

# **IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL**

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

### **MEMORANDUM BY THE HOME OFFICE**

#### **Summary of the Bill**

1. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill (“the Bill”) will be introduced in the House of Commons on 5 March 2020. The Bill has three Parts:
  - a. Part 1: Measures relating to ending free movement
  - b. Part 2: Social security co-ordination
  - c. Part 3: General.

#### *Part 1 of the Bill: Measures relating to ending free movement*

2. Part 1 of the Bill enables the establishment of the future immigration system following the UK’s withdrawal from the EU. Part 1 ends the EU’s rules on free movement of persons and other retained EU law on immigration which will, at the end of the transition period, otherwise be saved as, and incorporated into, UK law by the EU (Withdrawal) Act 2018 (“EUWA 2018”). Part 1 also makes provision to protect the position of Irish citizens once their free movement rights end (clause 2).
3. As a consequence of repealing retained EU law on free movement, the Bill will move those within the scope of free movement of persons (“EEA citizens” - see paragraph 6 for further explanation) from a rights-based immigration system derived from EU law into the domestic immigration framework established by the Immigration Act 1971 (“the 1971 Act”). The Bill will achieve this by repealing the provision at section 7 of the Immigration Act 1988 whereby such persons do not currently require leave to enter and remain in the UK. As a result of this change, EEA citizens will require leave to enter and remain in the UK, as is currently the case for those non-EEA citizens who do not fall within the scope of free movement: this will be the effect of clause 1 and Schedule 1 to the Bill.
4. The Bill paves the way for the future points-based immigration system for EEA citizens, but it does not set out the detail of this system. The detail of the future immigration system (i.e. the requirements to be met to come to the UK as a worker, student, family member, etc.) will be provided for in the Immigration Rules and by other existing powers to make secondary legislation in due course.
5. Neither does the Bill itself make transitional, transitory or saving provision in relation to the position of EEA citizens currently in the UK; although it contains the necessary powers to do so.

## Terminology

6. The term “EEA citizens” is used throughout this document in relation to Part 1 of the Bill:
  - a. The changes made by the Bill generally apply to EEA citizens and not only to EU citizens. This is because (i) the free movement principles of EU law apply to the EEA States (for the purposes of this memo, this includes Iceland, Norway, Liechtenstein); and (ii) as a result, the majority of the provisions of retained EU law that will be repealed, revoked or amended by the Bill extend beyond EU citizens to EEA citizens.
  - b. For these purposes, “EEA citizens” should be understood as including Swiss citizens, unless otherwise stated, as Swiss citizens are also within the scope of the UK’s implementation of EU free movement law – primarily through the Immigration (European Economic Area) Regulations 2016 (the “EEA Regulations”).
  - c. The Bill makes provision for the position of Irish citizens in UK law to be protected. Unless the context requires otherwise, and/or it is stated otherwise, references to “EEA citizens” in this Memorandum excludes Irish citizens.
  - d. For these purposes, and unless the context requires otherwise, “EEA citizens” includes non-EEA citizens who are entitled to rely on free movement rights, such as the family members of EEA citizens.
  - e. When this Memorandum refers to “non-EEA citizens” it means, unless otherwise specified, those non-EEA citizens not exercising free movement rights.

### *The extent to which this Memorandum addresses the detail of the future immigration system*

7. 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.
8. As regards EEA citizens who have exercised free movement rights before the UK’s withdrawal, the Department notes the Joint Committee on Human Right’s particular concern about such persons in its fifth report of the 2016-17 session, *The Human Right Implications of Brexit* and in its 18<sup>th</sup> report of the 2017-2019 session “[Legislative Scrutiny: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#)”<sup>1</sup>. Insofar as such persons will be affected by this Bill, the Department will ensure that the Convention rights of such persons are

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<sup>1</sup> Due to the general election on 12 December 2019, this Committee closed this inquiry.

respected. As regards such persons, the UK has entered into agreements on the terms of its departure from the EU and implemented its provisions through the EU (Withdrawal Agreement) Act 2020 (“EUWAA 2020”). Part III of that Act contains various provisions on the rights of EEA citizens resident in the UK before the end of the transition period.

9. In practice, the rights of EEA citizens who are in the UK before the end of the transition period to enter and remain are given effect via Appendix EU and Appendix EU (Family Permit) of the Immigration Rules<sup>2</sup>, which enable EEA citizens to submit applications for leave before the deadline. The Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 provide a right of appeal for an array of immigration decisions made in relation to EEA citizens, including refusals under the EU Settlement Scheme. Various other provisions of the EUWAA 2020 deliver other rights, including in relation to frontier workers, thresholds for deportation, and the six month “grace period” following the end of the transition period during which all of the benefits of the withdrawal agreements are deemed to apply to EEA citizens resident prior to the end of the transition period (even if they have not yet applied to the Settlement Scheme).
10. The provisions made by this Bill must be compatible with the terms of the withdrawal agreements, which have direct effect in UK law<sup>3</sup>. Fundamentally, Part 1 of the Bill is about ending free movement in an ordered and coherent way, but this can only be delivered after the end of the transition period. The Bill includes a power to make provision in consequence of, or in connection with, Part 1 of the Bill. References to free movement or a person’s immigration status occur at various areas of the statute book and the power will be used to reflect the fact that free movement no longer exists. The Bill makes no provision for EEA citizens who take up residence in the UK after the end of the transition period, which will be provided for in future immigration rules and secondary legislation.

#### *Part 2 of the Bill (Social security co-ordination)*

11. Part 2 of the Bill enables the UK Government (and/or, where appropriate, a devolved authority) to make legislative changes to the retained social security co-ordination regime, at the end of the transition period.
12. The retained social security co-ordination regime, which clause 5 takes a power to modify, governs the co-ordination of social security between EEA States and contains rules relating to individuals whose social security situation is not confined to a single EEA State. This includes rules relating to the payment of social security contributions and access to benefits (including export and

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<sup>2</sup> The EU Settlement Scheme is now fully open with the total number of applications received more than 3 million (by the end of January 2020).

<sup>3</sup> See sections 7A and 7B of the EUWA 2018, as inserted by EUWAA 2020, which are not covered by the disapplication of directly effective EU-derived rights in paragraph 6 of Schedule 1 to the Bill.

aggregation) across the EEA by EEA citizens, and in some cases non-EEA citizens.

13. The retained social security co-ordination regime will be saved as, and incorporated into, UK law (and fixed, using the deficiencies power) under the EUWA 2018 at the end of the transition period. The retained regime applies to people who do not fall within scope of the Withdrawal Agreement.
14. The power in Part 2 of the Bill enables the Government to implement future social security co-ordination policy in respect of those people who do not fall within scope of the Withdrawal Agreement. The purpose of the clause is to provide the Government (and/or, where appropriate, a devolved authority) with the powers needed to respond flexibly to the outcome of negotiations on the future framework by modifying the retained social security co-ordination regime to implement new policy.
15. Clause 5 also allows supplementary, incidental, consequential, transitional, transitory or saving modifications to be made to any provision made by or under primary legislation and to retained direct EU legislation not listed in the clause, to ensure that changes to the social security co-ordination regime are reflected, where necessary, in related legislation.
16. The provision disapplying section 4 EUWA 2018 rights ensures that in so far as any such rights are inconsistent with, or otherwise capable of affecting the exercise of the power at clause 5, they shall cease to be recognised and available in domestic law. This allows effect to be given to policy changes after the end of the transition period which depart from the social security co-ordination regime that has been retained. This is broadly consistent with the approach adopted in other policy areas in relation to rights saved by section 4 of the EUWA 2018.

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### **Statement under section 19 of the Human Rights Act 1998**

17. The Secretary of State has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights, on introduction of the Bill in the House of Commons.

### **Introductory comments**

#### *General approach to consideration of Convention rights in this Memorandum*

18. This Memorandum includes general comments on issues, and an analysis of Convention issues in relation to the Bill. Where there is no significant Convention issue, or the Convention issue is covered by the general comments in this Memorandum, no mention is made of the provision.

*General comments on article 8 and article 14 ECHR in relation to Part 1 of the Bill*

19. The Department notes the general comments made in relation to articles 8 and 14 ECHR in its Memoranda to the Joint Committee on Human Rights in relation to the bills that led to the Immigration Act 2014 and the Immigration Act 2016 respectively. In particular, these Memoranda set out the Department's understanding:
- a. that case law on article 8 has established a number of propositions about the ability of a State to enforce immigration controls where they might affect a person's right to respect for private and family life<sup>4</sup>;
  - b. that differential treatment on grounds of both nationality and immigration status constitute an "other status" for the purposes of article 14, albeit that there is a wide margin of appreciation in assessing the extent to which differences of treatment are justified<sup>5</sup>; and
  - c. that in order for an issue to engage article 14 there must be a difference of treatment of persons in analogous, or relevantly similar, situations; for measures concerning actual immigration control there is no direct comparator between those subject to immigration control and those not, albeit for other measures regarding the enjoyment of Convention rights (for example, in relation to access to services), any differential treatment must be objectively and reasonably justifiable<sup>6</sup>.

20. The Department's position in relation to such matters remains unchanged. As such, and in view of the detailed exposition of the Department's position in previous recent Memoranda, the Department does not repeat these matters here.

*Alignment of the position of EEA citizens with non-EEA citizens*

21. The Department does not consider that the move from free movement to the UK, leave-based, immigration framework of itself raises specific article 8 issues in relation to EEA citizens: the UK immigration law framework already protects article 8 rights for non-EEA citizens, and it will do so for EEA citizens.

*Future policy decisions relating to matters arising out of both Parts 1 and 2 of the Bill*

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<sup>4</sup> See, for example, paragraphs 8 and 9 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2014 and paragraphs 8 and 9 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2016.

<sup>5</sup> See, for example, paragraph 10 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2014 and paragraph 10 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2016.

<sup>6</sup> See paragraph 10 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2014, the response of the Committee to that Memorandum in its Eighth report of 2013-14 (HL Paper 102 HC935), and paragraphs 11 to 13 of the Memorandum to the Committee relating to the bill that led to the Immigration Act 2016.

22. Close consideration will be given to Convention rights in relation to the future immigration system, and social security co-ordination system, as they are developed in order to ensure that policies are compatible with Convention rights and other obligations.

### **ECHR Articles engaged and potentially interfered with**

23. This section includes an analysis of Convention issues in relation to clause 2 (Irish citizens: entitlement to enter or remain without leave). As regards the remainder of the Bill, no significant Convention issues arise. Where potential Convention issues arise in relation to policies that will be given effect by the exercise of powers under the Bill or existing powers, no mention is made. In the case of policies to be implemented in the future, for example, the future immigration system, or the exercise of powers in the Bill relating to social security co-ordination, consideration will be given to ensuring compliance with Convention rights throughout the development of those policies.

### **Clause 2: Irish citizens**

Article engaged: article 14 in conjunction with article 8

#### *Interference*

24. Once the EEA Regulations are revoked some Irish citizens in the UK will no longer have any lawful immigration status (i.e. those whose most recent arrival was after 1973 and from outside the Common Travel Area ("CTA")). The purpose of this provision in the Bill is to protect the rights of Irish citizens upon the cessation of EEA free movement by aligning the rights of Irish citizens in the UK irrespective of where they have travelled from.
25. The Irish citizens' rights provisions in the Bill specify that an Irish citizen does not require leave to enter or remain in the United Kingdom, unless that person falls within one of three categories: (1) they are subject to a deportation order, (2) they have had exclusion directions issued against them by the Secretary of State, or (3) they are subject to an international travel ban. If any of these categories apply, then the Irish citizen will need leave to enter or remain in the United Kingdom, even if they are travelling within the CTA.
26. These are the primary provisions relating to Irish rights. Clause 2 makes further consequential provisions aimed at harmonising the position of all Irish citizens. To the extent that these consequential provisions raise legal issues, they are explained below.
27. The Irish citizens' rights provisions discriminate in favour of Irish citizens in comparison with other EEA citizens. The Department has considered whether article 14 may be engaged<sup>7</sup> because the provisions provide for immigration

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<sup>7</sup> In the circumstances in which another Convention right, most likely article 8, is also in play.

control for Irish citizens based upon their nationality status, which is within the ambit of article 14.

28. In order for an issue to engage article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar situations. Other EEA citizens would theoretically be the comparators who under the provisions in the Bill are treated in a less favourable manner than Irish citizens. However, the Department's view is that Irish citizens have a long-held unique status in UK law and are not therefore analogous to other non-British citizens, or to non-Irish EEA citizens.

29. This is because, first, since 1948 the UK government has been required by law to treat Irish citizens as if they are not 'aliens', that is, not British but not foreign. Section 2 of the Ireland Act 1949 also provides that Ireland is not to be treated as a foreign country for the purposes of UK law. Second, and perhaps more importantly, the maintenance of the CTA supports the provisions of the Belfast ('Good Friday') Agreement. The CTA is relevant to north/south co-operation and also the identity and citizenship provisions of the Belfast ('Good Friday') Agreement. The Belfast ('Good Friday') Agreement puts Irish citizens in a different position to non-Irish EEA citizens. For these reasons the Department does not consider Irish citizens to be a direct comparator to other EEA citizens for the purposes of travel to and stay in the United Kingdom, notwithstanding that Irish citizens may at present rely on rights under the EU Treaties as the basis of their stay in the UK. Accordingly, the Department's view is that article 14 is not engaged.

### *Justification*

30. Notwithstanding the Department's view that article 14 is not engaged, consideration has been given to whether, in the event that article 14 were found to be engaged, the measures could be justified. If these provisions do engage article 14 on the basis that all EEA citizens are in an analogous situation to Irish citizens, and another Convention right is also engaged<sup>8</sup>, then the Department would consider there to be strong arguments that any interference with article 14 rights would be justified. The margin of appreciation afforded to states is relatively wide where differential treatment is based on immigration status and the difference in treatment can be said to be justified on an objective and rational basis, pursues a legitimate aim and is proportionate. The provisions in the Bill are intended to:

- a) support the historic and current treatment of Irish citizens in the UK as 'not alien' or 'not foreign', as per section 2 of the Ireland Act 1949;
- b) support the terms of the Belfast ('Good Friday') Agreement and the peace process by maintaining close links between the UK and Ireland,

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<sup>8</sup> In practice a claim of breach of article 14 in these circumstances would be most likely to arise in the context in which article 8 is engaged.

particularly, to respect and provide protection for Irish citizens born or based in Northern Ireland; and

- c) support the continued functioning of the CTA. They avoid Irish citizens being subject to differential treatment based on where they travel from, which could undermine the ongoing co-operation and arrangements made between Ireland and the UK.

31. The unique and particularly close political, economic and cultural ties between the UK and Ireland provide sufficient justification for treating Irish citizens more favourably than other nationalities, including other EEA nationalities. The historical relationship between the UK and Ireland goes back many centuries and has created a relationship between the UK and Ireland which is different to other EEA States. The legitimate aim being pursued is to maintain political stability and economic prosperity across the island of Ireland, and the policy of continuing the status quo for Irish citizens is a proportionate way of achieving this. The Department does not consider that these provisions are incompatible with Convention rights.

### **EU Charter of Fundamental Rights**

32. The EUWA 2018 does not incorporate the Charter into UK law but rather converts the underlying rights and principles of EU law into UK law. As this Bill repeals, revokes or otherwise disapplies retained EU law in relation to free movement and immigration and also in relation to social security co-ordination, any EU rights and principles saved as part of UK law by that Act will not continue to apply to the content of this Bill. Consequently, this Memorandum does not provide a detailed analysis of whether this Bill is consistent with the Charter.

**Home Office**  
**5 March 2020**