13 May 2020

ILPA Briefing on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill – Second Reading

Background

1. The Immigration Law Practitioners' Association (ILPA) is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. For enquiries please contact Charles Bishop, Legal and Parliamentary Officer, at charles.bishop@ilpa.org.uk.

Introduction

2. In summary, ILPA's recommendations on the Bill are:
    a. Paragraph 6 of Schedule 1 should be amended so that the provisions the government intends to disapply are stated on the face of the Bill.
    b. Clause 2 of the Bill should be brought into line with the government's policy in relation to deportation of Irish citizens.
    c. Clause 2 of the Bill should make clear that Irish citizens born in Northern Ireland may not be deported or excluded from the UK.
    d. The government must justify the continued need for the powers in clause 4.
    e. The government should omit clause 5 on the co-ordination of social security and bring forward primary legislation to make any changes.

Legal protections at risk because of uncertainty

3. While the Bill is supposed to provide for the ending of free movement, we are concerned that paragraph 6 of Schedule 1 of the Bill potentially disapplies any retained EU law as it relates to the immigration context. This could lead to repeal of legal protections far beyond the realm of free movement.

4. Section 4 of the European Union (Withdrawal) Act 2018 is designed to retain certain provisions of EU law as "retained EU law" within UK law. Paragraph 6 of Schedule 1 disapplies those provisions of EU law to the extent that they are:
    a. inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts; or
    b. otherwise capable of affecting the exercise of functions in connection with immigration.

5. This is extremely broad. "functions in connection with immigration" could, on a reasonable interpretation, relate to almost any aspect of immigration control within the UK. The provision is then broadened even further when paired with the test of "capable of affecting". As well as being broad, the language lacks sufficient objective parameters to be able to ascertain its intended targets. Expert immigration practitioners agree it is impossible to predict with accuracy all the areas of retained EU law it could affect.

6. This raises fundamental rule of law concerns: migrants, their representatives, Home Office caseworkers and judges must be able to ascertain with a reasonable degree of certainty what the law is. We do not believe that this provision meets that standard.

7. Our preliminary research has identified that the following legal protections, which do not relate to free movement, are at risk of being disapplied in any context relating to immigration:

    a. Protections for victims of trafficking in the anti-trafficking Directive 2011/36/EU, for example the protection against removal of a victim of trafficking because they never received sufficient support and assistance under Article 11, or because an investigation was never conducted, or the protection against removal during their reflection and recovery period.

    b. Protections for asylum seekers in the Reception Conditions Directive 2013/33/EU.

    c. Protections for victims of crime in the EU Victims Rights' Directive 2012/29/EU.

8. We wish to make clear that we cannot be sure, at this stage, whether or not these protections are at risk. The only way to know for certain whether or not a provision remains UK law or not is to test the matter in the courts. But to subject the withdrawal of such fundamental rights to this level of uncertainty is deeply unsatisfactory.

9. These protections are potentially at risk as collateral damage to the ending of free movement. We do not understand the government as *intending* to repeal these provisions. But if this is not their intention, then they must explain why they fall within the scope of the Bill as currently drafted.

10. There are other options open to the government. The explanatory notes, at paragraph 69, provides a list of the provisions the government is intending to be affected by this provision. We believe these provisions should be listed directly within Schedule 1 of the Bill itself, as has been done with other provisions. If the government intends to repeal other areas of retained EU law, then it should state what those provisions are.

    Recommendation 1: We recommend that paragraph 6 of Schedule 1 is amended so that the provisions the government intends to disapply are stated on the face of the Bill.

Protections against deportation for Irish citizens

11. Since 2007, the UK government's policy position is to deport Irish citizens only:

    a. where a court has recommended deportation in sentencing; or

    b. where the Secretary of State concludes, due to the exceptional circumstances of the case, the public interest requires deportation.

12. This is to reflect the special status Irish citizens have in the UK because of "close historical, community and political ties between the United Kingdom and Ireland, along with the existence of the common travel area".[1]

13. However, this position is merely a matter of executive policy: it is not protected in any primary or secondary legislation, which currently permits deportation of Irish citizens in a broader range of circumstances, circumscribed by EU law relating to free movement.[2] When the EU law protections against deportation are switched off by this Bill, there will be no law to stop a future government from reversing its position on deportation of Irish nationals, given that the domestic law would allow it to do so. The policy position, however, is totally separate from the UK's membership of the EU: there is no democratic basis on which to remove these legal protections when free movement is switched off.

14. The government has expressed no intention to depart from the policy position, and so it is unclear why the opportunity has not been taken to incorporate the greater protective status for Irish citizens into law. During the passage of the equivalent version of the Bill in the Parliamentary Session of 2017-2019, the minister at the time never explained why this was the case. The position is particularly confusing given that the government has taken steps to remove Irish citizens from the automatic deportation regime (including when an individual is sentenced to at least 12 months' imprisonment) and could easily have done so for the rest of the regime.[3] Rather than correcting the legal position, clause 2(2) of the Bill has the effect of weakening the legal protections for Irish citizens because it fails to put in place a replacement for the safety net EU law offered.

    Recommendation 2: ILPA therefore proposes amending clause 2(2) of the Bill to bring it into line with the current policy in relation to Irish citizens and ensuring that policy is secured elsewhere in immigration law.

15. The Good Friday Agreement envisages that Irish citizens who are from Northern Ireland should not, as a matter of law, be able to be excluded or deported from the United Kingdom at all. This position is not currently reflected in UK immigration law. This Bill is a missed opportunity to implement the Good Friday Agreement.

16. Because British citizens cannot be excluded or deported from the United Kingdom, there is a risk that, when an Irish citizen from Northern Ireland is threatened with deportation, they will be forced to assert British citizenship in order to continue to live in Northern Ireland. This goes against the terms and spirit of Article 1(iv) of the Good Friday Agreement, which allows all people of Northern Ireland to remain on the territory, whether or not they identify as Irish, British or both.

    Recommendation 3: We recommend that clause 2 be amended to clarify that those people of Northern Ireland entitled to identify as Irish citizens under Article 1(vi) of the Good Friday Agreement may not be deported or excluded from the United Kingdom.

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[1] Minister for Immigration, Liam Byrne, House of Commons Written Ministerial Statement, 19 February 2007, available at https://publications.parliament.uk/pa/cm200607/cmhansrd/cm070219/wmstext/70219m0002.htm.
[2] Immigration Act 1971, s3(5) and (6).
[3] Immigration, Nationality and Asylum (EU Exit) Regulations 2019, regulation 17, which exempts Irish citizens from the UK Borders Act 2007, s32.

Unclear basis for broad delegated powers in clause 4

The provisions are drafted more widely than they need to be

17. Clause 4 of the Bill confers an extremely wide power on the Home Secretary to make whatever legal amendments s/he "considers appropriate in consequence of, or in connection with, any provision of" the immigration part of the Bill. This includes the ability to amend primary legislation.

18. We recognise the government's stated intention behind the clause is to ensure coherence across the statute book following the substantial changes brought about the ending of free movement. However, our concern is that clause 4(4) is drafted so widely that it could relate to almost any aspect of immigration law in the UK, which has the potential to engage a large variety of human rights issues. Given there is no time restriction on the clause, the concern is that there is potential for the power to be abused beyond the government's intentions.

The reasons given in the past for the powers no longer apply

19. During the passage of the Bill under the previous government, the minister set out a number of reasons why the powers in clause 4 and specifically clause 4(4) were necessary. However, in the time since then, almost all of these reasons have been rendered irrelevant because of the passage of primary and secondary legislation. We have provided below a table of the reasons the minister gave alongside an explanation of the current status of the issue the minister identifies.[4]

Reason for clause 4	Current status of reason
"protect the status of EEA nationals and their family members who are resident in the UK before exit day and ensure that their residence rights are not affected by the UK's departure from the EU"	This power is now contained in section 7(1)(b)-(d) EU(WA)A 2020, which applies both to those within and outside the scope of the Withdrawal Agreement: s7(2). It is unclear why a second power is needed.
"in the unlikely event that we leave the EU without a deal, the power will enable us to make provision for EEA nationals who arrive after exit day but before the future border and immigration system is rolled out"	There is now a deal in place on citizens' rights. There is no longer a prospect of "no deal" in this context (citizens' rights will not be affected by the current negotiations on the future relationship).
"enable us to meet the UK's obligation under the draft withdrawal agreement"	The necessary powers are now contained in the EU(WA)A 2020.
"align the positions of EU nationals and non-EU nationals in relation to the deportation regime"	Reg.17 of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, made under EU(W)A 2018, provides these amendments in relation to the deportation thresholds. Given these Regulations were made under the EU(W)A 2018, it is unclear why a further power is necessary in the Bill.

[4] These reasons were taken from the remarks of the Minister for Immigration, Caroline Nokes, Immigration and Social Security Co-ordination (EU Withdrawal) Bill Deb (26 February 2019) vol. 655 col. 183-184. Available at https://bit.ly/2TLtLJK.

"without the power in the clause we cannot deliver the future system"	It is unclear why this is the case. The minister herself made clear the system will be delivered through the Immigration Rules.
"to ensure our laws work coherently once we have left the EU" and gives as a specific example section 126 of the Nationality, Immigration and Asylum Act 2002 and the need to ensure there is no longer a reference to applications under the Immigration (EEA) Regulations 2016.	The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 makes sweeping changes to a huge amount of primary and secondary legislation to ensure this coherence. Reg.12(3) makes the specific change to the 2002 Act to which the minister refers.

The Home Secretary has powers under other provisions to achieve the same goals

20. The explanatory notes at paragraph 37 state that the Home Secretary needs the power in clause 4 in order to make provision in order to protect "the EEA citizen spouse of a British citizen who does not have comprehensive sickness insurance and who is not otherwise exercising Treaty rights, such as the right to work, and who is therefore not technically exercising EU free movement rights". However, it is unclear why the Home Secretary could not make provision in respect of this type of person under s7(1)(b)-(d) EU(WA)A 2020.

Recommendation 4: We therefore believe that the government must renew its justifications as to why the broad powers in clause 4 are necessary, given the wide range of other powers available to ministers already in this area and the risk for abuse.

Unnecessary powers in relation to social security co-ordination

21. Clause 5 of the Bill confers a power on an appropriate authority (ministers, or devolved authorities in Scotland and Northern Ireland) to amend social security-related retained direct EU legislation and primary legislation.

22. The law that the clause refers to is the provision made in EU Regulation 883/2004 (and others), currently directly applicable in the UK, for the co-ordination of social security, healthcare, and pension provision for people who move from one EU state to another (or to the UK) and who are publicly insured (by way of national insurance contributions and similar) as regards these areas of ordinary life. It allows contributions to be aggregated so that pensions earned in more than one state may be drawn in the country they currently live in, provides access to public healthcare without charge to the person concerned, and facilitates access to contribution-based social security benefits.

23. Since the UK left the EU on 31 January 2020, the relevant EU regulations pertaining to social security, pensions, and healthcare, have been retained in UK law by section 3 of the European Union (Withdrawal) Act 2018. That Act already contains a power in section 8 to modify retained direct EU law. Further, the government has already exercised this power and amended the Co-ordinating Regulations in the Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement (Amendment) (EU Exit) Regulations 2019.

24. The proposed power in clause 5 of the Bill is therefore unnecessary. Any changes that do not fall within the scope of the power in section 8 of the 2018 Act must, necessarily, not relate to any ability for the law to operate effectively or to any deficiency in EU law. That being so, the case for such changes to be brought forward in Parliament by primary legislation is overwhelming.

25. In addition, the Secretary of State has further powers as regards social security, healthcare, and pension rights for those who are protected by the Withdrawal Agreement. Section 5 of the European Union (Withdrawal Agreement) Act 2020 inserts section 7A into the 2018 Act so as to secure Withdrawal Agreement rights in domestic law. That protection is buttressed by section 13 of the 2020 Act, which confers a power to make regulations in respect of social security co-ordination rights protected by the Withdrawal Agreement.

26. The Secretary of State already has two sets of powers to make regulations in this area. She has not shown why these powers, which are very broad in scope, are inadequate. There is no proper justification for adding a third set of powers. Good administration requires that the statute book not be littered with unnecessary, duplicating powers that bypass the need for primary legislation.

    Recommendation 5: Clause 5 of the Bill should simply be omitted. It is not needed. There is no justification for it.