

European Union (Withdrawal Agreement) Bill

Amendments to be moved in committee

Schedule 2, page 46, line 12

after “is” insert “following open
advertisement and recruitment
processes“

Effect

This amendment ensures that the recruitment of non-executive members of the IMA will be open and transparent. This is an essential element in ensuring that the IMA is recognised as an independent body.

European Union (Withdrawal Agreement) Bill

Amendments to be moved in committee

2, page 48, line 25

After “may” insert “following a motion approved by both Houses of Parliament”

Effect

This amendment ensures that the Secretary of State may only remove a non-executive member of the IMA if that removal has been approved by both Houses of Parliament.

European Union (Withdrawal Agreement) Bill

Amendments to be moved in committee

Clause 26, page 30, line 9

leave out sub-section (1)

Effect

This amendment deletes clause 26(1).

This clause amends section 6 of the European Union (Withdrawal) Act 2018. Section 6 provided that the UK Supreme Court or the High Court of Justiciary (when sitting as a court of appeal otherwise than in relation to a compatibility issue) are not bound by any retained EU case law, but may depart from that case law in the same way that the court would depart from its own case law.

Clause 26 would allow regulations to be laid, specifying additional courts or tribunals that could depart from any retained EU case law. These regulations could additionally specify for these courts and tribunals the extent to which or circumstances in which departure from any retained EU case law would be permitted; the test to be applied; or the considerations relevant to that test (or also specifically any considerations relevant to the Supreme Court or High Court of Justiciary in the application their test around precedent, namely the House of Lords Practice Direction on Judicial Precedent) .

The degree to which this provision could fetter the discretion of courts in determining the application of precedent raises concerns, not least regarding the separation of powers. There are also concerns about ensuring certainty and predictability in the status of retained EU case law. Departures from existing EU case law were envisaged to be limited in the Department for Exiting the European Union White Paper, which stated, “we propose that the Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court. It is very rare for the Supreme Court to depart from one of its own decisions or that of its predecessor, the House of Lords... We would expect the Supreme Court to take a similar, sparing approach to departing from CJEU case law.” A wider range of courts or tribunals being able to depart from precedent may see a proliferation of decisions around the status of retained EU case law (and, potentially an increase in upward appeals where a higher court could reaffirm the original interpretation and reasoning of CJEU case law). Some courts and tribunals are comprised in whole or in part by lay Judges, some courts have limited geographic scope for any decisions made, for instance, in Scotland where decisions at Sheriff Court level are only binding in that Sheriffdom.

Regulations would require consultation with the President of the Supreme Court, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, the Senior President of Tribunals, and any other persons considered relevant. However, we believe that wider scrutiny would be required around changes of this significance, engaging, at least, the super- affirmative process to allow wide consultation and scrutiny.

Clause 26 could result in divergence of approach within and between the jurisdictions of the UK on matters of law where a common approach is essential, both for legal certainty and the

proper operation of that law. Decision on the interpretation of retained EU law should be taken at the highest level, as originally envisaged by the 2018 Act.