The government's view that it should introduce regulations implementing section 6(5A) of the European Union (Withdrawal) Act 2018, as introduced by section 26(1) of the European Union (Withdrawal Agreement) Act 2020, will put the courts in the invidious position of making policy due to the government abrogating its primary responsibility for doing so, subject to the scrutiny of Parliament. It is a recipe for chaos. These are proposals for irresponsible law-making.

The government's approach to policy-making and the role of the courts in this consultation stand in stark contrast to its wish to curtail the powers of the courts when it comes to public law challenges to its own decision-making, as revealed in the recently published Terms of Reference for the Independent Review of Administrative Law.

The government invites views on its proposals:

(i) to designate additional courts or tribunals with the power to depart from retained EU case law after 'IP Completion Day';

(ii) for courts and tribunals with the power to depart from retained EU case law to be bound by decisions of superior courts which have considered the question of whether to depart from retained EU case law (and on its deliberations as to the extent to which departure from retained domestic case law should be allowed);

(iii) not to set out a test for departing from retained EU case law in the Regulations;

(iv) for the same test (that currently applied by the Supreme Court when deciding whether to depart from its own precedents – 'Whether it appears right to do so') to apply to all courts and tribunals permitted to depart from retained EU case law; and

(v) not to set out the considerations to be taken onto account by relevant courts or tribunals when departing from retained EU case law.

It is indicative of the government's lack of concern for the implications of what are far reaching proposals that a consultation concerning matters of such fundamental significance and complexity has been restricted to six weeks in the middle of the Covid-19 pandemic.

Our answers to the questions posed in the consultation are encapsulated in our comments below.

1. It is for Parliament to legislate; it shouldn't be left to courts and tribunals

The structure of the 2018 Act is to preserve and retain EU law after the end of the transition period. The powers of modification contained in section 8 are intended only to be exercised for the purpose of addressing deficiencies in retained EU law arising out of the UK's departure from the EU.

This reflects a deliberate policy decision, originally outlined in the White Paper 'Legislating for the United Kingdom's withdrawal from the European Union', that, in order to minimise disruption, all EU law which applied in the UK before exit day (before the concept of an implementation period was introduced) would continue to apply after exit day unless and until modified by Parliament, or by Ministers using delegated powers under the 2018 Act.

If there are to be changes of policy relating to retained EU law, then they should be determined by Parliament alone as a part of the democratic process. This is not a responsibility which should be passed to courts and tribunals.

Professor Richard Ekins of the Policy Exchange supports the view about government responsibility when he says of section 26 of the European Union (Withdrawal Agreement) Act 2020: 'But it would be much better for ministers simply to change retained EU law directly, by way of secondary law-making powers or by proposing primary legislation that would clarify or replace retained EU law, including case law.'

The government's mantra has always been that it is 'taking back control' on leaving the EU and yet here it is not keeping control but rather ceding it to unelected judges. Instead of taking responsibility for the difficult and controversial policy decisions that are the consequence of our leaving the EU the government is handing the responsibility for the dismantling of EU law onto courts and tribunals to do so piecemeal and with no guidance or framework or oversight and no democratic input.

This is particularly true for retained EU case law in the field of labour and health and safety law. According to the government's proposals, issues such as the ones we describe below in relation to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will be left for the courts to determine.

2. Implications for the UK-EU Trade Agreement

Section 5 of Chapter two, Title III ('Level Playing Field and Sustainability') of the current EU negotiating mandate provides, under the heading 'Labour and social protection':

'Article LPFS.2.27: Non-regression of the level of protection

1. A Party shall not adopt or maintain any measure that weakens or reduces the level of labour and social protection provided by the Party's law and practices and by the enforcement thereof, below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period, and by their enforcement.

2. For the purpose of this Section, and without prejudice to Article LPFS.2.28(3)(b) [Future levels of protection], labour and social protection covers the following areas: (i) fundamental rights at work, (ii) occupational health and safety standards, (iii) fair working conditions and employment standards, (iv) information and consultation rights at company level, and (v) restructuring.'

In the field of health and safety law, there will be those who call for departures from EU retained case law after the end of the implementation period ('IP Completion Day') as a means to diminish the levels of protection provided by UK health and safety law. Any measure that weakened or reduced the level of labour and social protection in the UK below the common standards applicable at the end of the transition period would be a departure from the level playing field envisaged.

The government's attempt to introduce regulations to implement section 6(5A) of the 2018 Act will have the effect of tying the hands of those negotiating the UK-EU Treaty (if there is to be one) as to the extent of any non-regression commitment they are able to make. It seems, for example that they would not be able to agree to the non-regression commitments proposed by the European Union, and, if they were to, the effect of those regulations would be to put the UK in breach of the Level Playing Field provisions of the UK-EU Treaty. It is wholly inappropriate for a negotiator's hands to be tied, or for the issue of non-regression commitments to be determined in this way.

3. When did the circumstances giving rise to the claim arise?

Nowhere in the consultation is there any discussion of the critical issue of 'when did the circumstances giving rise to the claim occur to determine if the Regulations apply?' If the power to depart from retained EU case law applies to any determination by a 'relevant' court from the first day after IP Completion Day, then there could be departure from retained EU case law in circumstances which occurred prior to departure.

This raises implications in respect of the retrospectivity of laws, and engages rights under Article 1 Protocol 1 of the European Convention. The tension between the regulations and the Human Rights Act arising from this oversight (deliberate or otherwise) should not be left to the 'relevant' court.

4. 'Relevant' courts or tribunals

It will be apparent that we are very much against the proposed exercise of the power contained in section 6(5A) of the 2018 Act. We oppose both Options 1 and 2, however we think that Option 2 will bring even more chaos.

Either option will involve courts reaching their own conclusions (subject to precedent where a higher court has already considered the question) as to whether to depart from retained EU case law. Unless there is precedent, and especially in light of the test to be applied, different courts will reach different conclusions, not least because different cases will be argued differently.

In the field of labour law, this will potentially include hugely politically controversial issues such as 'In what circumstances is there a relevant transfer for the purpose of the TUPE?' and 'What are the circumstances which mean that a variation to terms and conditions by reason of a relevant transfer for the purpose of TUPE are void?' It is entirely irresponsible, given the long history of litigation on these and many other notoriously difficult and controversial issues for it to be left to 'relevant' courts to decide individually on the facts before them whether to depart from retained EU case law or not. A similar level of controversy will arise (as acknowledged in the consultation paper) in relation to the heavily litigated area of holiday pay. These are isolated examples but there will be many others in the field of labour and health and safety law alone.

5. The test to be applied

Section 6(5) requires the Supreme Court to apply the same test when deciding whether to depart from EU retained case law as it applies when deciding whether to depart from its own existing case law. There is at least some logic to the proposal that any other 'relevant' court should apply the same test. To provide otherwise would mean that different courts in the same litigation would be able to depart from retained EU Case law on different bases.

However, the test applicable to the Supreme Court is 'when it appears right to do so', which is discretionary. That may well be an appropriate test to be used by the highest court in a chain of appeals from which, by definition, there is no appeal. But it is entirely inappropriate for such a wide-ranging test to be applied, on a discretionary basis, by courts lower in the chain subject only to precedent where there exists a judgment of a higher court. Whilst it may be impossible to be confident that all the circumstances which might be relevant had been catered for if there was prescription the ambit of the discretion proposed is a recipe for chaos and cost.

6. Departure from retained domestic case law

We also oppose the introduction of a facility for relevant courts to depart from retained domestic case law.

We think that the opportunity for 'relevant' courts to dismantle retained EU law should be kept to a minimum. If it is to be carried out at all, it must be by due parliamentary process – the same way that it became enshrined in our law in the first place.

Permitting departure from retained domestic case law would (i) create yet further difficulties in terms of the boundaries of the definition of retained domestic case law; and (ii) run the risk of upsetting established systems of precedent.

'Retained domestic case law' means:

> ...any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP Completion day and so far as they -
>
> (a) relate to anything to which section 2, 3, or 4 applies; and
>
> (b) are not excluded by section 5 of Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time).

The requirements of sub-paragraphs (a) and (b) are notoriously difficult, uncertain and untested in their application. The boundary between retained domestic case law and other domestic case law will be uncertain. Extending the ability to depart from retained EU case law to retained domestic case law would introduce yet another complicated layer of enquiry, and will only lead to further litigation and cost.

Introducing an ability to depart from retained domestic case law could also see a 'relevant court' depart from the precedent set by a higher court when that higher court had applied EU law.

7. 'General Principles'

We think there's ambiguity as to the effect of the proposed regulations on 'retained general principles of EU law'.

Examples of 'general principles of EU law', as explained in the Explanatory Notes to the 2018 Act, include the principles of proportionality, effectiveness and equivalence as well as fundamental rights.

Retained EU law includes retained general principles of EU Law. That much is confirmed by the treatment of general principles in Schedule 1 to the 2018 Act.

Section 6(3) provides that any question as to the meaning or effect of retained EU law is to be decided (so far as the law is unmodified after IP Completion Day) in accordance with retained case law and retained general principles. Retained case law is retained domestic case law and retained EU case law.

Section 4 provides for the Supreme Court not to be bound by any retained EU case law. And to form part of retained EU law, 'general principles' must have been recognised in a judgment of the CJEU before IP Completion Day. In our view it does not follow that 'general principles' are to be treated in the same way as retained EU case law and we note that section 6(3) recognises that they are two different things. We think the status of 'general principles' (subject to Schedule 1) is the same as any other retained EU law which is not retained EU case law.

Our understanding is that, even if the power to depart from retained EU case law was extended to include retained domestic case law, that would still leave the requirement to adhere to general principles unaffected and this should be made clear.

8. Terms of Reference for the Independent Review of Administrative Law

The terms of reference announced by the government make it clear that it is considering measures including:

(i) setting out the permissible grounds for judicial review in legislation, almost certainly on a narrower basis than applies at present;

(ii) legislating so as to shield from judicial review some matters that are currently subject to it;

(iii) making it less likely that a contested executive decision will be void;

(iv) limiting the criteria for standing to those affected by an executive decision; and

(v) restricting rights of appeal.

These are all measures designed to restrict what this government perceives to be the unwarranted encroachment of courts and judges onto territory of policy which should be left to the executive and Parliament, and to make it more difficult for the courts to adjudicate on executive decision-making.

And yet, whilst politically keen to limit courts' powers in one area so far as it encroaches on the overriding power of parliamentary sovereignty, when it comes to making the decisions to depart from retained EU case law, the government proposes to pass those decisions to the judges and courts.

In areas of labour law and health and safety law where people's livelihoods and lives are at stake and departure from retained EU case law will raise matters of hotly contested political controversy the government intends to 'pass the buck' to the courts and in our view they are not the appropriate forum. Shifting decisions away from Whitehall is what the current administration has been seeking to do throughout the Covid-19 pandemic and the consequences of that are plain for all to see. We should not be allowing further distancing - providing cover for the government and enabling them to shift blame - to occur here.

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