Ministry
of Justice

Retained EU Case Law

Consultation on the departure from retained EU case law by UK courts and tribunals

Consultation Questions

Please submit responses marked for the attention of Joanne Thambyrajah by email to Judicial_Policy_Correspondence@Justice.gov.uk

Q1: Do you consider that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. Please give reasons for your answer.

We oppose the view that the power to depart from retained EU case law should be extended beyond the UK Supreme Court, the High Court of Justiciary, and the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions (i.e. Option 1 in the Consultation document).

Our position builds on the Government's aspiration 'to balance the need for legal certainty with the need for the law to continue to evolve and reflect changing needs of the UK following our departure from the EU'. With too many courts having the power to depart from retained EU case law, the aim of legal certainty can be challenged. With too few, the volume of cases reaching the Supreme Court or the High Court of Justiciary is likely to increase, resulting in delays in considering cases.

Under the European Union (Withdrawal) Act 2018, retained EU case law is endowed with the same status as a decision of the UK Supreme Court or the High Court of Justiciary. Only those courts have the power to depart from their own case law. If the status granted to retained EU case law is to have any meaning, lower courts should not have the power to depart from Court of Justice of the EU (CJEU) decisions concerning retained EU law. In addition, the general thrust of the withdrawal legislation is continuity, including in its instructions to the courts. For example, the UK courts may continue to have 'regard' to CJEU decisions even after the transition period. Having said that, we acknowledge that the scope of the respective regulations that can be adopted under Section 26 of the EU (Withdrawal Agreement) Act 2020 Act (on how to interpret and even to disapply EU retained case law as well as domestic case law which relates to EU retained case law) is not defined in the Act itself.

Section 26(1)(d) provides:

A Minister of the Crown may by regulations provide for—

(a) a court or tribunal to be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section,

(b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law,

(c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law, or

(d) considerations which are to be relevant to—

(i) the Supreme Court or the High Court of Justiciary in applying the test mentioned in subsection (5), or

(ii) a relevant court or relevant tribunal in applying any test provided for by virtue of paragraph (c) above.

Although the scope of the respective regulations is not defined in the EU (Withdrawal Agreement) Act 2020, when added on to the existing Section 6 of the EU (Withdrawal) Act 2018, it can be argued that they shall not apply to the Supreme Court, or the specific circumstances when the High Court is not effectively the highest legal court. As these courts are not bound to interpret retained EU law in line with CJEU decisions, they can surely decide not to follow them on the same basis as they decide not to adhere to one of their own precedents.

Q2: What do you consider would be the impacts of extending the power to depart from retained EU case law in each of the options below? Please give reasons for your answer.

a. The Court of Appeal and equivalent level courts;

b. The High Court and equivalent level courts and tribunals;

c. All courts and tribunals.

The range of courts that will be given the power to depart from retained EU case law is likely to impact on the management of the workload within the judicial system. Whilst extending the power to depart from retained EU case law to all courts and tribunals gives rise to concerns of workload management and interpretative consistency, offering this power only to the Supreme Court (and High Court of the Justiciary) could have an impact on efficiency and access to justice, due to the increased litigation costs. It is for this reason that we are in favour of Option 1 of the Consultation document, whereby the power to depart from retained EU case law should be extended to the UK Supreme Court, the High Court of Justiciary, and the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions.

The High Court would most likely deal with an increasing number of judicial review cases against acts of the administration that implicate principles emanating from retained EU law. This may be the case particularly in contested fields implicating EU law, such as financial regulation (e.g. bankers' bonus caps if not scrapped after Brexit or for consequences of the loss of passporting).

Should the power to depart from retained EU case law be given to all courts and tribunals, certain areas of law could change more quickly than would be the case if new legislation would be required after Brexit. Such an option could jeopardise

interpretative consistency and increase the likelihood of divergent decisions, with the risk that the law develops differently in different jurisdictions within the United Kingdom.

Q3: Which option do you consider achieves the best balance of enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK. Please give reasons for your answer.

The Government's goal for extending the ability of courts to depart from retained EU case law is 'to allow for the more rapid development of retained EU law'. We suggest that the timeliness of departure from EU case law should be a secondary issue. What is important at this stage is that the UK takes as much time as it is possibly needed to transition into adjudication that can guarantee procedural fairness and legal certainty to the users of the justice system. This chimes with the general tenet of the domestic common law which aims for gradual development. It is important that any decision to depart from existing case law is considered carefully to avoid a perception of a rush to 'nationalise' retained EU case law.

It is also important that the constitutional separation of powers be respected and a decision to depart from retained EU case law should not be seen as an attempt to legislate via the backdoor. There is already significant scope within the European Union (Withdrawal Act) 2018 for the amendment of retained EU law. Significant changes to the interpretation of retained EU law are also best left to the political organs of Government.

There is always a risk that if lower courts are permitted to depart from retained EU case law and retained domestic law, the law will become confused and inconsistent, thereby requiring a reference to the higher courts in any case and obviating the goal of reducing delays. Whilst such uncertainty would, ultimately, be resolved via appeal to higher courts, it should be kept in mind that not all cases are subject to appeal and thus reaching a position of legal certainty might take even longer for some cases. In addition, the greater the ability of lower courts to depart from retained EU case law the quicker the divergence of UK law to law applicable in other EU jurisdictions shall be.

Q4: If the power to depart from retained EU case law is extended to the Court of Appeal and its equivalents, do you agree that the list below specifies the full range of courts in scope?

i. **Court of Appeal of England and Wales;**
ii. **Court Martial Appeal Court;**
iii. **Court of Appeal of Northern Ireland;**
iv. **The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and**
v. **The Inner House of the Court of Session in Scotland.**

Please give reasons for your answer.

To our knowledge, the list specified the full range of courts in scope.

Q5: If the power to depart from retained EU case law is to be extended to the High Court and its equivalents, do you agree that the list of courts below captures the full range of courts in scope?

i. **The High Court of England and Wales**
ii. **Outer House of the Court of Session in Scotland;**
iii. **The Sheriff Appeal Court of Scotland in Scotland;**
iv. **The High Court of Justiciary sitting at first instance; and**
v. **The High Court in Northern Ireland.**

Please give reasons for your answer.

To our knowledge, the list specified the full range of courts in scope.

Q6: In respect of either option, are there other courts or tribunals to which the power to depart from retained EU case law should be extended? If yes, in what circumstances should this occur? Please give reasons for your answer.

Q7: Do you consider that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law? If yes, in what circumstances should this occur? Please give reasons for your answer.

We believe that there are issues with the choice of terminology in the European Union (Withdrawal Act) 2018. The term 'retained EU law' is used in the Act to encompass a number of broad elements, namely: EU-derived domestic legislation, for example domestic legislation implementing an EU directive (Section 2); Direct EU legislation not requiring domestic implementation, for example EU regulations (Section 3); Any EU rights, obligations etc available in domestic law by virtue of Section 2(1) of the European Communities Act 1972, for example directly effective provisions of EU directives (Section 4); General principles of EU law (Section 5) and finally retained case law (Section 6). This category of 'retained case law' is then divided into two subsets: retained EU case law and retained domestic case law. The former is composed of decisions handed down by the CJEU 'related to anything to which retained EU law applies', while the latter concerns decisions of domestic courts again 'related to anything to which retained EU law applies'.

While the above categorisations seem straightforward on their face, the reality is that the precise scope of 'retained EU law' remains unclear. In the first instance, it is not clear whether EU-derived domestic implementing legislation described in Section 2 can properly be described as 'retained EU law'. Although the aim of such legislation is to implement EU law requirements, it has always been and remains domestic law. If we further take the example of Section 4, it is likely that directly effective provisions of EU directives fall within its scope. These are provisions that can be relied on directly by litigants in the absence of correct implementation in national law and by courts to steer the interpretation of domestic law, which must be read consistently with the underlying directive. As Section 4 makes clear, however, such a right will only be 'retained' if it is 'of a kind' already recognised by the CJEU or domestic courts at the end of the transition period. This will involve litigants having to closely examine existing case law to determine whether a provision of a directive has already been recognised as conferring rights.

This task is further complicated by Section 4(3) which specifies that the exclusions found in Section 5 apply here. A notable feature of Section 5 is that it excludes the EU Charter of Fundamental Rights from domestic law post-transition. The CJEU has, at times, relied on the Charter and a directive in tandem to reinforce its conclusion that a particular provision of a directive has direct effect (Case C-214/16 *King* EU:C:2017:914). The consequences of this approach for the classification of a right as 'of a kind' already recognised by the CJEU or domestic courts remains uncertain. A final issue in relation to the term 'retained EU law' is whether Section 2 is to be narrowly defined as covering only secondary legislation enacted specifically to implement EU law or whether it should be interpreted more broadly

to include legislation, such as the Equality Act 2010, which is closely 'connected' to EU-derived obligations.

It is clear, then, that there remain significant issues in determining the precise scope of 'retained EU law', with consequent implications for the scope of both retained EU case law and retained domestic case law, the definition of which depends on the underlying scope of retained EU law.

There are also further discrepancies with the use of the word 'retained'. To use an example, the term 'retained EU case law' is broader than 'retained general principles'. It encompasses the law as established by the outcome of former cases which includes any principles laid down by, and any decisions of, the CJEU. Such case law constitutes an official and legally binding interpretation of EU law. Under Section 26(1)(ba) of the European Union (Withdrawal Agreement) Act 2020, UK courts will not need to follow retained EU case law (and will not therefore be bound by EU general principles) as they have effect in EU law immediately before the end of the transition period. This abstention is subject to the exceptions spelt out in Section 5 of the European Union (Withdrawal) Act 2018 which preserves fundamental rights that exist independently of the Charter and Schedule 1 which sets out that they can be used as principles of interpretation. As such, UK courts could continue to use EU general principles (as recognised at the end of the transition period) in order to interpret the meaning of provisions in retained EU law. While this is true, under Schedule 1 of the European Union (Withdrawal) Act 2018 parties will no longer be able to assert in proceedings that EU general principles have been breached, inclusive but not limited to fundamental rights.

Another problem with the use of 'retained EU case law' pertains to the legal void created in departing from the protection offered by the EU Charter of Fundamental Rights which, as already mentioned, will not be retained in domestic law. The exclusion of the Charter constitutes a clear break with the general thrust of the Withdrawal Acts, which are ostensibly about providing continuity and legal certainty. In some legal fields, notably in the employment law context, the Charter has become an increasingly important tool in the interpretation of EU legislation. In some instances, the Charter and EU employment legislation enjoy a symbiotic relationship. For example, Article 31(2) of the Charter provides for a fundamental right to paid annual leave. This right is sourced from the provisions of the Working Time Directive 2003/88/EC (WTD). The Charter is now used by the CJEU to reinforce its purposive and usually employee friendly reading of the WTD (C-569/16 *Bauer* ECLI:EU:C:2018:871). National implementing legislation, for example the UK Working Time Regulations 1998 (WTR) must be read consistently with the WTD as already interpreted by the CJEU through the lens of the Charter. Untying this Gordian knot will be a difficult task for any court. This difficulty is compounded by the fact that as established above, the EU's fundamental rights guaranteed as unwritten general principles of EU law will be preserved as an aid to interpretation of retained EU law. In the past, the CJEU has referred to certain pieces of EU legislation as being no more than a mere expression of a pre-existing general

principle, for example the principle of non-discrimination (Case C-144/04 *Mangold* ECLI:EU:C:2005:709). It remains unclear precisely which other EU legislative rights may also be classed as general principles.

All of this being said, there are likely to be very few instances of explicit conflict or contradiction between the interpretation of EU law adopted by the CJEU and the relevant domestic implementing legislation. One area where there has been tension between EU law and the approach favoured by the UK legislature can be found in the context of paid annual leave within Article 7 of the WTD, which has been implemented in national law via Regulation 13 of the WTR. This tension is well illustrated in Case C-214/16 *King* ECLI:EU:C:2017:914, which originated in the UK. King worked under a 'self-employed commission-only contract' with the company Sash WW, under which any annual leave he took was unpaid. When the relationship with the company ended, King sought to recover payment for any annual leave that had been taken unpaid as well as any annual leave that he had not taken over the entire duration of his relationship with the company. Regulation 13(9) of the WTR provides that workers are not entitled to 'carry over' periods of untaken leave into the next holiday year. This would mean that King would lose his entitlement to any paid leave not taken during any relevant leave year. For the CJEU, such a position was not compatible with Article 7 of the WTD, with the CJEU holding that the Directive 'must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave'. This case illustrates an area in which the domestic courts may wish to depart from the interpretative gloss applied to national implementing legislation by a decision of the CJEU.

Q8: Do you agree that the relevant courts and tribunals to which the power is extended should be bound by decisions of the UK Supreme Court, High Court of Justiciary and Court of Appeal and its equivalents across the UK where it has already considered the question of whether to depart from retained EU case law after the end of the Transition Period, in the normal operation of precedent? Please give reasons for your answer.

As previously mentioned, we hold the view that the power to depart from retained EU law should not be extended beyond the UK Supreme Court, the High Court of Justiciary, and the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions. We do not see a reason why the normal operation of precedent should change as a result of extending the power to depart from EU law. Changing the normal operation of precedent would lead to legal uncertainty and would defy the purpose of maintaining the power to depart from retained EU law for the higher courts.

Moreover, such a change might risk creating two streams of common law, whereby the normal operation of precedent would continue in cases unrelated to retained EU law but would discontinue in cases where the courts have considered the question of whether to depart from retained EU case law.

Q9: Do you agree:

a. that the test that should be applied by additional courts or tribunals should be the test used by the UK Supreme Court in deciding whether to depart from its own case law?

b. that this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law?

Please give reasons for your answers. If you do not agree, what alternative test do you consider should be applied? Please give reasons for your answer.

We agree that the test should be capable of being easily understood and applied across the jurisdictions by reference to the relevant case law. However, we would argue that, instead of following the current open-ended test used by the UK Supreme Court (i.e. departing from existing law where it appears right to do so), the test as to whether to depart from EU law should entail consideration of a number of variables:

- the impact of departure from retained EU case law on the substantive field in question. A different approach would need to be taken in areas that have been heavily regulated by EU law, perhaps both by a regulation and a directive (such as trade mark law) as opposed to other areas where there is scope for innovation by deviating from the course of CJEU case law (e.g. patent law and supplementary protection certificates, where UK courts have already expressed a divergence in opinion to the CJEU) or where the

position of the UK as a third-country would still need to maintain close engagement with the EU (e.g. for equivalence in the field of financial services);

- the extent to which departure from retained EU case law impacts upon the protection of fundamental rights (such as citizens' rights). In the absence of the EU Charter of Fundamental Rights, any alteration would need to be subject to compliance with common law rights, human rights scrutiny and the rule of law;
- the extent to which departure from retained EU case law would violate domestic principles of statutory interpretation. The courts should not be permitted to depart from retained EU case law in a manner that contradicts the clear wording of any underlying retained EU law;
- the impact to which departure from retained EU case law may affect UK-EU trade and business carried out on both sides of the English channel.

Q10: Are there any factors which you consider should be included in a list of considerations for the UK Supreme Court, High Court of Justiciary and other courts and tribunals to whom the power is extended to take into account when deciding whether to depart from retained EU case law? Please give reasons for your answer.

Please see our answer to the previous question.

Q11: As part of this consultation process, we would also like to know your views on how these proposals are likely to impact the administration of justice and in particular the operation of our courts and tribunals.

a. **Do you consider that the changes proposed would be likely to impact on the volume of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?**
b. **Do you consider that the changes proposed would be likely to impact on the type of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?**
c. **Do you consider that the changes proposed would be likely to have more of an impact on particular parts of the justice system, or its users? Please specify where this might occur and why.**
d. **Do you consider that the changes proposed would have more of an impact on individuals with particular protected characteristics under the Equalities Act 2010? Please specify where this might occur and why.**

Q12: Do you have any other comments that you wish us to consider in respect of this consultation.

Thank you for participating in this consultation.

About you

Please use this section to tell us about yourself

Full name	Stavroula Karapapa Anastasia Karatzia Theodore Konstadinides Niall O'Connor
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	We are all academics from the School of Law, University of Essex
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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.