



# **European Union (Withdrawal Agreement) Bill**

**House of Commons**

**Committee Stage Briefing**

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## **For further information contact**

Jodie Blackstock, Legal Director  
email: [jblackstock@justice.org.uk](mailto:jblackstock@justice.org.uk) direct line: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100  
fax: 020 7329 5055 email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)

1. 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 UK section of the International Commission of Jurists.
2. This briefing addresses the European Union (Withdrawal Agreement) Bill,<sup>1</sup> ahead of Committee Stage on 7 January 2020.
3. JUSTICE takes no view on the UK’s decision to leave the European Union (“EU”). However, JUSTICE has previously raised concerns about the rights implications of Brexit legislation<sup>2</sup> as well as the resort to delegated powers, loss of reciprocal justice arrangements/procedures and lack of guidance around future interpretation of EU law.<sup>3</sup>
4. JUSTICE has identified four principle areas of concern in the clauses of the current Bill: powers conferred to Ministers relating to the courts; diminution of Parliamentary scrutiny; the effect on acquired rights of UK citizens; and threats to the rights of both EU citizens and those seeking asylum in the UK.

### **Powers conferred to Ministers relating to the courts**

#### Clause 26: Permitting lower courts to depart from CJEU rulings

5. New Clause 26(1) allows Ministers, by regulations, to specify the circumstances in which lower courts could depart from the rulings of the Court of Justice of the European Union (CJEU) after the implementation or transition period.
6. Without this new provision, lower courts would have been required by the Bill to follow rulings of UK higher courts – the UK Supreme Court and of the High Court of Justiciary

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<sup>1</sup> HC Bill (2019-20) [1].

<sup>2</sup> Liberty, Amnesty International, Public Law Project (“PLP”) and JUSTICE (joint briefing), ‘Leaving the EU need not - and should not – result in ordinary people in the UK losing existing rights’ (October 2017), available at <https://justice.org.uk/wp-content/uploads/2017/10/Joint-HR-Threats-Brief-Committee-Repeal-Bill.pdf>

<sup>3</sup> JUSTICE, EU Withdrawal Bill Second Reading Briefing (September 2017) available at <https://justice.org.uk/wp-content/uploads/2017/09/JUSTICE-briefing-on-EU-Withdrawal-Bill.pdf>

in Scotland – on retained EU law. This means that lower courts would have been bound by CJEU judgments unless or until those higher courts had ruled otherwise or the substance of domestic law had been changed through legislation.

7. The Government has justified new Clause 26(1) on the basis that it will ensure that lower court judges will not "inadvertently" be tied to CJEU rulings "for years to come", preventing a "legal bottleneck" and allowing the UK to "take back control of our laws and disentangle ourselves from the EU's legal order".<sup>4</sup>
8. JUSTICE would suggest that this justification is not made out. Section 5(1) of the European Union (Withdrawal) Act 2018 ("EU(W)A") ensures the overriding policy aim: that the principle of the supremacy of EU law does not apply after exit day. Parliament will be empowered "to disentangle the UK from the EU's legal order" as it sees fit, and courts will have to interpret legislation according to Parliamentary intent.
9. However, far from alleviating a "legal bottleneck", allowing *lower court judges* to depart from CJEU jurisprudence will create considerable legal uncertainty, not to mention frustrate the intention of the Bill to facilitate a "smooth and orderly transition".<sup>5 6</sup>
10. Enabling lower courts to rule on interpretation of EU law undermines *stare decisis* (the principle that a court should follow precedent established by previously decided cases with similar facts and issues to provide certainty and consistency in the administration of justice) and the supervisory role of the senior courts.
11. Further, the effect of Clause 26 is to push lower court judges (as well as the members of the senior judiciary to be consulted by the Minister under Clause 26(1)(d)), into a distinctly political role, undermining constitutional separation and judicial

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<sup>4</sup> BBC, 'Brexit bill to give new powers to British judges' (18 December 2019) available at <https://www.bbc.co.uk/news/uk-politics-50840595>

<sup>5</sup> European Union (Withdrawal Agreement) Bill 2019-20 Explanatory Notes, para 42.

<sup>6</sup> Legal certainty is further undermined by the continuing lack of guidance around how courts should interpret *future* CJEU case law. In our Second Reading Briefing on the European Union (Withdrawal) Bill, we echoed concerns raised by both Lord Neuberger and the Institute for Government about the lack of clarity on this issue, urging Parliament to provide courts with a specific, legal test governing the treatment of CJEU case-law after Brexit.

independence. This is particularly of concern as decisions around the interpretation and retention of EU law could have considerable human rights implications.<sup>7</sup> We agree with the Equality and Human Rights Commission's (EHRC) observation that the Clause could potentially "[open] the door to future regression on human rights and equality protections,"<sup>8</sup> and would add that any departure from EU standards must only occur in the context of rigorous legislative scrutiny.

12. The lack of a specified legal test within the Bill is an additional cause of concern. Under Clause 26(1)(d), it will be for the Minister to provide for "the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law" as well as the relevant considerations in applying the test. This is a departure from the approach taken in EU(W)A s. 6(5), where the relevant test was outlined on the face of the Act.<sup>9</sup> Leaving decisions on legal tests to regulations for each "relevant court or relevant tribunal" risks a piecemeal and arbitrary approach.

13. JUSTICE would therefore suggest that **Clauses 26(1) (b) and (d) are left out** of the Bill.

14. In the alternative, we would propose the following amendment:

**"Clause 26, page 31, line 15, before "and" insert –**

**(5C) a court or tribunal sitting as a court of first instance may not be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section."**

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<sup>7</sup> The BBC cites the following examples in which lower courts could make key interpretative decisions: airlines fighting compensation claims from passengers whose flights were delayed by technical faults; employers challenging workers' right to carry over holiday entitlement while on sick leave; Google challenging EU law on people's "right to be forgotten" online. See n. 2., above.

<sup>8</sup> Equality and Human Rights Commission, EU (Withdrawal Agreement) Bill: key issues briefing House of Commons, Second Reading (20 December 2019) p. 1.

<sup>9</sup> "In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law".

## **Diminution of Parliamentary scrutiny**

### Removal of Parliamentary veto in previous Clauses 30 and 31

15. Clause 30 in the previous iteration of the Bill (“October Bill”)<sup>10</sup> gave MPs a veto over any Minister agreeing to an extension of the transition or implementation period in the Joint Committee. Clause 31 gave MPs a veto over the start of future relationship negotiations with the EU; an approval function in relation to the Government’s negotiating mandate; and, an enhanced Parliamentary approval process for any future relationship treaty subsequently negotiated with the EU.
16. JUSTICE would argue that the removal of these Clauses from the current Bill is unfortunate and undermines the legislature’s ability to scrutinise the Executive robustly. The change raises doubts about the stated commitment of the Bill to recognise the sovereignty of the UK Parliament.<sup>11</sup>
17. We understand that the Government has taken the position that there shall be no extension of the transition period, as reflected in new Clause 33. JUSTICE takes no view on the merits of that decision – and in the circumstances understands that previous Clause 30 is otiose.
18. However, we see no reason why Ministers should be relieved of the obligation to provide updates on the future trading relationship or to ensure that Parliament approves of the Government’s negotiating objectives. To that end, we would suggest that **Clause 31 of the October Bill is reinstated.**

### Expansion of delegated powers

19. In our Briefing on the European Union (Withdrawal) Bill, we stated our concern about the general resort to delegated powers:

*[T]his Bill enables Ministers of the Crown to legislate for potentially huge changes to our law through secondary legislation, which cannot hope to have the level of scrutiny by Parliament required for such significant change. A better balance must*

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<sup>10</sup> HC Bill (2019) [7].

<sup>11</sup> European Union (Withdrawal Agreement) Bill 2019-20 Explanatory Notes, para 2.

*be struck between those amendments that will require primary legislation and what can be handled through secondary legislation.*<sup>12</sup>

We noted also our particular concern about the breadth of “Henry VIII” powers, allowing Government to change Acts of Parliament with virtually no principled limitation.<sup>13</sup>

20. The current Bill confers on ministers 19 further delegated Henry VIII powers, with “significant policy and rights implications”.<sup>14</sup> As PLP and Liberty have pointed out in their joint briefing, the powers conferred to Ministers in this Bill are even broader than those in the EU(W)A. The authors note that in implementing the Withdrawal Agreement, Ministers are empowered to make regulations which “modify any provision made by or under an enactment” as they “consider appropriate”, citing Clauses 5-11 of the Bill and noting that all of the 19 new delegated powers in the Bill employ this form of words.

21. In order to address these concerns JUSTICE would seek at a minimum a **commitment from the floor of the House that the Government will not use the powers in the Bill in a manner inconsistent with the Withdrawal Agreement** (in line with PLP and Liberty’s “Recommendation 1”).

22. PLP and Liberty note that the Bill makes no use of the sifting procedure under EU(W)A Schedule 7 for SIs laid by the draft negative resolution procedure. JUSTICE agrees that this is unfortunate and represents a further regression in terms of proper Parliamentary scrutiny. JUSTICE would therefore suggest that **Clauses 3, 4, 7, 8, 9, 11, 12, 13, 14, 18, 19, 21, 22 and 26 are amended so that regulations made under the delegated powers in these Clauses are subject to the process in EU(W)A Schedule 7 paragraph 3** (in line with PLP and Liberty’s “Recommendation 4”).

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<sup>12</sup> JUSTICE, n. 3 above, para 3.

<sup>13</sup> Ibid., para 12.

<sup>14</sup> PLP and Liberty, ‘EU (Withdrawal Agreement) Bill: PLP and Liberty’s Joint Briefing for Second Reading in the House of Commons’ (19 December 2019) available at <https://publiclawproject.org.uk/wp-content/uploads/2019/12/191218-PLP-and-Liberty-Joint-Briefing-Withdrawal-Agreement-Bill-Second-Reading.pdf>, para 8.

23. Finally, as we recommended in the draft stages for EU(W)A and given the expansive proposals for the powers in this Bill, JUSTICE would recommend the **introduction of a constitutional protection clause** in response to the broad Henry VIII powers created by the Bill. As Oxford academic Dr Tarun Khaitan has identified, this protection clause has repeatedly been used by Parliament to address concerns about overreach of Ministerial power.<sup>15</sup> The provision states:

A Minister may not make provision under section...unless he considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.

(2) Those conditions are that—

- (a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
- (b) the effect of the provision is proportionate to the policy objective;
- (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (d) the provision does not remove any necessary protection;
- (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (f) the provision is not of constitutional significance

24. A suitably adapted constitution protection clause could be used here to prevent undue overreach in the same way.

## **Acquired Rights**

### Removal of Clause 34 and Schedule 4 on workers' rights

25. Clause 34 and Schedule 4 of the October Bill provided additional procedural protections for workers' rights that currently form part of EU law. These provisions have been removed entirely from the current Bill. Government has suggested that the substance of the deleted clauses will be covered in a separate Employment Bill. This Bill is yet to be laid before Parliament.

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<sup>15</sup> See <https://ukconstitutionallaw.org/2017/07/19/tarun-khaitan-a-constitution-protection-clause-for-the-great-repeal-bill/>. Dr Khaitan gives the examples of section 3(2)(f) of the Legislative and Regulatory Reform Act 2006; section 5D(2)(e) of the Fire and Rescue Services Act 2004 (as amended in 2011); and section 6(2)(e) of the Localism Act 2011. Section 83(2)(e) of the Local Government Act (Northern Ireland) 2014 includes a similar limitation on the powers delegated upon the Department of the Environment.

26. In our Briefing on the European Union (Withdrawal) Bill, we stressed the importance of the preservation of acquired fundamental rights in Brexit legislation. We noted our concern that although fundamental rights are *retained* following what is now IP completion day,<sup>16</sup> there is no preservation mechanism preventing a Minister modifying retained EU law where they deem it to be “deficient”.<sup>17</sup>
27. The Court in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 separated the rights created by the EU into three types: (1) rights capable of replication in the law of the United Kingdom, such as rights under the Working Time Directive, or rights of residence for EU citizens in the UK; (2) rights enjoyed in other Member States of the EU, such as freedom of movement for British citizens in other EU states; and (3) rights that could not be replicated in UK law, such as the right to petition the CJEU or vote in the European Parliament elections. The workplace protections contained in Clause 34 and Schedule 4 of the October Bill fall squarely into the first category and we see no reason for removing these from the current Bill – even if an Employment Bill is forthcoming. JUSTICE would suggest that **Clause 34 and Schedule 4 of the October Bill are reinstated.**

## **Rights of EU Citizens and those seeking asylum**

### Clause 7: Deadlines for immigration status applications

28. The UK Government has committed to Part Two of the Withdrawal Agreement, providing for Citizens’ Rights which include rights relating to entry and residence.
29. Clause 7 of the new Bill empowers Ministers to make regulations requiring individuals within scope of the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens’ Rights Agreement to apply for UK immigration status by a specific deadline. As provided for in the various Agreements, this deadline must not be less than six months from the end of the implementation period.

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<sup>16</sup> EU(W)A, s. 3.

<sup>17</sup> Subject to the exceptions in EU(W)A ss 8(7) and 9(3).



30. The Government has not yet officially set out in any detail its intended approach towards those who miss that deadline. The Explanatory Notes to the Bill simply state “once free movement has ended, beneficiaries of the citizens’ rights part of the Agreements who have not yet secured leave to enter or remain in the UK under the EU Settlement Scheme would no longer have a lawful basis to reside in the UK unless further provision is made”.<sup>18</sup>
31. JUSTICE would suggest far greater clarity is required around the approach taken towards those who miss the given deadline. In particular, JUSTICE considers that attention must be paid to those who are unable to engage properly with the application process, for example due to incapacity, age, homelessness or other vulnerabilities. Although the Home Office has stated a commitment to assisting those who fall into this cohort,<sup>19</sup> we consider that enlisting the third sector to assist vulnerable applicants does not provide the legal longstop necessary to prevent the risk of unjust deportations.
32. JUSTICE therefore agrees with the approach in proposed **amendment NC5**, requiring *inter alia* that “no provision of this or any other enactment, or adopted under this or any other enactment, may be used to require European Union nationals and their family members ... who reside in the United Kingdom immediately prior to the end of the implementation period, to apply for a new residence status under Article 18(1) of the Withdrawal Agreement, or to introduce a deadline for applications under residence scheme immigration rules or relevant entry clearance rules”.
33. The Preamble to the Withdrawal Agreement recognises that “it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement”.<sup>20</sup> JUSTICE feels that the Bill as currently drafted

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<sup>18</sup> European Union (Withdrawal Agreement) Bill 2019-20 Explanatory Notes, para 138.

<sup>19</sup> Fifteenth Report of Session 2017–19, EU Settlement Scheme (HC 1945).

<sup>20</sup> HM Government, *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, Preamble, p. 3.

does not reflect that aspiration, and that inclusion of the amendment identified above would remedy this incongruity.

### Clause 37: Family Reunion

34. EU(W)A s. 17 requires Government to seek to negotiate an agreement with the EU aiming to facilitate family reunion for unaccompanied children who have claimed asylum in the EU and have a relative in the UK (or vice versa). Clause 37 of the current Bill would abolish that requirement. Instead, a Minister would be obliged to make a single policy statement to Parliament “in relation to any future arrangements” between the UK and EU about these children. The policy statement would have to be laid within two months of the Bill receiving Royal Assent. The Bill’s Explanatory Notes do not specify why the Government considers the change necessary.

35. This provision clearly affects some of the most vulnerable potential users of the justice system. In JUSTICE’s Working Party report *Immigration and Asylum Appeals – a Fresh Look*, we noted that in asylum cases “appellants are often highly vulnerable and many cases involve fundamental and non-derogable rights ... Users of the system can be amongst the most vulnerable, sometimes with multiple vulnerabilities.”<sup>21</sup> This is particularly the case where appellants are children.

36. Government has claimed that its “policy on child refugees has not changed and we will continue to do all we can to enable children to claim asylum and be reunited with their families, which the legislation published today reaffirms.”<sup>22</sup> The Prime Minister claimed further during Second Reading that “we will continue to support fully the purpose and spirit of the Dubs amendment”.<sup>23</sup> JUSTICE fails to see how Clause 37 squares with this policy objective. We support **proposed amendment 4**, requiring a

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<sup>21</sup> JUSTICE Working Party, *Immigration and Asylum Appeals – a Fresh Look* (2018) available at <https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf> Executive Summary; para 1.1. See also para 4.18, citing Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, para. 3.

<sup>22</sup> House of Commons Library, ‘Family reunion rights and the EU (Withdrawal Agreement) Bill’ (23 December 2019) available at <https://commonslibrary.parliament.uk/brexit/negotiations/family-reunion-rights-and-the-eu-withdrawal-agreement-bill/>.

<sup>23</sup> HC Deb 20 December 2019, vol 669, col 148.

Minister to make a statement to the House of Commons setting out the steps the Government has taken, and progress made towards, securing the agreement envisaged in EU(W)A s. 17. This amendment secures accountability and guards against a regression in rights protection for the most vulnerable.