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

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

Introduction

1. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill was introduced in the House of Commons on 5 March 2020. The Bill was brought to the Lords on 1 July and received a second reading on 22 July. The Bill replaces an earlier bill introduced in the Commons on 20 December 2018 which fell upon the dissolution of Parliament in October 2019.

2. The Bill has two main purposes: to end free movement of persons under EU law and to provide for the amendment of retained EU law governing social security co-ordination.

3. The Bill is of major constitutional importance for the way in which it removes the UK from one of the main structures of the EU (free movement). It is a skeleton bill which grants broad powers in relation to immigration law and social security co-ordination, each with potentially significant implications for European Economic Area (EEA) citizens in the UK and possibly for UK citizens in EEA countries who currently rely upon reciprocal arrangements.

4. This Bill raises issues of constitutional concern that have been recurring themes of our legislative scrutiny work, particularly in respect of bills relating to Brexit.[1] These include broad delegated powers, including Henry VIII powers, for which there is little policy detail as to their intended use; insufficient safeguards and scrutiny processes in relation to the use of these powers; and the relationship between the UK Government and the devolved administrations. The Government recently responded to the concerns we raised.[2] However, we think there are significant issues that still need to be addressed and we will be commenting further in due course.

Legal complexity and the rule of law

5. Immigration is a complicated policy area which has been repeatedly legislated for in recent years. As part of our inquiry into the legislative process,[3] we found that immigration law was an area

> "where the complexity of law had developed to the point that it was a serious threat to the ability of lawyers and judges to apply it consistently—not to mention raising rule-of-law concerns as to the ability of the general public to understand the law to which they are subject."[4]

6. This Bill threatens to add to that complexity. Clause 1 gives effect to schedule 1 which ends rights to free movement under retained EU law. Under clause

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1 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71)

2 Cabinet Office, Government response to the House of Lords Constitution Committee's Sixth Report of Session 2019–2021 'Brexit legislation: constitutional issues', 13 August 2020

3 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27). See, in particular, paras 110–126 and 133–147

4 *Ibid.*, para 113

1, many areas of immigration law are repealed or are "omitted" from the category of retained EU law. In certain cases, omissions are subject merely to a test of "inconsistency" with the Immigration Acts,[5] with no further detail on how such inconsistency is to be assessed. For example, schedule 1, paragraph 4(1) provides that "the Workers Regulation is omitted". Paragraph 4(2) then states:

> "The other provisions of the Workers Regulation cease to apply so far as—
>
> (a) they are inconsistent with any provision made by or under the Immigration Acts (including, and as amended by, this Act), or
>
> (b) they are otherwise capable of affecting the interpretation, application or operation of any such provision."

7. These provisions were criticised in evidence to the House of Commons public bill committee which considered the Bill. Adrian Berry, a barrister and the Chair of the Immigration Law Practitioners' Association, said:

> "How is the ordinary person, never mind the legislator, to know whether the law is good or not in a particular area if you draft like that? You need to make better laws. Make it certain, and put on the face of the Bill those things that you think are going to be disapplied because they are inconsistent with immigration provisions."[6]

8. **We are concerned that the provisions in this Bill are broad and some are worded in vague or subjective terms. They risk making a complex area of the law even more difficult to navigate and understand for practitioners and individuals alike. The statute book requires clarity rather than obscurity and provisions such as these threaten to frustrate essential ingredients of the rule of law.**

9. **We have previously recommended that immigration law be consolidated.[7] We reiterate this recommendation in the strongest possible terms, as consolidation will be even more urgent following the passage of this Bill.**

Delegated powers

Retained EU law

10. The Bill contains delegated powers which are intended to give effect to both of its key aims: ending free movement and social security co-ordination. In respect of each, the Bill interacts with the European Union (Withdrawal) Act 2018 (EUWA) and its provision for "retained EU law", as amended by European Union (Withdrawal Agreement) Act 2020.

11. At present, under the EUWA, free movement provisions are part of "retained direct principal EU legislation", which has a status akin to primary legislation in that it can only be amended or repealed by Act of Parliament.[8] Clause 3 of

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5 Schedule 1 to the Interpretation Act 1978 states that the "Immigration Acts" has the meaning given by section 61(2) of the UK Borders Act 2007. This section is amended by clause 3 of the Bill.

6 Immigration and Social Security Co-ordination (EU Withdrawal) Bill, Public Bill Committee, 9 June 2020, col 52

7 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 147

8 European Union (Withdrawal) Act 2018, section 7(2)

the Bill removes a number of free movement provisions from this category of law, such that they will be open to repeal or revocation by way of secondary legislation, subject to the made affirmative procedure.

12. We have previously raised concerns about bills relating to Brexit providing for elements of retained EU law to be amended by new powers which are not subject to the scrutiny safeguards set out in the European Union (Withdrawal) Act 2018, the operation of which are the result of careful and detailed consideration.[9]

13. **The Bill effectively changes significant areas of immigration law from primary into secondary legislation, weakening the parliamentary scrutiny that will be required for any future amendment or repeal.**

14. **The Government must provide a justification for treating this area of EU law differently from the other EU-related law covered by the European Union (Withdrawal) Act 2018. If it is unable to do so, regulations made under this Bill should not be subject to weaker forms of parliamentary scrutiny than equivalent measures made under the 2018 Act.**

Free movement

15. As well as reducing the scrutiny to which some EU-related immigration law will be subject, the Bill contains a broad Henry VIII power in clause 4 to make provision for the termination of free movement:

> "The Secretary of State may by regulations made by statutory instrument make such provision as the Secretary of State considers appropriate in consequence of, or in connection with, any provision of this Part."

16. Regulations under the power may modify primary legislation or "retained direct EU legislation". The test for any such regulations is a permissive one of "appropriateness" in the view of the Secretary of State, and its range is broadened by the phrase "in connection with". This formulation appears to make the power effectively open-ended.

17. We have previously considered issues with permissive language in the drafting of legislation:

> "Drafting techniques such as "for example" and "among other things" are not necessarily inappropriate. They become problematic when used in relation to broad delegated powers. Given the breadth of many of the powers sought in the Brexit bills, and the lack of policy to indicate how they might be used, such illustrative language emphasises the wide range of circumstances to which such powers might be applied. It is difficult for Parliament to predict how these powers might be used by a future government and where the line is to be drawn between their lawful and unlawful application. These concerns are compounded when the powers are not circumscribed by sunset clauses or other safeguards."[10]

We concluded:

9 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), para 42

10 *Ibid.*, para 34

> "Delegated powers should be sought only when their use can be clearly anticipated and defined. Illustrative language that does not meaningfully constrain broad powers is inappropriate and should not be used."[11]

18. The problems resulting from the breadth of the clause 4 powers are exacerbated by the scrutiny provisions which accompany them. The first statutory instrument made under these powers can be made by way of made affirmative procedure, by which regulations are only subject to parliamentary scrutiny and approval after coming into force.

19. Further, where citizens' rights have been transposed from EU law into UK law by secondary legislation, they could be altered or removed by regulations subject only to the negative procedure (whereby Parliament does not need actively to approve the regulations). For example, it could be used to draw EEA nationals into areas of possible criminal liability under asylum and immigration law to which they are not currently subject.[12]

20. The Delegated Powers and Regulatory Reform Committee (DPRRC) has reported on this Bill.[13] It concluded that clause 4 was a "very significant delegation of power from Parliament to the Executive", noting the permissive wording, the subject matter of the Bill and the large number of persons who will be affected.[14] It said:

> "we are frankly disturbed that the Government should consider it appropriate to include the words "in connection with". This would confer permanent powers on Ministers to make whatever legislation they considered appropriate, provided there was at least some connection with Part 1, however tenuous; and to do so by negative procedure regulations (assuming no amendment was made to primary legislation)."[15]

21. The DPRRC made a series of recommendations for amending clause 4. These included removing the phrase "in connection with", removing the powers related to fees and charges unless the Government provides a full justification for them, and changing the scrutiny process for the powers such that the first set of regulations are not subject to the made affirmative procedure.[16]

22. **We agree with the conclusions of the Delegated Powers and Regulatory Reform Committee about the powers in clause 4. A Henry VIII clause that is subject to such a permissive test as "appropriateness", and which may be used to do anything "in connection with" in relation to so broad and important an issue as free movement, is constitutionally unacceptable. Such vague and subjective language undermine fundamental elements of the rule of law.**

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11 *Ibid.*, para 35

12 This was recognised by the Government in the Delegated Powers Memorandum to the 2017–19 version of the Bill. Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017–19, Delegated Powers Memorandum, 31 December 2018, para 9.

13 Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (22nd Report, Session 19–21, HL Paper 118)

14 *Ibid.*, para 12

15 *Ibid.*, para 19

16 *Ibid.*, paras 26–28

Social security co-ordination

23. Clause 5(1) contains a broad Henry VIII power to modify the EU Social Security Co-ordination Regulations, which form part of retained EU law under the EUWA. The Government set out the purpose of the clause in the Explanatory Notes:

> "This clause allows the Government (and/or, where appropriate, a Northern Ireland department) to make regulations to implement any new policies regarding co-ordination of social security. This clause is intended to be used to implement new policies subject to the outcome of future negotiations with the EU."[17]

24. The Government acknowledged that this is a "wide power" which is intended to give Ministers "the ability to deliver a range of policy options".[18]

25. Clause 5(3)(c) contains a further Henry VIII power to make supplementary and consequential provisions. This is cast in wide terms, including the power "to provide for a person to exercise a discretion in dealing with any matter". This includes the power to modify primary legislation and retained direct EU legislation which is not listed in clause 5(2).

26. The Bill also provides in clause 5(5) that "EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, provision made by regulations under this section." This wide provision removes a large area of retained EU law from the purview of the powers in EUWA and their attendant safeguards.

27. The DPRRC noted the lack of explanation as to: the need for the clause 5(1) power given the existence of other powers to amend the Social Security Co-ordination Regulations; how the Government might seek to use it; why it included a power to amend primary legislation and retained direct EU legislation not listed in clause 5(2); why it was not time limited; and why Ministers will have no duty to consult before making regulations.[19] It said the impression was that the Government was "seeking these powers in order to avoid having to prepare a detailed bill implementing their policy once it is settled" and having to present such a bill for full parliamentary scrutiny.[20]

28. The DPRRC concluded that the Government had "provided an inadequate justification for a wholesale transfer to Ministers of power to legislate in a field that could have a major impact on large numbers of UK citizens resident in EEA countries, and EEA citizens resident in the UK, who currently rely upon reciprocal arrangements" and that clause 5 should be omitted from the Bill.[21]

29. **The Government has failed to provide sufficient justification for such a broad Henry VIII power. Social security coordination is addressed in section 13 of the European Union (Withdrawal Agreement) Act**

17 Immigration and Social Security Co-ordination (EU Withdrawal) Bill, Explanatory Notes, para 42
18 Immigration and Social Security Co-ordination (EU Withdrawal) Bill, Delegated Powers Memorandum, paras 30–32
19 Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (22nd Report, Session 19–21, HL Paper 118), para 40
20 *Ibid.*, para 41
21 *Ibid.*, para 42

2020. Any further modification of the Social Security Co-ordination Regulations that might be required could be achieved using the power in section 8 of the European Union (Withdrawal) Act 2018.

30. **We strongly agree with the conclusions of the Delegated Powers and Regulatory Reform Committee and their recommendation that clause 5 be removed from the Bill.**

Devolution

31. Clause 5(8) and schedule 2 make further provision for the power of Northern Ireland departments to make regulations under clause 5. This provides that a Northern Ireland department can only make regulations alone if the instrument is within devolved competence. It also sets out the requirements for UK Government consent, joint exercise of powers and consultation.

32. The Scottish Government had described equivalent powers for social security coordination for Scottish ministers as "welcome and useful" in respect of the 2017–19 version of the Bill, but for both iterations it recommended that the Scottish Parliament should not consent.[22] As a result, in order to avoid the refusal of legislative consent, the UK Government removed the provisions relating to Scotland from the Bill.[23]

33. We have observed that the relationship between the UK Government and the Scottish Government—the product of inevitable political tensions about Brexit—has been strained and this has made securing legislative consent for Brexit-related legislation more difficult.[24] We concluded previously:

> "Effective inter-governmental relations are essential to achieve a smooth transfer of competences from the EU level to the devolved administrations and to agree new common UK frameworks. We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions."[25]

34. **The absence of effective inter-governmental relations and mechanisms to support them are long-standing problems. Brexit has made the need to address them increasingly pressing.[26] It is extraordinary and profoundly disappointing that the official review of inter-governmental relations has yet to reach any conclusions. The Government and the devolved administrations must do more to make progress with strengthening inter-governmental relations.**

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22 Scottish Government, Legislative Consent Memorandum: Immigration and Social Security Co-Ordination (EU Withdrawal) Bill, March 2019, paras 13 and 30; Scottish Government, Legislative Consent Memorandum: Immigration and Social Security Co-Ordination (EU Withdrawal) Bill, July 2020, para 24

23 Immigration and Social Security Co-ordination (EU Withdrawal) Bill, Explanatory Notes, para 3

24 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), paras 54–60

25 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), para 264

26 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146); Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149)