

## Ministry of Justice

### Retained EU Case Law: Consultation on the departure from retained EU case law by the UK courts and tribunals

#### A response by the Association of Personal Injury Lawyers

August 2020

### Introduction

We welcome the opportunity to respond to the Government's consultation on which UK courts should be given the power to depart from retained EU case law. We agree with the Government's desire to balance the need for legal certainty with the need for the law to evolve, however, we do not agree that the proposals within the consultation achieve this. We are concerned that some of the proposals depart from established judicial hierarchy which creates a strict grading of importance for the order in which courts sit and the weight attached to their decision making. This hierarchy of the courts is essential in ensuring the administration of justice functions effectively within the court system and we believe that the only way this can be sensibly achieved is by the Supreme Court being the only court to have the jurisdiction to depart from retained EU case law. An alternative approach risks considerable uncertainty, with the prospect of divergent decisions between the courts at all levels on important issues, including the fundamental rights of individuals derived from retained EU law.

#### **Q1 Do you consider that the powers 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 do not agree that the power to depart from retained EU case law should be extended beyond the UK Supreme Court and High Court of Justiciary and are concerned by these proposals.

Whilst it is difficult to predict what issues will arise following the UK's departure from the EU and after the end of the Transition Period on 31 December 2020, it is fair to say that the issues will not be straightforward. Lord Reed in his evidence to the House of Lords Select Committee on the Constitution<sup>1</sup> raised concerns about the detailed issues around language and interpretation that the judiciary would have to deal with. It is with this and the importance of legal certainty in the administration of justice in mind that APIL believes that the Supreme Court should be the only court to have the jurisdiction to depart from retained EU case law.

Retaining judicial scrutiny at this level would in our view be the only way to ensure we do not interfere with judicial hierarchy. It is also the only way of ensuring certainty and legal clarity. Allowing lower courts to interpret the law and not follow judicial precedent will simply allow

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<sup>1</sup> Annual evidence session with the President and deputy President of the Supreme Court. Question 12 Wednesday 4 March 2020

for a divergence in approach and cases will result in appeals to the Supreme Court in any event. This will cost the parties and the court system time and money. It also risks seeing justice denied to weaker parties, including consumers and injury victims, who seek to exercise their rights under retained EU law/case law, only to find those rights denied due to the wide ambit of discretion which would be afforded to judges below Supreme Court level.

**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.**

We do not agree that the power to depart from retained EU case law should be extended below that of the Supreme Court, it is essential that the Government respects that these are fundamental constitutional matters that should not be tampered with lightly to serve what might be considered the political will of divergence with the EU when the Brexit transition period ends. The proposal to extend the power to depart from retained EU case law will increase pressures on the lower courts and should not be amended by statutory instrument. Making constitutional changes in this way, creates a significant risk that the use of ministerial power could undermine legal certainty and increase the challenge for the courts when dealing with retained EU law. See our reasons in question 1.

If the Government is to extend the power beyond the Supreme Court there will be significant impact on court time, impact on judicial precedent and the value of judgments; and lack of certainty from lower judicial determination.

We would also be concerned about the cost of litigation in these cases on appeal to the Supreme Court. Cases that challenge EU law precedent are by their very nature going to include important points of principle for the parties involved,. Given the importance, parties will almost certainly seek determination from the highest court in the UK to ensure legal certainty rather than stop at a High Court or Court of Appeal (or their equivalent) level determination. Lowering the level of the court at which the determination can be made, only increases litigation and delays the parties from getting the decisions they need. The consultation paper suggests that by allowing lower courts to determine these points there will be some certainty until the point at which a higher court makes a determination. Our experience shows us that this is not the case. Until there is a final decision litigation will continue. A clear example of this in an EU context is the repeated litigation by the MIB as to the interpretation and application of the EU Motor Insurance Directives<sup>2</sup>. In personal injury cases we have seen uncertainty created by 'pending decisions'. By having multiple levels of appeal, parties will attempt to 'game the system' by capitalising on that uncertainty created by lower court decisions seeking to force claimants to settle cases solely because of litigation risk.

If the Government is intent on powers being extended to courts below Supreme Court level, the court must at least be at appellate level to create sufficient certainty. If parties are

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<sup>2</sup> See for example: R&S Pilling t/a Phoenix Engineering (Respondent) v UK Insurance Ltd (Appellant) UKSC 2017/0096; Moreno v MIB [2016] UKSC 52; and Lewis v Tindale, albeit in that case the UKSC refused permission to appeal but in doing so would have had in mind its approach to judicial precedent and settled principles of law.

unhappy with a lower court decision it is inevitable that they will appeal to the Supreme Court.

We agree with the concerns expressed in the consultation that lowering the level of the court at which the power to depart from retained EU case law is set will result in forum shopping amongst the UK jurisdictions.

**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.**

We believe that legal certainty should take priority over timely departure. This should not be a sprint to the finish, case law takes years to evolve and it is crucial that the Supreme Court retains the power to make the necessary determination. There is an important check and balance by ensuring that a case goes to the Supreme Court from the outset and we believe that this is what should continue to happen in relation to points of law arising from retained EU case law.

Where cases are issued in the lower courts they should be required to observe legal precedent from higher courts (ultimately the UKSC) to ensure legal certainty. The appeals process should continue to be a check and safeguard in the event a party disagrees with a decision with the ongoing interpretation of retained EU law/case law. The higher courts should continue to apply existing rules of judicial precedent when considering whether to depart from a previous decision and ultimately only the UKSC should be able to depart from retained EU case law that would otherwise be binding on the lower courts. We do not believe that this will swamp the courts, the Supreme Court has the power to consolidate a number of cases to be heard on the similar issue in order to avoid time and expense.

There is concern expressed in the consultation document that domestic law may become 'fossilised'. Our view is that if the Government is concerned that reform is necessary or that the view generally is that the law is not developing quickly enough, then the Government should look to the legislature and intervene with primary legislation. The role of the Supreme Court will also be to flag up any points of law they feel are outside of their remit and that require primary legislation. However, first and foremost, if the Government is intent on accelerating the departure from retained EU law and case law in specific areas then it is the role of parliament and primary legislation to bring about those changes, not the role of the courts.

If, however, the Government is still minded to introduce further changes then we would not support extending powers below that of the Court of Appeal or equivalent levels, to do so would create considerable risk where legal certainty is concerned. If you start to remove that certainty, the UK will lose its appeal as being a place of choice for people to resolve their disputes and would therefore militate against, rather than support, one of the Government's stated aims following Brexit that the UK should continue to be a place of choice for parties to litigate their disputes.

In addition, extending the power below that of the Court of Appeal could substantially reduce the quality of the judgments. In the High Court of England and Wales a single judge sits in determination of the case, whereas with the Court of Appeal and Supreme Court a panel sits in determination, which gives greater collective judicial decision. We do not agree with the suggestion that the power to depart from retained EU case law should be extended to any court where the determination is made by a single judge.

**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.**

APIL has no comments.

**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 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.**

We do not agree with the suggestion that the power to depart from retained EU case law should be extended to any court where the decision is made by a single judge. We have no comments on the 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.**

We have no comments on this.

**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 do not agree with this proposal. To allow a departure from such decisions goes against the doctrine of judicial precedent. APIL is firmly of the view that it is not appropriate for the doctrine of judicial precedent to be interfered with in this way. To do so would be with a view to appeasing the political will to accelerate divergence from EU law when the transition period ends, notwithstanding the impact this may have on the rights of individuals, legal certainty and access to justice. Such a proposal will create enormous uncertainty for litigants, not knowing if a higher judicial determination is binding or not.

Put simply: there should be no change to the current rules on judicial precedent as far as retained domestic case law relating to retained EU case law is concerned.

If the Government chooses to interfere in fundamental constitutional matters such as the doctrine of judicial precedent then this requires far greater scrutiny than the scope of this consultation permits.

**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.**

It is essential that the current doctrine of judicial precedent is retained to ensure that there is certainty within the process. Without the normal operation of the rule there would be a chaotic situation resembling a free-for-all. By having such an established doctrine, we retain certainty and avoid the situation where inferior courts do not have to apply the legal principles set down by superior courts in earlier cases. It is therefore, essential that lower courts continue to be bound by decisions of the UK Supreme Court.

**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 do not agree with the Government's recommendation that the same test be applied by all relevant courts and tribunals. The Government suggests that this provides clarity. We do not agree. We believe that the Supreme Court test should only apply to those cases being appealed to the Supreme Court. The reason the Supreme Court has a different test and

more discretion is because they are the overarching court to which all UK jurisdictions appeal. It is right that each individual court should apply its own test when considering if it should allow an appeal. Applying a different test to that already established within the courts own jurisdiction will create uncertainty, allowing for different consideration for different cases being appealed depending on the issues to be considered. It could result in a blurring of lines as to the test each of the lower courts should otherwise apply when considering whether to depart from their earlier decisions, or indeed decisions of the Supreme Court if this were permitted. The proposal to extend the test applied by the Supreme Court to the Court of Appeal and to the lower courts, undermines the authority and role of the Supreme Court as the ultimate court of appeal hearing the cases of greatest public or constitutional importance for the UK population on the law of England, Wales, Scotland & NI.

While we do not agree with the proposal, if the power to depart from retained EU case law is extended to the Court of Appeal level then when deciding whether to depart from retained EU case law, the Court of Appeal should apply the test it applies currently when considering departure from its own existing precedent.

**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.**

We do not agree with the suggestion that there should be a list of considerations. We believe that it would be impossible to compile a full list of considerations for the courts to take into account when deciding whether to depart from EU retained case law.

**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?**

If the power to depart from retained EU case law is extended to the lower courts, there is a risk that there would be more cases going to trial on points of law. Parties would know that there is a possibility that the judge will have the ability to depart from earlier case law and would take advantage of that, which would give rise to considerable uncertainty. Any change that would potentially give rise to an even greater number of cases being challenged would be against the criteria specified in the consultation document. Any rise in the number of cases at High Court or county court level would be particularly undesirable at present given limited judicial and court resources which have been compounded by the Covid-19 Pandemic.

There is also the potential for inconsistent decisions in the lower courts on retained EU law if the power to depart were extended, there is far more likely to be appeal after appeal through the senior courts appeals process, thereby clogging up the court system and impacting timely administration of justice.

**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.**

There is a significant likelihood for these proposals to adversely impact on vulnerable, inexperienced parties. If you have an injury victim against a well-resourced insurer, the insurer will know they have the ability to litigate the case all the way through the court system with the prospect of being able to change the position with regards to the individuals' rights under retained under EU law. They could run the case to the Supreme Court because they have the financial means to do so, whereas an individual to the dispute will not have the financial resources available to them. This is not a reason for extending the power to depart from retained EU case law to the lower courts, rather it is a fundamental reason for maintaining the status quo so that weaker parties to a dispute can, as far as is possible, exercise their rights with certainty of outcome.

We believe that there are areas of litigation where certain parties will look to immediately challenge the status quo. In the personal injury sector, it is likely that insurers will prioritise challenges to the Road Traffic Act. It has long been noted that the insurance sector does not agree with the additional rights afforded to victims of road collisions by the EU compulsory motor insurance regime. We are also concerned that this will afford the opportunity for insurers to revisit arguments on the protection of employees in the workplace.

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

We have no additional comments.

### **About APIL**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

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