

EXPLANATORY MEMORANDUM TO
THE EUROPEAN UNION (WITHDRAWAL) ACT 2018 (RELEVANT COURT)
(RETAINED EU CASE LAW) REGULATIONS

[2020] No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is made under Section 6(5A) of the European Union (Withdrawal) Act 2018 (the 2018 Act).
- 2.2 It makes provision to designate additional courts in the UK which may depart from retained EU case law and sets out the test which must be applied in doing so. Further, it makes clear that these changes do not alter the existing rules of precedent between decisions of UK courts.

Explanations

What did any relevant law do before the end of the Transition Period?

- 2.3 During the Transition Period, EU law continues to apply to the UK under the terms of the Withdrawal Agreement. During this time, EU law must be interpreted in accordance with the decisions and principles laid down by the Court of Justice of the European Union.
- 2.4 At the end of the Transition Period on 31 December 2020, the 2018 Act will save and convert much of the body of existing EU law into domestic law and preserves the laws we have made in the UK to implement our EU obligations. This body of law is “*retained EU law*”. The 2018 Act also provides that retained EU law, as far as that law is unmodified on or after the end of the Transition Period, and as far as is relevant to it, is to be interpreted in line with the principles and decisions laid down by the Court of Justice of the European Union before the end of the Transition Period, subject to certain exceptions (“*retained EU case law*”¹).
- 2.5 The 2018 Act gave retained EU case law the same status as judgments of the UK Supreme Court or High Court of Justiciary in Scotland (where it is the final criminal court of appeal in Scotland where there is no further route of appeal). Section 6(4) of the 2018 Act provides that the UK Supreme Court and the High Court of Justiciary in Scotland are not bound by retained EU case law after the end of the Transition Period.

¹ Retained EU case law is defined at section 6(7) of the 2018 Act as “*any principles laid down by, and any decisions of, the [Court of Justice of the European Union] as they have effect in EU law immediately before IP completion day and so far as they (a) related to anything to which section 2,3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time)*”

It further provides that these two courts, in deciding whether to depart from retained EU case law, must apply the same existing test which they respectively apply in deciding to depart from their own case law.

Why is it being changed?

- 2.6 Extending the power to the limited list of additional courts specified in this instrument, will help achieve our aim of appropriate and timely departure from retained EU case law by allowing EU case law to evolve more quickly than otherwise might have been achieved. Such a step would also help mitigate the operational impacts on the UK Supreme Court and High Court of Justiciary in Scotland which would arise if the power were reserved solely to those courts. There are also additional benefits to the UK Supreme Court in being assisted by prior judicial dialogue on these complex issues from the Court of Appeal or the relevant appellate court in Scotland or Northern Ireland.
- 2.7 By restricting this power to the highest appeal courts, we will also minimise the risk of adverse impacts which may arise out of any legal uncertainty resulting from additional litigation being brought, and the risk of divergence of approach between courts across the UK.

What will it now do?

- 2.8 This instrument provides that the Court of Appeal of England and Wales, and equivalent courts across the UK have the power to depart from retained EU case law. This instrument also sets out the test to be applied in exercising this power.
- 2.9 The full list of the additional courts identified as equivalent to the Court of Appeal is as follows:
- The Court of Appeal of England and Wales;
 - The Court Martial Appeal Court;
 - The Court of Appeal of Northern Ireland;
 - The High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issue or a devolution issue;
 - The Inner House of the Court of Session in Scotland;
 - The Lands Valuation Appeal Court in Scotland; and
 - The Registration Appeal Court in Scotland.
- 2.10 The instrument also provides that these additional courts must apply the same test as will be used by the UK Supreme Court in deciding whether to depart from its own case law. Applying the same test as that used by the UK Supreme Court will help to promote consistency and certainty so far as it is possible to do so.
- 2.11 It also preserves the normal operation of precedent between decisions of UK courts, by making clear that the courts listed at paragraph 2.9 will be bound in the normal way by a decision of another court which would normally bind them on whether or not to depart from retained EU case law. The instrument does not allow courts to depart from retained domestic case law² which relates to retained EU case law in circumstances where they would not otherwise be able to.

² Retained domestic case law means the principles and decisions laid down by UK courts and tribunals before the end of the Transition Period in relation to retained EU law (subject to certain exceptions).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This is the first use of the power to make Regulations under section 6(5A) of the 2018 Act. This is a novel power being exercised to designate additional courts with the power to depart from retained EU case law applying the same test as used by the UK Supreme Court in deciding to depart from its own case law.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Lord Chancellor and Secretary of State for Justice The Right Honourable Robert Buckland QC MP has made the following statement regarding Human Rights:

“In my view the provisions of The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 At the end of the Transition period on 31 December 2020, the 2018 Act will save and convert much of the body of existing EU law into domestic law and preserves the laws we have made in the UK to implement our EU obligations. Section 6 of the 2018 Act sets out how this retained EU law is to be read and interpreted from the end of the Transition Period. Section 6(3) of the 2018 Act provides that questions as to the meaning of unmodified retained EU law must be determined in accordance with principles and decisions laid down by the Court of Justice of the European Union before the end of the Transition Period, subject to certain exceptions (retained EU case law).
- 6.2 Section 6(4) of the 2018 Act provides that the UK Supreme Court and the High Court of Justiciary in Scotland (where it is acting as a final court of appeal) are not bound by retained EU case law. Section 6(5) of the 2018 Act provides that in deciding whether to depart from retained EU case law, those courts must apply the test which they respectively apply in deciding whether to depart from their own case law.
- 6.3 Section 6(4)(ba) of the 2018 Act, which will be commenced at the end of the Transition Period, provides that a “relevant court” or “relevant tribunal” is also not bound by retained EU case law so far as provided by Regulations made under s6(5A).
- 6.4 Section 6(5A) of the 2018 Act provides that a Minister of the Crown may make provision for:

- A court or tribunal to be a relevant court or relevant tribunal for the purposes of Section 6;
 - The extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law;
 - The test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law; or
 - Considerations which are to be relevant to the UK Supreme Court and High Court of Justiciary in Scotland (acting as a final court of appeal) in deciding whether to depart from retained EU case law, or any relevant courts or relevant tribunals specified under the Regulations in deciding whether to depart from retained EU case law.
- 6.5 The Government is making this instrument in order to extend the power to depart from retained EU case law to the Court of Appeal of England and Wales and equivalent courts across the UK. This instrument also sets the test to be applied by these courts in exercising the power to depart from retained EU case law but does not amend the existing operation of the doctrine of precedent between decisions of UK courts in any way.

7. Policy background

What is being done and why?

- 7.1 We are introducing these Regulations to extend the power to depart from retained EU case law to the list of courts outlined in paragraph 2.9.
- 7.2 During our membership of the EU, the body of case law has evolved from judgments of the Court of Justice of the European Union. Following our departure from the EU, and in order to promote legal clarity and certainty in our law, Parliament, through the 2018 Act, has provided that the EU law we have chosen to retain is to be interpreted in line with retained EU case law.
- 7.3 In making this provision, we have considered that the way the 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 to 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.
- 7.4 Without the ability to depart from retained EU case law, there is a risk that retained EU law remains tied to an interpretation from the Court of Justice of the European Union that is arguably no longer appropriate in the UK. It is for this reason that Parliament conferred on the UK Supreme Court and High Court of Justiciary in Scotland the power to depart from retained EU case law. Through amendments to the 2018 Act, made by the European Union (Withdrawal Agreement) Act 2020, Parliament enabled the making of Regulations designating additional courts and tribunals with this power as well as setting the extent to which these courts and tribunals would be bound by retained EU case law, setting the test to be applied by these courts and the factors to be considered in making such decisions. This instrument is made under this power. This instrument will enable the additional courts listed in paragraph 2.9 to consider retained EU case law in the context of our

departure from the EU and to make decisions to depart from that case law where it considers that the relevant test is met.

- 7.5 After considering the responses resulting from the consultation process, the Government is satisfied that it is appropriate to introduce Regulations to extend the power to depart from retained EU case law to the additional courts as listed in paragraph 2.9. Extending the power to this limited list of additional courts will help to achieve our aim of enabling appropriate and timely departure from retained EU case law. Such a step would also help mitigate the operational impacts on the UK Supreme Court and High Court of Justiciary in Scotland which would arise if the power were reserved solely to those courts; and there will be benefits to the UK Supreme Court in being assisted by a prior judicial dialogue on these complex issues from the Court of Appeal or the relevant appellate court in Scotland or Northern Ireland.
- 7.6 These Regulations will specify that in deciding to depart from retained EU case law, these additional courts must apply the test that the UK Supreme Court applies in deciding to depart from its own case law. This test was initially set out in the House of Lords Practice Statement which has been in operation since 1966 and has evolved over time through case law to reflect changing circumstances. This instrument also clarifies that the doctrine of precedent will apply in the normal way, providing that these additional courts will be bound by a decision which would normally bind them on whether to depart from retained EU case law. The instrument does not allow these courts to depart from retained domestic case law which relates to retained EU case law in circumstances where they would not otherwise be able to.
- 7.7 We have completed an Impact Assessment and have concluded that it is not possible to accurately establish the costs and benefits associated with this instrument as there is no way of establishing the extent and nature of litigation which could be pursued or the extent to which courts would decide to depart from retained EU case law. However, the Government is satisfied that this instrument achieves the policy objectives of enabling timely departure from retained EU case law whilst maintaining legal certainty and clarity across the UK as far as it is possible to do so.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is made under section 6(5A) of the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 Under section 6(5C) of the 2018 Act, before making these Regulations, the Minister of the Crown has a statutory duty to consult with the President of the UK Supreme Court, the Lord Chief Justice (England and Wales), the Lord President of the Court of Session, the Lord Chief Justice (Northern Ireland), the Senior President of the Tribunals and such other persons the Minister considers appropriate.
- 10.2 The Government consulted on these proposals between 2 July and 13 August 2020. The consultation was publicly available and in addition to the statutory consultees,

views were sought from a range of consultees, including the Devolved Administrations, legal services sector, regulatory bodies and businesses.

10.3 The consultation sought views on:

- whether the power to depart from retained EU case law should be extended to additional UK courts and tribunals;
- whether to prescribe a test to be applied, and if so what test;
- what considerations should be relevant to the test when being applied by either the UK Supreme Court, the High Court of Justiciary in Scotland and any additional courts and tribunals on whom the power to depart from retained EU case law is conferred;
- the application of the doctrine of precedent to decisions relating to departure from retained EU case law; and
- an assessment of the impacts and equality impacts, including on different levels of courts and tribunals.

10.4 At present the power to depart from retained EU case law at the end of the Transition Period sits only with the UK Supreme Court and High Court of Justiciary in Scotland (acting as a final court of appeal). The consultation presented two options:

- Option 1 – to extend the power to the Court of Appeal and equivalent courts across the United Kingdom.
- Option 2 – to extend the power to Court of Appeal and equivalent courts and the High Court and equivalent courts across the United Kingdom

10.5 The consultation generated 75 responses. Most responses were not in favour of exercising this power at all (56%). They cited the risk of legal uncertainty and clarity, and corresponding impact on the attractiveness of the UK as a place to do business. It should, however, be noted that a number of those opposed to making Regulations at all were concerned about the ability in principle of the courts to be able to depart from retained EU case law at all, and the potential impact of such a decision, if made, by the courts.

10.6 However, the consultation was on the question of whether more courts ought to be able to depart from retained EU case law, rather than the existence of the ability to depart from retained EU case law itself as this latter point has already been determined by Parliament.

10.7 The consultation responses were clear that there should be cautious approach in exercising the power to make these Regulations. In this context, 32% of respondents supported extending the power to depart from retained EU case law to the Court of Appeal level. This figure increases to 56% when including those respondents whose primary preference was for no Regulations to be made but considered the Court of Appeal level to be the preferable approach if Regulations were to be made nevertheless.

10.8 There was recognition amongst the responses of the benefits of extending the list of courts who may depart from retained EU case law to the Court of Appeal and its equivalents across the UK. It was noted by some respondents that this could help to alleviate undue pressure on the UK Supreme Court and the High Court of Justiciary in Scotland as well as providing the benefits of judicial dialogue of prior consideration of the issues prior to determination by the UK Supreme Court.

- 10.9 Only two respondents favoured extending the power beyond the Court of Appeal and its equivalents across the UK to the High Court and its equivalents across the UK (Option 2). The risk of driving large volumes of cases and legal uncertainty was the main reason cited in opposition to this proposed approach. It was also noted that the risk of divergence in decisions between jurisdictions was greater with this approach. Respondents also noted the benefits of transparency and clarity around such decisions as there is greater reporting of decisions at the Court of Appeal level in comparison to the High Court level.
- 10.10 The Government has concluded that extending the power to depart from retained EU case law to the Court of Appeal and its equivalents across the UK strikes the appropriate balance between the policy aim of enabling case law to evolve, where appropriate in a more timely manner, whilst minimising the risk of creating legal uncertainty.
- 10.11 In the consultation, we identified the following courts as being Court of Appeal level:
- Court of Appeal of England and Wales;
 - Court Martial Appeal Court;
 - Court of Appeal of Northern Ireland;
 - The High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and
 - The Inner House of the Court of Session in Scotland.
- 10.12 Having considered the consultation responses in full, we have concluded that two additional courts, namely the Lands Valuation Appeal Court and Registration Appeal Court in Scotland should be added to this list. They are specialist courts in their respective jurisdictions and are listed separately from the Court of Session of Scotland in Section 2 (6) of the Judiciary and Courts (Scotland) Act 2008. These courts are final appeal courts in Scotland who, broadly speaking, sit at the same level as the Inner House of the Court of Session in Scotland. There is no automatic route of appeal to the UK Supreme Court for either of these courts.
- 10.13 On the question of the test to be applied, the majority of respondents (55%) agreed that the test that should be applied by additional courts or tribunals should be the same as that applied by the UK Supreme Court test in deciding whether to depart from its own case law.
- 10.14 The majority of respondents did not consider that there should be a list of considerations for courts to take into account when deciding whether to depart from retained EU case law (either for the UK Supreme Court, the High Court of Justiciary in Scotland, or additional courts and tribunals) suggesting it was not necessary. The Government has concluded that seeking to codify the wealth of case law on this point would be unhelpful and counter-productive to the aim of maintaining legal certainty. It is for these reasons that the Government will not be including a list of considerations for courts to take into account in deciding whether to depart from retained EU case law in the Regulations.
- 10.15 The majority of respondents also did not consider that any courts 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. Furthermore, there was a strong consensus that there was no justifiable reason to depart from the normal

operation of the doctrine of precedent. Of those who answered this question in the consultation, there was strong support for the doctrine of precedent to continue to operate in its normal manner to preserve legal certainty and predictability across the UK. It was argued that to do otherwise would significantly undermine legal certainty, heighten the risk of inconsistencies, cause uncertainty in the development of the law and unnecessarily risk divergence.

10.16 Having considered the consultation responses, the Government has concluded that is unnecessary to introduce any changes to the doctrine of precedent and risk creating legal uncertainty, heighten the risk of inconsistencies and unintended consequences to businesses and the public.

10.17 The full consultation response document can be found here:

<https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals>.

11. Guidance

11.1 No specific guidance is being published.

12. Impact

12.1 We consulted and sought views of the impacts and equality impacts, including on different levels of courts and tribunal. There was consensus that impacts were difficult to quantify but on balance, we consider option 1 (in paragraph 10.4) provides the best balance between the benefits of designating additional courts with the power to depart from retained EU case law and any negative impacts that may materialise from legal uncertainty.

12.2 A full Impact Assessment is published alongside this Explanatory Memorandum and can be found here: <https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals>.

13. Regulating small business

13.1 The legislation does not regulate activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018 (as amended), these proposals will be reviewed in due course as part of the post legislative scrutiny of the 2018 Act.

15. Contact

15.1 Joanne Davies at the Ministry of Justice Telephone: 020 3334 3181 or email: Judicial_Policy_Correspondence@Justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jane Sigley, Deputy Director for Judicial Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Lord Chancellor and Secretary of State for Justice The Right Honourable Robert Buckland QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.