Immigration and Social Security Co-ordination (EU Withdrawal) Bill

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Introduction

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the British section of the International Commission of Jurists. JUSTICE has been working on the role of the European Union with regards to fundamental rights in the UK for over a decade.

2. The European Union (Withdrawal) Act 2018 ("EUWA") will save and incorporate into UK law legislation providing for free movement. Clause 1 and Schedule 1 of the Bill will end free movement between the UK and EEA member states by repealing this legislation. When free movement ends, EEA nationals and their family members will be required, as non-EEA nationals currently are, to have leave to enter and remain in the UK under the Immigration Act 1971. Immigration was at the heart of the Brexit debate; it is an issue with which the public, and consequently, Parliament, is deeply concerned and has wide ranging views. JUSTICE takes no position on the content of the UK's post-Brexit immigration policy but believes the principles of it need to be properly debated and scrutinised.

3. This briefing addresses our initial concerns regarding the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (the "Bill"). The end of free movement together with the immigration policy that is subsequently implemented, will constitute the biggest change to the country's immigration policy since the Maastricht Treaty in 1992, yet the Bill provides the Government with extraordinarily broad powers to legislate by way of secondary legislation in the immigration and connected social security co-ordination field, by-passing the full scrutiny of Parliament. Changes in this area have the potential to affect the fundamental rights of many individuals, both EEA nationals and UK citizens, and require careful scrutiny and justification. Furthermore the Bill removes the right to free movement without ensuring that affected individuals will be granted adequate protections of their accrued rights.

4. JUSTICE therefore urges Parliament to:

    a. put on primary legislative footing, by including on the face of the Bill:

i. an obligation to protect the long term settlement rights of EEA nationals and their family members residing in the UK prior to exit under the EU Settlement Scheme ("the Settlement Scheme"), including by providing for a right of appeal;

ii. transitional provisions protecting the rights of EEA nationals and their family members exercising free movement rights in the UK prior to exit day, including providing a legal basis for them to remain in the UK whilst their application to the Settlement Scheme is determined; and

iii. transitional provisions protecting the rights of EEA nationals and their family members who arrive in the UK between exit day and January 2021 when the Government anticipates the new immigration policy will be in place, including the right to apply for "European Temporary Leave to Remain"; and

b. limit the ability of the Government to create a new post-Brexit immigration policy without proper scrutiny from Parliament by:

i. limiting the delegated power in clause 4(1) explicitly to making provisions that are necessary to:

A. 'tidy up' the statute book to ensure the proper functioning of UK law as a result of ending free movement; and

B. make any further transitional arrangements required to protect the rights of those individuals identified in a. above; and

ii. circumscribing the power to make and amend the Immigration Rules in section 3 of the Immigration Act 1971.

5. In addition, JUSTICE supports an amendment proposed by a group of civil society organisations to place a time limit of 28 days on immigration detention.

New clause – protection of rights of EEA nationals and family members

6. We are concerned that as drafted the Bill leaves the rights of EEA nationals and their family members currently in the UK, and those who will arrive between the UK between exit day and January 2021 when the Government anticipates the new immigration policy will be in place, in an uncertain position as they lack primary legislative footing. To remedy this we believe that the Bill should provide for the following rights on its face.

Long term residency rights of EEA nationals in the UK prior to exit day

7. The Government has already made provision for the Settlement Scheme in the Immigration Rules. This enables EEA nationals and their families with 5-years residency to apply for settled status i.e. long term leave to remain in the UK. Those with less than five years are able to apply for pre-settled status. In a 'no deal scenario' applicants will need to have been resident in the UK prior to exit day and the deadline for applications will be 31 December 2020. In the event of a 'deal' applicants will need to be resident in the UK by 31 December 2020 and the deadline for applications is 30 June 2011.[1]

8. The Government has stated that:

"We have always been clear that we highly value the contributions EU citizens make to the social, economic and cultural fabric of the UK and that we want them to stay in the UK. To remove any ambiguity, the UK Government guarantees that EU citizens resident in the UK by 29 March 2019 will be able to stay and we will take the necessary steps to protect their rights even in a unlikely 'no deal' scenario."[2]

9. However, as the Settlement Scheme is made under the Immigration Rules the Government has the power under section 3 of the Immigration Act 1971 to amend or revoke it at any time. We therefore call on the Government to enshrine these principles in primary legislation in the Bill.

10. JUSTICE is also concerned about the lack of an appeal right for Settlement Scheme applicants in a 'no deal' scenario and joins the Public Law Project ("PLP") in calling for

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[1] https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means; Department for Exiting the European Union, 'Citizens' Rights – EU citizens in the UK and UK nationals in the EU Policy Paper', available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762222/Policy_paper_on_citizens__rights_in_the_event_of_a_no_deal_Brexit.pdf

[2] Department for Exiting the European Union, 'Citizens' Rights – EU citizens in the UK and UK nationals in the EU Policy Paper', para 7.

this to be remedied in the Bill.[3] A right to settled or pre-settled status under the Scheme is meaningless if there is no effective way to enforce this right. Whilst Settlement Scheme applicants would be able to challenge a decision by way of administrative review and/or judicial review neither of these are as effective method of challenge as an appeal. Judicial review claims can only be brought on narrow legal grounds, the remedies are discretionary and the court will not "retake" the decision. Furthermore access to judicial review is constrained by the inability, in most cases, to get legal aid unless permission is granted.[4] Administriative review is even less effective as it would entail the Home Office reviewing its own decision to refuse status. This is particularly unsatisfactorily in light of issues with the quality of Home Office decision making as indicated by the fact that 49% of appeals to the First-tier Tribunal (Immigration and Asylum Chamber) were upheld in 2017/18.[5] Administrative reviews are far less likely to result in a different outcome for the applicant.[6]

11. In order for applicants to the Settlement Scheme to have a right of appeal, this must be provided for in primary legislation. As PLP explains in its briefing, applicants to the are currently in a 'no deal, no appeal' situation: the existence of an appeal right for the Settlement Scheme was agreed in the Withdrawal Agreement between the EU and the UK, therefore the domestic legislation implementing this agreement would need to provide for an appeal right. However, in a no deal scenario, there is currently no provision for a right of appeal.

12. A decision as to whether an individual is entitled to settled status (or pre-settled status) has an enormous impact on the rights of applicants. We agree with PLP that leaving quality of justice afforded to individuals uncertain and contingent on the approval of a withdrawal agreement by Parliament prior to exit day is a totally unsatisfactory position and should be remedied in this Bill.

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[3] Public Law Project, "No Deal, No Appeal: A Draft Amendment To The Immigration And Social Security Co-Ordination (EU Withdrawal) Bill", available at: https://publiclawproject.org.uk/wp-content/uploads/2019/01/PLP-Briefing-on-Immigration-and-Social-Security-Co-ordination-Bill-2019.pdf

[4] Civil Legal Aid (Remuneration) Regulations 2013, s.5A

[5] Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: April to June 2018, Table FIA_3.

[6] As an indication, following the removal of the right of appeal in respect of decisions refusing leave to remain to domestic violence victims for leave to remain in UK, it was reported that only 2 per cent of administrative reviews resulted in a an initial Home Office decision being overturned between 2015 and May 2018, in comparison to a previous success rate of 82% for appeals (January to March 2011) (N. McIntyre and A. Topping, 'Abuse victims increasingly denied right to stay in UK' (*The Guardian*, 16 August 2018) available at:https://www.theguardian.com/uk-news/2018/aug/16/abuse-victims-increasingly-denied-right-to-stay-in-uk)

13. For the reasons given above and those provided by PLP in its briefing we therefore support the following amendment:

When a decision is made under the EU Settlement Scheme in Appendix EU of the Immigration Rules in respect of a person he may appeal to the Tribunal if it relates to a refusal to grant:

(a) an application for settled status;

(b) an application for pre-settled status; or

(c) if it relates to an incorrect grant of pre-settled status when the applicant is entitled to settled status under that Appendix to the Immigration Rules.

Transitional arrangements

EEA nationals exercising free movement rights in the UK prior to exit

14. Currently, EEA nationals and their family members resident in the UK on exit will, assuming free movement is ended on exit day, be left without any legal status if they have not already applied for and received their settled or pre-settled status. Given that the Settlement Scheme only entered public pilot phase on 21 January 2019 and will not be fully rolled out into until March 2019,[7] and the time it will take to process applications, this will almost certainly be large number of people. EEA nationals and their family members will also lose other rights associated with free movement, for example the right of appeal in respect of EU rights under section 109 of the Nationality, Immigration and Asylum Act 2002, which will be repealed by virtue of clause 1 and schedule 1 of the Bill.

15. JUSTICE strongly welcomes the Government's intention, as set out in the Memorandum to provide for transitional provisions to protect the existing legal rights of EEA nationals exercising free movement rights in the UK prior to exit. However, the implementation of such rights are currently dependent on the Secretary of State making transitional and saving provisions under clause 4(1). Furthermore, if such rights are provided for in secondary legislation, the Government would also be able to use the delegated power in clause 4(1) to amend or repeal them with very limited scrutiny given that the negative procedure would likely apply (as the regulations would likely be amending secondary legislation).

[7] https://www.gov.uk/government/news/eu-settlement-scheme-rolled-out-to-public-test-phase

16. We therefore urge the Government to include in the Bill itself the transitional provisions that will guarantee the rights of those EEA nationals and their family members exercising their right to free movement prior to the UK's departure from the EU. This would provide certainty that these rights would be protected, allow for proper parliamentary scrutiny of such provisions and prevent their amendment or repeal without scrutiny.

EEA nationals entering the UK post exit day and prior to January 2021

17. The Explanatory Notes to the Bill state that the future immigration arrangements for EEA nationals have not yet been finalised; they may be the same as those that apply to non-EEA nationals, or they may be different.[8] The Government in its White Paper has stated that the new immigration system will not be in place until January 2021.[9] If clause 1 of the Bill is commenced on exit day as anticipated, there will therefore be a gap between the end of free movement and the implementation of the new immigration policy.

18. The Government recently announced its plans in respect EEA nationals and their family members who arrive after the exit day but prior to the implementation of the new immigration policy in a 'no deal' scenario. EEA nationals and their family members entering on or before 31 December 2020 will automatically be granted leave for three months, under which they will be entitled to work and study. EU citizens who wish to stay longer than three months will need to apply to the Home Office for a new type of leave "European Temporary Leave to Remain" within three months of arrival. Leave to remain will be granted for 36 months which will include permission to work and study. These transitional measures will be in place until 31 December 2020. [10]

19. We are encouraged by this sensible intention. The provisions governing these arrangements should also be set out on the face of the Bill to enable their proper scrutiny and ensure that such rights cannot be subsequently amended or withdrawn by secondary legislation.

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[8] Explanatory Notes, paras 8 and 9, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/en/18309en.pdf

[9] HM Government, 'The UK's future skills-based immigration system", December 2018, para 9.22 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf

[10] Home Office and UK Visa and Immigration, 'Immigration from 30 March 2019 if there is no deal', 28 January 2019 available at https://www.gov.uk/government/publications/eu-immigration-after-free-movement-ends-if-theres-no-deal/immigration-from-30-march-2019-if-there-is-no-deal

Clause 4 – delegated powers relating to termination of free movement

20. Clause 4(1) confers a power on the Secretary of State to make by regulations "such provision as [he] considers appropriate in consequence of, or in connection with, any provision of [Part 1 of the Bill]". By virtue of sub-clauses (2) and (3) this power includes the ability to modify current primary legislation and retained direct EU legislation, to make supplementary, incidental, transitional, transitory or saving provision and to make different provision for different purpose. The power is further extended by sub-clause (4) which provides that regulations may make provision in respect of people not entitled to exercise free movement rights prior to the repeal of the free movement legislation.

21. We consider that the scope of this power is inappropriately broad. It confers on the Secretary of State the power to make regulations, including those which amend **any** legislation he wishes so long as it is in some way "connected with" the repeal of free movement legislation. Furthermore, by virtue of sub-clause (4), the regulations need not even relate to individuals who were exercising free movement rights before the end of free movement. This power would include the ability to make any changes the Government wants to immigration policy as all such changes will arguably be "connected with" the end of free movement, at least for the foreseeable future. This power goes beyond the power contained in section 3 of the 1971 Immigration Act to make Immigration Rules, as it also allows for the amendment of primary legislation and retained direct EU legislation. Although the Bill requires the affirmative procedure to be used for regulations that make amendments to primary legislation, we believe that this still provides insufficient scrutiny for regulations that have the potential to significantly impact and shape post-Brexit immigration policy. For example, the affirmative procedure does not afford Parliament the opportunity to make amendments to regulations.

22. In its Memorandum on Delegated Powers (the "Memorandum") the Government justifies the need for this power for two main reasons:

    a. **'tidying up' the statute book**: "there are references to free movement and related matters across the statute book in both primary and secondary legislation. It is therefore necessary for the Bill to contain a power wide enough to deal with consequential amendments, including consequential amendments

to primary legislation, by secondary legislation, once Parliament has approved the principle of the repeal of free movement law";[11] and

b. **protecting rights of EEA nationals resident in the UK before exit** (i.e. transitional arrangements): "the provision will be used to protect the rights of EEA nationals who are resident in the UK before exit, that would otherwise be affected by the Bill; for example, so that persons who have an EEA right of appeal pending at the point at which the repeal of section 109 of the Nationality, Immigration and Asylum Act 2002 is commenced do not lose that right of appeal; and so that EEA nationals who are in the UK before exit may continue to remain in the UK lawfully for a period of time to enable them to apply for, and have decision taken in respect of, application for leave to remain or indefinite leave to remain under the Settlement Scheme.[12]

23. If these are indeed the aims of Government, we do not believe that the power should be any broader than this. As such, the delegated power in clause 4 should be specifically constrained in its use to these two matters.

24. Whilst, as explained above, we think that the transitional protections for EEA nationals and their family members should be set out on the face of the Bill, we understand that there may be a subsequent need to address issues relating to transitional protections not already provided for in the Bill itself.

25. Further, if Parliament approves the repeal of free movement legislation, we recognise the need for a delegated power which allows Ministers to make small, practical amendments to "tidy up" the statute book, for example removing references to EEA nationals, EU law and EU institutions where these no longer make sense in the context of the end of free movement.[13]

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[11] Memorandum, para 10, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/20-12-DLM-Imm.pdf

[12] *Ibid*, para 11.

[13] As per example 3 in Factsheet 4: consequential power (relating to ending free movement), available at https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/factsheet-4-consequential-power-relating-to-ending-free-movement

26. We therefore propose that the power is explicitly limited in its use:

    a. to make such further provision as is necessary to protect the accrued rights of those persons, who prior to 29 March 2019, benefitted in the UK from the right to free movement under EU law. This should explicitly include non-EEA nationals in the UK prior to 29 March 2019 exercising EU law-derived rights; and

    b. to prevent, remedy or mitigate any failure of retained EU law to operate effectively, as a result of any provision of Part 1 of the Bill, mirroring the constraints imposed in section 8(1)(a) of the EUWA.

27. Clause 4(5) enables the delegated power to be used to "modify provision relating to the imposition of fees or charges which is made by or under primary legislation". We note that by virtue of clause 4(4), the Government can impose any fee or charge it likes on any person, whether or not they were previously entitled to exercise free movement. The breadth of this power is unacceptable. The Government states that it is required in order to "enable coherent functioning of provisions which will be amended as a consequence of, or in connection with, the repeal of free movement law".[14] However, this does not in our view provide a sufficient explanation of exactly why this power is required. Unless the government can explain why such a power to impose fees and charges is required in connection with the two uses set out above, we propose that this clause 4(5) is removed.

<u>"Made affirmative" procedure</u>

28. Clause 4(6) proposes that the first set of regulations made under clause 4(1) will be subject to the "made affirmative" procedure.[15] Under this procedure, regulations are brought into law before Parliament has considered them, but will cease to have effect 40 days later unless approved within that period by resolution of each House. This contrasts with the usual "draft affirmative" procedure, which requires regulations to be approved in draft by resolution of each House before they are made into law, thereby affording Parliament greater scrutiny prior to enactment. The Government justifies the use of the "made affirmative" procedure on the basis that the Bill may obtain Royal Assent close to

[14] Memorandum, para 16.

[15] Subsection (8) of clause 4.

Exit day but (in a no deal scenario) the substantive provisions of Part 1 of the Bill will take effect from exit day.

29. However, in our view, as explained above the transitional provision should be contained on the face of the Bill. We also believe that the consequential 'tidying' up amendments could also be included in the Bill itself. As the Delegated Powers and Regulatory Reform Committee have pointed out given the need for the first set of regulations to be in force by exit day, Government must already be well-advanced in its preparation of the regulations which would include such provisions. There is therefore no reason why they cannot be moved into the Bill itself, obviating the need for the "made affirmative" procedure.[16]

30. If this is not possible, then the Government should consider whether it would be appropriate to delay the commencement of clause 1 until the regulations have been approved using the ordinary affirmative procedure. We accept that this would incur a (small) delay to the end of free movement. However, if the provisions required to ensure the protection of EEA nationals' and their family members' rights have not yet had the chance to be laid in Parliament and be scrutinised, the Government is not in a position to assure an immigration system compliant with the UK's human rights obligations.

31. Alternatively, if the "made affirmative" procedure must be used, this should only be used on the basis that the delegated power is limited as described in paragraph 26 above.

<u>Use of negative procedure</u>

32. Clause 4(8) proposes that regulations made pursuant to the Bill - other than the first set described above - and those amending or repealing primary legislation will be subject to the negative procedure. As the Memorandum makes clear, this includes indirect non-textual modifications to primary legislation. Non-textual modifications are amendments which modify the effect of primary legislation without actually altering the text of the primary legislation. For example, a regulation providing for a section in primary legislation to cease to have effect in particular circumstances or adding new circumstances in which a section applies. As the Delegated Powers and Regulatory Reform Committee has pointed out on a number of occasions "a non-textual modification of primary legislation is

[16] House of Lords Delegated Powers and Regulatory Reform Committee, 46th Report of Session 2017–19, HL Paper 275, Immigration and Social Security Co-ordination (EU Withdrawal) Bill, 30 January 2019, para 28.

capable of making changes which are no less significant than textual amendment".[17] It therefore stands to reason that such amendments should be subject to the same level of scrutiny as textual amendments and in our view should also be subject to the affirmative procedure.

33. Clause 4(7), which provides for the use of the affirmative procedure for regulations that amend or repeal any provision of primary legislation, should be amended to include regulations that make 'non-textual' amendments to primary legislation as well. Clause 4(8) and the use of the negative procedure would then only apply to regulations that did not modify the effect of primary legislation.

New clause – power to make Immigration Rules

34. Even if clause 4 is constrained in the way we suggest above we are aware that section 3 of the Immigration Act 1971 provides for the Government with broad powers to make immigration policy by way of the Immigration Rules. The Government in its Factsheet 1 states that the Bill "does not set out the details of the future immigration system because those details, such as the requirements a person must meet to come to the UK as a worker, student or family member, will, as now, be set out in the Immigration Rules."[18]

35. Given that Brexit represents a momentous change to the UK's immigration policy and the centrality of the immigration issues to the Brexit debate, we believe that the principles of the UK's post-Brexit immigration system need to be subject to proper debate, scrutiny and agreement by Parliament. We therefore propose that the power to make Immigration Rules under section 3 of the Immigration Act 1971 is circumscribed so that it cannot be used to make changes to post-Brexit immigration policy without the principles of such policy being set out in primary legislation.

Clause 5 – power to modify retained direct EU legislation relating to social security co-ordination

36. By virtue of the EUWA, EU regulations relating to social security co-ordination (the "Co-ordination Regulations") will be converted into domestic law on exit day. The Co-

[17] For example see, House of Lords Delegated Powers and Regulatory Reform Committee, 14th Report of Session 2014-15, Counter-Terrorism and Security Bill, 16 January 2015, para 9, available at https://publications.parliament.uk/pa/ld201415/ldselect/lddelreg/97/97.pdf

[18] Home Office, Policy paper, Immigration and Social Security Co-ordination (EU Withdrawal) Bill, Factsheet 1: overview, 21 December 2018, available at https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/factsheet-1-overview

ordination Regulations provide a reciprocal framework to protect the social security rights of people moving between EEA states. They do not create a harmonised system of social security benefits or guarantee a general right to such benefits. They ensure that:

a. individuals who move to another EEA state are covered by the social security legislation of only one country at a time and are therefore only liable to make contributions in one country;

b. a person has the same rights and obligations of the Member State where they are covered;

c. periods of insurance, employment or residence in other Member States can be taken into account when determining a person's eligibility for benefits; and

d. a person can receive benefits they're entitled to from one member State even if they are resident in another Member State.

37. The Co-ordination Regulations cover only social security benefits, which provide cover against certain categories of 'social risk' such as sickness, maternity/paternity, unemployment and old age. Some non-contributory benefits fall within the regulations but cannot be exported and benefits which are 'social and medical assistance' are not covered at all.

38. The Co-ordination Regulations also confer a right on those with a European Health Insurance Card (EHIC), to access medically necessary, state-provided healthcare during a temporary stay in any other EEA state. The home member state is normally required to reimburse the host country for the cost of the treatment.

39. Clause 5(1) of the Bill provides "an appropriate authority"[19] with the power to "modify the [Co-ordination Regulations]" by secondary legislation. The power is incredibly broad, providing absolutely no limits on the modifications that appropriate authorities are able to make to the Co-ordination Regulations. In addition, by virtue of sub-clause (3) the power explicitly includes the power to make different provision for different categories of person to whom they apply, to otherwise make different provision for different purposes, to make

[19] The Secretary of State, a devolved authority or a Minister of the Crown acting jointly with a devolved authority subsection (7) of clause 5 of the Bill.

supplementary, consequential, transitional, transitory or saving provision and to provide for a person to exercise a discretion in dealing with any matter. The power is further enhanced by subsection (4) which provides for the ability to amend or repeal primary legislation and other retained direct EU legislation not mentioned in subsection (2). JUSTICE is deeply concerned with the scope of this power and its unlimited nature.

40. We understand that the Government needs to be able to make amendments to Co-ordination Regulations in order to remedy deficiencies in them resulting from the UK's exit from the EU. For example, changing references to "Member State" to "the United Kingdom or a Member State". We also appreciate that difficulties arise with the retained Co-ordination Regulations due to their reciprocal nature and the fact that after exit day (in a no deal scenario), the UK cannot unilaterally impose reciprocal obligations on the EU. However, the power to make such amendments is already provided for under section 8 of the EUWA. In fact, Government has already laid before Parliament four draft statutory instruments relating to social security co-ordination pursuant to section 8.[20] The Explanatory Memorandum for these regulations states that they aim to:

    a. "address deficiencies in retained law caused by the UK withdrawing from the EU, which would impact the operation of the retained Coordination Regulations in a no-deal scenario";[21] and

    b. "ensure that citizens' rights are protected as far as possible in a no-deal scenario. As per the intent of the EU (Withdrawal) Act 2018, these instruments aim to maintain the status quo."[22]

41. The Government is explicit in its desire to use the power in clause 5 to "implement policy changes to the social security co-ordination rules that will have been retained into domestic law",[23] something that it would not be able to by delegated legislation made under EUWA. The Government states that the power "will provide the appropriate

[20] Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2018; Social Security Coordination (Regulation (EC) No 987/2009) (Amendment) (EU Exit) Regulations 2018; Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2018; and Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment) (EU Exit) Regulations 2018.

[21] Explanatory Memorandum, para 2.5, available at https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-social-security-coordination-regulation-ec-no-883-2004-eea-agreement-and-swiss-agreement-amendment-eu-exit-regulations-2018-9

[22] Explanatory Memorandum, para 2.6.

[23] Memorandum, para 26

authorities with the ability to deliver a range of policy options from exit day in any or all of" the following areas:

a. "what access EU nationals will have in the future to certain UK benefits and pensions;

b. the extent to which UK nationals can export certain benefits and pensions if they move to an EU Member State; and

c. the administration and rules which govern entitlement and obligations when people live and work in more than one country."[24]

42. Social security co-ordination is vital to protect the rights of EEA nationals who come to live in the UK and UK nationals who go to live in EEA member states. Policy in this area has the potential to greatly impact the lives of millions of people,[25] affecting their ability to receive benefits that they are entitled to through national insurance contributions or periods of residency. In our view it is wholly inappropriate for the Bill to grant the Government unlimited power to legislate for policy in this important field.

43. The memorandum states that "to ensure that the use of the power…is subject to full Parliamentary scrutiny, it is proposed that the exercise of the power is subject to the affirmative procedure". However, as explained above, there are still limitations to the level of scrutiny which the affirmative procedure provides. This is an area of policy that requires full debate and scrutiny from Parliament and the principles of any future policy should be set out in primary legislation.

44. In light of the above, we do not see any need for a further delegated power in relation to social security co-ordination, let alone one with such extraordinary breadth. In its ECHR Memorandum the Government states that the anticipated policy changes in both a no deal scenario and in certain deal scenarios could not otherwise be delivered by existing powers, such as the EUWA powers.[26] However, in our view such policy changes, or at least the principles of the policy, should be set out in primary legislation. This will be the

[24] Memorandum, para 26

[25] Available data suggests that there are around 785,000 UK nationals living in other EU countries (excluding Ireland) and around 3.8 million EU nationals living in the UK (House of Commons Library, Migration Statistics, Briefing Paper, SN06077, 11 December 2018, available at file:///C:/Users/sneedleman/Downloads/SN06077.pdf).

[26]Immigration and Social Security Co-ordination (EU Withdrawal) Bill, European Convention on Human Rights, Memorandum by the Home Office, December 2018, para 12, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/11-01-DLM-Imm.pdf.

case in a "deal" scenario as the Withdrawal Agreement and its implementing primary legislation will address future policy on social security coordination.[27] In a "no-deal" scenario the EUWA provides sufficient powers to make, and the Government has already drafted, regulations to maintain the status quo as far as possible until an agreement on social security coordination is reached with the EU, at which point further primary legislation will be required. We are therefore of the view that clause 5 should be removed in its entirety from the Bill.

Limit on immigration detention

45. Deprivation of liberty is a serious interference with an individual's human rights. Unlike incarceration as a sentence for a criminal offence, immigration detention is not a criminal procedure but an administrative process; the decision to detain an individual is made by the Home Office. It is therefore not subject to the same procedural safeguards that exist in the criminal justice system, for example it is not currently subject to automatic independent review. The UK is the only country in the EU with no current time limit on immigration detention, resulting in many individuals being detained for months and even years. Individuals in detention include those with the right to be in the UK (as demonstrated by the Windrush scandal) and, despite government policy to the contrary, individuals with mental and physical health problems, which are further exacerbated by detention. Whatever an individuals' personal circumstances, the state should not have the power to deprive any individual of his liberty indefinitely. This view is supported by the JCHR which recently released a report on immigration detention which recommended limiting the maximum cumulative period for detention to 28 days. It also suggest that this should be placed on statutory footing by way of an amendment to the Bill. [28]

[27] The Withdrawal Agreement provides for social security co-ordination to continue until the end of the transition period to ensure that individuals who have moved between the UK and EEA member states "are not disadvantaged in their access to pensions, benefits and other forms of social security, including healthcare cover" (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf) and the Political Declaration (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf, para 54) and Government White Paper on the future relationship between the UK and EU (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, para 89) envisage future social security coordination between the UK and the EU.

[28] House of Commons House of Lords Joint Committee on Human Rights, "Immigration detention", Sixteenth Report of Session 2017–19 Report, 30 January 2019, available at: https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf

46. JUSTICE fully supports a 28 time limit on immigration detention and the amendment to that effect suggested by a group of civil society organisations including Detention Action, the Bar Council and Bail for Immigration Detainees.

JUSTICE

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