

Legal certainty, complexity and citizens' rights



Charles Bishop



Complexity

- (aa) sub-paragraph (a)(ii)(aa); or
- (bb) sub-paragraph (b)(ii)(aa) (where the relevant citizen is an Irish citizen); or
- (cc) sub-paragraph (c)(i); or
- (dd) sub-paragraph (d)(iii)(aa); or
- (ee) sub-paragraph (e)(i)(bb)(aaa), (e)(i)(bb)(ccc) or (e)(ii)(bb)(aaa); or
- (ff) sub-paragraph (f)(ii)(aa)

- (aa) sub-paragraph (b)(i)(aa); or
- (bb) sub-paragraph (b)(ii)(aa); or
- (cc) sub-paragraph (b)(iii)(aa); or
- (dd) sub-paragraph (b)(iv)(bb)(aaa), (b)(iv)(bb)(bbb) or (b)(v)(bb)(aaa); or
- (ee) sub-paragraph (b)(vi)(aa); and

(aa) meets the requirements of sub-paragraph (b) of the applicable definition of relevant EEA citizen in Annex 1; or
 (bb) meets the requirements of sub-paragraph (d)(ii)(bb) of the applicable definition of relevant EEA citizen in Annex 1; or
 (cc) meets the requirements of sub-paragraph (e)(ii) or (e)(iii) of the applicable definition of relevant EEA citizen in Annex 1; or
 (dd) is a **relevant naturalised British citizen** (in accordance with sub-paragraphs (b), (c) and (d) of the relevant definition in Annex 1); or

- There are 2 different family permits:
- the EU Settlement Scheme family permit
 - the EEA family permit
- The one you should apply for depends on your circumstances.



12. Given that the scheme was designed to regularise the status of millions of European citizens and their family members who were resident in the United Kingdom before it exited from the European Union, the provisions needed to be sufficiently clear for a lay person to apply for leave to enter or remain without the assistance of a legal representative. Instead, some parts are barely comprehensible even to experienced legal professionals, including the Secretary of State's own representatives, who through no fault of their own often seem unable to explain the meaning of the provisions to the Tribunal with any confidence.

13. The rules require navigation from definition to definition to understand a single requirement. The publicly available online provisions are formatted in a dense and impenetrable way that ignore the usual conventions of legal drafting, with no paragraph breaks, confusing alphabetical sub-provisions, and define requirements by reference to multiple definitions elsewhere in the Appendix. Some provisions contain a series of requirements expressed in the negative, which makes the meaning more difficult to decipher. In short, some parts of the rules relating to the EU Settlement Scheme are so difficult to comprehend that it is at least arguable that they lack the clarity of law.

SSH D v Kabir (3 Jan 2023, unreported, EA/13870/2021) per UTJ Canavan

Many other examples outside Appendix EU



Law Commission report

Recommendation 1.

We recommend that the Immigration Rules be overhauled.

Paragraph 1.21



Law
Commission
Reforming the law

Simplification of the Immigration Rules: Report

[Immigration Rules Appendix Short-term Student \(English language\)](#)

Immigration Rules for Short-term Students

[Immigration Rules Appendix Child Student](#)

Immigration Rules for Child Students

[Immigration Rules Appendix Parent of a Child Student](#)

Parent of a Child Student

[Immigration Rules Appendix Graduate](#)

This route is for a Student in the UK who wants to work, or look for work, following the successful completion of an eligible course of study at UK bachelor's degree-level or above. The study must have been with a higher education provider with a track record of compliance.

[Immigration Rules Appendix Skilled Worker](#)

The Skilled Worker route is for employers to recruit people to work in the UK, including in UK waters, in a specific job. A Skilled Worker must have a job offer in an eligible skilled occupation from a Home Office-approved sponsor.

[Immigration Rules part 3: students](#)

Persons seeking to enter or remain in the United Kingdom for studies.

[Immigration Rules part 4: work experience](#)

Persons seeking to enter or remain in the United Kingdom in an "au pair" placement, as a working holidaymaker or for training or work experience (paragraphs 122 to 127).

[Immigration Rules part 5: working in the UK](#)

Persons seeking to enter or remain in the United Kingdom for employment (paragraphs 128A to 199B).

Dangers of simplicity

Brexit: Home Office advert banned for 'misleading' EU citizens

🕒 28 August 2019 · 💬 [Comments](#)

A government advert telling EU citizens what they need to do to stay in the UK after Brexit has been banned.

In a Home Office radio advert aired in April, listeners were told: "All you need to apply is your passport or ID card and to complete an online form".

But the Advertising Standards Authority ruled the claim was misleading, as many applicants were required to submit further documents not stated in the ad.

The Home Office said: "We completely disagree with ASA's decision."



What does the law say about this?

- Common law
- Retained EU law and the Withdrawal Agreement
- ECHR



Common law

- Immigration Rules not a statutory instrument or (probably) delegated legislation. They are statements of administrative practice, but have a status higher than mere policy in other public law contexts because of the role of Parliament.
- No freestanding ground of judicial review that Immigration Rules must be clear and not confusing. But have been examples of rules being struck down in the (distant) past as partial or unequal in their operation as between classes; manifestly unjust; made in bad faith; or involving such oppressive or gratuitous interference with the rights of those affected by it as could find no justification in the minds of reasonable persons.
- And may be certain instances when complexity or obscurity of the provision is relevant to interpretation:
 - Principle of legality? Primarily one of statutory construction: *R (Miller) v COP* [2022] 1 WLR 4987 at para 58.
 - Construction against absurdity
 - Relevance of quality of legislative drafting to interpretation: *Bennion* [10.7] and *R v Investors Compensation Board ex p Bowden* [1994] 1 All ER 525.



Common law

- May be certain instances when complexity or obscurity of the provision is relevant to interpretation:
 - Principle of legality? Primarily one of statutory construction:
R (Miller) v COP [2022] 1 WLR 4987 at para 58.
 - Construction against absurdity
 - Relevance of quality of legislative drafting to interpretation: *Bennion* [10.7] and *R v Investors Compensation Board ex p Bowden* [1994] 1 All ER 525.
- But more difficult to use in straightforward rationality-type challenges:

“106. The United Kingdom's transition from EU law, including its domestic implementing legislation, to a system rooted in the concepts of leave to enter and remain created by the Immigration Act 1971 has been long and complex. In these circumstances, this court should be slow to categorise a difference in outcome, depending upon whether EU law or the EUSS was initially chosen, as being *Wednesbury* unreasonable.”

R (Ali) v SSHD [2023] EWHC 1615 (Admin)



Retained EU law and the Withdrawal Agreement

- Art 4(3) WA: *“The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law”.*
- See also *R (IMA) v SSHD* [2023] 1 WLR 817 at para 131 “the fact that the United Kingdom has left the EU does not mean EU legal concepts must be ignored; indeed, the contrary is the case.”
- The most relevant general principle is legal certainty which applies to the interpretation of the WA. Query how far that extends to interpretation of Appendix EU and decisions made thereunder.



Requirements of legal certainty

- Aspect of the rule of law.
- Principle recognised since 1961 and regularly invoked by CJEU, but case law is (ironically) somewhat inconsistent and murky.
- Rules of law must be clear, precise and predictable as regards their effects: eg *Criminal proceedings against Costa* (C-72/10) EU:C:2012:80 at [74].
- Application of rules of law must be foreseeable by those subject to them: eg *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* (C-201/08) [2009] E.C.R. I-8343 at [46].
- But more regularly gives rise to legitimate expectation requirements and similar public law concepts.
- Unclear extent to which general principles inform EUSS going forward.



“Quality of law” and the ECHR

- Requirements stem from provision that interferences with Convention rights are “prescribed by law” or “in accordance with the law” in Arts 5, 8, 9, 10 and 11.
- Basic requirements (see e.g. *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037):
 - Measure must have some basis in domestic law
 - Measure must be compatible with the rule of law, meaning it should be both accessible and foreseeable.
 - Accessibility includes being published, comprehensible and it being possible to discover what its provisions are.
 - Foreseeability includes that a person must be able to foresee its consequences for them and that discretions should not be so broad as in practice to be dependent on the will of those who apply them.



ECHR and the Immigration Rules

- Conflicting case law as to whether section 3 HRA 1998 with its enhanced interpretation duty to ensure consistency with the ECHR applies to the Immigration Rules: see e.g. *R (Syed) v Secretary of State for the Home Department* [2012] Imm AR 40 (held that it did not apply, but handed down before *R (Alvi) v SSHD* [2012] 1 WLR 2208) vs *R (W (A Child)) v SSHD* [2020] 1 WLR 4420 (held it did apply, but Syed not cited).
- Application of the Immigration Rules must respect Convention rights under section 6 HRA 1998: *Pankina v SSHD* [2011] QB 376.
- Court may find the Immigration Rules incompatible with ECHR in certain situations but exact standard remains to be determined following contemporary approach to such challenges after *R (A) v SSHD* and *BF (Eritrea) v SSHD* (see also *R (W)* (above) and *R (MM (Lebanon)) v SSHD* [2017] 1 WLR 771).



What next?

- Role of ECHR in EUSS appeals: *Celik* (CA) at para 72:

“Article 8 of the Convention does not assist in interpreting the scope of the Withdrawal Agreement and determining the rights granted by that Agreement. Issues under Article 8 of the Convention may arise when the respondent is considering relevant decisions under the Immigration Rules. When taking such decisions, the respondent would be under a duty under section 6 of the Human Rights Act 1998 to act compatibly with any such rights. In fact, we were told that, subsequent to the Upper Tribunal hearing, the appellant did apply for leave under Appendix FM of the Immigration Rules and limited leave to remain was granted. The appellant at present remains with his wife in the United Kingdom. There does not, at present, appear to be any arguable case that there is any breach of Article 8 of the Convention.”

See also *Batool* on raising ECHR arguments in EUSS appeals, and *SSWP v AT* [2023] 1 WLR 2669 (subject to appeal) on role of the Charter.





- Principles of non-discrimination: protection of vulnerable?



Thank you

180 Fleet Street
London
EC4A 2HG

clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
+44 (0)20 7430 1221

 Landmark Chambers
 @Landmark_LC
 Landmark.Chambers
 Landmark Chambers

© Copyright Landmark Chambers 2023

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

