Law Society of Scotland

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Written Evidence

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

February 2019

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to provide evidence on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (the Bill) and have the following comments to put forward for consideration.

Communication

Clause 1 repeals provisions of retained EU law relating to free movement, such as the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and section 7 of the Immigration Act 1988. Such action is an anticipated consequence of the UK's departure from the EU. Commencement of this provision will be left to commencement regulations (per clause 7(8) of the Bill).

Given the significant impact of this legislation on EU nationals living in the UK, we would urge the government to ensure that there is widespread publicity in advance of commencement to ensure that all those who will be affected by this legislation are aware of its effect and when that will come into force. This should include publicity in a range of European languages to maximise the effectiveness of this communication.

Need for transitional measures

We have some concerns regarding the potential for an unintentional gap to be created if transitional measures are not put in place for EU citizens who entered the UK before the UK leaves the EU prior to the repeal of the retained EU free movement law, as provided for by Clause 1.

Leaving without an approved Withdrawal Agreement

Our understanding of the current policy intention of the government is for the rights of EU nationals who enter the UK prior to the UK leaving the EU (pre-exit entrants) to live and work in the UK to remain unchanged. These individuals will require to register through the settled status scheme by December 2020 in the case of the UK leaving the EU without a deal.[1] Those who can demonstrate five years' continuous residence in the UK will qualify for settled status, and those with less than the five years can apply for pre-settled status, which can be changed to settled status once five years' residence has been achieved.

EU citizens who enter the UK after the UK leaves the EU (post-exit entrants) will be able to stay in the UK for three months or apply for European Temporary Leave to Remain which will allow them to live, work, and study in the UK for up to 36 months.[2]

For pre-exit entrants who have not yet applied for settled status, it is currently unclear on what grounds they would be entitled to remain in the UK if Clause 1 of this Bill was implemented without further transitional measures being provided for.

Withdrawal Agreement

If the UK leaves the EU with the Withdrawal Agreement in place, there would only be one scheme, the settled status scheme (including pre-settled status), which would open to all who enter prior to December 2020. The 2016 Regulations will presumably remain in force until then and people will be able to continue applying for permanent residence followed by citizenship if they are eligible to do so.

An issue arises for an EU national who has been granted a permanent residence document and has applied for British citizenship on the basis of that document. The Home Office service standard for deciding a citizenship application is six months. If the 2016 Regulations are repealed by Clause 1 after submission of the application, but before it is granted, the client's residence will become unlawful if they don't make a settled status application unless there are transitional provisions.

Transitional measures

In both situations, these transitional provisions will be introduced through commencement regulations (Clause 7(8) and 7(9) of the Bill). We would suggest that the necessary transitional measures should be included on the face of the Bill in order to provide certainty and allow for individuals to get accurate advice to plan their future and to avoid any unintended consequences of this Bill.

[1] UK Government Guide, *Stay in the UK after it leaves the EU ('settled status'): step by step*

[2] UK Government Guidance, *European Temporary Leave to Remain* (28 January 2019)

Regulation making powers

The Bill contains several powers to make regulations.

Clause 4 contains a wide Henry VIII clause empowering the government to pass regulations, which can amend primary legislation and retained EU law, which are deemed "appropriate in consequence of, or in connection with, any provision of this Part" (clause 4(1)). The power is extended further by clause 4(4) which allows such regulations to make provisions for persons who were not reliant on EU free movement law prior to its repeal (i.e. anyone subject to immigrant control).

Clause 4(5) provides that such regulations may modify provision relating to the imposition of fees or charges.

Clause 4(6) provides that the first statutory instrument passed under clause 4(1) is to be passed through the 'Made Affirmative' procedure. Such procedure is usually used where an urgent change to the law is required. No such urgency has been identified in the explanatory notes accompanying the Bill. It is unclear why the 'Draft Affirmative' procedure, which prevents the regulations from coming in to force until they have received parliamentary procedure, has not been used.

Clause 4(7) provides that subsequent statutory instruments passed under clause 4(1) which amend or repeal primary legislation are to be passed through the 'Draft Affirmative' procedure. Clause 4(8) provides that all other statutory instruments passed under clause 4(1) are to be passed through the 'Made Negative' procedure. It is unclear why the 'Draft Negative' procedure has not been used which would prevent the regulations from coming in to force during the period within which parliament may object to the regulations.

As above, the abrogation of parliamentary scrutiny is deeply concerning. The cumulative effect of these provisions is to reduce the level of parliamentary scrutiny of legislation relating to immigration (both EU and non-EU). At present, statutory instruments providing for the charging of fees for immigration and nationality applications and for the imposition of the Immigration Health Surcharge must be passed through the 'Draft Affirmative' procedure.[3] Clause 4 of the Bill allows such charges to be imposed by regulations passed through the "Made Negative" procedure. Such regulations could apply to both EU and non-EU migrants (per clause 4(4)).

We query the need for such a wide Henry VIII is necessary in addition to the already extensive executive powers in relation to immigration[4] and retained EU law[5] and why the use of the 'Made Negative' procedure

[3] See sections 74(2)(b) and 74(2)(j) of the Immigration Act 2014

[4] See for example: section 3(2) of the Immigration Act 1971 which empowers the Secretary of State to make rules (known as the immigration rules) as to the practice to be followed in the administration of immigration control; section 68 of the Immigration Act 2014 which empowers the Secretary of State to make regulations setting the fees payable by those making immigration and nationality applications; and section 38 of the Immigration Act 2014 which empowers the Secretary of State to make regulations requiring an Immigration Health Surcharge to be paid by anyone applying for leave to enter or remain in the UK.

[5] See sections 8 and 9 of the European Union (Withdrawal) Act 2018 which provide for extensive Henry VIII powers permitting changes to be made to retained EU law.

(which provides for the lowest level of parliamentary scrutiny) is justified rather than the 'Draft Affirmative' procedure (which provides for the highest level of parliamentary scrutiny).

We suggest limiting these powers by amending the Bill such as to doing only what is necessary to give effect to Part 1 of the Bill.

Similarly, the Bill provides wide powers for an appropriate authority to amend the retained direct EU legislation around social security coordination detailed in the clause; an appropriate authority being either the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority. Regulations amending the retained direct EU legislation would require approval by each House of Parliament (or using the affirmative procedure in Scotland), which we believe is appropriate scrutiny for the significant issues involved. The powers provided under clause 5 are wide-ranging, to accommodate the range of possible outcomes around social security coordination and the reciprocal arrangements required to facilitate this between the UK and Member States; though in practice, these may be constrained by wider immigration policy following the UK's withdrawal from the EU. Because of the devolution of aspects of social security under the Scotland Act, there is the potential, though again possibly limited in practice, for differential approaches to reserved and devolved benefits in Scotland.

We also note the regulations laid under section 8 of the EU (Withdrawal) Act 2018 to address deficiencies in retained EU law following the UK's withdrawal from the EU[6]. The policy aims of these regulations, broadly, are to unilaterally retain the principle of social security coordination and to make the necessary technical amendments to allow this to occur. Future reciprocation from Member States is hoped for in return; though this may involve practical challenges, for instance, around information sharing pending adequacy decisions around data protection. There may be other practical issues, such as how to ensure payment of social security contributions in only one country in a 'gig economy' environment[7], though these relating to social security coordination overall rather than specifically to UK withdrawal.

Further comments

Though not covered on the face of the Bill, additional issues have been raised over the course of this Bill's debate and consideration, and we would provide brief additional comments on two of these issues – a right of appeal, and immigration detention.

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

[7] As discussed by Niamh Nic Shuibhne, *Reconnecting free movement of workers and equal treatment in an unequal Europe*, E.L. Rev. 2018, 43(4), 477-510

Right of appeal

The Draft Withdrawal Agreement requires a right of appeal against refusal of residence status to an EU citizen under the settled status scheme.[8] The provisions to implement the settled status scheme are contained within the immigration rules and the scheme is due to become open to the majority of EU citizens in the UK on 21 January 2019.[9] However, provisions providing for a right of appeal are beyond the scope of the immigration rules and need to be contained within primary legislation. We would be interested in clarification as to when legislation will be laid before Parliament providing for the right of appeal required under the Withdrawal Agreement.[10]

EU citizens need to be able to have adverse decisions reviewed by an independent judicial body capable of examining the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Without such oversight, there is no accountability for poor quality decisions which incorrectly apply the law. As noted by the Supreme Court in the context of Employment Tribunal fees, impeding access to the judicial redress is contrary to the rule of law:

"At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."[11]

In order to prevent the rights conferred on EU citizens from becoming a 'dead letter', there must be a right of appeal against refusal.

[8] Draft Withdrawal Agreement dated 14 November 2018, Article 18(1)(r)

[9] Statement of Changes to the Immigration Rules, HC 1849, dated 20 December 2018, brings Appendix EU in to effect for all EU citizens who hold a valid passport and all non-EU citizens who have been issued with a residence card under the 2016 Regulations.

[10] Citizens' Rights - EU citizens in the UK and UK nationals in the EU, Department for Exiting the European Union Policy Paper, 6 December 2018, paragraph 11 provides that "EU citizens would have the right to challenge a refusal of UK immigration status under the EU Settlement Scheme by way of administrative review and judicial review, in line with the remedies generally available to non-EEA nationals refused leave to remain in the UK"

[11] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at paragraph 68

Immigration detention

In its response to the United Nation's Universal Periodic Review recommendation that the UK stop the practice of arresting migrants for unspecified periods, the UK Government gave two main justifications for resisting a time limit. Their first justification was that an individual's detention remains under regular review by the government, and their second was that individuals can apply for release on immigration bail and can challenge the lawfulness of their detention in the courts.[12]

In relation to the second justification – that detainees can apply for release on bail – we think that the government's approach over-emphasises the role of individual detainees in applying for release and does not take sufficient account of the barriers to release. We think that the government should take more responsibility for facilitating release, including by time-limiting detention.[13]

[12] Ministry of Justice, *United Nations Universal Periodic Review – UK, British Overseas Territories and Crown Dependencies – Response to the recommendations received on 4 May 2017* (29 August 2017)

[13] Further information on the barriers to release and other issues surrounding the question of time-limiting immigration detention can be found in our submission to the immigration detention inquiry of the Joint Select Committee on Human Rights (November 2018)

For further information, please contact:
Marina Sinclair-Chin
Policy Team
Law Society of Scotland
DD: 0131 476 8136
marinasinclair-chin@lawscot.org.uk