Law Society of Scotland

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

July 2020

Introduction

The Law Society of Scotland is The Law Society of Scotland is the professional body for over 12,000 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.

The Society's Immigration and Asylum Law Sub Committee welcomes the opportunity to comment on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

The Sub Committee has the following comments to put forward for consideration.

General Comments

Territorial extent

The Bill extends to the whole of the United Kingdom.

In relation to Scotland the Scotland Act 1998, Schedule 5 provides the following reservation to the UK Parliament:

B6. Immigration and nationality

Section B6.

Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents. Bill extends to the whole of the United Kingdom.

Therefore so far as the bill concerns immigration matters it does not engage the Legislative Consent Convention and the consent of the Scottish Parliament is not required see the Explanatory Notes (para 25). The Explanatory Notes also clarify the extent to which the bill was amended during its passage through the House of Commons (para 3). The House of Commons amended the Bill on 30 June so as to not engage the legislative consent process in the Scottish Parliament regarding the social security co-ordination provisions. The Scottish Government confirmed earlier in June that it would not bring forward a legislative consent motion in respect of the in the Bill in the Scottish Parliament. This resulted in Government amendments to Clause 5

and Schedule 2 which removed reference to Scottish Ministers from the order making powers under those provisions.

Specific Comments

PART 1 MEASURES RELATING TO ENDING FREE MOVEMENT

Clause 1 Repeal of the main retained EU law relating to free movement etc and Schedule 1

This clause underpins schedule 1 which will make provision to repeal rights to free movement of persons under retained EU law under the European Union (Withdrawal) Act 2018 and will bring to an end other EU derived rights relating to immigration.

The Society's View

This clause will achieve the Government's policy intention but why is clause 1 necessary when the European Union (Withdrawal) Act 2018 already gives Ministers the power to repeal Retained EU Law?

Schedule 1 will repeal:

a. the exemption from the requirement for leave to enter or remain for persons exercising EU rights under the Immigration Act 1988 section 7.

b. the provision for EU free movement rights of entry, residence and protection from expulsion under the Immigration (European Economic Area) Regulations 2016.

c. the right to move to the UK to take employment under Article 1 Regulation EU/492/11.

d. EU-derived rights, powers, liabilities, obligations, restrictions, remedies, and procedures that would otherwise continue to be available in UK law under section 4 of the European Union (Withdrawal) Act 2018.

These repeals end free movement of persons between the EU and the UK and are required as a result of the UK's membership coming to an end on 31 January 2020.

We are concerned about the lack of provision for a 'grace period' between 1 January 2021 and 30 June 2021. Clause 1 repeals EU free movement law. It is anticipated that this clause will be brought in to force on 1 January 2021, in line with the Government's stated intention of ending free movement at the end of the implementation or transition period. It is important that there is clarification of what protections will be put in place for those seeking to rely on those rights during the 'grace period' required by the Withdrawal Agreement (Arts 18(1)(b) and 18(2)). Paragraph 10 of the Explanatory Notes states that "Statutory instruments to be made under the powers in the EUWAA 2020 will protect EEA citizens and their family members' existing rights of residence, entry and exit until [30 June 2021]". To ensure transparency and appropriate scrutiny, these statutory instruments ought to be published alongside the Bill. Alternatively the provisions could be included on the face of the Bill. This would provide certainty and allow for individuals to

be given accurate advice on how best to plan their future and avoid any unintended consequences of the repeal of EU free movement law.

By way of example, it is unclear when an EEA national who has been issued with a permanent residence document under the Immigration (EEA) Regulations 2016 will cease being able to rely on that document for the purposes of an application for naturalisation as a British citizen. Will this continue to be possible between 1 January 2021 and 30 June 2021? Will an person who has submitted an application before 1 January 2021 be considered to be free from immigration restrictions due to possession of a permanent residence document even if the decision on their application is issued after 1 January 2021, by which time the legal basis for that document will have been repealed? It is also unclear what immigration status EEA nationals will hold during the 'grace period' and how they will be able to prove that they are in the UK lawfully.

EEA nationals and their advisers need to know, and Parliament needs to be in a position to scrutinise, the protections the Government intends to put in place to ensure that EEA nationals residing in the UK prior to the end of the implementation or transition period are not disadvantaged by the repeal of EU free movement law before the end of the 'grace period'.

Clause 2 Irish citizens: entitlement to enter or remain without leave

The Society's View

This clause will achieve the Government's policy intention.

Clause 2 inserts a new section 3ZA into the Immigration Act 1971 to clarify that subject to certain exceptions an Irish citizen does not require leave to enter or remain in the UK.

The exceptions include deportation, exclusion, and where notice of removal directions has been given. They also apply to persons excluded by certain international instruments under the Immigration Act 1971 section 8B.

Where a specified circumstance applies, an Irish citizen must have leave in order to enter the UK.

Clause 3 Meaning of "the Immigration Acts" etc.and Clause 4 Consequential etc. provision

The Society's View

We have no comment to make.

Clause 4 Consequential etc. provision

Clause 4 gives the Secretary of State power to make such regulations as she considers appropriate in consequence of, or in connection with part 1 of the Bill.

Clause 4(2) provides that the regulations may modify any provision made by or under primary legislation passed before or in the same Parliamentary session as this Act and retained direct EU legislation. These Henry VIII powers are very widely drawn and the regulations will need careful scrutiny.

Clause 4(6) and 4(9) do not take account of the Coronavirus emergency and should be amended accordingly.

PART 2 SOCIAL SECURITY CO-ORDINATION

Clause 5 Power to modify retained direct EU legislation relating to social security co-ordination and Schedule 2

The Society's View

Clause 5 empowers the Secretary of State to modify retained direct EU legislation.

Regulation (EC)No.883/2004 provides for passporting of social security contributions, across the EU enabling EU Citizens to 'aggregate' social security contributions made to the social security system of more than one Member State. This allows payment of contribution-based pensions taking into account the total contributions made in the host Member State and in other Member States where the citizen has made payments.

Indefinite Immigration Detention

The Society's View

Although not referred to in the bill this issue arose in the debates at Report in the House of Commons. We responded to the Joint Committee on Human Rights Inquiry into Indefinite Detention in 2018 and refer to our response which can be accessed here https://www.lawscot.org.uk/media/361494/18-11-21-imm-inquiry-immigration-detention.pdf

The Joint Committee Report concluded in relation to indefinite detention: 'The UK is the only country in Europe that does not impose time limits on immigration detention. Without such a time limit, there is a reduced incentive for officials to progress cases as quickly as possible, so that individuals can have their status resolved swiftly, for example by being removed or having their status regularised.

We recommend that detainees should not spend more than 28 days in detention. This will end the trauma of indefinite detention. In exceptional circumstances, for example when the detainee seeks unreasonably to frustrate the removal process and has caused the delay, the Home Office would be able to apply to a judge who could decide whether to extend the detention for up to a further 28 days'. See further: https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/148403.htm

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.

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. International comparators demonstrate that alternatives are available.

The introduction of regular review in Schedule 10 of the Immigration Act 2016 is a step in the right direction but we think the four monthly review of detention is too infrequent and there are too many limitations on its scope (for example, the review not taking place when removal is contemplated within the next 14 days).

In addition, it is important to note that the automatic review provisions in the Immigration Act 2016 do not apply to those subject to deportation or who have national security cases. There is likely to be a significant number of detainees who will probably continue to be detained longer than is necessary.

In relation to the processes which could be used to apply a time limit in practice, there are international comparators to draw on. The Netherlands, for example, reduced its reliance on immigration detention significantly between 2011 and 2015.

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