

Complexity in the Immigration Rules: politics or the outcome of Judicial Review?

Gemma Manning

Senior Lecturer, University of Huddersfield

Jonathan Collinson

Lecturer in Law, University of Huddersfield

<https://orcid.org/0000-0001-7049-2192>

Disclosure

No financial interest or benefit has arisen from the direct applications of our research.

Word Count: 2816

Abstract

This article will consider the Supreme Court decision in *Alvi* and the distinction between the immigration rules and Home Office guidance. It will then demonstrate how prescription in the Rules predates *Alvi*, and discuss why this issue requires clarification in the context of the Law Commission's recent consultation on simplifying the Immigration Rules.

Introduction

The overwhelmingly complex nature of the Immigration Rules has been repeatedly noted by immigration lawyers.¹ Judges have described immigration law as a “maze”,² “an impenetrable jungle”,³ and possessing “a degree of complexity which even the Byzantine Emperors would have envied.”⁴ The Law Commission have finally taken notice and have published a consultation paper⁵ on simplifying the Immigration Rules.

In its report, the Commission identifies the Supreme Court judgment in *Alvi v Secretary of State for the Home Department*⁶ as the primary cause of the increased length and complexity in the Immigration Rules. *Alvi* established that factors determinative of a decision to grant or refuse leave to enter or remain must be based on rules, and not mere guidance.⁷ The Law Commission’s paper correctly identifies the outcome of Mr Alvi’s judicial review as an immediate catalyst for a large increase in the length of the Immigration Rules. However, the

¹ Luqmani Thompson & Partners, ‘Just how complex is immigration law?’ (27 March 2014) <<https://www.luqmanithompson.com/just-complex-immigration-law/>> accessed 30 April 2019

Darren Stevenson, ‘The byzantine complexity of the Immigration Rules, an ex-insider’s perspective’ (*McGill & Co Solicitors*, 02 August 2017) <<https://www.mcgillandco.co.uk/blog/the-byzantine-complexity-of-the-immigration-rules-an-ex-insiders-perspective.html>> accessed 30 April 2019

Colin Yeo, ‘How complex is UK immigration law and is this a problem?’ (*Free Movement*, 24th January 2018) <<https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/>> accessed 30 April 2019

² *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424 [21] (Underhill LJ)

³ *Sapkota & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1320 [127] (Jackson LJ)

⁴ *Pokhriyal v The Secretary of State for the Home Department* [2013] EWCA Civ 1568 [4] (Jackson LJ)

⁵ Law Commission, ‘Simplification of the Immigration Rules: Consultation Paper’ (Consultation Paper 242, 21 January 2019) <<https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>> accessed 30 April 2019

⁶ *Alvi v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 4 All ER 1041

⁷ *ibid* [57]

Commission errs in focussing on this apparent *legal* source of complexity. We argue instead that complexity in the Immigration Rules has been an ongoing and conscious *political* choice.

This article will consider the Supreme Court decision in *Alvi* and the distinction between the immigration rules and Home Office guidance. It will then demonstrate how prescription in the Rules predates *Alvi*, and discuss why this issue requires clarification in the context of the Law Commission's recent consultation on simplifying the Immigration Rules.

***Alvi* and the difference between rules and guidance**

Mr Alvi was refused leave to remain under the Points Based System because the job of assistant physiotherapist did not carry sufficient points for a Tier 2 (General) Migrant. Mr Alvi pursued a Judicial Review to challenge the refusal on the grounds that the list of skilled occupations (which listed assistant physiotherapist at below the requisite level) was contained in the codes of practice (a guidance document), not in the Immigration Rules themselves. The Supreme Court found that because this determinative criterion was found in guidance, rather than in the Immigration Rules – and therefore had not been laid before Parliament – the Secretary of State for the Home Department (SSHD) could not lawfully rely on it to refuse Mr Alvi's application.⁸

The *Alvi* judgment was a catalyst for a sudden growth in the number of Immigration Rules and their apparent complexity. It emphasised the need for factors determinative of a decision on leave to enter or remain to be based on Rules, not guidance. However, rather than responding proportionately to the judgment, significant Home Office guidance was quickly and clumsily transposed into the rules.

⁸ *ibid* [62]

By the Law Commission's reckoning, an additional 300-500 pages were added to the Immigration Rules after the *Alvi* judgment.⁹ The Law Commission's key recommendation is to reverse these increases to the length of the Immigration Rules by returning evidential requirements to guidance;¹⁰ but as actual guidance rather than as rules masquerading as guidance.

Overly simplistic analysis

Alvi precipitated a rapid expansion of the Immigration Rules, as the Home Office scrambled to preserve its system of control by importing what had been guidance into the Immigration Rules. However, it is overly simplistic to suggest that the complexity of the Immigration Rules is primarily due to the judgment in *Alvi*. This is not least because the judgment in *Alvi* rested on the proposition that the Home Office guidance was being treated as *rules* rather than as *guidance*. This meant that, in effect, the Immigration Rules were already of greater length, complexity, and prescription. The difference, pre-*Alvi*, was that some of the rules were unconstitutionally mislabelled as *guidance*.

In *Alvi*, the main justification for the distinction between guidance and the Rules is that the Immigration Rules are laid before Parliament, but the guidance is not. Section 3 (2) Immigration Act 1971 requires rules regulating immigration to be laid before Parliament by the Secretary of State for the Home Department (SSHD). If a rule does not go before Parliament, then the SSHD (as a member of the executive), oversteps her proper constitutional

⁹ Law Commission (n5) [5.22, 5.30-5.31]

¹⁰ Law Commission (n5) [6.3]

boundaries. A rule, for these purposes, is “any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused.”¹¹

Immigration rules, as emphasised by Lord Brown in *Odelola*¹² are statements of administrative policy, entering into force through the negative resolution procedure and not requiring approval by both Houses of Parliament. If disapproved, they are simply amended to attract approval rather than abrogated. But given the increasing length and complexity of the rules, the less likely parliamentary time will be available to debate them. The reality, as discussed in *Alvi*, is that the merits of statements of changes to the Immigration Rules are considered by the Legislation Scrutiny Committee in the House of Lords. Written and oral evidence may be called for, including from the Secretary of State, and a detailed report may be produced within 12-15 days, drawing them to the attention of the House, to allow time for debate within the 40-day period.¹³

However, the guidance that was transposed into rules immediately after *Alvi*, bypassed any opportunity for parliamentary debate.¹⁴ The judgment in *Alvi* was given on 18th July 2012, the statement of changes to the rules laid before Parliament on 19th July 2012¹⁶ and the rules brought into force on 20th July 2012.¹⁷ This can be contrasted to the main changes to family

¹¹ *Alvi* (n6) [57] (Lord Hope)

¹² *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230, [35] (Lord Brown)

¹³ *Alvi* (n6) [35] (Lord Hope)

¹⁴ Sanaz Saifolahi, ‘New Immigration Rules brought in immediately’, (*Free Movement*, 19th July 2012), <https://www.freemovement.org.uk/new-immigration-rules-brought-in-immediately/> accessed 29 May 2019

¹⁶ Home Office, *Statement of Changes to Immigration Rules CM 8423*, July 2012, <https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-cm8423-july-2012> accessed 29th May 2019. This included Appendix FM SE on specified evidence for family members to meet the requirements of Appendix FM.

¹⁷ HL Deb 18 July 2012, vol 739, col WS49, <https://publications.parliament.uk/pa/ld201213/ldhansrd/text/120718-wms0001.htm> accessed 29 May 2019

migration in Appendix FM itself, subject to consultation a year previously,¹⁸ with the statement of changes being published on 13th June 2012 and coming into force on 9th July 2012.¹⁹ The irony is that the Supreme Court in *Alvi* declared that guidance alone cannot be used to decide a case, as it has not been considered by Parliament, yet significant guidance was then rushed through Parliament to become rules with scant consideration of its content and prescriptive terms. Detailed evidential requirements, spanning 246 pages of guidance, became part of the Immigration Rules, but with none of the substantive Parliamentary scrutiny which is said to be their constitutional hallmark.

Another reason the Supreme Court in *Alvi* attributed greater importance to the Rules than the guidance was that there was a right of appeal against an immigration decision on the ground that it is not in accordance with the Immigration Rules.²⁰ Unfortunately, this is no longer the case. Prior to the Immigration Act 2014 immigration decisions could be appealed on the basis that the decision was simply “not in accordance with immigration rules”.²¹ After the Act, appeals must be brought on the basis that there is a breach of Convention rights under the Refugee Convention or the Human Rights Act.²² To fit within the new appeal grounds immigration appellants must demonstrate an interference with human rights.

¹⁸ Home Office, *Family Migration A Consultation*, June 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/269011/family-consultation.pdf accessed 30th May 2019

¹⁹ Home Office, *Statement of Changes to Immigration Rules HC 194*, 23 June 2012, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284574/hc194.pdf accessed 29 May 2019

²⁰ *Odelola* (n12) [6], quoted by Lord Hope in *Alvi* (n6), [9]

²¹ Formerly the Nationality, Immigration and Asylum Act 2002, s84(1)(a)

²² Immigration Act 2014, s15(4) amending the Nationality, Immigration and Asylum Act 2002, s84(1)

*Mohammed and Mostafa*²³ has tempered the harshness of these provisions by allowing the rules to illuminate the Article 8 proportionality exercise where family life is engaged.²⁴ But in *Mohammed and Mostafa* the relationship was between spouses, clearly engaging Article 8. The case was restrictive in its remit as it was propounded that “it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1).”²⁵

Thus, where an entry clearance decision is *prima facie* contrary to the Immigration Rules, but the appellants do not have relationships with individuals in the UK which amount to Article 8 ECHR protected family life, appellants will be left without an effective right of appeal. For example in *Adjei*,²⁶ citing *Kugathas v IAT*,²⁷ the Tribunal found that the ties between the appellant and her father and stepmother were not “more than the normal emotional ties between adult relatives” and therefore did not constitute family life under article 8 of the ECHR.²⁸ This restrictive approach to relationships and Article 8 was upheld by the Court of Appeal *Kopoi*.²⁹

Given the limited remit of family life appeals, the curtailment of appeal rights by the Immigration Act 2014 may bridge the gap between Rules and guidance and call into question the heightened status of the Rules over the guidance. This is a point made in the consultation paper,³⁰ but the implications are not explored in depth.

²³ *Mohammed and Mostafa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC)

²⁴ *ibid*, [9, 18]

²⁵ *ibid*, [24]

²⁶ *Adjei (visit visas – Article 8)* [2015] UKUT 0261 (IAC)

²⁷ *Kugathas v IAT* [2003] EWCA Civ 31

²⁸ *Adjei* (n26) [17]

²⁹ *Entry Clearance Officer, Sierra Leone v Kopoi* [2017] EWCA Civ 1511 (10 October 2017).

³⁰ Law Commission (n5) [6.15]

The judgment in *Alvi* was ultimately constitutionally correct. The SSHD is empowered by Parliament to promulgate Immigration Rules, and these are subject to Parliamentary scrutiny. To treat guidance as rules would permit the SSHD to circumvent Parliamentary scrutiny. However the implications of *Alvi*, both on its own terms and in light of more recent developments in the constitutional status of the Immigration Rules, is more nuanced than is suggested by the Home Office's response of quick and clumsy transposition of the guidance into Rules. Something else more significant is at play.

Political choices in responding to Judicial Review in *Alvi*

The Home Office's decision immediately to transpose its guidance into the Immigration Rules was a response to the judicial review proceedings in *Alvi*, but existed within a much broader political context which has favoured prescription.

Prescription in the Immigration Rules is bound up with Conservative Party policy to restrict net-migration to "tens of thousands", a promise it made at Parliamentary elections in 2010,³¹ 2015,³² and 2017.³³ Both the categories of person, and the ways in which a person can evidence their being in a relevant immigration category, have been subject to increased prescription. Changes to the Immigration Rules to favour prescription have been accompanied by the

³¹ The Guardian, 'Tories would limit immigration to 'tens of thousands' a year, says Cameron' (*The Guardian*, 11 January 2010) <<https://www.theguardian.com/uk/2010/jan/11/david-cameron-limit-immigration>> accessed 21 May 2017

³² Nicholas Watt, 'Opposition mocks Tory renewal of failed migration target' (*The Guardian*, 3 March 2015) <<https://www.theguardian.com/uk-news/2015/mar/03/opposition-mocks-tory-renewal-of-failed-migration-target>> accessed 21 May 2017

³³ Anushka Asthana, 'Conservatives to retain 'tens of thousands' immigration pledge' (*The Guardian*, 8 May 2017) <<https://www.theguardian.com/politics/2017/may/08/conservatives-to-keep-tens-of-thousands-immigration-pledge>> accessed 21 May 2017

removal of discretion by Home Office caseworkers,³⁴ and an “attempt to “shift” the judicial role from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the Rules”.³⁵ Presented as filling a “public policy vacuum”³⁶ in Article 8 ECHR family life cases, increased prescription and less discretionary decision-making has clearly been identified as a means to reduce the number of successful immigration applications in furtherance of a political goal.

The Commission’s paper does not address the fact that the complexity of the current Immigration Rules is a consequence of active political choice to pursue prescriptiveness in all aspects of the Immigration Rules. The Law Commission’s recommendations on simplification will ultimately be ignored if they cut against the political grain of prescription, unless the political case is addressed head-on. In this section we focus on the Immigration Rules for family migration and on “Article 8” family life appeals to illustrate the *political* rather than *legal* genesis of the complexity of the Immigration Rules.

The Family Migration Rules

The Genuine and Subsisting Requirement. In July 2012 an Immigration Rule was introduced that required applicants for entry clearance to be in a “genuine and subsisting relationship” with a partner,³⁷ in addition to the existing requirements of intention to live together

³⁴ Sheona York, ‘The “Hostile Environment” - How Home Office Immigration Policies and Practices Create and Perpetuate Illegality’ (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 363. 365

³⁵ Robert Thomas, ‘Agency Rulemaking, Rule-Type, and Immigration Administration’ [2013] *Public Law* 135, 147

³⁶ Home Office, ‘Statement of Intent: Family Migration’ (June 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf> accessed 11 November 2016, [38]

³⁷ Immigration Rules, Appendix FM section E-ECP 2.6

permanently³⁸ and that the marriage is subsisting.³⁹ This increase in complexity in the Immigration Rules demonstrates a political preference for increased prescriptiveness *before* the *Alvi* judgment, rather than in response to it.

In the Home Office consultation on the Family Migration Rules,⁴⁰ a year before the *Alvi* judgment, the first question asked whether the constitution of a genuine and continuing relationship, marriage or partnership needed clearer definition in the rules.⁴¹ The decision to add to the Immigration Rules was viewed by many as unnecessary. Both the Immigration Law Practitioners Association (ILPA)⁴² and Liberty⁴³ emphasised that case law⁴⁴ and the existing Immigration Rules incorporated an assessment of the genuineness of the relationship.

Yet the government's stated policy intention was finding "objective means of identifying whether a relationship, marriage or partnership is genuine and continuing or not" and defining "more clearly what constitutes a genuine and continuing relationship, marriage or

³⁸ Immigration Rules, Appendix FM section E-ECP 2.10

³⁹ *GA (Subsisting marriage) Ghana** [2006] UKAIT 00046

⁴⁰ Home Office, *Family Migration A Consultation*, June 2011, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/269011/family-consultation.pdf accessed 30th May 2019> accessed 2 June 2019 [2.9]

⁴¹ Immigration Law Practitioners Association, *UK Border Agency: Family Migration, a Consultation, Response from Immigration Law Practitioners Association* (ILPA, 2011), <<http://www.ilpa.org.uk/resource/13813/response-to-uk-border-agency-consultation-family-migration>> accessed 30 May 2019

⁴² Immigration Law Practitioners Association, 'UK Border Agency: Family Migration, a Consultation, Response from Immigration Law Practitioners Association' (13 October 2011) <<http://www.ilpa.org.uk/resources.php/13813/response-to-uk-border-agency-consultation-family-migration>> accessed 30 April 2019

⁴³ Liberty, 'Liberty's Response to the Home Office's Consultation on Immigration' (October 2011) <<https://www.libertyhumanrights.org.uk/sites/default/files/liberty-s-response-to-the-home-office-s-family-migration-consultation-oct-11.pdf>> accessed 30 April 2019

⁴⁴ *GA (Subsisting marriage) Ghana** [2006] UKAIT 00046

partnership”.⁴⁵ This sought to justify an overly prescriptive approach to a necessarily discretionary judgment. As ILPA cautioned, “What constitutes a genuine relationship differs as people’s relationships are different and unique to the individuals involved. It is not possible to define a genuine relationship or give set criteria.”⁴⁶

Despite these warnings the proposal became an Immigration Rule. Although the rule itself appeared relatively straightforward, in simply requiring the relationship to be genuine and subsisting,⁴⁷ additional prescriptive criteria was introduced in guidance, stipulating factors to determine the genuineness or otherwise of relationships.⁴⁸ Given the inherently vague nature of the terms ‘genuine’ and ‘subsisting’, this guidance invariably will be closely followed to interpret the rule in the majority of cases.

The Minimum Income Requirement. Another example of an existing political preference for prescriptiveness is the introduction of the minimum income requirement. This conscious political move towards tighter immigration control ignored significant objections and a lack of evidential basis for its necessity. The Family Migration Rules themselves were not a response to *Alvi*. Appendix FM itself was designed to support a political agenda to reduce net migration

⁴⁵ UK Border Agency, ‘Family Migration: A Consultation’ (June 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/269011/family-consultation.pdf> accessed 30 April 2019, [2.9]

⁴⁶ ILPA (n42) 6

⁴⁷ E-ECP 2.6 Appendix FM, Immigration Rules Appendix FM Family Members, <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members> accessed 30 May 2019

⁴⁸ Home Office, ‘Immigration Directorate Instructions Family Members Under Appendix FM of the Immigration Rules, Annex FM Section FM 2.0 Genuine and Subsisting Relationship’ (June 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263237/section-FM2.1.pdf> accessed 26 April 2019; Now contained in Home Office, *Family Policy: Partners Divorce and Dissolution* (Version 1.0, 29 May 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804738/Partner_divorce_and_dissolution_guidance_v.1.0ext.pdf accessed 30 May 2019, 16-20

to the UK, in part by implementing the Migration Advisory Committee's (MAC) recommended minimum income threshold.⁴⁹

This was justified as *instituting* the MAC's recommendation of a minimum income threshold. But the MAC were only asked to advise on the minimum amount a sponsor *should* earn to avoid recourse to public funds, not whether a minimum income threshold was necessary or effective.⁵⁰ The government policy to have a single income threshold was a political decision, and this pre-empted the MAC's advice on providing effective support without reliance on state funding.⁵¹

In instituting a minimum income threshold, the Home Office created first a series of prescriptive primary Immigration Rules, such as a complex savings calculation where the minimum income is not met by earned income alone.⁵² These were accompanied initially by guidance which prescribed the form of evidence deemed acceptable to prove that the primary Immigration Rule had been met.

After *Alvi*, this guidance was transposed into the Immigration Rules as Appendix FM SE. Whilst *Alvi* may have been the catalyst to the guidance becoming Rules the decision to have a minimum income requirement, and to require prescriptive evidentiary support, was propounded in a Home Office's 2011 consultation, as follows:

⁴⁹ Gemma Manning, 'The Minimum Income Requirement for Family Settlement: The Cost of Integration' [2019] Public Law 304, 406-8

⁵⁰ *ibid*

⁵¹ Statement of Changes in Immigration Rules, Motion of Regret', *Hansard*, HL Vol.740, col.181 (23 October 2012), per Baroness Smith.

⁵² Immigration Rules, Appendix FM section E-ECP3.1(b)

In applying the minimum income threshold [...] We will set out in the rules or guidance the supporting evidence to be provided (e.g. P60s, bank statements) and the period over which any cash savings must have been or remain available to the sponsor.⁵³

Once again warnings by ILPA and Liberty against the need for a minimum income were ignored and the political decision for overly prescriptive rules and guidance prevailed.

“Article 8” Immigration Rules. The “Article 8 ECHR” Immigration Rules in Appendix FM of the Immigration Rules which deal with removal and deportation⁵⁴ were also not in response to *Alvi*. These new Immigration Rules did not have precursors in guidance. Instead, the Rt Hon. Theresa May MP (then SSHD) intended to create a new ‘complete code’ within the Immigration Rules to determine claims for immigration leave on the basis of private and family life in the UK. The Statement of Intent claimed that, “The new rules will reflect fully the factors which can weigh for or against an Article 8 claim. [...] This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis.”⁵⁵

As SSHD, May declared her belief that many foreign nationals “shouldn’t be here”,⁵⁶ but that she was constrained from enforcing their deportation or removal by the interpretation of human

⁵³ Home Office, (n18) [2.21]

⁵⁴ Immigration Rules 396-399A

⁵⁵ Home Office, ‘Statement of Intent: Family Migration’
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf>
accessed 29 May 2019, [7]

⁵⁶ politics.co.uk, ‘Theresa May Speech in Full’ (*politics.co.uk*, 4 October 2011)
<<http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>> accessed 9 April 2018

rights law by the courts, and that a new, complete code in the Immigration Rules would resolve this problem.⁵⁷ The length and complexity of the Immigration Rules in Appendix FM was therefore not caused by *legal* necessity stemming from the Supreme Court judgment in *Alvi*. Instead it was the side effect of purely *political* decisions.

Why is it important?

Arguing that the recent increase of the length and complexity of the Immigration Rules is a consequence of conscious political decisions by the SSHD, rather than as an unfortunate side effect of the Supreme Court in *Alvi*, is not about attributing blame. Instead it is an argument with genuine consequences for the viability of the Law Commission's simplification proposals. The Home Office is the sponsoring department for the Commission's work, and it is ultimately the SSHD who will determine whether any of the Commission's final recommendations ever get put into practice.

Therefore the chances of the Commission's recommendations (as provisional as those recommendations might be at this stage) being adopted by the SSHD as a basis for action is contingent on convincing him that he ought to abandon an entrenched policy preference for prescriptiveness. It is unclear to us that the Commission's consultation paper in its current form has any prospect of doing so because its analysis appears premised on the idea that the Supreme Court judgment in *Alvi* forced the hand of the Home Office to create prescriptive Immigration Rules. We have instead argued that the Home Office's approach to the Immigration Rules – whether correctly labelled as rules or (before *Alvi*) incorrectly as guidance – has been to favour prescription over discretion, and that this is a long-standing policy preference.

⁵⁷ Jonathan Collinson, 'Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court Decision in *KO (Nigeria)*' (2019) 33 *Journal of Immigration, Asylum and Nationality Law* 8, 10