

PRESERVATION OF EU IMMIGRATION RIGHTS POST-BREXIT AND THE EU CHARTER

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OVERVIEW AND RESOURCES

- This talk is concerned with EU immigration law *after* the end of transition or “implementation”, currently scheduled for the end of 31 December 2020
- Two critical pieces of primary legislation:
 - European Union (Withdrawal) **Act** 2018 (“2018 Act”)
 - Immigration and Social Security Co-ordination (EU Withdrawal) **Bill** 2019-20
- NB also the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, made under the 2018 Act

THE EUROPEAN WITHDRAWAL ACT 2018 (1): A NEW CONSTITUTIONAL STATUTE

- The EU (Withdrawal) Act 2018 makes detailed provision about the retention, status, and amendment of EU law following Brexit.
- The 2018 Act is a constitutional statute, whose meaning and effect are likely to be the subject of argument for many years or even decades after Brexit.
- Many uncertainties and unanswered questions about its application.

THE EUROPEAN WITHDRAWAL ACT 2018 (2): REPEAL OF THE ECA 1972

- Section 1 of the 2018 Act:
The European Communities Act 1972 is repealed on exit day.
- Exit day was 31 January 2020. But this is all deferred as a result of section 1A, which defers all this until “IP completion day”, currently 31 December 2020. so section 1 contains a half-truth at best!
- Note that some of the references in the 2018 Act to “exit day” have been amended to “IP Completion day” but in some cases the amendments have not yet come into effect.
- EU Law is largely given effect in UK law by ECA 1972, so effect will be that, subject to exceptions in 2018 Act, EU Law ceases to have effect.

THE EUROPEAN WITHDRAWAL ACT 2018 (3): PRESERVATION OF EU LAW

- Sections 2-7 provide for major exceptions to repeal of EU, so as to preserve most EU law in force on Exit Day.
- Three categories of retained EU law:
 - Section 2, Saving for EU-derived domestic legislation
 - Section 3, Incorporation of Direct EU legislation
 - Section 4, Saving for rights under section 2(1) ECA 1972
- Each of these is in turn subject to general exceptions in section 5 and Schedule 1

SECTION 2: SAVING FOR EU-DERIVED DOMESTIC LEGISLATION

- Section covers “any enactment” either (a) made under, or (b) made for a purpose mentioned in section 2 of the ECA 1972. It also covers “any enactment” otherwise relating to EU law. Note that definition of “EU-derived domestic legislation” now moved to section 1B, but unaltered in substance
- Basic effect is to preserve legal status quo at exit day, subject to sections 8 and 9.
- This covers both primary and secondary legislation, whether or not made under ECA 1972

SECTION 3: DIRECT EU LEGISLATION

- Section 3 is aimed at “direct EU legislation” i.e. EU legislation which has direct effect in UK law without, and without need for, implementing UK legislation. Primary examples:
 - EU Regulations, decisions, tertiary legislation
 - Annexes and protocols to the EEA agreement
- House of Lords Constitution Committee observes that relationship with section 2 may be “complex”, because potentially directly effective EU legislation may nevertheless be implemented by UK legislation so that section 2 applies, but:

25. ... It is possible ... to envisage circumstances in which only part of a relevant EU instrument is reflected in domestic legislation. ... Thus, post-exit, certain EU instruments may persist in domestic law through the combined effect of [sections] 2 and 3, such as some provisions of the Equality Act.

SECTION 4: RIGHTS ETC

- Section 4 provides for retention of “any rights, powers, liabilities, obligations, restrictions remedies and procedures” that are recognised before exit day “by virtue of section 2(1) of the ECA 1972.
- Importantly, this is means by which directly effective rights under EU Directives are preserved, subject to section 4(2)(b):
 - (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).*

EXCEPTION 1: SUPREMACY OF EU LAW

- Section 5(1) provides that the principle of the supremacy of EU law does not apply to any enactment made on or after exit day. Section 5(2) provides that “accordingly”, the principle continues to apply “to the interpretation, disapplication or quashing of any enactment or rule of law” made before exit day.
- Supremacy principles (see para Chapter 5 of HL CC Report for detailed discussion), not defined in Act, but is the principle that EU law has supremacy over all forms of domestic law.
- Basic effect is that the legal and legal effect of domestic legal acts made before exit day can still be judged against compatibility with EU law. Those made after, cannot be so judged.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (1)

- Section 5(4) provides that the Charter of Fundamental Rights is not part of UK law after exit
- Section 5(5) says that this does not affect the operation of EU law “fundamental rights or principles which exist irrespective of the Charter”
- Paradox. The explanatory notes to the 2018 Act says:

The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. ... Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights ...
- This reflects judgments of CJEU which will remain binding e.g. *NS (Afghanistan) v SSHD* [2012] 3 WLR 1374. Indeed, pre-exit, Charter is only effective in UK law because of legal reality or fiction that Charter does no more than restate existing principles.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (2)

- So there is a strong argument that the exclusion of the Charter has no legal consequences. But the position is unclear, and not clearly settled by the Act
- House of Lords Constitution Committee observes:

119. The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why any exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (3)

- Charter *only* applies for now when UK is acting within the “material scope” of EU law: see Article 51 of the Charter, and see e.g. *Zagorksi* [2011] HRLR 6
- So not possible to simply rely on the Charter in all cases in the way one can with ECHR.
- Relatively straightforward where a question arises as to *interpretation* of retained EU law that UK will be acting within Scope (and difficult to see how in any case one could ignore Charter on a question of interpretation, given continuing relevance of EU case law)
- Much more tricky in relation to exercise of *discretion* within existing EU law framework

SECTION 6: INTERPRETATION OF RETAINED LAW

STATUS OF CJEU JUDGMENTS POST-EXIT

- Section 6 is concerned with status of CJEU case law post-exit.
- Section 6(1) provides that a UK court “is not bound by” CJEU decisions made on or after IP completion day. Section 6(2) however provides that a court may “have regard” to such judgments
 - So courts will have to develop case law (analogous to section 2 HRA 1998 case law) on extent to which they will have regard to such case law
- Courts are however bound by EU case law decided before exit day, where it touches the meaning and effect of EU law provisions (section 6(4)).
 - There is an exception to that for the Supreme Court, which may depart from a CJEU judgment which would otherwise be binding under section 6(5) applying the same test as it applies to departing from its own decisions

SECTION 6: INTERPRETATION OF RETAINED LAW

STATUS OF CJEU JUDGMENTS POST-EXIT (2)

- Now subject to new power (section 26 2020 Act, inserting section 6(5A) into 2018 Act) for Ministers to make secondary legislation designating other courts as courts which *may* depart from EU case law decided before exit day
- Highly controversial power, for good summary see joint PLP and Clientearth briefing note:
https://publiclawproject.org.uk/wp-content/uploads/2020/01/PLP-and-ClientEarth-joint-briefing-on-clause-26-of-WAB_.pdf

SECTION 8: SECONDARY LEGISLATION

- Section 8 provides power to amend primary and secondary legislation to deal with “deficiencies arising from withdrawal”, namely “to prevent, remedy or mitigate”:
 - (a) *any failure of retained EU law to operate effectively, or*
 - (b) *any other deficiency in retained EU law*

arising from withdrawal of the United Kingdom from the EU.
- Deficiencies are listed non-exhaustively in section 8.
- General idea is that this is not a power to make substantive changes on controversial issues, but to deal with consequential problems arising from withdrawal
- The 2019 Regs are made pursuant to this power. Should not generally make *substantive* changes to immigration law other than where EU law is not effective post-exit. Example of important matter which is revoked is Dublin III Regulation relating to returns of asylum seekers to EU countries that they passed through – cannot be operated post-exit.

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (1)

- Bill broadly makes provision about two matters:
 - End of Free Movement rights
 - Make provision relating to social security co-ordination
- Takes very different approach to these two topics, with very different consequences for continuing relevance of EU rights

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (2): FREE MOVEMENT

- Section 1 gives effect to Schedule 1, which it says “makes provision”:
 - (a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and*
 - (b) end other EU-derived rights, and repeal other retained EU law, relating to immigration*
- Schedule 1 then lists the rights which are repealed, including:
 - Part 1, section 7 IA 1988, section 108 NIA 2002 and the Immigration (EEA) Regs 2016
 - Part 3, rights etc which would be retained under section 4 of the 2018 Act. NB Drafting seems very unclear, read literally would relate to all EU rights regardless of whether relating to immigration and free movement. Explanatory notes do clarify that it is only provisions relating to Free Movement

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (3): FREE MOVEMENT PRESERVED RIGHTS?

- Basic effect of Bill, if passed, will be to remove all Free Movement Rights so that EU migrants revert to “domestic law / non-EU” immigration rights, subject to and in accordance with Appendix EU and immigration rules more generally
- Little or no scope to argue for preserved EU rights going forward in relation to *free movement*. 2020 Bill expressly revokes all retained EU law
- Likewise for EU Charter, once these measures are repealed little or no scope to argue that EU is acting with scope of EU law in relation to immigration matters.
- But query in relation to Appendix EU, which pre-dates coming into force of Bill

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (4): OTHER IMMIGRATION PRESERVED RIGHTS?

- Bill does not revoke all EU law relating to immigration, and in particular does not revoke:
 - In relation to asylum, Qualification Directive and Procedures Directive will, subject to further legislation before 2021, become part of retained EU law
 - Trafficking Directive will become part of retained EU law
- In relation to these, EU rights are fully preserved subject to further legislation. That also means that:
 - EU case law decided before exit remains binding, subject to the Supreme Court, High Court of Justiciary and regs under section 6(5A) of the 2018 Act
 - EU case law decided after exit remains relevant
 - Charter remains potentially applicable in this sphere
 - Query status of directly effective rights recognised *after* exit day (NB section 4(2)(b) above)

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (5): OTHER IMMIGRATION PRESERVED RIGHTS?

- Bill does not revoke all EU law relating to immigration, and in particular does not revoke:
 - In relation to asylum, Qualification Directive and Procedures Directive will, subject to further legislation before 2021, become part of retained EU law
 - Trafficking Directive will become part of retained EU law
- NB for now, no *power* to revoke these provisions, subject to future primary legislation
- In relation to these, EU rights are fully preserved subject to further legislation. That also means that:
 - EU case law decided before exit remains binding, subject to the Supreme Court, High Court of Justiciary and regs under section 6(5A) of the 2018 Act
 - EU case law decided after exit remains relevant
 - Charter remains potentially applicable in this sphere
 - Query status of directly effective rights recognised *after* exit day (NB section 4(2)(b) above)

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL (6): SOCIAL SECURITY

- Unlike free movement provisions, clause 5 of the Bill does not *revoke* measures relating to social security co-ordination but merely gives power to modify them in future
- For time being, such measures continue as part of retained EU law, subject to future modifications
- Most important measure here is EU Reg 883/2004, whose effect includes:
 - Enabling EU nationals living in the UK to access social security benefits if they are working or have worked here or have become “insured” in other ways (e.g. *Ruas* [2010] PTSR 1757)
 - Enabling UK nationals, and others who have lived and worked here, to claim UK benefits in certain circumstances whilst living in EU member states (e.g. *Tolley* [2017] 1 WLR 1261, and see *Konevod*, in Court of Appeal, forthcoming)
- For time being, EU rights are preserved, and Charter remains potentially applicable

Thank you for listening

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