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AFTER BREXIT

Retained EU Law

James Goudie QC

TheBig Picture (1)

- ECHR Rights retained: Human Rights Act 1998 is not repealed, or amended
- Remains the case that ECHR Remedy is ultimately limited to declaration of incompatibility
- Thence the importance of the European Charter of Fundamental Rights (“the Charter”)
- The Charter can be used to disapply domestic law: Benkerbouche v SoS for FCO (2017) UKSC 62
- On the importance of the Charter see e.g. Case C-193/17, Cresco Investigation GmbH v Achatzi (2019) IRLR 380

TheBig Picture (2)

- BUT Section 5(4) of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) provides that “the Charter of Fundamental Rights is not part of domestic law on or after exit day”
- This is one of the exceptions to the general thrust of the 2018 Act which is to retain existing EU law
- Much EU law is retained by the 2018 Act: other EU law is retained in effect by domestic legislation, such as the Data Protection Act 2018
- The 2018 Act is merely the beginning of legislation to give effect to Brexit
- The 2018 Act is being supplemented by further primary legislation, e.g. the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (“the Immigration Bill”), and secondary legislation, e.g. the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, S.I. 2019/745
- House of Lords Delegated Powers and Regulatory Reform Committee draws attention to “very significant delegations of power” contained in the Immigration Bill
 - Consequential provisions on end of free movement
 - Social security coordination

The Immigration Bill

- Ends free movement
 - repeals the main retained EU law relating to free movement
 - brings EEA nationals and their family members under UK immigration control
- Protects the status of Irish citizens in UK immigration law once their EU freedom of movement rights end
- Confers powers to amend, by regulations, retained EU law governing social security coordination..

The 2018 Act: Overview

Paragraph 2 of the Explanatory Note states:-

The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal

The 2018 Act: Approach

The Explanatory Notes state:-

- “10. The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and where appropriate, the devolved legislatures to make any future changes
11. The Act performs four main functions. It:
- repeals the European Communities Act 1972 (“the ECA”);
 - converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserves laws made in the UK to implement EU obligations;
 - creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement (subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal); and
 - removes the existing restrictions on devolved competence in relation to acting incompatibly with EU law so that decision making powers in areas currently governed by EU law will pass to the devolved institutions, except where specified in secondary legislation under this Act.”
- “14. The Act does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are appropriate to ensure the law continues to function properly from exit day. ... ”

The 2018 Act: the Structure (1)

- Section 1 of the 2018 Act repeals the European Communities Act 1972 (“ECA 1972”) on “exit day”, 29 March 2019, extended to 12 April or 22 May 2019, then to 31 October 2019
- BUT Section 2(1) of the 2018 Act provides that “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, CONTINUES TO HAVE EFFECT in domestic law on and after exit day”
- Section 2(2) defines “EU-derived domestic legislation”, principally by reference to enactments made pursuant to Section 2(2) of ECA 1972, including Statutes and SIs transposing EU Directives into UK law

The 2018 Act: the Structure (2)

- By Section 3(1), direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day
- Section 3(2) defines “direct EU legislation”, such as EU Regulations
- Sections 2 and 3 of the 2018 Act are subject to –
 - Section 5, and
 - Schedule 1

The 2018 Act: Savings and Exceptions (1)

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- Sections 4 and 5 and Schedule 1 contain savings and exceptions
- Section 4 savings dependent upon reciprocity and EU institutions
- Section 5 provides in part:-
 - (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day
 - (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day
 - (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification
 - (4) The Charter of Fundamental Rights (“the Charter”) is not part of domestic law on or after exit day
 - (5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)
- On Section 5(5), see the Explanatory Notes

The 2018 Act: Savings and Exceptions (2)

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- The Charter goes, but remains relevant in the UK
- Retained EU case law handed down prior to exit day, including decisions which refer to the Charter, will continue to be binding on UK Courts and Tribunals: Section 6(7) of the 2018 Act
- Some EU Directives already implemented refer to the Charter: e.g. the Equal Treatment Directive; the Charter general principles will be relevant to interpretation
- These principles include proportionality, equality, legal certainty, fundamental rights and effective judicial protection
- Post Brexit CJEU case law may be referred to in UK Courts: Section 6(2) and (3)

The 2018 Act: Savings and Exceptions (3)

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- Paragraph 2 of Schedule 1 to the 2018 Act provides that no general principle of EU law is part of domestic law on or after exit day if it was not recognized as a general principle of EU law by the European Court in a case decided before exit day
- Paragraph 3(1) provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law
- Paragraph 4 provides that there is no right in domestic law on or after exit day to damages in accordance with the rule in Francovitch

The 2018 Act: Further Provisions (1)

- Section 6 of the 2018 Act relates to interpretation of retained EU law, including retained EU case law, as defined by Section 6(7)
- Section 7 relates to the status of retained EU law, and how it can be modified
- Section 8 gives Ministers wide powers for 2 years after exit day to amend the retained law in order to correct, within 2 years of exit day, “deficiencies” in that law arising from the UK’s withdrawal from the EU
- The Government has said that around 800 pieces of secondary legislation are needed to correct these deficiencies
- Section 9: Regulations implementing withdrawal
- Section 13: Parliamentary approval required of outcome of negotiations with EU
 - Withdrawal Agreement (“WA”)
 - Framework for future relationship, or Political Declaration (“PD”)
- Section 13(1)-(6) assume agreement is reached: Section 13(7)-(12) assume “no deal”

The 2018 Act: Further Provisions (2)

- Border arrangements between North (UK) and South Ireland
- Section 16 requires the Government to publish within 6 months a draft Bill dealing with environmental issues
 - Draft Environment (Principles and Governance Bill) was published on 19 December 2018: new environmental watchdog?
- Lengthy provisions about Devolution
 - Bulk of repatriated EU powers to come to UK Parliament
 - Major issue with Scotland: Scotland Acts 1998 and 2016
- Loss of EU Commission as regulator in environmental law and other areas, loss of regulatory cooperation and lack of enforcement of level playing field
- Loss of access to e.g. European Investment Bank

The 2018 Act: Further Provisions (3)

- Sections 20 and 21: Interpretation
- Section 22 and lengthy Schedules 7 and 8: Regulations and scrutiny thereof and procedures therefor
- Section 23 and Schedules 8 and 9: consequential and transitional
- Section 25: Commencement
- Provisions coming into effect on passing of Act include Sections 8-11, 13-14 and 16-18
- Sections 1-7 inclusive require Commencement Orders: Section 25(4)

The 2018 Act: Commencement

- Two Commencement Orders: S.I. 2018/808 and 2019/399
- S.I. 2018/808: Regulation 3: Provisions coming into force on “First Appointed Day”, 4 July 2018
- S.I. 2018/808: Regulation 4: Provisions coming into force on “Exit Day”
- S.I. 2019/399, “Appointed Day”, 1 March 2019
- Very partial bringing into force of Sections 5 and 6
- **SECTIONS 1-4 INCLUSIVE NOT YET IN FORCE AT ALL**

What is retained

- EU Law, only unless and until changed
 - Controversial changes by secondary legislation, with some Parliamentary control (affirmative and negative procedures)
 - Potential for Judicial Review
- Not the Charter of Fundamental Rights
- The ECHR, human rights Judicial Review, and the Strasbourg Court

BUT:-

- “Human Rights Act is not safe after Brexit”
- In its response to a letter from the House of Lords EU Justice Sub-Committee, the Government has failed to give assurances that it will not repeal or replace the Human Rights Act – a stark contrast to its proclaimed commitment to ‘shared values of respect for human rights and fundamental freedoms’
- The House of Lords EU Justice Sub-Committee wrote to Lord Chancellor and Secretary of State for Justice David Gauke in December regarding the rights of citizens post-Brexit. The Committee sought an explanation for the dilution of the Government’s commitment to the ECHR
- The Committee received a “troubling response”. While again pledging an unchanging commitment to human rights and fundamental freedoms, the letter from Edward Argar MP, Undersecretary of State at the Ministry of Justice, ended with reference to the Government’s intention to revisit the Human Rights Act once the process of leaving the EU is concluded
- Chairman of the House of Lords EU Justice Sub-Committee said: “We have repeatedly asked the Government for assurances regarding citizens’ rights post-Brexit, deal or no deal. Again and again we are told that the Government is committed to the European Convention on Human Rights, but without a concrete commitment, and with messaging that is changing and becoming diluted

“Is the Government sincere in its commitment to the ECHR? If so, why has it failed to give assurances that it will not repeal or reform the Human Rights Act, which in essence incorporates the rights set out in the ECHR into domestic British law?”

- Inquiry by EU Home Affairs Committee into future UK-EU cooperation on asylum and international protection
- Examination of implications, in particular for the Dublin and EURODAC (data base) Regulations

Changes to Retained Law

- House of Commons European Statutory Instruments Committee
 - recommends SIs for
 - affirmative procedure (political and/or legal importance)
 - negative procedure (subject to annulment in pursuance of Resolution of either House of Parliament)
- Those recommended (Eleventh Report of Session 2017-19: 11 December 2018) for affirmative procedure include The European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2018, amending the Interpretation Act, including in relation to “non-ambulatory” references to EU legislation (references that are not automatically updated)
- Example: Common Fisheries Policy comprises approximately 100 EU Regulations; UK SI (recommended for affirmative procedure) amends 31 of these
- Government plans to lay over 60 Brexit-related international agreements before Parliament
- Regulations under Sanctions and Anti-Money Laundering Act 2018 to establish UK sanctions regime to replace the EU sanctions regime (Iran, Venezuela, Burma, etc)

Data Protection Upon Brexit

- In a No Deal Brexit, the GDPR will be incorporated into UK law on exit
- GDPR will at that point be modified by UK Regulations to ensure that it can continue to operate effectively following a No Deal Brexit
- Practical difficulties in relation to data flows between the UK and the EU, and perhaps between UK and other third countries
- In a WA Brexit, EU law will continue to apply during transition period
- Position thereafter depends on whether by end of transition there has been an EU finding of adequacy in relation to UK data protection law

- On exit, UK becomes a third country as far as EU law is concerned
- But GDPR continues to apply in relation to UK, as part of UK domestic law: see 2018 Act, Section 3. DPA 2018 still applies
- In various respects GDPR will require modification in order for it to operate effectively
- See the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, S.I. 2019/419, and (No. 2) Regulations, S.I. 2019/485

- EU law continues to operate. See WA, Articles 126/127
- Strong indication in PD of desire for continuing EU/UK convergence re data protection law. See PD Articles 8-10
- Specific provision for limited continued application of EU data protection law in UK: WA, Article 71
- Will there be a finding of adequacy? See PD Article 9: but no guarantee
- If no finding of adequacy, then issues arising after transition are similar to those arising after a No Deal Brexit

The WA (1)

- Implementation Period (transition provisions) until 31 December 2020
- Accompanied by PD on framework for future relations, which sets out basic guiding principles on citizens' rights: free movement ending, mobility to be based on non-discrimination, and reciprocity
- Common Travel Area between UK and Ireland will continue
- Under WA, EU citizens living in UK and British citizens living in EU prior to the end of the implementation period have the right to remain where they are
 - settled status scheme: UK resident EU citizens and their families will have to apply for immigration status, so that they can continue to live in UK after exit day

The WA (2)

- What groups are not covered by the WA: Cheri children are; Zambrano children are not; Surinder Singh families (see CJEU decision in Case C-89/17, Banger v UK) are not, but will be able to apply for settled status
- EU law, including GDPR, continues to apply to personal data exchanged between UK and EU before the end of the 21 month implementation (or transition) period

The WA (3)

- WA transition provisions during at least the implementation period on:-
 - Free movement of workers
 - Family members
 - Social security
 - Administrative procedures
 - ECJ Case law
 - Right to permanent residency

The WA (4)

- Could the WA (and “backstop”) be terminated under international law: Vienna Convention on the Law of Treaties (“VCLT”)?
 - VCLT probably does not apply: EU is international organisation, not a State
 - Even if VCLT did apply, it would be necessary to establish “material breach” (Article 60) or “fundamental change of circumstances” (Article 62)
 - Proving either would be extremely difficult
 - Continuation of backstop would not be a “fundamental change of circumstances” within meaning of VCLT
- Any dispute about the WA will have to be settled –
 - Within the WA dispute settlement mechanisms, or
 - By subsequent international agreements between the parties to the WA

CONCLUSION (1)

- After Brexit there are potentially 3 different types of EU law
- The different types are –
 - “retained EU law”, a special type of domestic law, with higher status than other domestic law
 - “withdrawal agreement” law, if there is a WA, and
 - ordinary EU law, which may still apply as a type of foreign law, especially in contract cases

CONCLUSION (2)

- Different rules apply to each of the 3 different types of EU law, in relation to –
 - Principles of interpretation
 - Remedies available, and
 - Duration

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Joint Senior Clerks – Lucy Barbet & Mark Dann
Director of Business Development – Andrea Kennedy
Director of Finance and Administration – Claire Halas

Tel: +44 (0) 20 7632 8500
Email: clerksteam@11kbw.com
Address: 11 King's Bench

