

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Eighth Delegated Legislation Committee

DRAFT CIVIL LEGAL AID (AMENDMENT)
(EU EXIT) REGULATIONS 2019

Tuesday 22 January 2019

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The Committee consisted of the following Members:

Chair: SIR HENRY BELLINGHAM

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| † Ali, Rushanara (<i>Bethnal Green and Bow</i>) (Lab) | † Kinnock, Stephen (<i>Aberavon</i>) (Lab) |
| † Foxcroft, Vicky (<i>Lewisham, Deptford</i>) (Lab) | † McFadden, Mr Pat (<i>Wolverhampton South East</i>) (Lab) |
| † Frazer, Lucy (<i>Parliamentary Under-Secretary of State for Justice</i>) | † Milling, Amanda (<i>Cannock Chase</i>) (Con) |
| † Goodwill, Mr Robert (<i>Scarborough and Whitby</i>) (Con) | † Powell, Lucy (<i>Manchester Central</i>) (Lab/Co-op) |
| † Hair, Kirstene (<i>Angus</i>) (Con) | † Qureshi, Yasmin (<i>Bolton South East</i>) (Lab) |
| † Harper, Mr Mark (<i>Forest of Dean</i>) (Con) | † Twigg, Derek (<i>Halton</i>) (Lab) |
| † Hepburn, Mr Stephen (<i>Jarrow</i>) (Lab) | † Warman, Matt (<i>Boston and Skegness</i>) (Con) |
| † Johnson, Dr Caroline (<i>Sleaford and North Hykeham</i>) (Con) | † Watling, Giles (<i>Clacton</i>) (Con) |
| † Keegan, Gillian (<i>Chichester</i>) (Con) | Mems Ayinla, <i>Committee Clerk</i> |
| | † attended the Committee |

Eighth Delegated Legislation Committee

Tuesday 22 January 2019

[SIR HENRY BELLINGHAM *in the Chair*]

Draft Civil Legal Aid (Amendment) (EU Exit) Regulations 2019

2.30 pm

The Parliamentary Under-Secretary of State for Justice (Lucy Frazer): I beg to move,

That the Committee has considered the draft Civil Legal Aid (Amendment) (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship again, Sir Henry. The draft regulations form part of the Government's preparations for the possibility of the UK leaving the EU without a deal. They will provide clarity to citizens and lawyers in the event of a no-deal outcome.

The draft regulations relate to EU directive 2003/8/EC, the EU legal aid directive, which creates reciprocal rights and obligations across member states. The directive's application is limited to civil and commercial matters; it applies to cross-border disputes in which an individual domiciled or habitually resident in an EU member state requires legal services in relation to proceedings in another member state or enforcement of a decision or authentic instrument in another member state.

In a no-deal scenario, we would not benefit from any reciprocity from other member states in that context. The draft regulations will therefore remove the legislation that implements the EU legal aid directive, which will no longer apply to the United Kingdom. As a result, individuals domiciled or habitually resident in an EU member state who require legal services in relation to proceedings in England and Wales or Northern Ireland, or who wish to enforce a decision or authentic instrument in England and Wales or Northern Ireland, will be subject to the same scope, means and merits requirements as those domiciled or habitually resident in England and Wales, Northern Ireland or third countries.

After EU exit, legal aid provision for those domiciled or habitually resident in the UK who participate in proceedings in an EU member state will fall to each member state's particular legal aid framework. Repealing the legislation that implements the EU legal aid directive will ensure legal certainty and clarity on legal aid entitlement. In addition, we will avoid a unilateral arrangement under which those domiciled or habitually resident in EU member states are treated more favourably than those domiciled or habitually resident in the United Kingdom or third countries.

The draft regulations will make a number of small technical amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Access to Justice (Northern Ireland) Order 2003. References to "enforceable EU rights" will be amended to refer to "retained enforceable EU rights"; the term will be defined with reference to rights retained in domestic law by operation of the European Union (Withdrawal) Act 2018. This will enable the proper functioning of the exceptional

case funding frameworks in England and Wales and Northern Ireland and, under LASPO, provision of foreign legal advice.

The draft regulations will also make some procedural amendments, one of which relates to whether an applicant for controlled work needs to attend a legal provider's premises in person. At present, it is not necessary for an individual who is seeking legal aid for controlled work in England and Wales to attend a legal provider's premises in person if they are present in or reside in the EU, if they cannot attend for good reason and if they can authorise someone to attend on their behalf. The draft regulations will change the exception so that those who reside within the EU will now be required to meet the same criteria that those who reside in third countries are expected to meet when they apply for controlled work and are not present in the UK.

A further amendment relates to licensed work. Again, those who reside within the EU will now be required to meet the same criteria that those who reside in third countries are currently expected to meet when they apply for licensed work and are not present in England and Wales.

The draft regulations will make provision for transitional arrangements for certain live matters under the repealed or amended legislation at the time of EU exit. Those matters will continue to operate under the same rules as before.

I should highlight the limited application of the draft regulations. In 2017 there were only 27 cross-border applications made between England and Wales and central authorities in other EU member states, of which 20 were from EU residents seeking legal aid in England and Wales. Although it is not possible to estimate precise amounts, we expect that any implications for the legal aid fund will be considerably small. In addition, a number of legal aid applications that are in scope as a result of the EU legal aid directive may have been made directly to the Legal Aid Agency or providers, not via central authorities, and it is not possible to identify those cases. Officials at Northern Ireland's Department of Justice have confirmed that, although applications under the EU legal aid directive are not centrally recorded for statistical purposes, it has established that an estimated three applications were made in the last two years.

This SI is necessary in order to correct deficiencies in legal aid legislation in England, Wales and Northern Ireland that arise from the UK's exit from the EU, including LASPO, the Access to Justice (Northern Ireland) Order 2003 and subordinate legislation. The Scottish Government are separately taking forward any required amendments to legal aid legislation. This legislation will simply enable us to continue going forward without the reciprocity that we have previously enjoyed and will not be afforded in the future. I commend the draft regulations to the Committee.

2.36 pm

Yasmin Qureshi (Bolton South East) (Lab): It is a pleasure to serve under your chairmanship, Sir Henry. As the Minister has explained, this regulation will repeal a 2003 directive that was designed

"to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid"

for cross-border disputes over family, commercial and civil matters, which are obviously important issues that need to be dealt with properly. As the Minister has outlined, a cross-border dispute is defined as

“one where the party applying for legal aid in the context of the directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.”

In practical terms, this is relevant for individuals who are domiciled or habitually resident in an EU member state and require legal services for proceedings in other member states, or who wish to enforce a decision or an authentic instrument in another member state.

Although it is acknowledged that some of the provisions in this regulation are procedural in nature, there is one substantive provision that will have a massive impact on access to legal aid by removing paragraph 44 of part 1 of schedule 1 in LASPO. When this statutory instrument was discussed in the other place, Lord Thomas of Gresford said that the current framework

“provides predictability and certainty for citizens and businesses” and that

“judgments and orders obtained will be recognised and enforced...as is the case now.”—[*Official Report, House of Lords*, 15 January 2019; Vol. 795, c. 191.]

Those benefits were recognised in the Government’s 2017 paper, “Providing a cross-border civil judicial cooperation framework”. Paragraph 7 stated:

“This framework provides predictability and certainty for citizens and businesses from the EU and the UK about the laws that apply to their cross-border relationships, the courts that would be responsible, and their ability to rely on decisions from one country’s courts in another State.”

An important feature of civil judicial co-operation at present is the mutual provision of legal aid. The legal aid directive sets minimum common rules relating to legal aid in order to improve access to justice in cross-border disputes. It applies to all such disputes over civil and commercial matters, but particularly to family law—the disposal of assets and access to children, especially across borders. This provision was incorporated into English law by LASPO, and its purpose is to ensure that people domiciled or habitually resident in EU member states are not treated more favourably after we leave the European Union than those who reside in England, Wales and Northern Ireland. EU residents who require legal services in relation to proceedings in our courts, or who wish to enforce an overseas judgment, will no longer have a right to legal aid for matters within the scope of the EU directive.

The statutory instrument uses the Henry VIII powers in section 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to revoke the legislation implementing the European Union directive in UK domestic law. As far as we can ascertain, the statutory instrument would prevent European Union residents from seeking legal aid for exceptional cases that are not normally within the scope of UK domestic legal aid, but where not providing it would be a breach of retained enforceable European Union rights. Can the Minister tell us whether, after Brexit, EU residents will be able to apply for legal aid in the ordinary way for cases involving children across borders in an English court, for example, and whether legal aid would be granted if the ordinary tests of merits and means were satisfied? Does domicile or residency in the European Union disqualify an applicant who applies for legal aid in the normal way?

One of our many concerns is that the Government have not properly planned for reciprocal justice arrangements after we leave the European Union. That

failure could have very damaging consequences for the people who rely on those arrangements, including those resolving complex family law cases. There are concerns across Parliament, including on the Justice Committee, that the Ministry of Justice has provided little detail or certainty about how co-operation on justice will be managed after we have left the European Union. In October, the Chair of the Lords EU Justice Sub-Committee wrote to the Lord Chancellor to set out a number of the Sub-Committee’s concerns about the impact of the Government’s handling of the Brexit negotiations on judicial co-operation, warning about the

“‘profound and damaging’ impact of a no-deal Brexit on the UK’s family law system and those that these courts seek to protect”.

The civil judicial co-operation framework that I referred to earlier on, which was issued by the Government, was found by the Lords EU Justice Sub-Committee to contain little detail on how the Government’s aims for co-operation would be achieved, and noted that

“a worrying level of complacency has taken hold in the Government that assumes that we can leave the EU without alternatives in place and that other international arrangements will fill the void left by this important EU legislation.”

It is in that context that we express concern that the provisions in the statutory instrument could begin to undo the existing legal framework without yet having an agreed replacement in place. That is a risky approach that would be avoidable were it not for the Government’s failure so far to secure comprehensive agreements on future co-operation in justice matters. The Lords EU Justice Sub-Committee is not alone in noting that. The matter was raised in two debates in Westminster Hall last year, which focused generally on judicial co-operation post Brexit, not only for legal services but for our judicial and civil relationships.

The statutory instrument does not come with a clear explanation, which is another concern expressed by the Lords. The Government’s failure to plan properly for reciprocal justice arrangements could have damaging consequences for people who rely on such co-operation. Earlier, I asked whether European Union residents could apply in the ordinary way for legal aid for UK courts post Brexit in cases of children across borders, for example, and whether that aid would be granted subject to means and merit tests. No answer has been given. I would be grateful if the Minister gave us some facts and figures about which applications for legal aid might be accepted. It is well known that the Law Society has indicated its concerns to the Ministry of Justice about the provisions and the problems that they may cause. For those reasons, we will vote against the statutory instrument.

2.44 pm

Lucy Frazer: I will make three points: two relate to the SI and the third is more global. First, it is extremely disappointing that, in opposing the regulations, the Opposition will not enable us to provide for a smooth transition by ensuring that our statute book is fit for purpose if we leave the EU without a deal.

Secondly, I am very disappointed by the suggestion from my friend, the hon. Member for Bolton South East, with whom I work very well, that the regulations will have a massive impact. What we are doing with the legislation is simple: we are ensuring that, as we leave the EU, its member states do not receive preferential treatment vis-à-vis other third countries. Under World

[Lucy Frazer]

Trade Organisation trade terms, we are not allowed to give preferential treatment to one portion of the world. We are ensuring that we do not give a more favourable position to EU member states. Under the SI, as with all the SIs introduced by the Ministry of Justice, individuals from those member states will still be able to get the same treatment as EU nationals in this particular provision of legal aid. They will still be able to get legal aid under the same conditions as our residents under LASPO, as long as the matter for which they are claiming is in scope and subject to means and merits.

Thirdly, the hon. Member for Bolton South East made a very broad point about other matters not relevant to the statutory instrument. We will debate those matters in due course. She mentioned the important point of civil jurisdiction and the enforcement of judgments, for which another SI will be introduced. She also mentioned family law. We, like the EU, think it is extremely important for us and the EU to get a deal to ensure that we have a reciprocal arrangement on family law. Indeed, a reciprocal arrangement on family law is one of the areas of mutual interest that the EU has identified and that it is willing to negotiate within a future framework. The matter under discussion, however, is a no-deal scenario.

Rushanara Ali (Bethnal Green and Bow) (Lab): May I remind the Minister that it is extremely disappointing that her Government are still leaving the prospect of a no-deal situation over us? That is irresponsible and she should be concerned about that. My hon. Friend the Member for Bolton South East raised legitimate concerns about British nationals who will continue to live in the EU. The Minister needs to focus on that. Thinking simply in terms of WTO rules is not appropriate because British nationals will still live in other countries, and in that context, we will need partnerships that allow them to have access to justice.

Lucy Frazer: The best way to protect the citizens whom the hon. Lady talks about is to ensure that we have a deal. The Prime Minister's deal will allow us an

implementation period to negotiate the very points that the hon. Lady identifies. One of those points is an agreement in relation to families, on which we would be able to get a reciprocal arrangement in future.

Mr Robert Goodwill (Scarborough and Whitby) (Con): Does my hon. Friend share my surprise that the shadow Minister, the hon. Member for Bolton South East, did not vote for that deal, especially given that 58.3% of people in Bolton voted to leave the European Union? The only way that we can guarantee that it will happen is to get the deal over the line.

Lucy Frazer: That is a very good point. I am sure hon. Members would like to continue discussing the very important SI before us, but I will commend it to the Committee.

Question put.

The Committee divided: Ayes 9, Noes 8.

Division No. 1]

AYES

Frazer, Lucy	Keegan, Gillian
Goodwill, rh Mr Robert	Milling, Amanda
Hair, Kirstene	Warman, Matt
Harper, rh Mr Mark	Watling, Giles
Johnson, Dr Caroline	

NOES

Ali, Rushanara	McFadden, rh Mr Pat
Foxcroft, Vicky	Powell, Lucy
Hepburn, Mr Stephen	Qureshi, Yasmin
Kinnock, Stephen	Twigg, Derek

Question accordingly agreed to.

Resolved,

That the Committee has considered the draft Civil Legal Aid (Amendment) (EU Exit) Regulations 2019.

2.53 pm

Committee rose.