PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Third Delegated Legislation Committee

DRAFT EUROPEAN UNION (WITHDRAWAL) ACT 2018 (RELEVANT COURT) (RETAINED EU CASE LAW) REGULATIONS 2020

Tuesday 17 November 2020

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 21 November 2020

The Committee consisted of the following Members:

Chair: †Sir Christopher Chope

† Bristow, Paul *(Peterborough)* (Con)
Cadbury, Ruth *(Brentford and Isleworth)* (Lab)
† Chalk, Alex *(Parliamentary Under-Secretary of State for Justice)*
† Charalambous, Bambos *(Enfield, Southgate)* (Lab)
† Cunningham, Alex *(Stockton North)* (Lab)
† Davies, Dr James *(Vale of Clwyd)* (Con)
† Drummond, Mrs Flick *(Meon Valley)* (Con)
Fletcher, Nick *(Don Valley)* (Con)
Fovargue, Yvonne *(Makerfield)* (Lab)
Hill, Mike *(Hartlepool)* (Lab)
† Howell, Paul *(Sedgefield)* (Con)
Lewis, Clive *(Norwich South)* (Lab)
† Mumby-Croft, Holly *(Scunthorpe)* (Con)
† Pursglove, Tom *(Corby)* (Con)
† Stafford, Alexander *(Rother Valley)* (Con)
Thompson, Owen *(Midlothian)* (SNP)
† Wakeford, Christian *(Bury South)* (Con)

Huw Yardley, *Committee Clerk*

† attended the Committee

Third Delegated Legislation Committee

Tuesday 17 November 2020

[Sir Christopher Chope *in the Chair*]

Draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020

2.30 pm

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

That the Committee has considered the draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

It is a pleasure to serve under your chairmanship, Sir Christopher.

The instrument before the Committee relates to the question of which courts should be able to depart from retained EU case law. From January, our courts, rather than the Court of Justice of the European Union, will be the final arbiter of laws that govern lives in the United Kingdom. In order to promote legal clarity and certainty in our law following our departure from the EU, Parliament has provided that the EU law we have chosen to retain is to be interpreted in line with EU case law that we have also chosen to retain.

The way in which our law is interpreted by our courts and tribunals does not remain static over time. Our departure from the EU has naturally brought with it a change in the context in which the law is considered, and we would want our courts to be able to reflect that in their decisions where appropriate. Without the ability to depart from EU case law, there is a risk that EU law that has been retained in UK law remains tied to an old interpretation—an interpretation that is arguably no longer appropriate. In that way, the law can become fossilised or ossified. For that reason, the European Union (Withdrawal) Act 2018 vested in the United Kingdom Supreme Court, and Scotland's High Court of Justiciary in specified cases, the power to depart from retained EU case law, applying their own test for deciding whether to depart from their own case law when doing so.

The instrument will extend the number of UK courts that have the power to depart from retained EU case law to include courts at the Court of Appeal level across the UK. It sets out that in making such decisions the test to be applied by those courts is to be the same as that applied by the United Kingdom Supreme Court in deciding whether to depart from its own case law, namely whether it is right to do so.

The instrument will achieve our aim of enabling retained EU case law to evolve in a more timely way than otherwise might have been achieved through the status quo. It will also help to mitigate the operational impacts on the UK Supreme Court and the High Court of Justiciary in Scotland that would have arisen had the power to depart from retained EU case law been reserved solely to those courts. It will further assist those courts by providing prior judicial dialogue on those complex cases from the Court of Appeal level.

In short, the provisions will balance achieving sufficient certainty with allowing appropriate flexibility. It may be worth my spending a moment just to explain what is meant by retained EU case law. That case law is defined in the 2018 Act as, broadly, any principles and decisions of the Court of Justice of the European Union, as they have effect in EU law prior to the end of the transition period. That includes those cases that were referred to the Court of Justice of the European Union by the UK, as well as those referred by other member states. That is a vast and complex body of case law, which spans across many different areas of law—environmental law, employment law, commercial law and many others.

As I have set out, the principle that British courts should be able to depart from retained EU case law has already been decided in Parliament, vesting the power to do so in the Supreme Court and the High Court of Justiciary in Scotland, where it is the final court of appeal. In amending the 2018 Act through the European Union (Withdrawal Agreement) Act 2020, however, Parliament also provided the power to make regulations to extend the list of courts that may depart from retained EU case law, to set the test to be applied by those courts and to specify any consideration that courts with the power to depart from retained EU case law should take into account in coming to such decisions.

This instrument extends the list of courts that can depart from retained EU case law to courts at the Court of Appeal level across the UK. The full list of courts is: first, the Court of Appeal of England and Wales; secondly, the Court Martial Appeal Court; thirdly, the Court of Appeal of Northern Ireland; fourthly, the High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; fifthly, the Inner House of the Court of Session of Scotland; sixthly, the Lands Valuation Appeal Court in Scotland; and seventhly, the Registration Appeal Court in Scotland.

The instrument also sets out that the test to be applied by those additional courts when deciding whether to depart from retained EU case law will be the same test used by the UK Supreme Court in deciding whether to depart from its own case law, namely, as I have already said, where it is right to do so. That test is well established and as a result is capable of being easily understood and applied without any further guidance. It is anticipated that applying the same test as that used by the Supreme Court will enable a consistent approach across the jurisdictions and in turn on appeal to the Supreme Court. There is a wealth of case law underpinning the Supreme Court's test that has evolved over time to ensure that courts take into account changing circumstances and modern public policy.

Although the powers under which the instrument is made enable a list of factors to be specified for consideration by any court with the power to depart from retained EU case law, the Government have decided against that approach. In applying the Supreme Court's own test in deciding whether to depart from retained EU case law, the courts will consider the principles set out in the House of Lords Practice Statement, which has been in operation since 1966, as well as the wealth of factors set out in judgments of the Supreme Court on the interpretation of its own test.

The instrument does not change the operation of the doctrine of precedent, which practically speaking, as hon. Members will know, means that when a court

reaches a decision on whether to depart from retained EU case law, that judgment has the same precedent status as other judgments from that court. In other words, what matters is the rank of the court rather than the underlying material. As required in statute, the Government have consulted the President of the UK Supreme Court, the Lord Chief Justice of England and Wales, the Senior President of Tribunals, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, and others. That consultation, which was also extended to the devolved Administrations, as well as to representatives across the legal services sector, businesses and other organisations, and was open to the public, ran from 2 July to 13 August. The Government's response to the consultation was published on 15 October.

That consultation sought views on whether to extend the power to depart from retained EU case law to the Court of Appeal and its equivalents across the UK, or to the High Court and its UK equivalents. Having considered the responses fully, the consultation response set out the Government's decision to extend the power to depart from retained EU case law to seven additional Court of Appeal level courts listed in this instrument, as this option, as I have already said, strikes the appropriate balance between enabling retained EU case law to evolve more quickly where appropriate, and providing legal clarity and certainty.

It also assists in managing the operational impact by ensuring that cases are considered in a timely way. Giving additional courts the power to depart from retained EU case law avoids the two highest courts across the UK receiving high numbers of cases that would be likely to take considerably longer to resolve, which is not in the interests of the parties to those proceedings or indeed those with an interest in their outcome. Furthermore, by extending the power to this list of additional courts, we can mitigate the impact of potentially large volumes of divergent decisions both within and across the UK jurisdictions, as decisions of these courts are binding on themselves and courts below, as well as being persuasive across the UK's three legal systems.

An impact assessment has been published alongside the consultation response. Any impact is heavily dependent on litigant behaviour in bringing proceedings seeking a departure from retained EU case law and of course the outcome of that litigation. However, based on the qualitative assessment, we assess that any impact from an increase of case volumes as a result of this instrument is manageable at the Court of Appeal level, and helps mitigate pressure on the Supreme Court.

The instrument enables our courts to be better able to consider whether to depart from retained EU case law than the status quo provided in the 2018 Act. Providing the seven specified courts with the ability to depart from retained EU case law will allow timely evolution of our case law, relieve pressure on the UK Supreme Court and avoid our case law becoming ossified. We are taking an approach that balances the importance of legal clarity and certainty with a need for the law to evolve with changing circumstances.

2.39 pm

Alex Cunningham (Stockton North) (Lab): It is a pleasure to serve under your chairmanship on a particularly dull afternoon, Sir Christopher. I hope that my speech will not be too dull.

The Opposition try to work with the Government to help us prepare for the end of the transition period. I am not the only one who has been content with brief speeches and decisions not to oppose the Government's plans in many areas. Sadly, we are in a very different place with this statutory instrument.

As the Minister said, the European Union (Withdrawal) Act 2018 sets out the legal framework following our departure from the EU, after the end of the transition period on 31 December 2020 – a mere six weeks away. The aim of the 2018 Act is to provide much needed legal certainty in our domestic law, following Brexit. That is something that we welcome. As the Minister said, the 2018 Act sets out, among other things, which pieces of EU case law are to be retained in our domestic law, and how those laws are to be interpreted by our courts. As things stand, the 2018 Act gives the UK Supreme Court and the High Court of Justiciary in Scotland the power to depart from retained EU case law if those courts consider that it is right to do so. The provisions of the SI would extend the power to depart from retained EU case law to the Court of Appeal of England and Wales, as well as to other courts of appeal.

On 2 July 2020, the Government launched a consultation on whether that extension would be the right thing to do, and the Minister referred to it. In total, there were 75 responses to the consultation ranging from members of the judiciary to trade unions. Almost half of the responses received were from members of the legal services sector. The responses are quite startling. When respondents were asked whether the power to depart from retained EU case law should be extended, as the Government wish, beyond the UK Supreme Court, almost 60% of respondents were clear that it should not. When respondents were asked what positives would come from extending the power to the Court of Appeal, as proposed by the Government, only 9%—9%, Sir Christopher—of respondents said that doing so would

'strike the right balance between legal certainty and the evolution of law'.

Even fewer respondents—only 8%—agreed with the Government's assertion that extending the power of the Court of Appeal would reduce pressure on the UK Supreme Court.

On the other hand, let us look at what respondents thought would be the negative impact of taking the decision. Some 37% of respondents said that extending the power of the Court of Appeal would introduce an element of uncertainty into UK law; 16% said that it would be an inappropriate constitutional change; and 24% said that it would lead to an overall increase in court workloads, when our court system is already on its knees as a result of the pandemic. That prompts the question, with such negative feedback, why are the Government so keen to pursue this action?

What is the point of holding a consultation just to ignore the very clear message of those who have responded? Both the Bar Council and the Law Society have also expressed a strong preference for the power to depart

[Alex Cunningham]

from retained EU case law to be reserved only to the Supreme Court and the High Court of Justiciary in Scotland. In its response to the proposed changes, the Law Society made its view very clear and said

'the power to depart from retained caselaw should not be extended to UK courts…beyond the Supreme Court'.

It went on to say

'any change from this position would constitute a major shift in the administration of justice'

which could

'result in a lack of legal certainty through the emergence of novel judgements that are either not bringing on other courts or are inconsistent with precedent.'

Those serious concerns cannot be overlooked.

Granting the power to depart from retained EU case law to lower courts is likely to encourage litigation by parties who hope to overturn an earlier judgment that relied on EU case law, and subsequently will increase the volume of cases. That will inevitably put additional pressure on the courts, which are already facing a significant backlog at this time. The Minister mentioned the behaviour of litigants, and how the success of the instrument will rely on that. Well, I do not know whether he can really trust that people will not start to follow the route I have described.

It was not just the legal sector that opposed the move, the unions also expressed their opposition. The Government's response to the consultation makes it clear that the unions are hugely concerned about the impact that a mass departure from retained EU case law would have on workers' rights. The response notes that the unions were clear that the Government should not go ahead with the plan as it would undermine the doctrine of precedent and cause

'significant uncertainty and disruption to both employers and employees.'

But this is not just about the professionals and the impact on workers' rights. The proposals could have an impact on all areas of law—competition law, state aid, trade, agriculture, employment and intellectual property. And the Minister outlined other sectors of the law. Given all those areas of law, to attempt to overcome adopted established EU case law could result in our courts being overworked with all manner of weird and wonderful cases to deal with.

We accept that the courts should have the power to divert from EU case law vested in UK law, but that power should remain exclusively with the Supreme Court. I invite the Minister to address all the concerns expressed by the legal profession and the trade unions in particular. Will he outline why he believes the professionals are wrong in their concerns and how justice will be properly protected? Can he outline what the Government plan to do to ensure that the courts under the Supreme Court are able to operate effectively in the areas covered by the SI, and to ensure that the changes do not simply result in increased litigation and, ultimately, even more appeals to the Supreme Court?

We know that the Government have always been keen to stress how important workers' rights are to Ministers and how workers have nothing to fear from a departure from EU law, which has in the past enhanced and better protected those rights. What reassurances can the Minister give to trade unions that their fears are unfounded, and that workers' rights will not be compromised as result of the changes proposed today? We will wait and see, but I cannot see how the Minister can justify all the changes brought in by the SI. We have tried to work with the Government, and even help them to get the necessary secondary legislation in place in all manner of areas for use after the transition period. On this occasion, we are also trying to help, but as the proposed regulations stand, we will oppose them.

2.46 pm

Alex Chalk: I am grateful to the hon. Member for Stockton North for his remarks; let me try to address some of his concerns.

The hon. Gentleman referred to the responses to the consultation but did not advert to the fact that a number of those who responded said that they did not want to have any opportunity at all to depart from EU retained case law. We think that would not only strike the wrong balance but would hide-bound British justice in a way that would not serve the interests of anyone in society. Plainly, there must be the opportunity for the courts to depart, the only question is which seniority of court should be able to do so. We quite accept that there is a balance to strike—a balance between ensuring that there is legal certainty and clarity which is important for litigants and those who want to advise them and ensuring that there is the necessary flexibility so that we can evolve, adjust and adapt.

The hon. Gentleman also failed to mention that of those who responded and engaged with the central question, namely, and I paraphrase, 'Do you want this to extend to the Court of Appeal or beyond to the High Court?', the overwhelming majority said the Court of Appeal, and that is precisely what we are doing.

The hon. Gentleman's central point, and again I paraphase, is 'Look, we should simply stick with the Supreme Court.' But if he pauses to reflect on the implications of that, the very point he made about access to justice—I concede that that is a proper concern—is inhibited by retaining the power within the Supreme Court. How many individuals can credibly make their way to get a judgment from the Supreme Court? Not many. For the poor old Supreme Court to be left with the entirety of the work would be no service to it either. It would be much better for it to have had some of the legal points considered by the Court of Appeal, which brings to bear some of the finest legal expertise one will find anywhere in the world, and thereafter in appropriate cases for the Supreme Court to engage. If we leave it all to the Supreme Court, I respectfully suggest that is not necessarily particularly good for the overall quality of justice, and it makes justice inaccessible.

The third and final point is this: the hon. Gentleman's proposal risks absurdity. If the European Court of Justice itself revisits its own case law, as it is able to do, perhaps in respect of employment law or environmental safeguards, and decides to have a different interpretation of regulations, directives and such, under his proposal of our in effect not making any changes ever, British courts would not be able to turn round and say, 'Well, that looks like a jolly sensible new interpretation; we will apply it here in the UK.' Our courts would be hamstrung in a way that, I respectfully suggest, would not be good for justice or access to justice.

The hon. Gentleman said that the trade unions have concerns and he referred to a 'mass departure' from retained EU law. Again, that misrepresents the position. If we had given the power to Cheltenham magistrates court to depart from retained EU case law, I would quite accept his point. But we are not giving that power to the magistrates court, the county court, the Crown court or even the High Court, but instead to the Court of Appeal. I hope that he recognises that that is a very senior court, and I should also make it clear that the equivalent courts to which I referred bind themselves with the doctrine of precedent.

The hon. Gentleman argued that the SI undermines the doctrine of precedent. On the contrary, it cements and reinforces that doctrine. That is the principle which underpins the provisions. It strikes the right balance between certainty and agility. I commend the draft instrument to the Committee.

Question put,

The Committee divided: Ayes 8, Noes 2.

Division No. 1]

AYES

Bristow, Paul	Howell, Paul
Chalk, Alex	Mumby-Croft, Holly
Davies, Dr James	Pursglove, Tom
Drummond, Mrs Flick	Wakeford, Christian

NOES

Charalambous, Bambos	Cunningham, Alex

Question accordingly agreed to.

Resolved,

That the Committee has considered the draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

2.52 pm

Committee rose.