain English; they have always been written with a view to their being readily comprehensible by immigration officers and other non-lawyers. The Rules were last consolidated as HC 395 in 1994 and a fresh consolidation is long overdue. It is to be hoped that the next consolidation will retain the existing wording of the individual Rules.

5 Some acknowledgement is due to Margaret Phelan and James Gillespie for their labours in compiling the Handbook of Immigration Law, now in its fifth edition published in 2007. It is an essential tool for immigration judges, lawyers and others working in the field. It is something of an irony that no comparable service is provided by the Home Office, Ministry of Justice or Treasury Solicitor, the departments concerned respectively with administration of immigration and asylum processes, appeals and the drafting of legislation, which between them have huge resources of legal and other civil service manpower. Two barristers practising in the field of immigration provide this service in their spare time. It is to be hoped that the simplification exercise will result in a Consolidation Act, consolidated versions of the Immigration Rules and so far as reasonably practicable of other statutory instruments.

6 It is also to be hoped that once the consolidation and simplification exercises are completed (assuming that the government accepts the recommendation on priorities set out in paragraph 3 above) and the new Acts of Parliament and subordinate legislation resulting from them are in place, the government will be able to manage in future with a minimum of new primary and subordinate legislation in the interests of pursuing the aims of stability and comprehensibility of the law.

Harry Mitchell QC
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