

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM BY THE
DEPARTMENT FOR EXITING THE EUROPEAN UNION

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the European Union (Withdrawal Agreement) Bill. The memorandum has been prepared by the Department for Exiting the European Union.
2. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Secretary of State has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary of the Bill

3. The Bill implements the Withdrawal Agreement, as agreed between the United Kingdom and the European Union (“**EU**”). The Bill is required to implement the Withdrawal Agreement for it to have domestic legal effect. The Bill is also required before the UK Government can ratify the Withdrawal Agreement and then leave the EU. This Bill is also the vehicle for the Government to give effect to the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein (“**EEA EFTA Separation Agreement**”) and the Swiss Citizens’ Rights Agreement between the UK and Switzerland (“**Swiss Citizens’ Rights Agreement**”).
4. The Bill has five parts:
 - Part 1: Implementation Period
 - Part 2: Remaining Implementation of Withdrawal Agreement etc: General
 - Part 3: Citizens’ Rights
 - Part 4: Other Subject Areas
 - Part 5: General and Final Provision

Part 1: Implementation Period

5. Part 1 of the Bill gives effect in domestic law to Part Four (*Transition*) of the Withdrawal Agreement and provides for an implementation period (“**the IP**”) that will commence on exit day (which was extended to 31 January 2020 by agreement with the EU) and will expire on “IP completion day” (defined as 31 December 2020 at 11.00 p.m.). The Bill prohibits Ministers of the Crown from agreeing to extend the IP in the Joint Committee.
6. Part 1 ensures that during the IP, the European Communities Act 1972 (“**ECA**”) as it currently has effect in domestic law will continue to have effect (with modifications) notwithstanding the repeal of the ECA that will take effect on exit day by virtue of section 1 of the European Union (Withdrawal) Act 2018 (“**the EU (Withdrawal) Act**”). It also glosses EU-related legislative references in saved EU-derived domestic legislation to ensure they continue to operate, and provides a power to add further glosses, disapply them or make different provision if it transpires the original glosses do not produce the correct results.
7. As a consequence of the Agreements, provision has been made to amend the EU (Withdrawal) Act to postpone until IP completion day the conversion of EU law into domestic law. Provision has also been made to delay the commencement of statutory instruments - which have so far been drafted to take effect on or by reference to “exit day” - to take effect on or by reference to “IP completion day”. This is found in clauses 25 to 27 and Schedule 5.

Part 2: Remaining Implementation of Withdrawal Agreement etc: General

8. Part 2 of the Bill makes provision to give effect to the Withdrawal Agreement in domestic law in order to comply with the requirements of Article 4 (*Methods and principles relating to the effect, the implementation and the application of this Agreement*) of the Withdrawal Agreement. In particular, it inserts a new section 7A (*General implementation of remainder of withdrawal agreement*) into the EU (Withdrawal) Act which provides, among other things, for a ‘conduit pipe’ through which provisions of the Agreements will apply directly in domestic law without need for further implementing legislation and to ensure that domestic law is read and has effect in accordance with the Withdrawal Agreement.
9. An equivalent provision implementing the EEA EFTA Separation Agreement and the Swiss Citizens’ Rights Agreement is provided for by virtue of a new section 7B of the EU (Withdrawal) Act.

Part 3: Citizens' Rights

10. Part 3 of the Bill allows for the implementation of the requirements of Part Two (*Citizens' Rights*) of the Withdrawal Agreement (and of the equivalent provisions of the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement), along with Part 2 of the Bill, by conferring powers to ensure that domestic law provides EU citizens and nationals of EFTA States in the UK the rights that they are entitled to under those Agreements and, in certain areas enables provision to be made in respect of individuals who do not fall within the scope of their provisions. It also makes amendments to primary legislation to ensure that deportation provisions comply with the rights contained in those Agreements. Part 3 of the Bill also implements the requirement of the Withdrawal Agreement and of the EEA EFTA Separation Agreement that the UK establishes an independent monitoring authority to monitor the implementation and application of Part Two of those two agreements (but not of the Swiss Citizens' Rights Agreement).

Part 4: Other Subject Areas

11. Part 4 of the Bill contains provision implementing a variety of areas within the Agreements, including those provided for in:

- a. Part Three (*Separation Provisions*) of the Withdrawal Agreement and the EEA EFTA Separation Agreement, which provides for transitional arrangements in a number of areas to ensure the UK's orderly withdrawal from the EU legal order, and from its relationship with the EEA EFTA countries;
- b. Part Five (*Financial Provisions*) of the Withdrawal Agreement, which allows for payments required pursuant to the Withdrawal Agreement; and
- c. The Protocol on Ireland/Northern Ireland.

12. Part 4 also provides for a number of legislative provisions covering Government commitments associated with the operation of the Withdrawal Agreement in the UK. These include protections for Northern Ireland (including no alteration to North-South co-operation), a prohibition on the Government agreeing to extend the IP in the Joint Committee, and the interaction of the Agreements and their implementation through the Bill with the EU (Withdrawal) Act 2018.

13. Further details on the provisions outlined above and on the other clauses of, and Schedules to, the Bill are set out in the Explanatory Notes that accompany the Bill.

General approach to consideration of Convention rights in this Memorandum

14. This Memorandum analyses Convention issues that derive from the Bill so far as Convention rights are engaged and potentially interfered with. Where there is no Convention issue, no mention is made of the provision.
15. The Bill does not raise any Convention issues in itself. This Memorandum therefore instead discusses the Convention issues associated with delegated legislation that would be made under powers in the Bill. This is however not intended to substitute consideration being given to compliance with Convention rights by relevant Government departments at the time of making those instruments - such consideration must, and will, be given.

ECHR Articles engaged and potentially interfered with

16. This section includes an analysis of Convention issues in relation to clause 7 (Rights related to residence: application deadline and temporary protection), clause 13 (Co-ordination of social security systems), and clause 14 (Non-discrimination, equal treatment and rights of workers etc.). These provisions contain powers to implement the Agreements - the analysis therefore considers provisions that will be brought forward to implement the Agreements on the basis of these powers.
17. As far as Northern Ireland is concerned, clause 23 and Schedule 3, by implementing the requirements of Article 2(1) of the Protocol, provide further assurance that there will be no diminution in the rights provided for in the "Rights, Safeguards and Equality of Opportunity" part of the Belfast Agreement. These rights are wholly consistent with ECHR rights.
18. Paragraph 5 of Schedule 3 amends the Northern Ireland Act 1998 in order to clarify the Northern Ireland Human Rights Commission's 'own motion' standing powers to challenge the compatibility of legislation with the ECHR, via the Human Rights Act 1998, without being required to show that there would be an actual or potential victim. This ensures that the Commission is fully able to carry out its vital function of promoting and protecting human rights in Northern Ireland and is therefore consistent with ECHR rights. As regards the remainder of the Bill, no significant Convention issues arise.

Part 3: Citizens' Rights

Residence rights

Article engaged and potentially interfered with - Article 14 with Article 8

19. In general, the Bill (and the Agreements that it implements) do not interfere with Article 8 ECHR (Rights to respect for private and family life); the Bill supports the preservation of residence rights that the cohort of citizens protected by the Agreements have under EU law at present. The Article 8 position of individual EEA or Swiss nationals and their family members will differ according to a multitude of factors (including, for example, whether or not they have acquired a right of permanent residence, their length of residence, whether or not they have been exercising Treaty rights, the lawfulness of their presence, and the nature and extent of their family relationships). It should not be assumed that every EEA or Swiss national who is resident in the UK at the end of the IP has an Article 8 ECHR right to remain in the UK or to be joined by their family members.

20. Article 8 may however be engaged on the basis of discrimination under Article 14 ECHR (which prohibits discrimination in the enjoyment of one of the other substantive rights in the Convention). This is on the basis that EEA and Swiss nationals - including the extra cohorts of individuals not within scope of the Agreements for whom provision will be made¹ (“**extra cohorts**”) - will be treated more favourably than third country nationals and in some areas UK nationals (e.g. family reunification).

21. The relevant ‘status’ for the purposes of Article 14 ECHR is nationality and immigration status², i.e. certain EEA and Swiss nationals being treated more favourably than UK or third country nationals.

Engaged by clause 7: Rights related to residence application deadline and temporary protection

22. Provision under clause 7 will provide for residence rights of EEA and Swiss nationals and their family members to be preserved for a grace period and whilst an application under the settlement scheme is finally determined. The provision will differentiate on grounds of nationality. The Home Office’s

¹ I.e. a first extra cohort of individuals whose right to live in the UK will derive from EU law at the end of the IP but who are not caught by Title I and Title II of Part Two of the Agreements concerning rights to residence and a second extra cohort of individuals who are covered for reasons of policy and operational simplicity.

² *Bah v UK*. (App. no 56328/07) [2011] ECHR 1448.

intention is to use clause 7 to save the operation of the Immigration (European Economic Area) Regulations 2016³ for this cohort.

Interference

23. EEA and Swiss nationals will be treated more favourably than third country nationals who will be subject to the 'rest of the world' immigration regime. They will also have more favourable rights to family reunification than UK nationals (in particular, UK nationals must usually meet an income threshold before they can be joined in the UK by a third country national family member).

Justification

24. There is an objective and reasonable justification pursuant to a legitimate aim for the provision that will be made under clause 7, and that provision will be proportionate to that aim. Such measures are necessary to provide a smooth transition in leaving the EU and ensure legal certainty for individuals. The cohort of EEA and Swiss nationals in question arrived in the UK under a legal system (free movement of persons under EU law) which will have generated an expectation that they would continue to benefit from that regime. Whilst this does not amount to a legally enforceable expectation, it supports the argument that the difference in treatment is justified (and/or that the cohort protected by clause 7 is not in an analogous position to a third country national or UK national). The special nature of the EU legal order and status of EU citizens has been recognised by the European Court of Human Rights⁴ ("ECtHR") and the UK is transitioning out of that order. Further, the ECtHR has held that Member States are generally free to grant preferential treatment to their citizens over non-nationals in matters of immigration policy, because of their long lasting and strong ties with the country.⁵ The same reasoning would apply to EEA and Swiss nationals who have resided in the UK and as such developed strong ties with the country. Such preferential treatment (including to the extra cohorts) strikes a fair balance between protecting the rights of EEA and Swiss nationals and their family members and the rights of third country nationals/UK nationals in relation to discrimination. For those covered by the Agreements, this analysis will apply and be supported by the fact that the UK is required to treat persons in a certain way pursuant to international obligations in the Agreements.

³ S.I. 2016/1052.

⁴ *Moustaquim v Belgium* (Application no. [12313/86](#)).

⁵ *Absulaziz v UK* [1985] 7 EHRR 471 and *Biao v Denmark* (app. 38590/10 24 May 2016).

Benefits and Services

Article engaged and potentially interfered with - Article 14 with Article 1 protocol 1, Article 2, Article 3, Article 8

25. Discrimination on grounds of nationality in respect of access to benefits (Article 14 ECHR) may be engaged on the basis that EEA and Swiss nationals (including the extra cohorts not within scope of the Agreements) would be treated more favourably than third country nationals.

26. Welfare benefits (discretionary or not) are generally accepted to fall within the ambit of Article 1 Protocol 1 ECHR (Protection of property) (“**A1P1**”).⁶ Article 8 ECHR (Right to respect for private and family life) is also relevant, particularly where policies have a significant impact on family life, and while Article 8 does not normally confer a direct right to payment of benefits, where the state chooses to, it must do so in a non-discriminatory manner.

27. In the context of the reciprocal healthcare entitlements under Title III of Part 2 of the Withdrawal Agreement, the substantive rights which are most likely to be engaged are Article 2 (Right to life), Article 3 and A1P1. A third country national residing in the UK, or a UK national not in scope of the Agreements, might seek to procure urgent medical treatment abroad where that treatment is unavailable within a reasonable timeframe in the UK. There is a small chance that their inability to obtain such treatment through reciprocal healthcare routes (at the UK’s expense) might be within the ambit of Article 2, which includes a positive obligation on the part of the state to take appropriate steps to protect life. This involves ensuring that an individual’s life is not put at risk through the denial of generally available medical treatment. Being deprived of reciprocal healthcare rights might also be within the ambit of Article 3 (for the purposes of engaging Article 14), given that in extreme cases an inability to obtain UK-funded treatment abroad might amount to inhumane treatment. Health-related cash benefits are capable of being “property” for the purposes of A1P1.⁷ It could be argued that no longer being able to claim reimbursement for treatment abroad constitutes the deprivation of property, within the ambit of this Article. Separately, third country nationals not ordinarily resident in the UK will be subject to NHS charging, whereas EU citizens and nationals of EFTA States covered by Title III who are visiting the UK will be able to continue to rely on Member State-issued reciprocal healthcare entitlements to access free care (within the scope of EU Regulation 883/2004). Again, the inability of third country nationals to access free

⁶ See *DA and others v Secretary of State for Work and Pensions* [2018] EWCA Civ 504 and *R(RJM) v the Secretary of State for Work and Pensions* [2008] UKHL 63.

⁷ See *R (RJM) v the Secretary of State for the Home Department* [2008] UKHL 63 in relation to non-contributory disability benefits.

treatment to the same extent as EEA and Swiss nationals and their family members might be within the scope of Articles 2 or 3, though in this context it is unlikely that these Articles are engaged with, because urgent treatment is in any case exempt.⁸

Engaged by Clause 13 - Social security coordination rights

28. In relation to DWP and HMRC-administered benefits, entitlements under EU Regulation 883/2004 and Regulation 987/2009 (“**Social Security Coordination Regulations**”⁹) include equal treatment with UK nationals, the ability to aggregate social security contributions made in the UK and EFTA States, and the ability to export certain UK benefits to EU and EFTA States.

29. In relation to healthcare, entitlements under the Social Security Coordination Regulations include the ability to obtain healthcare in other States reimbursed by the UK, namely the EHIC, S1 and S2 schemes.¹⁰

Interference - clause 13

30. In respect of social security coordination, residents in the UK (which include UK nationals and third country nationals resident in the UK) who have not exercised relevant rights under the Social Security Coordination Regulations at the end of the IP may not benefit from these entitlements. As such, the rights of third country nationals in respect of A1P1/Article 8 with Article 14 are arguably interfered with.

Justification - clause 13

31. If the conferral of entitlements under Title III of the Agreements is indeed within the ambit of Articles 2, 3 or A1P1 ECHR, there is an objective and reasonable justification for differential treatment. In particular:

- a. It has not been open to the UK to agree to the continuation of reciprocal healthcare for the entire UK population. This will be negotiated as part of the future relationship with the EU;

⁸ See The National Health Service (Charges to Overseas Visitors) Regulations 2015, reg 9.

⁹ Title III covers TCNs in certain circumstances and, in relation to these individuals, Regulation 1408/71 and Regulation 574/72 are applied instead.

¹⁰ Under the EHIC scheme a person has a right to treatment which becomes medically necessary during a temporary stay in another Member State to prevent the patient being forced to return home early. Under the S1 scheme a person has a right to access healthcare when residing in another Member State outside of the Member State that is competent for their healthcare.

Under the S2 scheme a person has a right to obtain specific planned treatment in another Member State, with authorisation from their competent Member State.

- b. under the Agreements, healthcare will be granted reciprocally to UK nationals in the EU, protecting the rights of UK nationals residing in Member States at the end of the IP; and
 - c. Title III principally benefits EU citizens and nationals of EFTA states who are residing or working (or have resided or worked) in the UK at the end of the IP, or who have exercised rights under the Social Security Coordination Regulations before the end of the IP. The entitlements are not unconditional: EU citizens will lose full social security coordination rights if they are no longer within one of the situations covered by Title III, except where they have retained residence rights under Title II. Further rights are granted by Title III in relation to those who do not have full social security coordination rights but have past periods of contributions. The decision as to the scope of Title III is therefore a proportionate one.
32. To the extent that entitlement to benefits administered by DWP and HMRC, in accordance with Title III may be within the ambit of A1P1, there will be an objective and reasonable justification for differential treatment (in relation to A1P1 with Article 14) and given this justification, interference with A1P1 on its own will be well within the state's margin of appreciation in social and economic policy. In particular:
- a. The social security parts of the Agreements principally benefit EU citizens and nationals of EFTA States who are residing or working (or have resided or worked) in the UK at the end of the IP, or who have exercised rights under the Social Security Coordination Regulations before the end of the IP. The entitlements are not unconditional: EU citizens will lose full social security coordination rights if they are no longer within one of the situations covered by Title III, except where they have retained residence rights under Title II. The decision as to the scope of Title III is therefore a proportionate one;
 - b. The position for EU citizens in the UK is mirrored in terms of the preservation of the rights which was negotiated with the EU for UK nationals living in the EU. It is necessary to look at both sides of the equation; and
 - c. Given that the rights in question only arise for those who have exercised free movement, anyone who has not exercised these rights is not in a comparable situation.

Engaged by clause 14 - Access to benefits and services

33. Clause 14 allows Ministers to make regulations which may be used in relation to access to publicly-funded benefits and services for those individuals who are in scope of the Agreements as well as those covered by residence scheme immigration rules but not the Agreements. One of the purposes of this power is to achieve the policy of continuing to apply the current eligibility criteria for access to publicly funded benefits and services after the end of the IP as are in place now, as well as to save the basis on which current EU law continues to apply.

Interference - clause 14

34. The intention is that EU citizens and nationals of EFTA states who are within scope of the clause will as now be treated more favourably than those third country nationals who have not gained indefinite leave to remain in the UK in relation to access to publicly funded benefits and healthcare. As such, the rights of third country nationals in respect of A1P1/Article 8 with Article 14 are arguably interfered with.

Justification - clause 14

35. The justifications set out in relation to clause 7 will also apply here. Treating these EU citizens and nationals of EFTA States differently from certain third country nationals is justified on the basis of their strong ties with the UK and given we are moving out of the EU legal order. Further, in respect of A1P1 ECHR, the state has a wide margin of appreciation when it comes to social and economic policy. The ECtHR has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be “*manifestly without reasonable foundation*”.¹¹ As regards access to healthcare, it should be noted that the purpose of charging overseas visitors is (among other things) to generate money for the NHS, so that it can provide free care on a sustainable basis to those who are ordinarily resident within the UK. Whether to exempt other cohorts is a political question which relates to the allocation of finite resources. Provision made on the basis of clause 14 will be well within that wide margin of appreciation.

DEPARTMENT FOR EXITING THE EUROPEAN UNION

17 December 2019

¹¹ See e.g. *James v UK* (1986) 8 E.H.R.R. 123 and *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37.