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

House of Commons

Second reading

Briefing

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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. Clause 1 and Schedule 1 of the Bill will end free movement between the UK and EEA member states. 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 consider the following amendments to the Bill:

    a. **Include an obligation in primary legislation to protect the settlement rights of EEA nationals and their family members exercising their free movement rights in the UK prior to the end of the transition period who miss the application deadline within the EU Settlement Scheme (EUSS), currently 30 June 2021**, and pursuant to such obligation, clarify:

i. the proactive steps it will take to avoid unjust measures taken against those who are legally resident in the UK in accordance with the Withdrawal Agreement but whose status is not determined through the EUSS before the application deadline;

ii. how it will "assess all the circumstances and reasons" of those who miss applications, and

iii. how it will approach the "reasonable grounds" test of any applications made after the application deadline.

b. **Limit the potentially excessive delegated power in clause 4(1) to only making provisions that are necessary to:**

i. 'tidy up' the statute book to ensure the proper transition and functioning of UK law as a result of the measures in Part 1 ending free movement; and

ii. make any further transitional arrangements required to protect the rights of those EEA citizens and their families.

c. **Ensure appropriate scrutiny from Parliament before the first clause 4 regulations by removing the use of the 40-day "made affirmative" procedure**.

d. **Limit the power of the Government to create a new post-Brexit immigration policy without proper scrutiny from Parliament by circumscribing the power to make and amend the Immigration Rules in section 3 of the Immigration Act 1971**.

e. **Remove clause 5, thereby requiring new social security co-ordination policy to be given primary legislative footing and scrutiny.**

New clause – protection of rights of EEA nationals and family members who miss the application deadline for the EU Settlement Scheme

5. The Withdrawal Agreement confirms the residence, entry and exit rights of EEA citizens and their families before the end of the transition period. JUSTICE previously called for the confirmation of this legal status to be approached by the UK through a declaratory scheme rather than requiring an application process,.[1]

6. JUSTICE's primary consideration is for those EEA citizens who are unable to engage properly with the application process, for example due to incapacity, age, homelessness or other vulnerabilities. We are especially concerned given the recent research from the Migration Observatory at the University of Oxford, whose report of 16 April 2020 suggests that official estimates of the EU citizen population in the UK exclude or undercount several groups of people. It warns that unless the Home Office invests in new data, it will be impossible to know how many people are set to lose their status.[2]

7. In addition, the access of vulnerable people to the application system has been made more difficult during the Coronavirus outbreak, since postal applications have been suspended, whilst online applications continue to be unavailable for many applicants.[3]

8. Although the Home Office has stated a commitment to assisting those who fall into this cohort,[4] we consider that enlisting the third sector to assist vulnerable

[1] Oral Evidence given to the House of Commons Public Bill Committee on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19, Second Sitting, Tuesday 12 February 2019, available at https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal/committees/houseofcommonspublicbillcommitteeontheimmigrationandsocialsecuritycoordinationeuwithdrawalbill201719.html.

[2] Madeleine Sumption, 'Not Settled Yet? Understanding the EU Settlement Scheme using the Available Data' Migration Observatory, University of Oxford, 16 April 2020, available here: https://migrationobservatory.ox.ac.uk/resources/reports/not-settled-yet-understanding-the-eu-settlement-scheme-using-the-available-data/.

[3] You cannot use the online service to apply to the scheme if you're not an EU, EEA or Swiss citizen and you're applying as: the family member of a British citizen you lived with in Switzerland or an EU or EEA country; the family member of a British citizen who also has EU, EEA or Swiss citizenship and who lived in the UK as an EU, EEA or Swiss citizen before getting British citizenship; the primary carer of a British, EU, EEA or Swiss citizen; the child of an EU, EEA or Swiss citizen who used to live and work in the UK, and you're in education - or you're the child's primary carer. See https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status

[4] Fifteenth Report of Session 2017–19, EU Settlement Scheme (HC 1945).

applicants does not provide the legal longstop necessary to prevent the risk of unjust deportations.

9. **We recommend that the Bill includes:**
    a. **An obligation for the Government to protect EEA citizens and their families who are legally resident in the UK in accordance with the Withdrawal Agreement but whose status is not determined through the EU Settlement Scheme before the application deadline at the end of the grace period;**
    b. **An obligation for the Government to set out a statement of policy before Parliament, clarifying:**
        i. **the proactive steps it will take to avoid unjust measures taken against those EEA citizens and their families;**
        ii. **in accordance with Article 18(1)(d) of the Withdrawal Agreement, how it will "assess all the circumstances and reasons" of those who miss the application deadline; and**
        iii. **how it will approach the "reasonable grounds" test of any applications made after the application deadline.**

<u>Clause 4 – delegated powers relating to termination of free movement</u>

10. Clause 4(1) confers a power on the Secretary of State to make by regulations "such provision as [she] 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.

11. 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 **<u>any</u>** 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.

12. 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";[5]

    b. **protecting rights of EEA nationals resident in the UK before the end of the transition period** : "for example, so 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;;.[6]

    c. Provisions "crucial" for the implementation of the Bill: "for example … transitional provision in relation to the immigration status of an Irish citizen who was subject to an exclusion order under the EEA Regulations immediately before those regulations were revoked, to enable them to be treated for the purposes of new section 3ZA of the Immigration Act 1971 (inserted by clause 2 of the Bill), as a person to whom section 3ZA(3) applies." [7]

[5] Memorandum, para 13, available at https://publications.parliament.uk/pa/bills/cbill/58-01/0104/2020-03-04%20DPmemo%20-%20ImmSSCBill%20Final_%20(003).pdf
[6] Memorandum, para 15.
[7] Memorandum, para 15.

13. 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 stated matters.

14. Whilst we think that the above protection 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.

15. Further, if Parliament approves the repeal of free movement legislation (clause 1) and/or the new section 32A to the Immigration Act 1971 (clause 2) 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,[8] or making crucial transitional provisions to enable the new section 32ZA to function.

16. **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 benefit in the UK from the right to free movement under EU law up to the end of the transition period. This should explicitly include non-EEA nationals in the UK 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.**

17. 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

[8] As per the examples 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

to "enable coherent functioning of provisions which will be amended as a consequence of, or in connection with, the repeal of free movement law".[9] 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.

"Made affirmative" procedure

18. Clause 4(6) proposes that the first set of regulations made under clause 4(1) will be subject to the "made affirmative" procedure. 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.

19. When this Bill was before Parliament in 2019, the Government justified the use of the "made affirmative" procedure on the basis that the Bill may obtain Royal Assent close to exit day but (in a no deal scenario) the substantive provisions of Part 1 of the Bill will take effect from exit day. Of course, no deal is no longer a possibility. As such the justification for keeping the 40-day made affirmative procedure in the most recent memorandum simply states that this is "to enable the regulations to come into force alongside the commencement of Part 1 of the Bill on the intended date of 31 December 2020".[10] This is not an adequate explanation for why EEA citizens and families must be subject to regulations for such a significant period before they are scrutinised by Parliament.

20. There are months of Parliamentary time between this Act's intended passing and the end of the transition period, and the 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.[11]**

[9] Memorandum, para 19.
[10] Memorandum, para 22.
[11] 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.

21. If this is not possible, then the regulations should be approved using the ordinary affirmative procedure. This is far preferable to a situation in which provisions, which ostensibly ensure the protection of EEA nationals' and their family members' rights, are in force before they are scrutinised by Parliament.

22. 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 16 above.

Use of negative procedure

23. 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 capable of making changes which are no less significant than textual amendment".[12] 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.

24. **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.[13]**

[12] 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.

[13] **Further or in the alternative, Parliament may wish to consider the use of a "sift" mechanism**, such as that enabled by section 8 and schedule 7 of EUWA 2018. This would ensure that the negative procedure is not inappropriately used. **See Recommendation 6 of the Public Law Project's briefing.** Note their proposed solution is for all clause 4(1) regulations to be sifted, i.e. an initial sift mechanism, in the alternative to our recommendation. An alternative taken with our recommendation would be a residual sift, i.e. only those provisions which do not amend (textually or non-textually) primary legislation would be sifted for their appropriateness for the negative procedure, as a safeguard. If this mechanism

New clause – power to make Immigration Rules

25. Even if clause 4 is constrained in the way we suggest above, we are aware that section 3 of the Immigration Act 1971 provides the Government with broad powers to make immigration policy by way of the Immigration Rules. The Human Rights Memorandum accompanying the Bill states: "The intention is to rely on current UK law powers, in particular, the power at section 3 of the 1971 Act to make Immigration Rules, to provide for the future immigration system in due course. As such, this Memorandum does not address Convention issues arising in relation to the future immigration system."[14]

26. 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.

27. **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

28. EU regulations relating to social security co-ordination listed in Clause 5(2) (the "Co-ordination Regulations") will be retained in domestic law after the transition period. The Co-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:

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were used, JUSTICE would strongly suggest the use of the same Committee as deal with the EUWA sifts.

[14] Immigration and Social Security Co-ordination (EU Withdrawal) Bill, European Convention on Human Rights, Memorandum by the Home Office, 5 March 2020, para 7, available at https://publications.parliament.uk/pa/bills/cbill/58-01/0104/2020-03-04%20ECHR%20Memo%20ImmSSCBill%20Final2.pdf.

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.

29. 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.

30. 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.

31. Clause 5(1) of the Bill provides "an appropriate authority"[15] 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 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 passed before, or in the same Session as, the Act 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.

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

32. 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. In fact this has already occurred under the section 8 and schedule 7 EUWA 2018 procedure for four of the Co-ordination Regulations.[16]

33. The Government is explicit in its desire to use the power in clause 5 to "respond flexibly to the outcome of negotiations on the future framework and make changes to the retained social security co-ordination rules",[17] something that it would not be able to do by delegated legislation made under EUWA. The Government states that the power "will provide the appropriate authorities with the ability to deliver a range of policy options from the end of the transition period 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."[18]

34. 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,[19] 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.

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[16] See The Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019; The Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment) (EU Exit) Regulations 2019; The Social Security Coordination (Regulation (EC) No 987/2009) (Amendment) (EU Exit) Regulations 2019 and the Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2019.

[17] Memorandum, para 30.

[18] Memorandum, para 30.

[19] 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, 6 March 2020 , https://researchbriefings.files.parliament.uk/documents/SN06077/SN06077.pdf. However, note the recent doubt which has been cast on the reliability of the best data by the Migration Observatory study referenced above at footnote 2.

35. 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".[20] 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.

36. 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 previous ECHR Memorandum, the Government stated 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.[21] Regardless of the merits of such arguments for broad powers last year, a deal has been reached and there is no need to plan for no deal scenarios. The Withdrawal Agreement provides for social security co-coordination to continue until the end of the transition period, after which, In our view, such policy changes, or at least the principles of the policy, should be set out in primary legislation. We are therefore of the view that clause 5 should be removed in its entirety from the Bill.

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[20] Memorandum, para 32.

[21] 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.