



Immigration and ‘the Great Repeal Bill’: Briefing on the implications of the European Union (Withdrawal) Bill 2017-19 for immigration and asylum

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About JCWI

JCWI is an independent national charity established in 1967. We work to ensure justice and fairness in immigration, nationality and asylum law and policy and we provide direct legal advice and assistance to those affected by UK immigration control. We have built up expertise over decades fighting for justice for those who are vulnerable and have particular experience of dealing with complex immigration issues.

Background and overview

On 13th July 2017, the European Union (Withdrawal) Bill 2017-19 (formerly referred to as the ‘Great Repeal Bill’) entered the House of Commons and received its first reading¹. The bill provides the broad legislative basis for implementing Brexit, incorporating and amending EU legislation as it is brought onto the domestic statute book. Although the bill does not deal directly with immigration and asylum law, it has wide-reaching implications for policy areas where rules or practices relate to or derive from EU law.

Under the bill, the 1972 European Communities Act, which provides for EU law to be given effect in UK domestic law, will be repealed (Clause 1). The bill provides for all EU law as it stands at the moment of Brexit to be transferred into UK law (Clauses 2 – 5), referred to as ‘retained EU legislation’.

¹ The White Paper for the bill: Legislating for the United Kingdom’s withdrawal from the European Union, for the bill, outlining its objectives and proposed content, was released in March 2017 by the Department for Exiting the European Union.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf



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The bill also, however, creates new delegated powers for the government for two years from the date of Brexit (Clauses 7, 8 and 9)². During this period, ministers would be able to make substantial changes to primary and secondary legislation without requiring parliamentary scrutiny or approval, where they consider this appropriate in order to ensure a smooth transition to Brexit. Ministers would be able to make *'any provision that could be made by an Act of Parliament'*. It is not yet clear how these powers would work in relation to any transitional period following the official date of Brexit from March 2019.

These new 'Henry VIII powers' are limited, but barely. Ministers must only *'consider appropriate'* the changes in order to prevent or mitigate *'a) any failure of retained EU law to operate effectively, or b) any other deficiency in retained EU law'* (clause 7). The bill envisages no oversight of exercise of the powers by an external or parliamentary body. This opens up the possibility that any EU legislation brought onto the domestic statute book, including that concerned with the rights of EU nationals and their family members, minimum standards of treatment of refugees and asylum seekers and victims of trafficking, and rights derived from Court of Justice of the European Union (CJEU) caselaw, could be subject to ministerial change without accountability.

Clause 8 of the bill provides that changes may be made to retained EU legislation in order to *'prevent or remedy any breach, arising from withdrawal of the UK from the EU, of the international obligations of the UK'*. The bill does not make clear whether this could include use of new delegated powers in the context of future bilateral trade deals – we would anticipate that immigration rules might be unilaterally modified, removed or introduced in such context. New delegated powers would also enable ministers to unilaterally modify retained EU legislation in order to implement the UK-EU withdrawal agreement (clause 9).

New regulations made by the government would not be subject to parliamentary scrutiny prior to entering the statute book, but would be subject to either the affirmative or the negative resolution processes in parliament. JCWI has decades of experience of parliamentary lobbying around delegated legislation in the area of immigration law. It is our experience that, due to other demands in the parliamentary timetable, such legislation is rarely even debated, let alone stalled or overturned by parliament.

² A Memorandum on the Bill gives more details on the delegated powers provided under the bill.
[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf)



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As such, the unprecedented executive powers offered by this bill could have significant implications for some foreign nationals whose rights currently derive from EU law and judgments of the CJEU. Although the Human Rights Act 1998 will be protected from amendment or removal, there are no other safeguards for individual rights in this bill.

In our view, it is imperative that the executive powers granted under clauses 7 - 9 be curbed, with a particular view to protecting individual rights (including but not limited to those of migrants and their family members) in the following ways:

- **Protect rights.** In line with the recommendations made by the House of Lords Constitution Committee³ and Liberty⁴, we advocate that a ‘non-retrogression’ clause be included in the bill to ensure that ministerial powers cannot be used to worsen human rights protections currently afforded by EU law. Protecting the existing individual rights of both British and non-British citizens must be a red line, with adequate safeguards in place to ensure that transgressions do not occur.
- **Protect CJEU decisions.** The bill (Clause 6) provides for decisions of the European Court of Justice (CJEU) to be carried into domestic law. However, the executive powers granted under clauses 7 - 9 could enable ministers to unilaterally amend or overturn legislation giving effect to CJEU judgments. This undermines the assurances of continuity in this area, given by Clause 6.
- **Introduce accountability and oversight.** Ministers should be required to justify their exercise of new delegated powers to an independent parliamentary or non-parliamentary body tasked with scrutinising decision-making to ensure that use of delegated powers does not extend beyond red lines, including protecting the existing individual rights of citizens and non-citizens.

³ The Great Repeal Bill and Delegated Powers, House of Lords Select Committee on the Constitution, 7 March 2017: <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>

⁴ Liberty’s briefing on the White Paper on the ‘Great Repeal Bill’, April 2017: <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Briefing%20on%20the%20White%20Paper%20on%20the%20Great%20Repeal%20Bill.pdf>



Implications for migrants and asylum seekers

The executive powers proposed by the bill could have particular implications for several groups of refugees and migrants given rights under EU law:

1. EEA nationals currently residing in the UK

The rights of EEA citizens and their family members to enter and reside in the UK primarily derive from the EU Citizens Directive (2004/38/EC) and the Treaty on the Functioning of the European Union (2007). The rights of this group from the date of Brexit are yet to be determined and are the subject of ongoing UK/EU withdrawal negotiations. It is likely that EU treaty rights holders residing in the UK before a cut-off date yet to be agreed will be given an immigration status under domestic immigration law, as agreed during the negotiations.

However, Clauses 7 - 9 of the bill would give ministers the power unilaterally to remove the residence rights of over 3 million EEA nationals currently residing in the UK, from the date of Brexit, if a UK/EU agreement is not reached. Explanatory notes appended to the Repeal Bill make explicit that ministers could '*modify, limit or remove the rights which domestic law presently grants to EU nationals*'⁵. This could have appalling consequences for the millions of families currently residing in the UK. Whether it materialises, the threat of this outcome has already created additional distress and insecurity for EEA nationals and their family members currently awaiting confirmation of their future status. Ministerial powers in the bill must be curbed to protect the rights of EEA treaty rights holders, regardless of the outcome of Brexit negotiations.

2. British citizens, EEA nationals and non-EEA nationals afforded residence rights by the European Court of Justice

Currently, some EEA and non-EEA nationals have residence rights in the UK as a result of domestic regulations which give effect to rights under EU law, including those identified in judgments of

⁵ European Union (Withdrawal) Bill explanatory notes: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>



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the European Court of Justice (CJEU). These rights arise from their relationship with a British citizen, usually a close family member, partner or spouse.

Clauses 7 - 9 would give ministers the power unilaterally to amend the regulations providing for derived residence rights in the UK, with no accountability or external oversight. Amendment of regulations could have significant implications for individual human rights, with direct impacts on long-term resident migrants, British citizen adults and children.

Relevant CJEU judgements include:

- **R (Secretary of State for the Home Department) v Immigration Appeal Tribunal and Surinder Singh [1992]**, currently given effect in the UK through the Immigration (European Economic Area) Regulations 2016. The Surinder Singh judgement enables UK citizens who have exercised their free movement rights in another EEA member state to bring a non-EEA family member back to the UK with them. They must meet additional requirements including that the British citizen would be a qualified person if they were an EEA national, and that the British citizen and family member resided together genuinely in another state for a purpose other than to circumvent UK immigration law.
- **Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) C-34/0**, also given effect in the Immigration (European Economic Area) Regulations 2016. The Zambrano judgment was reaffirmed and expanded in May 2017 by C-133/15 *Chavez-Vilchez and others*. These judgements grant a non-EEA carer (parent) of a British child residence rights here, in order that the child can fully exercise their EU citizenship rights.

3. Refugees and asylum seekers

This bill could result in a reduction in the UK's standards of treatment for asylum seekers from the date of Brexit.

The UK is currently part of the first phase Common European Asylum System and is bound by three EU directives relating to asylum seekers: the Qualification Directive (2004/83/EC), the Procedures Directive (2005/85/EC), and the Reception Directive (2003/9/EC). These directives



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establish minimum standards for how asylum seekers are defined, treated and considered across signatory states, and limit the scope of restrictive domestic legislation in this area.

Although the asylum directives would be transposed into UK law under clause 2 of the bill, the executive powers provided in Clauses 7 – 9 would enable ministers unilaterally to repeal or modify them, without reference to parliament. This could lead to a reduction in minimum standards for the reception and consideration of asylum claims in the UK.

In addition, the UK is a signatory to the Dublin III Regulation (Regulation (EU) No 604/2013). The Dublin III Regulation applies to all 28 EU member states and the four associated countries. Under ‘take charge’ provisions in the Regulation, asylum seekers processed in another Dublin country may be transferred to the UK where, for example, they have family members here. For example, this has provided a safe and legal route for hundreds of children previously living in the Calais and Dunkirk refugee camps to be reunited with family members in the UK. Under ‘take back’ provisions, the UK may return asylum seekers to another EU member state, for example, the first member state entered, for processing. The UK also participates in the EURODAC database and Visa Information System, allowing it to collect and share fingerprint information from asylum seekers with other EEA member states.

It is likely that the UK would wish to continue to participate in all or some of the provisions of the Dublin III Regulation – or a future version of it - as a non-EU member state, if possible. JCWI supports the recommendation made by Immigration Law Practitioners Association (ILPA) that the UK should continue at least to enact Dublin III take charge provisions (if other member States remain willing to send persons back to the UK) following Brexit.

4. Victims of trafficking

UK is currently a signatory to Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims. The Trafficking Directive establishes EU-wide minimum standards in preventing and combating human trafficking, and protecting victims.



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The bill in its current form could enable ministers to repeal or substantially modify the provisions in the directive without parliamentary scrutiny. This could, in theory, result in a lowering of standards for victims of trafficking. Anti-trafficking measures could also be impeded by a potential loss of cooperation with other EU member states over data-sharing.

5. Migrant workers

Alongside British workers, this bill could make some migrant workers in low-paid or insecure work more vulnerable to exploitation or abuse. The government has pledged to transpose into domestic law the key workers' rights directives by which the UK is currently bound. However, the bill would enable ministers, if they wished to do so, unilaterally to modify or remove these individual rights without parliamentary scrutiny. Relevant directives include:

- **Agency Workers Directive (2008/104/EC)**, given effect in the UK by the Agency Workers Regulations 2010, which protects the working and employment conditions of agency workers.
- **Working Time Directive (2003/88/EC)**, given effect in the UK by the Working Time Regulations 1998, which establishes a maximum working hours and creates a criminal offence for employers in excess of this.
- **EU Equal Treatment Directive (2006/54/EC)**, bans discrimination on the grounds of age, religion or sexual orientation, and places the burden of proof in discrimination on alleged perpetrators rather than alleged victims. EU law also prevents any cap from being placed on compensation payments in discrimination cases.

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