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Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21: Progress of the Bill

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Summary

This briefing provides an overview of the progress of the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21.*

Sections 3 and 4 and the summary below were added/updated in advance of consideration of Lords amendments stage on 19 October.

Section 5 was added/updated on 3 and 10 November. The other sections of the paper were not updated.

References to the Lords amendments in the summary below, and in sections 3 and 4, reflect the numbering in the Bill as amended in the Lords (Bill 195 of 2019-21).

References to the Bill in sections 1 and 2 of this briefing reflect the version of the Bill as introduced (Bill 104 of 2019-21).

Recent developments

Various amendments were made to the Bill in the Lords.

There was **one Government amendment**:

- **To clarify the scope of paragraph 4(2) of Schedule 1** is Articles 2 – 10 of the Workers Regulation **(Lords amendment 11).**

Peers voted in favour of several **non-government amendments**:

- **On the Bill's impact on the social care sector (Lords amendment 1):** To require the Government to commission and publish an independent assessment of the impact of the ending of EU free movement laws on the social care sector within six months of the Bill's enactment.
- **On family visa requirements affecting British citizens living in the EU (Lords amendment 2):** To preserve a lifetime entitlement for British citizens living in the EU before the end of this year to return to the UK with their close family members under the terms of EU free movement laws, rather than the UK's Immigration Rules.
- **On granting settled status to EEA/Swiss children in care (Lords amendment 3)**: To provide for EEA/Swiss children in care/entitled to leaving care support to be granted settled status under the EU Settlement Scheme (EUSS).
- **On refugee family reunion and unaccompanied children (Lords amendment 4):** To establish a legal route for people in Europe to apply for asylum in the UK and obtain permission to enter the UK as an asylum seeker, if they would have been eligible for a transfer to the UK under the Dublin III Regulation if that still applied to the UK; and to require the Government to lay a strategy for ensuring that unaccompanied children in EU Member States can continue to be relocated in the UK, if it is in their best interests.
- **On physical status documents under the EUSS (Lords amendment 5):** To require physical proof of settled and pre-settled status granted under the EUSS to be provided free of charge to successful applicants, upon request.

- **On immigration detention (Lords amendments 6,7,8 and 10):** To restrict the length of time that an EEA/Swiss national may be held in immigration detention to 28 days, to specify certain restrictions on the criteria and duration of the 96-hour initial detention period, and to provide for a bail hearing within the 96 hours.
- **On immigration protections for EEA/Swiss national victims of trafficking (Lords amendment 9):** To allow for EEA/Swiss nationals who have been confirmed as a victim of trafficking/modern slavery to be granted temporary leave to remain with recourse to public funds, in certain circumstances.

No Government or non-government amendments were made in the Lords to the clause and schedules in the Bill relating to social security co-ordination.

Background: what does the Bill do?

This is a short, Brexit-related Bill. Its primary purpose is to:

- repeal EU free movement of persons and other related EU-derived rights in UK law;
- make EU, EEA and Swiss citizens subject to UK immigration controls;
- make provision to protect Irish citizens’ immigration rights; and
- provide a power to amend retained EU legislation relating to social security co-ordination.

The Bill does not establish the new points-based system for immigration, which is due to come into effect in January 2021 and will apply equally to EU and non-EU nationals. That will be introduced through changes to the Immigration Rules.

1. Background to the Bill

The *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21* was introduced to the House on 5 March 2020. Second Reading took place on 18 May.

The Bill was considered by a Public Bill Committee over eight sittings between 9 - 18 June. The Committee took evidence from expert witnesses for the first two sittings. A range of external stakeholders submitted written evidence to the Committee.[1]

1.1 Summary of the Bill

The purpose of the Bill is to repeal EU free movement of persons and other related EU-derived rights in UK law, and make EU, EEA and Swiss citizens subject to UK immigration controls. It would also make provision to protect Irish citizens' immigration rights, and to amend retained direct EU legislation relating to social security co-ordination.

The Bill has three Parts. It comprises nine clauses and three Schedules.

Part 1 and Schedule 1 cover measures relating to the ending of EU free movement law in the UK.

- **Clause 1 and Schedule 1** repeal retained EU law relating to free movement. This will enable EEA nationals (and their family members) to become subject to UK immigration laws after the end of the Brexit transition period.
- **Clause 2** protects Irish nationals' existing rights, by clarifying their legal status in the UK after free movement ends. It does this by making various amendments to the *Immigration Act 1971*.
- **Clause 3** amends section 61 of the *UK Borders Act 2007*, in order to ensure that the definition of "the Immigration Acts" across legislation includes Part 1 (and associated provisions in Part 3) of the Bill.
- **Clause 4** gives the Secretary of State broad powers to make regulations in consequence of or in connection with the provisions in Part 1 of the Bill. These include "Henry VIII" powers to modify primary legislation, and powers to modify "retained direct EU legislation".

Part 2 and Schedules 2 and 3 make provision for social security co-ordination.

- **Clause 5 and Schedules 2-3** allow the Government (and/or a devolved authority) by regulations to modify retained EU law on social security co-ordination. The Government states that this power is necessary to enable it to make arrangements for social security co-ordination "whether the UK has a future agreement with the EU at the end of the transition period or not."

[1] Available on the Bill's pages on the Parliament website.

Part 3 sets out the Bill's defined terms, territorial extent, arrangements for commencement, and short title. The Bill applies to the whole of the UK. Provisions in Part 1 may be extended to any of the Channel Islands, the Isle of Man, and any of the British overseas territories. The Scottish Parliament and Northern Ireland Assembly will be asked for a Legislative Consent Motion in respect of clause 5.

The Bill does not set out the future immigration system, which will apply to EU and non-EU citizens who move to the UK after the Brexit transition period. The future immigration system will be provided for in the Immigration Rules.

The Library briefing prepared in advance of the Bill's Second Reading debate provides a more detailed overview of the Bill's clauses.

1.2 Second Reading debate

The Bill passed its Second Reading stage on 18 May by **351 votes to 252**.[2] Labour and the SNP voted against it.

The Home Secretary, Priti Patel, said that it showed that the Government is "delivering on the people's priorities" and reflected the promise made during the 2016 EU referendum to end free movement and regain control of the UK's borders.[3] She heralded the "once in a lifetime opportunity to reform our immigration system" and signalled the Government's determination to "get it right" from the start.[4]

The Home Secretary acknowledged that the broader context for the Bill had significantly changed since it was first introduced, due to the coronavirus pandemic. Ms Patel expressed a belief that the Bill would "play a vital role in our recovery plans". Many Members from opposition parties suggested that the timing of the Bill was inappropriate, referring to the uncertainty caused by the public health and unfolding economic crises, and limited information about the Government's plans to introduce a new immigration system from next year.[5]

Speaking for Labour, Nick Thomas-Symonds, Shadow Home Secretary, highlighted the Bill's broad regulation-making powers and raised concerns that some looked-after children in care with rights under the EU Withdrawal Agreement could lose their legal status if they do not apply to the EU Settlement Scheme before the deadline.[6]

Saying that "fairness will be at the heart of the amendments that the Opposition will press in Committee", he identified securing a time limit for immigration detention as a particular priority for the Opposition. David Davis also signalled an intention to table such an amendment.[7]

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2 HC Deb 18 May 2020, division 46
3 HC Deb 18 May 2020 c399
4 HC Deb 18 May 2020 c399
5 HC Deb 18 May 2020 c407
6 HC Deb 18 May 2020, cc401-405
7 HC Deb 18 May 2020 c413

In relation to the Government's plans for the future immigration system, Mr Thomas-Symonds remarked

> Those who clapped on Thursday are only too happy to vote through a Bill today that will send a powerful message to those same people that they are not considered by this Government to be skilled workers. (...) Government Ministers who were out clapping for the 180,000 EU nationals in the NHS and the care sector on Thursday night are sending a message tonight that they are no longer welcome. That is not fair, and it is not in the national interest.[8]

Various opposition Members made similar points, criticising the salary threshold for the new immigration system, implications for the social care sector, and objecting to the limited opportunities that MPs will have to scrutinise the Government's exercise of powers provided by the Bill and immigration rules introducing the new immigration system.

Caroline Nokes, former Minister for Immigration, sounded a note of caution over plans to implement the new system from next January, suggesting that "sometimes the best laid plans to revolutionise our immigration system do not work well when introduced on a big-bang style."[9] She expressed concern for small businesses who have not previously sponsored migrant workers through the points-based system and are currently dealing with the disruption caused by the coronavirus pandemic. Alberto Costa encouraged the Government to "think more about what comes after the points-based system", namely the route to citizenship and what could be learned from other countries' approaches to that.[10]

Various other topical immigration policy issues, not directly related to the Bill, were also raised. These included policies towards migrant workers in the health and social care sectors, the 'no recourse to public funds' rule, the Immigration Health Surcharge and other costs associated with the immigration system, and the findings of Wendy Williams' Windrush 'Lessons Learned' review.

The measures in the Bill relating to social security co-ordination (clause 5) received minimal attention.

8 HC Deb 18 May 2020 c402
9 HC Deb 18 May 2020 c406
10 HC Deb 18 May 2020 c410

2. Public Bill Committee

2.1 Repeal of retained EU law relating to free movement (clause 1)

Clause 1 introduces Schedule 1, which provides for the repeal of retained EU law relating to free movement of persons and immigration.

Previous commentary

The drafting of Schedule 1 has been criticised for ambiguity. Giving expert evidence in one of the Committee's preliminary sessions, Adrian Berry, a barrister and the Chair of the Immigration Law Practitioners' Association, commented:

> We look to the law to know what it means. We look for legal certainty and for good administration. In clause 5(5), and in paragraph 4(1) and 4(2) of schedule 1, you find the same legislative drafting technique used—retained EU law applies except in so far it is inconsistent with—and then a general statement—immigration Acts or an immigration function or regulations made. How is the ordinary person, never mind the legislator, to know whether the law is good or not in a particular area if you draft like that? You need to make better laws. Make it certain, and put on the face of the Bill those things that you think are going to be disapplied because they are inconsistent with immigration provisions. There must be a laundry list in the Home Office of these provisions and it would be better if they are expressed in the schedule to the Bill.[11]

Debate in Committee

Clause 1 and Schedule 1 were approved on divisions by 8 votes to 5.[12]

Holly Lynch, Shadow Immigration Minister, set out Labour's general disagreement with clause 1 and Schedule 1, describing the clause as "the Bill in a nutshell". She identified two broad themes, which were reflected in the various amendments and new clauses the Opposition tabled throughout the Committee's proceedings:

> Concerns about the clause fall into two distinct groups: ensuring that we have done the right thing by the some 3.5 million EU citizens who are already here under free movement rules when those come to an end, and certain groups in particular, and looking ahead to the future impact of restricted migration flows.[13]

Stuart McDonald, speaking on behalf of the SNP, expressed his party's strong opposition to clause 1 and Schedule 1, asserting that "there is nothing much to celebrate and lots to regret about clause 1, and indeed schedule 1".[14]

Stuart McDonald moved an amendment to paragraph 4(2) of Schedule 1. He argued that the Bill should expressly specify the provisions in the Workers Regulation which would be affected by the paragraph.

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11 PBC Deb 9 June 2020 c52
12 PBC Deb 11 June 2020, division 1; division 3
13 PBC Deb 11 June 2020 c83
14 PBC Deb 11 June 2020 c85

Kevin Foster, Minister for Future Borders and Immigration, said that it would not be possible to compile an exhaustive list "because court judgments will affect that." He emphasised that the purpose of the provision was to end the immigration rights arising from the Workers Regulation:

> Retaining sub-paragraph (4)(2) of schedule 1 will in no way compromise our commitments to upholding the rights of resident EEA citizens already working in the United Kingdom. It will simply ensure other provisions of the workers regulation, which are not specific to immigration, do not have ongoing effects on UK immigration law, but continue to have their effects for other purposes, hence the wording of the sub-section. Otherwise the UK would be required, for example, to provide all EEA citizens with an offer of employment as though they were British citizens, meaning they could not be subjected to any restrictions on access in the UK labour market, directly undermining the new points-based immigration system, which will not provide preferential treatment for EEA citizens.
>
> The changes made by sub-paragraph (4)(2) only relate to immigration aspects of the workers regulation and will not affect any other rights provided by that regulation. For example, the right to equal treatment in respect of positions of employment and work, and the right to join a trade union are unaffected by the provision, because this Bill is not the appropriate vehicle in which to consider them or to look for a power to alter or amend them.[15]

Stuart McDonald's amendment to Schedule 1 was disapproved by 8 votes to 5.[16]

Kate Green raised similar concerns about paragraph 6 of Schedule 1, which provides that:

> (1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as—
>
> > (a)they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or
> >
> > (b)they are otherwise capable of affecting the exercise of functions in connection with immigration.

Again, she sought to clarify "What exactly are the Government trying to target?" She raised a concern that the broad wording of the paragraph meant that it could be used to repeal EU-derived legal protections beyond the scope of free movement rights, citing the anti-trafficking directive, asylum reception conditions directive, and the victims' rights directive as possible examples. She argued that "As things stand, the breadth of the language in paragraphs 6 and a lack of sufficient objective parameters to ascertain its intended targets make it impossible to accurately predict which areas of retained EU law could be affected by the Bill." She continued:

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[15] PBC Deb 11 June 2020 c88-89

[16] PBC Deb 11 June 2020, division 2

> It raises fundamental legal concerns. Migrants and their representatives, Home Office caseworkers and judges must be able to ascertain with a reasonable degree of certainty what the law is. Indeed, that is one of the core lessons learned from the Windrush review carried out by Wendy Williams. I do not believe that this provision meets that standard.[17]

In response, Kevin Foster said that the purpose was to ensure that "people cannot in the future attempt to rely on such directly effective rights to bypass the system to enter and reside in the UK, other than under the points-based system".[18] He gave a couple of examples of rights that would be disapplied and some broader assurances about how the provisions would be used:

> Some people have asked for examples of rights that paragraph 6 would disapply. They include the rights of Turkish nationals to preferential immigration treatment under the European Economic Community-Turkey association agreement. They also include, as the hon. Member for Stretford and Urmston said, derivative rights of residents under EU law such as Zambrano carers, and the Chen, Ibrahim and Teixeira cases, which will cease from the day that paragraph 6 comes into force. Those rights stem directly from the treaty on the functioning of the EU and need to be disapplied because otherwise people could continue to cite and rely on them to bypass the future immigration system.
>
> The Government do not intend to use the provisions to avoid our responsibilities under international law. We are very clear that our system of protection routes will continue to operate separately from the system of migration rules, as they always have. Family migration will not form part of the points-based system; it will be based on the family migration rules. The wording has to be the way it is so that the paragraph is not too wide in scope. This is about citing it in relation to immigration—trying to cite an EU right to work in the UK rather than applying the provision in a situation where we would, for example, be breaching our international obligations. As I said during the evidence session on Tuesday, under statutory instruments and regulations, Ministers cannot act against international law. (...)
>
> In essence, the schedule is about being clear that it will not be possible to use a range of rights to undermine the points-based immigration system that we are putting in place. We want to make it clear that EEA and non-EEA citizens should look to migrate under the points-based system.[19]

Policy towards applications submitted after EUSS deadline, etc.

In later Committee sessions, following on from discussion of the Bill's commencement provisions, a group of new clauses proposed by opposition Members related to the EUSS application deadline were discussed. Members sought clarity over how the Government would approach applications received after the deadline and what kinds of circumstances would constitute a 'reasonable excuse' for missing the deadline. They also queried the status of EU nationals[20] in the period between the cut-off date for eligibility under the EUSS (31 December

[17] PBC Deb 11 June 2020 c91
[18] PBC Deb 11 June 2020 cc91-92
[19] PBC Deb 11 June 2020 c92
[20] In this briefing, 'EU' in this context means EU, EEA or Swiss nationals.

2020) and the deadline for applying to the EUSS (30 June 2021), and for people whose applications have not been resolved before the deadline.[21]

In terms of clarifying policy on what would constitute a reasonable excuse for missing the EUSS deadline, Kevin Foster said:

> ..., as we have shown with all aspects of the scheme, we will take a flexible and pragmatic approach and allow people with reasonable grounds for missing the deadline a further opportunity to apply. We will set out further guidance on this issue in due course, but with over a year to go until the deadline, our focus is on getting as many applications before it as possible.[22]

He further stated:

> I think it is safe to say that the list will not be an exhaustive one. There will need to be an element of discretion as we cannot list every single possible situation that might reasonably cause someone to be late in their application, but if, for example, they have had a difficult court case or something that meant they had not been able to apply, and a status had then been granted, it is likely that that would be seen as a reasonable excuse. It will be set out in guidance.
>
> Our intention is to set out a list of situations that are not exhaustive but indicative. We can all think of circumstances that would be perfectly reasonable. For example, in the case of a child in the care of a local authority, we would expect the local authority to have made efforts to get them registered. We could make a very long list and still not get to an exhaustive level. The list will demonstrate grounds, but it will not be an exhaustive list of the only situations that we would accept as reasonable grounds for failing to apply on time.[23]

The Minister confirmed that the Government is currently working on regulations to protect the rights of EU nationals during the six-month grace period after the end of the transition period:

> As we touched on, section 7 of the European Union (Withdrawal Agreement) Act provides powers to make regulations to provide temporary protection for this cohort during the grace period. That means that if someone has not applied under the EU settlement scheme by the end of the transition period, they will be able to continue to work and live their lives in the UK as they do now, provided that they apply by 30 June 2021 and are then granted status. The Government are currently developing those regulations, which will be debated and made in good time prior to the entry into force at the end of the transition period.[24]

The Minister subsequently wrote to Committee members confirming that the rights of people with unresolved EUSS applications on 30 June 2021 will also be protected by regulations:

> The regulations will save these rights for those who make an application by 30 June 2021 until it is finally determined. This includes pending the outcome of any appeal against a decision to refuse status under the EU Settlement Scheme. This means

[21] PBC Deb 16 June 2020 cc180-6; cc187-196
[22] PBC Deb 16 June 2020 c193
[23] PBC Deb 16 June 2020 c194
[24] PBC Deb 16 June 2020 c195

> someone who applies by the deadline of 30 June 2021 and has not yet been granted status under the EU Settlement Scheme can continue to work and live their life in the UK until their application is finally determined. The Home Office cannot take immigration enforcement action against an EEA citizen in this position, whose rights are protected while their immigration status is being resolved.[25]

2.2 Irish citizens (clause 2)

Clause 2 seeks to protect Irish nationals' existing rights, by clarifying their legal status in the UK after free movement ends. It does this by making various amendments to the *Immigration Act 1971*.

Previous commentary

The clause has been broadly welcomed. The Committee received evidence from some expert witnesses about some broader areas of ongoing uncertainty in respect of Irish citizens' rights in the UK, including:

- The legal status of the Common Travel Area (CTA) and associated rights, and potential differences with rights arising from the EU Settlement Scheme (EUSS).
- The threshold for deportation of Irish nationals, and whether this should be reflected in primary legislation rather than policy.
- How UK immigration law accommodates provisions in the Belfast Agreement concerning the rights of people of Northern Ireland to identify as British, Irish or both, and whether providing them with a right of abode in the UK might be an effective solution.[26]

Debate in Committee

Labour and the SNP both signalled their overall support for clause 2. It was ordered to stand part of the Bill without division.

There was some discussion of issues raised during the Committee's expert evidence sessions relating to the status of the CTA and associated rights, immigration issues arising from the Belfast Agreement, and policy on deportation of Irish nationals.

In terms of the rights of Irish citizens, the Minister said:

> Following the evidence sessions on Tuesday, I make clear that once free movement rights end, and to the extent those rights are not protected by the withdrawal agreement, an Irish citizen in the UK will be able to bring family members to the UK on the same basis as a British citizen. Crucially, this is because Irish citizens are considered settled from the day they arrive in the United Kingdom. Taken with these wider rights, the clause supports the citizenship provisions in the Belfast agreement that enable the people of Northern Ireland to identify as British, Irish or both as

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25 DEP 2020-0337, 17 June 2020
26 PBC Deb 9 June 2020 cc31-40; PBC 9 June 2020 c70

> they may so choose, and to hold both British and Irish citizenship.[27]

On deportation of Irish nationals, Kevin Foster reiterated that the longstanding policy was not changing:

> I confirm that our approach is to deport Irish citizens only where there are exceptional circumstances or where a court has specifically recommended deportation, which is incredibly rare. Committee members will be aware that we made provision to ensure that, from 1 January 2021, Irish citizens would be exempt from the automatic deportation provisions in the UK Borders Act 2007. That exemption is contained in the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, laid before the House in February last year. This clause also amends section 9 of the Immigration Act 1971 to confirm that restrictions placed on those who enter the UK from the common travel area by order under that section do not apply to Irish citizens.[28]

He confirmed that the Home Office was not aware of any case of an Irish national being deported from the UK in recent eras. Nevertheless, he argued that it would not be appropriate to put the policy in primary legislation:

> It is not right to specify such things in a Bill. There might be a circumstance around national security, but it would have to be exceptional, given the very good relationship we enjoy with the Republic of Ireland.[29]

In terms of the status and associated rights of Irish nationals in the UK more generally, the Minister said:

> Effectively, their Irish passport becomes equivalent to a UK national's passport.[30]

He confirmed that the Government is not considering providing a right of abode for Irish nationals.[31]

In a later sitting, the Committee considered new clause 27, proposed by Holly Lynch. It would have required the Government to lay a report detailing and contrasting rights arising from the CTA with those provided through the EUSS. Kevin Foster was not receptive to this request, but did offer to write to Stuart McDonald to confirm the action being taken to ensure that Irish nationals do not suffer a loss of rights in the UK after Brexit.[32]

2.3 Regulation-making powers (clause 4)

Clause 4 gives the Secretary of State broad powers to make regulations in consequence of or in connection with the provisions in Part 1 of the Bill. These include "Henry VIII" powers to modify primary legislation, and powers to modify "retained direct EU legislation".

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27 PBC Deb 11 June 2020 c94
28 PBC Deb 11 June 2020 c93
29 PBC Deb 11 June 2020 c97
30 PBC 11 June 2020 c97
31 PBC Deb 11 June 2020 c98
32 PBC Deb 18 June 2020 c258; see letter of 22 June 2020, DEP 2020-0350

Previous commentary

The wording of the clause is unchanged from the 2017-19 version of the Bill, which attracted considerable criticism. The Lords Delegated Powers and Regulatory Reform Committee's report on the 2017-19 Bill expressed concern that the clause gave a 'very significant delegation of power from Parliament to the Executive.'[33] The Committee came to this view due to the 'the combination of the subjective test of appropriateness, the words "in connection with Part 1", the subject matter of Part 1 and the large number of persons who will be affected'.

The Immigration Law Practitioners' Association considers that drafting of clause 4 and the absence of a sunset provision has "potential for the power to be abused beyond the government's intentions." It has argued that the justifications for the powers provided during the 2017-19 session no longer stand, because of the passage of subsequent legislation. It also argues that powers in other pieces of legislation (*European Union (Withdrawal Agreement) Act 2020*) could be used to achieve the same aims. [34]

Debate in Committee

Clause 4 was ordered to stand part of the Bill by 8 votes to 6.[35]

Clause 4 generated considerable debate in Committee.

Reducing the scope of powers under clause 4

Stuart McDonald proposed several amendments to clause 4, some of which were also supported by Labour. He said they were "designed to cut those powers down to size and to keep MPs in a job". The amendments variously sought to

- require use of the powers to be "necessary" rather than "appropriate" (amendment 2; rejected by 8 votes to 6)[36]
- remove the words "in connection with" (amendment 3)
- remove the power to make regulations modifying provisions on immigration fees or charges (amendment 4)
- limit the scope of the powers to schedule 1 (amendment 20)
- insert sunset clauses on the use of the powers (amendment 21)
- specify certain principles to guide the exercise of delegated powers under clause 4, including promotion of family life and a right of appeal (amendment 22)

Rejecting criticisms that Ministers were seeking a "blank cheque", Kevin Foster set out how the Government intends to use the powers in clause 4, emphasising that:

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33 *46th Report of Session 2017-19: Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, HL 275 2017-19, 30 January 2019, para 15

34 E.g. ILPA, *ILPA submission on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill – Public Bill Committee stage*, June 2020

35 PBC 11 June 2020, division 8

36 PBC Deb 11 June 2020, division 4

> ...we need this power to ensure that our laws operate coherently once free movement ends, to align the immigration treatment of newly arriving EEA citizens and non-EEA citizens from 1 January 2021, and to make relevant savings and transitional provisions for resident EEA citizens that cannot be made under powers in the European Union (Withdrawal Agreement) Act 2020.[37]

He sought to provide reassurance on how the power would be used in relation to Irish nationals' rights (clause 2):

> I understand the queries about that point. To be absolutely explicit, we intend to use that power in a very limited way to amend provisions in the Immigration Act 1971 that cover entering the UK via the common travel area. We will not use them for wider changes. As I said this morning, the Belfast agreement is fundamental international law, as well as a fundamental part of our constitution.[38]

He further suggested that drafting the clause more narrowly could lead to legal challenges and uncertainty, because opponents could make arguments about whether a regulation was "appropriate" or "necessary", and so on, in an attempt to undermine the ending of free movement law.[39]

Dissatisfied with the Minister's response, Stuart McDonald argued:

> Much of what he said related to how the Government propose to use these powers or what they are planning to do, but that is not how we should go about assessing whether the scope of the powers is appropriate. We need to assess what the scope of these powers would, in theory, allow the Government to do, and that goes way beyond what he set out.[40]

In response to concerns about the open-ended nature of the clause, the Minister said:

> ... regulations will need to be made under clause 4 to coincide with the repeal of free movement law by part 1. We have endeavoured to ensure that they make all the changes required by primary and secondary legislation, to come into effect by the end of the transition period. Beyond that, I assure him that we would make further changes under the power only if that were required, and Parliament will be fully engaged whenever it is used.
>
> The power cannot be used to make amendments relating to the consequences of exiting the EU more generally; it can be used only in consequence of or in connection with ending free movement and the clarified status of Irish citizens. Changes cannot be made indefinitely, as they would not be in consequence of or in connection with that purpose. For example, the powers cannot be used to amend future primary legislation or general immigration policies.[41]

Parliamentary scrutiny of regulations made under clause 4

A further set of amendments, proposed by Stuart McDonald and also endorsed by Labour, sought to amend the parliamentary approval process for regulations made under clause 4 (amendments 5, 8,9). The

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37 PBC Deb 11 June 2020 c114
38 PBC Deb 11 June 2020 c114
39 PBC Deb 11 June 2020 c113
40 PBC Deb 11 June 2020 c117
41 PBC Deb 11 June 2020 c115

Minister said that the made-affirmative procedure was necessary for the first set of regulations in case there is only a short amount of time between the Bill receiving Royal Assent and the end of the transition period on 31 December.[42]

Stuart McDonald pushed amendment 5 to a vote, but it was rejected by 8 votes to 6.[43]

Making the EUSS a declaratory system

Amendment 16, also pushed to a vote by Stuart McDonald, concerned the longstanding debate over whether people covered by the citizens' rights provisions in the UK-EU Withdrawal Agreement should have those rights provided by automatic operation of the law (a 'declaratory' system). The UK is currently operating a 'constitutive' system, meaning that people will only continue to have a legal status if they successfully apply to the EUSS before the application deadline next June.

Advocates of a declaratory system say that it would give certainty to everyone affected by the Withdrawal Agreement and ensure that no-one loses their legal status and entitlements on account of failure to apply to the EUSS.

Since its inception, successive UK governments have resisted calls to make the EUSS a declaratory system. They have argued that to do so would remove the incentive for people to apply for confirmation of their status, and risk creating difficulties for people to prove their immigration status in the future, similar to the Windrush scandal.

Reflecting this rationale, Kevin Foster said:

> The Government are adamant that we must avoid a situation where, years down the line, EEA citizens who have built their lives here find themselves struggling to prove their rights and entitlements in the UK. That is why we have set up this system. I fundamentally believe that changing a system that is working well would have the opposite effect to that which the amendment is intended to achieve. It would reduce the certainty of a grant of status under the EU settlement scheme, which has already been given to more than 3 million EEA citizens and their family members.[44]

The Minister alluded to the likely approach that the Home Office would take to cases that come to light after the application deadline next June:

> Like I said, we would be reasonable in accepting late applications—for example, if somebody did not have EU settled status because they were a child in care or mentally incapable at the time when they should have applied. I suspect that when we publish the guidance those two situations will be among the list of reasonable reasons for late applications. (...) We think it right that at some point a line be drawn, although we would be reasonable in respect of the circumstances of a late application. Certainly, in the early stages after the deadline, it is likely that the

42 PBC Deb 11 June 2020 c126

43 PBC Deb 11 June 2020, division 6

44

> bar to cross will be fairly low, in terms of what is a reasonable reason for not having made the deadline.[45]

Stuart McDonald rejected these arguments, contending that people would still have strong motivation to apply for confirmation of their status under a declaratory system:

> If we make the system declaratory, people will still apply because they need digital proof of their status to access work, social security, education and whatever else.[46]

The Committee returned to some of these issues in a later session in the context of debate on proposed new clauses 41 and 58 (discussed further in section 3.1 of this briefing).

Mr McDonald further warned:

> If he wants to talk about incentives, there is a big problem for anyone who misses the deadline of 30 June 2021. When they find out that they have missed it, they suddenly think, "I thought I was British, but I am not. I thought I had rights here because I had status under the old EU system, but it turns out I don't." Those hundreds of thousands of people will be absolutely petrified of applying to the Home Office because they have no assurance that they will be granted status here. There are vague words about being reasonable, but that did not really cut it for the Windrush generation, and this is a much bigger problem.[47]

Amendment 16 was disapproved on division by 8 votes to 5.[48]

Several other non-Government amendments were discussed in the context of debate on clause 4:

- to impose a cut-off date for the clause (amendment 12; negatived on division 9 votes to 7)[49]
- to ensure that regulations made under clause 4 do not have a detrimental effect on the children of EU nationals in the UK (amendment 15; rejected on division by 8 votes to 6)[50]
- to extend asylum seekers' rights to work whilst waiting for a decision on their asylum claim (amendment 13)
- to abolish the financial ("minimum income") requirement for partner visas (amendment 1)
- to suspend application of the financial requirement during the coronavirus pandemic (new clause 34)[51]
- to preserve the 'Surinder Singh' route for close family members of UK citizens living in the EU, which enables them to move to the UK under terms provided in EU free movement law, rather than the UK's Immigration Rules requirements (amendment 14)

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[45] PBC Deb 11 June 2020 c143
[46] PBC Deb 11 June 2020 c145
[47] PBC Deb 11 June 2020 cc144-5
[48] PBC 11 June 2020, division 7
[49] PBC Deb 16 June 2020, division 11
[50] PBC Deb 11 June 2020, division 5
[51] Kevin Foster subsequently wrote to all Committee members setting out the detail of arrangements introduced by the Home Office for partner visa applicants who are subject to the minimum income requirement and experience a temporary loss of income due to Covid-19, DEP 2020-0315, 12 June 2020.

2.4 Social security co-ordination (clause 5)

Clause 5 and Schedules 2 and 3 allow the Government (and/or a devolved authority) by regulations to modify retained EU law on social security co-ordination. The Government states that this power is necessary to enable it to make arrangements for social security co-ordination "whether the UK has a future agreement with the EU at the end of the transition period or not."[52]

The European Commission published a draft treaty text on 18 March covering all aspects of the EU's envisaged Future Relationship with the UK.[53] The draft treaty includes a Protocol on Social Security Coordination. Legal texts published by the UK Government on 19 May included a Draft Social Security Coordination Agreement setting out the UK's proposals. A Commons Library briefing, The UK-EU future relationship negotiations: social security co-ordination[54], compares the two texts.

Previous commentary

Compared with other parts of the Bill, clause 5 and Schedules 2 and 3 were debated only briefly in Committee. The issues highlighted were similar to those raised in the proceedings on the equivalent provisions of the 2017-19 Bill, although the context for the current Bill is slightly different.[55] Witnesses giving evidence to the 2017-19 Bill Public Bill Committee, and opposition parties' Members on that Committee, raised concerns about:

- the breadth of the powers conferred on Ministers;
- the lack of information on how the powers might be used; and
- the fact that Parliament would have no opportunity to amend legislation on future social security co-ordination arrangements[56]

The House of Lords Delegated Powers and Regulatory Reform Committee recommended that clause on the 2017-19 Bill should be omitted from the Bill on the ground that it contained an "inappropriate delegation of power."[57]

Giving evidence to the Public Bill Committee examining the current Bill, Jeremy Morgan, Vice Chair of British in Europe, said that although the Government had given assurances that it would uphold rights guaranteed by the Withdrawal Agreement, he was worried that the regulation-making power in clause 5 was wide enough to modify rights under the Withdrawal Agreement.[58] He also voiced concern that,

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52 Explanatory Notes, Bill 104-EN, para 18

53 Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020

54 CBP-8928, 11 June 2020

55 The main justification for the power in the 2017-19 Bill was to enable the Government to implement its preferred approach if the UK left the EU without a Withdrawal Agreement

56 See section 4.6 of Commons Library briefing CBP-8706, Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21, 13 May 2020

57 46th Report of Session 2017-19: Immigration and Social Security Co-ordination (EU Withdrawal) Bill, HL 275 2017-19, 30 January 2019, para 53

58 PBC Deb 9 June 2020 cc33-34

without adequate social security co-ordination measures in place, the number of British people moving to European countries would reduce considerably. He felt that it would be a "significantly reduced opportunity for young people in the UK now", noting that "seventy-nine per cent of UK citizens living in Europe at present are of working age or younger."[59]

Adrian Berry of the Immigration Law Practitioners' Association, told the Public Bill Committee that clause 5 was unnecessary:

> On clause 5, you already have powers to amend ineffective retained EU law under section 8 of the European Union (Withdrawal) Act 2018, so you can make regulations under Henry VIII powers to deal with any deficiencies in retained EU law and social security. You have given yourself additional powers under section 13 of the European Union (Withdrawal Agreement) Act 2020 to make regulations for social security co-ordination, so you already have two sets of Henry VIII powers. You are currently negotiating a third social security treaty, annexed to the draft free trade agreement. If that is agreed with the EU, you will have another Act of Parliament that you will need to implement that. Why do you need a fourth set in clause 5? If there is anything left in social security law that you have not covered under the array of Henry VIII powers that you are arming yourselves with, primary legislation and the scrutiny of MPs in this room at the highest level is required.[60]

Mr Berry also pointed out that the UK's Draft Social Security Coordination Agreement published on 19 May (see above) does not include any provisions to allow the payment of disability pensions overseas, or to reimburse healthcare charges for people in receipt of exported disability or old age pensions.[61] He said that this would impact "anybody who thinks they are going to be retiring in Spain, Italy or France", and that for disabled people moving after the end of the transition period travel would become "very problematic."[62]

Debate in Committee

No amendments to clause 5 were debated in Committee. In the debate in whether clause 5 should stand part of the Bill, Labour's Kate Green commented:

> The issue is the mission creep and scope creep involved in using secondary legislation to amend primary legislation and retained EU rights, particularly a mission creep that now encompasses the ability to make significant policy changes.[63]

She asked the Minister (Kevin Foster):

> Does he not in fact accept that changes in this important area require full debate and scrutiny in Parliament, and that the principles of any future policy should be set out in primary legislation?[64]

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59 PBC Deb 9 June 2020 c38
60 PBC Deb 9 June 2020 c50
61 PBC Deb 9 June 2020 c58
62 PBC Deb 9 June 2020 c59
63 PBC Deb 16 June 2020 c154
64 PBC Deb 16 June 2020 c155

For the SNP, Stuart McDonald said that while he acknowledged the need for the appropriate authorities to have some powers in relation to social security co-ordination, those powers should be "focused on making technical fixes rather than providing carte blanche", adding that the powers in the clause were "hugely broad."[65] Mr McDonald said:

> As Adrian Berry argued when he gave evidence last Tuesday, all these clauses should at least have the test of being "appropriate", if not being "necessary", as a qualification. Opposition MPs have been championing the "necessary" test, but the Government have always preferred the test of appropriateness. However, even that is absent from the clause. On paper, therefore, we are creating powers to make inappropriate regulations, which seems quite an unusual concept. More than ever, we need reassurance on what exactly the intended use of these regulations is, and we will look carefully at what the Minister said about that this morning.[66]

Mr McDonald also pressed the Government on whether it would consider an amendment to the Bill to introduce a duty on UK Ministers to consult Scottish Ministers before exercising the powers in clause 5 in relation to devolved social security competencies.[67]

The Minister for Future Borders and Immigration, Kevin Foster, said that the Government had been given "clear advice" that the powers in clause 5 were necessary. He said:

> Fundamentally, the clause is intended to ensure that we can implement powers and make the changes necessary, as outlined, to deliver the specific policy changes that we made clear in our manifesto, particularly around the export of child benefit, and also to ensure that we do not end up in a bizarre position where the UK is trying unilaterally to implement what is meant to be a reciprocal system, should we not be able to get a further agreement or if we have an agreement but are not able quickly and promptly to implement it.[68]

Mr Foster said that the affirmative procedure meant that both Houses would scrutinise any regulations and have the opportunity to block them if they felt they were inappropriate. He also noted that if a Minister made "wholly inappropriate" regulations then, unlike primary legislation, they could be reviewed in the courts.

The Minister said discussions with the Scottish Government were underway about the powers in clause 5. He hoped that the Scottish Parliament would pass a legislative consent motion, but said that if it did not, the Government would table amendments at Report Stage to remove the powers in relation to devolved matters in Scotland.[69]

The question that clause 5 should stand part of the Bill was agreed by 8 votes to 5. The five voting against were Labour Members. Schedules 2 and 3 were agreed to without a vote.

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65 PBC Deb 16 June 2020 c155
66 PBC Deb 16 June 2020 cc155-156
67 PBC Deb 16 June 2020 c156
68 PBC Deb 16 June 2020 c157
69 PBC Deb 16 June 2020 c157

In a letter of 17 June[70] to Kate Green (also copied to Members of the Committee), the Minister provided further clarification on matters raised in the debate on clause 5. The letter states that, among other things:

- The clause is necessary because the Government needs to prepare for all eventualities, including no further negotiated outcome: "It would not be practicable to repeatedly pass primary legislation should the Government be in a position where it was making different changes in relation to individual member states." The power is necessary to be able to respond flexibly and quickly to ensure certainty for citizens and businesses about the rules from 1 January 2021.
- On whether further primary legislation on social security co-ordination might be required in the event that an agreement is reached with the EU: "The Government will keep under review whether any further primary power may be needed to implement any aspects of the future relationship which falls outside the scope of powers we have already and under this Bill. The Government would still require Clause 5 in all scenarios to repeal those areas of the retained regulations not covered in a reciprocal agreement with the EU."
- Any draft regulations made under clause 5 would be submitted to the Social Security Advisory Committee (SSAC) for scrutiny.

Scotland and legislative consent

In a letter to the Committee Chairs on 22 June, Kevin Foster confirmed that the Scottish Government had not given legislative consent for the provisions in clause 5 of the Bill, and that as he had indicated in Committee, the Government would therefore be tabling amendments at Report. The letter explains:

> Following a further letter sent to the Scottish Government seeking legislative consent, the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville MSP, confirmed on 19 June the Scottish Government will not support legislative consent for the clause 5 relevant provisions of the Bill. This is despite stating in a legislative consent memorandum during the passage of the Bill in the previous Parliament that the conferred power for Devolved Administrations was welcome and useful.
>
> As I explained during Committee stage on 16 June, if the Scottish Government did not support consent, the UK Government would seek to amend clause 5 to restrict the powers in the Bill in relation to Scotland, with the effect of not engaging the legislative consent process in the Scottish Parliament. This is in line with the Sewel Convention.
>
> The amendments I am tabling today seek to: remove the power for Scottish Ministers to modify retained EU direct legislation under clause 5 (and to remove all related provisions in Part 2 of the Bill, the Social Security Coordination provisions); and to limit the power of the Secretary of State and the Treasury, and a Minister of the Crown acting jointly with a Northern Ireland Department, to make modifications so that they cannot make provision which falls within Scottish legislative competence.

[70] The letter has not been placed in the Library

> These amendments will not impact on reserved powers in the Bill or the powers for the UK Government or Northern Ireland Department to make provisions within Northern Irish legislative competence.
>
> The Scottish Government would need to bring forward their own parallel legislation to give them equivalent powers to amend the retained EU social security co-ordination regulations in areas of devolved competence.
>
> There has been significant engagement at official level with counterparts in the Scottish Government, in which the potential implications for the Scottish Government of not having these powers has been outlined.[71]

2.5 Extent, commencement etc. (Part 3)

Clauses 6,7, 8 and 9 were ordered to stand part of the Bill without divisions.[72]

Stuart McDonald used the territorial extent clause as an opportunity to discuss further the SNP's concerns about the impact of the new immigration system on Scotland. He proposed some amendments concerned with the potential to operate differentiated immigration policies across the component parts of the UK. Amendment 17, which he took to a vote, would have disapplied clause 1 and Schedule 1 in Scotland. It was rejected by 14 votes to 2.[73]

2.6 Proposed new clauses

The Government did not table any amendments or proposed new clauses to the Bill.

Half of the substantive Committee sessions were spent on scrutiny of proposed new clauses tabled by opposition Members. In many instances the sponsors indicated that the effect of their proposals would be limited to EEA nationals, due to the Bill's narrow remit, and that they would have preferred them to have a wider application if the scope of the Bill had permitted. Many of the SNP's proposals were supported by the Labour frontbench, and vice versa.

No new clauses were added to the Bill, but some went to a vote:

- proposing exempting EEA nationals from the Immigration Health Surcharge (new clause 12, disapproved by 8 votes to 2)[74]
- on fees for registration as a British citizen (new clause 13, rejected by 8 votes to 7)[75]

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71 DEP2020-0351
72 PBC Deb 16 June 2020 c158; c170; c180
73 PBC Deb 16 June 2020, division 10
74 PBC Deb 16 June 2020, division 12
75 PBC Deb 16 June 2020, division 13

- proposing bringing legal advice on rights under the Act within scope for legal aid (new clause 14, rejected by 8 votes to 7)[76]
- proposing an advisory committee on Immigration Rules (new clause 16, rejected by 8 votes to 7)[77]
- providing that the Bill (upon receiving Royal Assent) would not come into effect until a report clarifying the rights of EU nationals during the post-transition grace period had been laid (new clause 25, disapproved by 8 votes to 6)[78]

Many other new clauses, on a range of issues, were debated but not pressed to a vote.

Members of the Committee indicated that they intended to pursue several of the topics at Report stage, including:

- on the financial/minimum income requirement for sponsoring a partner visa (discussed in Committee as amendment 1)[79]
- to suspend the application of the 'no recourse to public funds' visa condition during the coronavirus pandemic (discussed in Committee as new clause 45)[80]
- to limit the application of hostile/compliant environment policies (discussed in Committee as new clause 55)[81]
- on immigration detention policies and practice.[82]

A couple of the new clauses had significant cross-party support:

- to grant EU national children in care/care leavers status under the EU Settlement Scheme automatically (discussed in Committee as new clause 41)
- to continue existing arrangements enabling unaccompanied asylum-seeking children, spouses and vulnerable adults to reunite with close relatives in the UK (discussed in Committee as new clause 46).

Automatic grant of status under EUSS for children in care/care leavers

New clause 41 (and a similar clause moved by Labour, new clause 58), sought to deal with the risk of EU children in local authority care losing their legal status in the UK through failure to apply to the EUSS.

It proposed that any child in care or child entitled to leaving care support who has rights to reside in the UK under EU free movement law would be automatically granted Indefinite Leave to Remain under the EUSS (i.e. 'settled status').

The clause was tabled by Tim Loughton and had extensive support from members across party lines, including the Chairs of the Home Affairs

76 PBC 16 June 2020, division 14
77 PBC Deb 16 June 2020, division 15
78 PBC Deb 18 June 2020, division 16
79 PBC Deb 11 June 2020 c135
80 PBC 18 June 2020 c300
81 PBC Deb 18 June 2020 c320
82 PBC Deb 18 June 2020 c306

Committee and Joint Committee on Human Rights. Dame Diana Johnson moved the new clause in Committee.

Diana Johnson and Holly Lynch both raised concerns about the number of children who have been able to secure their status through the EUSS so far. They referred to Home Office estimates that around 5,000 looked-after children and 4,000 care leavers would need to regularise their status before the EUSS application deadline, and contrasted this with the findings of recent research by The Children's Society:

> [The Children's Society] ...conducted its own research, sending freedom of information requests to every local authority or children's services provider in the UK. That totalled 211 providers, 153 of which responded to the FOI requests by January this year. Those local authorities identified just 3,612 European economic area or Swiss looked-after children and care leavers, which is only 40% of Home Office estimates. Of those 3,612 children and young people, only 730 had so far applied to the EU settlement scheme. Of those, only 404 were in receipt of status—282 had settled status and 122 had pre-settled status—meaning that, of those identified by local authorities, only 20% have applied and only 11% have been granted status. Although the data represents 73% of local authorities or service providers, and as such is not fully representative, it offers a strong indication that there are serious and urgent concerns about identifying and settling the migration status of vulnerable children whose status and future will be significantly affected by the Bill.[83]

Both Members contended that it was unlikely that there had been a significant increase in applications over the past few months, during the Covid-19 pandemic. They probed the Minister to share information that the Home Office has gathered on the number of looked-after children who might need to apply to the scheme.

Kevin Foster said that it wouldn't be possible to provide figures on the number of children potentially affected, because the cut-off date for eligibility isn't until the end of this year. He highlighted the quarterly statistical releases which include information about the number of applications made to the EUSS on behalf of children.[84]

Diana Johnson detailed some of the underlying difficulties that have arisen in seeking to identify eligible children in care and secure their status. These included local authorities' difficulties in identifying which children in their care have a qualifying nationality; social workers' lack of expertise or legal knowledge on immigration and nationality law; social workers' lack of awareness of the EUSS or their responsibilities under it; difficulties obtaining evidence of nationality from embassies or other supporting evidence; and the constraints imposed by general workload and the effects of the Covid-19 pandemic.[85]

Kevin Foster set out the action that the Government has taken in consultation with local authorities to ensure that looked after children and care leavers are supported in securing their status. This includes liaising with other relevant government departments and stakeholders,

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83 PBC Deb 18 June 2020 c283
84 PBC Deb 18 June 2020 c287
85 PBC Deb 18 June 2020 cc274-6

issuing guidance to local authorities on their responsibilities, conducting a new burdens assessment to ensure that adequate funding is in place, and facilitating direct contact between Home Office caseworkers and local authority staff making applications.

He repeated the Government's previously cited reasons for not wanting to grant status under the EUSS automatically. Diana Johnson and Holly Lynch had provided the Committee with more detailed explanations of how they envisaged a process of identifying potentially eligible children and automatically granting them status operating in practice. In response, the Minister said:

> I listened carefully to the comments made by the hon. Member for Kingston upon Hull North, in which she outlined the process local authorities could go through to list the children and send those lists to the Home Office. I thought, "If local authorities are going to go through all this, then the logical thing for them to do is make the applications that are required under the EU settlement scheme, and ensure the children they are listing have the status they need." It is hard to see what the benefit to councils would be if we introduced a different process that did not produce a better outcome. If that is what we are going to ask people to do—arrange a working identifier—the next stage is to ask them to make quite a simple application to the European settlement scheme to get the status that child deserves.[86]

Finally, he reiterated that the "reasonable grounds" excuse for failing to make an in-time application to the EU Settlement Scheme would cover children in care:

> Fundamentally, changing a system that is working well overall would have the exact opposite effect to that which the new clauses appear intended to achieve, leading to confusion and uncertainty. We have also made it clear that where a person eligible for status under the scheme has reasonable grounds for missing the deadline—for example, if their council did not apply to the EU settlement scheme on their behalf—they will be given a further opportunity to apply. We will ensure that individuals who have missed the deadline through no fault of their own can still obtain lawful status in the UK, which I suggest is a far better response to the concerns expressed by Opposition Members than the new clauses they are proposing. That is why the Government will not accept them.[87]

Diana Johnson's view, on the other hand, was that an approach which prevented a child becoming undocumented was preferable to acting to rectify their position after the event.[88]

Refugee family reunion

New clause 46 enabled the Committee to debate the Government's intended future arrangements for facilitating family reunion for refugees and asylum seeker families separated across Europe.

Although the UK's Immigration Rules allow some refugee family members to join the sponsoring refugee in the UK, they are more narrow in scope compared to related EU law (the Dublin III Regulation).

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86 PBC Deb 18 June 2020 cc288-9
87 PBC Deb 18 June 2020 c289
88 PBC Deb 18 June 2020 c275

The Dublin Regulation will no longer apply to the UK after the Brexit transition period.[89] Refugee advocates are concerned that separated families, including unaccompanied children, will lose routes to family reunion if the UK doesn't negotiate a similar new agreement with the EU or broaden the scope of its own Immigration Rules.

The Government has only committed to seeking a replacement deal with the EU in respect of unaccompanied asylum-seeking children. In May, it published the text of a draft agreement on this, which forms part of the negotiations on the future relationship with the EU. The EU has not identified this issue as a negotiating priority or produced a comparable draft text on the topic.

New clause 46, as debated in Committee, would have required the Government to amend the Immigration Rules in order to preserve the effect of the Dublin III Regulation. The intention was to ensure that unaccompanied asylum-seeking children, spouses and vulnerable adults would continue to have the same opportunities to reunite with close relatives in the UK.

It was a cross-party amendment tabled by the Home Affairs Committee.

Stuart McDonald introduced the new clause in Committee, on its behalf. He noted that it was also supported by the Chairs of the Joint Committee on Human Rights and Housing and Local Government Committee. Holly Lynch confirmed that Labour would also support the amendment.[90]

Mr McDonald summarised the concerns with the Government's proposed draft agreement with the EU:

> There are numerous problems with what the Government propose. Most fundamentally, the proposed text removes all mandatory requirements on the Government to facilitate family reunions and would make a child's right to join their relatives entirely discretionary. The text also intentionally avoids providing rights to children. It does not provide for appeals and attempts to put these issues beyond the reach of UK courts. Other categories of vulnerable refugees, including accompanied children and adults, would lose access to family reunion altogether. A series of other key safeguards are removed, including strict deadlines for responses and the responsibility for gathering information being on the state rather than the child.
>
> This issue is hugely important. Between 2009 and 2014, before mandatory provisions were introduced by Dublin III, family reunions to the UK were carried out at an average rate of 11 people annually. Between 2016 and 2018, after the mandatory provisions were introduced by Dublin III, family reunions to the UK were carried out at an average rate of 547 people annually.[91]

Reflecting on the position of separated children and families more generally, he commented:

[89] For background, see Commons Library briefing, *The UK's refugee family reunion rules: a comprehensive framework?*, 27 March 2020
[90] PBC Deb 18 June 2020 c301
[91] PBC 18 June 2020 cc300-1

> We now have a situation where there are unaccompanied child refugees and refugees more generally living in appalling conditions in Greece and France. Of course those countries are under an obligation to do more to support and assist them, but many of those kids have family here, and I cannot see how any reasonable person can argue against the logic, the sense and the simple compassionate idea that that child should be reunited with their family in this country and have their asylum claim decided here.[92]

Responding for the Government, Kevin Foster defended the UK's track record in providing asylum, refugee resettlement and refugee family reunion to people who need it.[93]

He criticised the new clause for failing to distinguish between asylum seekers and refugees, arguing that "Allowing individuals to sponsor family members to join them in the UK before a decision on their asylum claim is made creates greater uncertainty for families, who may be unable to remain in the UK." He also argued that expanding the range of relatives potentially eligible to join a family member in the UK could reduce the UK's general capacity to offer protection to people who need it:

> Very careful consideration is required before we extend family reunion provisions, to guard against significantly increasing the number of people who could qualify for family reunion, but who do not necessarily need protection themselves and who may be making unfounded claims of our protection systems for economic migration purposes. That could reduce our capacity to assist the most vulnerable refugees.[94]

He also explained why, in the Government's view, seeking a negotiated agreement with EU Member States on future transfers of unaccompanied asylum-seeking children is a better approach than unilaterally amending the UK's Immigration Rules in the way that the new clause suggested:

> As a sovereign state, it is important that we do not seek to recreate EU laws unilaterally, without considering what we want the UK's migration and humanitarian protection system to look like. (...)
>
> (...). A negotiated agreement for a state-to-state referral and transfer system would provide clear and consistent processes between the UK and EU member states, ensuring appropriate support for the child and guaranteeing reciprocity, yet these guarantees cannot be provided for in domestic UK provisions alone because they are inherently reciprocal. In addition, subsection (2)(a) of the new clause would require immigration rules to be made by regulations. That is not how immigration rules are made; they are made under the procedures set out in the Immigration Act 1971.[95]

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92 PBC 18 June 2020 c301
93 PBC Deb 18 June 2020 cc303-5
94 PBC Deb 18 June 2020 c304
95 PBC Deb 18 June 2020 cc304-5

3. Remaining stages (Commons)

3.1 Commons Report and Third Reading

The Bill had Report and Third Reading stages in the Commons on 30 June.

A string of **Government amendments**, concerning social security co-ordination provisions as per clause 5 and 6 of the Bill, were approved without a division. The Minister for Immigration explained that they sought to restrict the relevant powers in the Bill in relation to Scotland, so that they would no longer engage the legislative consent process. This was in response to the Scottish Government's decision to recommend that the Scottish Parliament do not give its legislative consent to the Bill.[96]

There were divisions on four **non-government amendments** at Report stage, none of which were approved. They variously proposed:

- That the Government commission an independent evaluation of the effect of the Bill on the health and social care sectors (new clause 1, negatived by 247-344 votes).[97]
- A 28-day time limit on the use of immigration detention (new clause 7, negatived by 252-332 votes).[98]
- A suspension of the No Recourse to Public Funds visa condition during the Covid-19 pandemic (new clause 13, negatived by 248-337 votes).[99]
- That the refugee family reunion Immigration Rules be amended in order to preserve the family reunion rights provided for in EU law - the Dublin III Regulation (new clause 29, negatived by 255-332 votes).[100]

Members voted to give the Bill a Third Reading, 342-248.[101]

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96 HC Deb 30 June 2020 c259
97 HC Deb 30 June 2020, Division 61
98 HC Deb 30 June 2020, Division 62
99 HC Deb 30 June 2020, Division 63
100 HC Deb 30 June 2020, Division 64
101 HC Deb 30 June 2020, Division 65

4. Developments in the Lords

4.1 Committee reports

The Lords Constitution Committee reported on the Bill on 2 September. It noted that the Bill

> . ... raises issues of constitutional concern that have been recurring themes of our legislative scrutiny work, particularly in respect of bills relating to Brexit. These include broad delegated powers, including Henry VIII powers, for which there is little policy detail as to their intended use; insufficient safeguards and scrutiny processes in relation to the use of these powers; and the relationship between the UK Government and the devolved administrations.[102]

It highlighted concerns about the "vague" and "subjective" terms used in the drafting of the broad provisions in the Bill, concluding that "They risk making a complex area of the law even more difficult to navigate and understand for practitioners and individuals alike."[103]

Similar points were made in the Lords Delegated Powers and Regulatory Reform Committee's separate report.[104] Focusing on clauses 4 and 5, the Committee identified "very significant delegations of power" from Parliament to the Executive. It specified a number of changes that it considered should be made to remedy concerns about the drafting of clause 4. It concluded that clause 5 should be removed from the Bill completely.

Both Committees were highly critical of the 'skeleton bill' style of the Bill's drafting. Noting that such an approach inhibits parliamentary scrutiny, the Delegated Powers Committee raised a concern that the Bill "could be seen as effecting a ...transfer of powers from the EU to Ministers, bypassing Parliament."[105]

4.2 Consideration over Lords stages

A similar range of issues attracted the interest and scrutiny of Peers as in the Commons.

The Bill was considered over three days in Public Bill Committee. There were no divisions and the Bill was not amended.

Report stage took place over three days, on 30 September and 5-6 October. One government amendment was approved without division. Several non-government amendments were approved upon division. A technical amendment to one of the non-government amendments was

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[102] Select Committee on the Constitution, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, 2 September 2020, HL Paper 120, para 4

[103] Select Committee on the Constitution, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, 2 September 2020, HL Paper 120, para 8

[104] Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* , HL Paper 118, 25 August 2020

[105] Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* , HL Paper 118, 25 August 2020, para 47

subsequently approved without division at Third Reading stage on 12 October.

Government amendment

One government amendment was approved at Lords Report stage.

Lords amendment 11 would amend paragraph 4(2) of Schedule 1, to confine its scope to Articles 2 – 10 of the Workers Regulation (Amendment 32A, approved without a division).[106]

The amendment was a response to criticisms that the original drafting of the paragraph failed to provide legal certainty. It followed through on an undertaking given at Committee stage by the Home Office Minister, Baroness Williams, to consider the matter further.

The similar style of drafting in **Paragraph 6 of Schedule 1** has also been criticised, but the Government continues to argue that it is not possible to change it to be more specific. Baroness Williams said:[107]

> I wish it were possible but there are far too many such rights, and their effect without the EEA regulations of 2016 would be too uncertain. (...) Therefore, rather than attempting to list the rights, paragraph 6 makes it clear that whichever rights are retained, they can in no way trump domestic immigration law—something that everyone can understand.

She continued:

> A person's immigration status is also widely used as an element of eligibility tests for public services and benefits. That is why the phrase "capable of affecting the interpretation, application or operation" is used. It clarifies that where eligibility rules refer to a provision of, or made under, the immigration Acts, equal treatment rights form part of retained EU law cannot be invoked to bypass such rules and give EEA migrants preferential treatment. I would add that this removal of preferential treatment is subject to the provisions of the withdrawal agreements, ensuring that EEA citizens who are resident before the end of this year are entitled to the same access to benefits and services as they are now.

Non-government amendments

Peers voted in favour of several non-government amendments, summarised below.

Impact of the ending of free movement on the social care sector (Lords amendment 1)

Background information

Library briefing *The new points-based immigration system* (11 May 2020).

[106] HL Deb 6 October 2020, c602
[107] HL Deb 6 October 2020, c600-1

The Lords amendment

This amendment would require the Government to commission and publish an independent assessment of the impact of section 1 of the Bill (i.e. the ending of EU free movement laws) on the social care sector within six months of the Bill's enactment.

The Government objects, arguing that it would be more appropriate to let the independent Migration Advisory Committee determine whether there is a need for such a report. It has also referred to its broader reforms to work visa routes under the new points-based immigration system, including the creation of a dedicated 'health and care' visa, and actions it is supporting to reduce the sector's dependence on immigration to fill staff shortages.

For related debate see HL Deb 30 September 2020 c183-203 (Minister's comments from c199). Amendment 3, in the name of Lord Rosser (Labour), agreed by 304-224 votes.[108]

Family visa requirements affecting British citizens living in the EU (Lords amendment 2)

Background information

Library briefing *Family visa requirements: future changes affecting British citizens in the EU* (8 October 2020).

The Lords amendment

This amendment would insert new sub-clauses 5A-C to **clause 5** of the Bill. They would require the Government to make regulations preserving a lifetime entitlement for British citizens living in the EU before the end of this year to return to the UK with their close family members under the terms of EU free movement laws, rather than the UK's Immigration Rules.

If the amendment does not remain part of the Bill, non-British family members of British citizens living in the EU face becoming subject to the UK's family visa requirements from Spring 2022.

The Government has objected to the amendment, on the grounds that it would not be fair to other British citizens if this group of people had a lifetime exemption from the UK's family visa requirements. It rejects the contention that it is imposing retrospective changes on British citizens living in the EU, by pointing out that it is giving almost three years' advance notice of the changes.

For related debate, see HL Deb 30 September 2020 c245-259; Minister's comments from c257. Amendment 11, in the name of Baroness Hamwee (Liberal Democrat), agreed by 312 votes to 223.[109]

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[108] HL Deb 5 October 2020, Division 1.
[109] HL Deb 5 October 2020, Division 2

Entitlement to settled status for EEA/Swiss children in care (Lords amendment 3)

Background

Alf Dubs, Tim Loughton, *The Independent,* 'It's vital we protect EU children in care from an uncertain future brought about by Brexit', 5 October 2020

The Lords amendment

Lords amendment 3 would insert a new clause requiring the Home Office to grant Indefinite Leave to Remain (i.e. settled status) under the EU Settlement Scheme (EUSS) to any child who is in the care of a local authority or entitled to leaving care support and is losing free movement rights under the Bill, further to receiving notification of the child's existence from the local authority.

It is intended to ensure that no child/young person in care or leaving care will become undocumented due to a failure to apply for status under the EUSS.

The Government has consistently argued against the need for such a provision. It has emphasised:

- That if such children were automatically granted status without a requirement to apply to the EUSS, they would not receive any proof of their status, which could lead to problems similar to those encountered by Windrush cases.
- That the Home Office is already providing support to local authorities to help them to identify children/young people potentially affected by the ending of EU free movement law in the UK and to ensure that they get status under the EUSS in time.
- As an additional safeguard, Home Office policy guidance on 'reasonable grounds' for missing the EUSS application deadline will allow for late applications from children in care/leaving care.

For related debate, see summary in section 2.6 of this briefing (Commons Committee stage) and HL Deb 30 September 2020, c262-274; Minister's comments from c271. Amendment 14, in the name of Lord Dubs (Labour), agreed by 323 votes to 227.[110]

Lord Dubs subsequently tabled a technical amendment to the clause at Third Reading stage, which was approved without a division.[111] It was in response to the Government's concerns about the automatic effect of the clause as previously worded. Lord Dubs clarified that his intention is that children/young people would be granted status through the EUSS, thereby receiving confirmation of their status.

[110] HL Deb 5 October 2020, Division 3
[111] HL Deb 12 October 2020, c882

Refugee family reunion and unaccompanied children (Lords amendment 4)

Background information

Library briefings *Brexit: The end of the Dublin III regulations in the UK* (14 October 2020), section 3.2 and *The UK's refugee family reunion rules: a comprehensive framework?* (27 March 2020).

The Lords amendment

The amendment is concerned with retaining the effect of the Dublin III Regulation's family reunion provisions in the UK after the end of the Brexit transition period.

Specifically, it would insert a new clause into the Bill which would establish a legal route for people in Europe to apply for asylum in the UK and obtain permission to enter the UK as asylum seekers. This would be available to people who are in a participating 'Dublin state' and would have been eligible for a transfer to the UK under the terms of the Dublin Regulation, if it still applied to the UK.

The new clause would require that, at least until there is a replacement agreement between the UK and EU in force, such a person must be granted permission to enter the UK for the purpose of claiming asylum. It specifies that applications for permission to enter the UK must be free of charge and decided within two months.

Furthermore, it would require the Government to make a strategy for ensuring that unaccompanied children in an EU Member State continue to be relocated to the UK, if it is in the child's best interests. This strategy must be laid before Parliament within six months of the Bill's enactment.

Campaigners are concerned that, without these provisions, separated families in Europe face losing a legal route for reunion in the UK due to the ending of the Dublin Regulation and absence of a successor agreement between the UK and EU.

The Government's main arguments against accepting the amendment are that:[112]

- It does not want to pre-empt the prospect of securing a negotiated agreement with the EU on the transfer of unaccompanied children. A UK-EU agreement would be preferable to relying on domestic rules, because it would guarantee the support of sending states.
- The UK's Immigration Rules already provide appropriate routes for refugee family reunion, and it would not be appropriate to replicate the provisions in the Dublin Regulation having left the EU. The Government is not persuaded, for example, that children should be able to sponsor applications from other family members, or that asylum seekers in the UK should be able to be joined by family members before their claim for asylum has been determined (both provided for under Dublin).

[112] HL Deb 5 October 2020 c405-7

- The requirement to lay a strategy for a new relocation scheme for unaccompanied children would be "incredibly difficult to deliver" considering the capacity strains that local authorities are already experiencing in respect of looking after unaccompanied children.

For related debate see summary in section 2.6 of this briefing (Commons Committee stage) and HL Deb 5 October 2020, c392-411; Minister's comments from c405. Amendment 15, in the name of Lord Dubs (Labour), agreed to by 317 votes to 223.[113]

Physical proof of status documents for EUSS applicants (Lords amendment 5)

Background information

Library briefing *EU Settlement Scheme* (23 February 2020), section 9.2.

The Lords amendment

This would insert a new clause requiring that people who are granted settled or pre-settled status granted under the EUSS be provided with a physical proof of their status upon request, free of charge.

The Government contends that the amendment would be a hindrance to efforts to modernise the immigration system and would have significant unfunded cost implications. It says that providing digital proof of status is part of broader moves within the immigration system to embrace digital technologies, which are working well so far; and that the Government is taking steps to ensure that elderly and vulnerable people are not disadvantaged.

For related debate, see HL Deb 5 October 2020 c446-474; Minister's comments from c467. Amendment 18, in the name of Lord Oates (Liberal Democrat), approved by 298 votes to 192.[114]

Restrictions on the use of immigration detention (Lords amendments 6, 7, 8 and 10)

Background information

Library briefing *Immigration detention in the UK: an overview* (12 September 2018).

The Lords amendments

These proposed new clauses would restrict the length of time that an EEA/Swiss national may be held in immigration detention to 28 days, specify certain restrictions on the criteria and duration of the 96-hour initial detention period, and provide for a bail hearing within the 96 hours. They would come into effect six months after the Bill/Act is passed.

The Government's objections include that legislating for a maximum time limit for immigration detention would enable people to frustrate

[113] HL Deb 5 October 2020, Division 4
[114] HL Deb 5 October 2020, Division 5

the removal process by "running down the clock". It is particularly concerned that foreign national ex-offenders would be automatically released after 28 days, regardless of the risk they posed to the public or whether they had a previous history of non-compliance with immigration requirements. It argues that immigration detention is used sparingly and for the shortest period possible. It also notes that all detainees have the right to apply for bail at any time, and there are automatic bail referrals for non-foreign national offender cases after four months.

Previous consideration

For related debate, see HL Deb 5 October 2020 c488-501; Minister's comments from c497. Amendment 20, in the name of Baroness Hamwee (Liberal Democrat), approved by 184 votes to 156.[115] Amendments 21, 22, and 31 which were consequential to Amendment 20 approved without division.[116]

Immigration protections for EEA/Swiss national victims of trafficking (Lords amendment 9)

Background information

Iain Duncan Smith and Lord McColl, Politics Home, 'Victims of slavery must not be left worse off as we end free movement', 5 October 2020

The Lords amendment

This would insert a new clause requiring that the Immigration Rules provide for EEA/Swiss nationals who have been confirmed as victims of trafficking/modern slavery to be granted at least 12 months' temporary leave to remain (with recourse to public funds), if:

- leave is necessary due to the person's circumstances; or
- the person is participating as a witness in criminal proceedings; or
- the person is bringing civil proceedings including pursuing compensation.

The proposed clause would effectively give greater statutory weight to the grounds within existing policy guidance on when to grant Discretionary Leave in trafficking/modern slavery cases.

The current position is that a person found to be a victim of trafficking/modern slavery does not automatically qualify for leave to remain in the UK - the Immigration Rules do not provide for leave to remain to be granted on that basis. But there are circumstances in which recognised victims can qualify for temporary permission to stay.

The options available depend on the person's nationality/immigration status. EEA/Swiss nationals can claim a right to reside in the UK under EU free movement of people law (e.g. if exercising treaty rights as a worker, student, self-sufficient person, etc.). Those in the UK before the

[115] HL Deb 5 October 2020, Division 7
[116] HL Deb 5 October 2020 c504; HL Deb 6 October 2020, c595

end of the transition period will be eligible to apply for status under the EUSS.

EEA/Swiss national victims who cannot assert a right to reside under EU law can apply for Discretionary Leave "outside the Immigration Rules", where the individual circumstances of the case give compelling reasons to do so. Leave is granted with recourse to public funds.

Discretionary Leave is also available to non-EEA national victims (who may also have other options, such as claiming asylum). Whereas non-EEA national victims who have claimed asylum are automatically considered for Discretionary Leave, EEA/Swiss nationals (who are generally ineligible for asylum) must apply for it.

If a person does not qualify for Discretionary Leave or any other leave, they are expected to leave the UK.

Supporters of the new clause contend that EEA/Swiss national trafficking victims face the prospect of losing some immigration protection due to the ending of EU free movement law in the UK and the cut-off point for applying to the EUSS. Lord McColl explained at Lords Report stage:

> At the end of the transition period, and once any opportunity to apply for settled or pre-settled status has passed, victims of human trafficking who are EEA nationals will be worse off because they will lose one of the key avenues to support that is available today—exercising their treaty rights—and that will be replaced by nothing.
>
> The confirmed victim will simply be left with the option of applying for discretionary leave to remain. This may not matter if there were a statutory basis for granting discretionary leave, with statutory criteria to make up for the loss of the opportunity for confirmed victims to access support through their treaty rights.

In speaking to the amendment, Lord McColl emphasised that his amendment would not provide for an automatic grant of Discretionary Leave to all EEA/Swiss nationals confirmed as victims of trafficking/modern slavery. Decisions to grant status would still rely on an assessment of the individual facts of the case.

However, speaking for the Government in opposition to the amendment, Lord Parkinson, a Government Whip, characterised the amendment as providing for a "blanket policy of granting Discretionary Leave". He set out the Government's concerns that it could be abused by some people who would make a false trafficking/modern slavery claim to secure permission to remain in the UK.

For related debate see HL Deb 6 October 2020 c566-580; Minister's comments from c577. Amendment 27, led by Lord McColl (Conservative), approved by 312 votes to 211.[117]

[117] HL Deb 6 October 2020, Division 1

4.3 Social security co-ordination

As noted in section 4.1 above, both the Lords Constitution Committee[118] and the Lords Delegated Powers and Regulatory Reform Committee[119] expressed serious concern about the breadth of the powers in clause 5 of the Bill (now clause 13 of the Bill as amended by the Lords) allowing the Government to modify retained EU law on social security co-ordination. The Delegated Powers Committee concluded that the Government had not provided adequate justification for a "wholesale transfer to Ministers of power to legislate" in this area, and recommended that the clause be omitted from the Bill on the ground that it contained an "inappropriate delegation of power."[120] The Constitution Committee strongly agreed with this recommendation. The Government's response to the Delegated Powers Committee's report was published on 14 October.[121]

On 4 September, the Government made available 'draft illustrative regulations' showing how it intended to use the delegated power in the event of a negotiated outcome with the EU on future social security co-ordination, together with an explanatory memorandum.[122]

On the final day of the Lords Committee Stage, amendments tabled by opposition parties seeking to probe and place limits on the powers under clause 5 were discussed, but none were put to the vote.[123] A letter dated 2 October from the DWP Minister Baroness Stedman-Scott to Baroness Sherlock gives further information on a number of questions raised during the Committee's proceedings.[124]

An amendment to clause 5 tabled by Lord Flight (Conservative) and Baroness Hamwee (Liberal Democrat), to ensure that the power to make regulations under clause 5 could only be used in ways consistent with the UK's obligations under the EU Withdrawal Agreement, was discussed at Report Stage on 6 October.[125] Baroness Stedman-Scott assured the House that the clause "does not enable the Government to alter the rights guaranteed to those in scope of the withdrawal agreement."[126] The amendment was withdrawn.

No Government or non-government amendments were made in the Lords to the clause and schedules in the Bill on social security co-ordination.

118 Select Committee on the Constitution, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, 2 September 2020, HL Paper 120
119 Delegated Powers and Regulatory Reform Committee, *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* , HL Paper 118, 25 August 2020
120 Ibid. para 44
121 HL Paper 141
122 Deposited Paper DEP2020-0517
123 HL Deb 16 September 2020 cc1361-1375
124 Deposited Paper DEP2020-0574
125 HL Deb 6 October 2020 cc592-595
126 Ibid. c594

5. Ping-pong stages

5.1 Outcome of Commons and Lords considerations

Commons consideration of Lords amendments (19 October)

Lords amendment 11 (the government amendment to paragraph 4 of Schedule 1) was agreed to without division.

The remaining Lords amendments were all disagreed to.

There were five divisions:

- Lords amendment 1: rejected by 335-254 votes.
- Lords amendment 3: rejected by 330 – 262 votes.
- Lords amendment 4: rejected by 327-264 votes.
- Lords amendment 5: rejected by 331-260 votes.
- Lords amendment 6: rejected by 328-264 votes.

- See links for Hansard debate and Commons reasons for disagreeing to the Lords' amendments (HL Bill 145).

Lords consideration: 21 October

The Lords did not insist upon any of their amendments but agreed **Lords amendment 4B** (on refugee family reunion and unaccompanied children) as a substitute for Lords Amendment 4.

There were three divisions:

- Lords amendment 2B: disagreed to by 168-254 votes.
- Lords amendment 4B: agreed to by 320 – 242 votes.
- Lords amendment 5: disagreed to by 166-237 votes.

- See links for Hansard debate, Minutes of proceedings and Lords Amendment in Lieu (Bill 204 of 2019-21).

Lords amendment 4B is the same as Lords amendment 4, except that it does not include the requirement for visa applications for people covered by the amendment be free of charge.

It was proposed by Lord Dubs in response to the Commons' reason for rejecting Lords amendment 4 (namely, that it engaged financial privilege).

Arguing against the amendment in lieu on 21 October, Baroness Williams said that the amendment would still impose a number of costs

related to family reunion applications and the processing of related asylum claims, which could not be recovered from an application fee.

During the course of the debate, Baroness Williams gave some further undertakings in relation to the Government's future intentions with regards to safe and legal routes to the UK for asylum seekers, refugees and their families. She said:

> ... the Government will conduct a review of safe and legal routes to the UK for asylum seekers, refugees and their families, which will include reviewing routes for unaccompanied asylum-seeking children to reunite with their family members in the UK. As noble Lords will recollect, we intend to bring legislation next year that will deliver those reforms.

And in relation to negotiations with the EU or individual Member States:

> ... I understand noble Lords' concerns about the risk of a non-negotiated outcome on asylum and illegal migration, and I can, today, make a commitment to the House that in the event of a non-negotiated outcome, this Government will pursue bilateral negotiations on post-transition migration issues with key countries with which we share a mutual interest. This will include new arrangements for the family reunion of unaccompanied asylum-seeking children. I hope noble Lords listened carefully to what I have just said.
>
> As I was leaving the Home Office today, the Greek Minister for Immigration and Asylum was in the Home Secretary's office, and I hope that is a clear demonstration of our commitment to these issues. I will also commit, on the back of that, to report back to the House in good time regarding our intentions to make progress in this area.[127]

In pushing his amendment to a vote, Lord Dubs said:

> The Minister referred to the Home Secretary's commitment that she wants safe and legal routes for family reunion of children. Of course, that is an aspiration, but it has to be made effective, and I am not convinced that anything the Government are doing will actually give effect to the Home Secretary's commitment. The Minister also said that even after 31 December, the Government will continue to talk to achieve bilateral arrangements. That is well and good, but that is a long way ahead, and the Government have, in the past, given undertakings, and, frankly, nothing much has come of them.[128]

Lords amendment 4B was approved by 320 – 242 votes.[129]

Commons consideration: 4 November

The Government disagreed with Lords amendment 4B. It proposed a **new clause in lieu (amendments 4C, 4D, 4E), which was accepted by the Commons** by 333 – 264 votes.[130]

Briefly, the new clause commits the Government to arranging for a review of legal routes of entry to the UK for people in EU Member

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127 HL Deb 21 October 2020 c1599
128 HL Deb 21 October 2020 c1599
129 HL Deb 21 October 2020, Division 2
130 HC Deb 4 November 2020, Division 162

States who have claimed asylum there or who are seeking to claim asylum in the UK (including unaccompanied children who are seeking family reunion with relatives in the UK).

In considering the position of unaccompanied children in EU Member States, the review must include a public consultation.

The Secretary of State must lay a statement before Parliament providing further details about the review. A report on the outcome of the review must be published and laid before Parliament after it has been completed. The proposed clause does not specify a timetable for completion of the review.

During the course of the debate on the amendment in lieu, Kevin Foster confirmed that the review will consider legal routes to the UK from all countries, rather than only EU Member States.

Lords consideration: 9 November

After a brief debate, and discussion of some assurances given by Baroness Williams about how the UK's family reunion Immigration Rules can apply to 'Dublin' cases and ensuring that the related guidance for Home Office officials is updated if necessary, Lord Dubs withdrew his amendment 4B.[131]

5.2 Government undertakings made during Ping-pong

The Government committed to implementing a couple of the other Lords amendments, whilst successfully arguing that they shouldn't be accepted for insertion in the Bill:

- **On the Bill's impact on the social care sector (Lords amendment 1):** The Government committed to the substance of the amendment – specifically, to publishing an independent assessment of the impact of ending free movement on the social care sector, within six months of the Bill's enactment.[132]
- **On immigration protections for EEA/Swiss national victims of trafficking (Lords amendment 9):** The Government committed to amending policy guidance to provide that from 1 January 2021, EEA national confirmed victims of trafficking/modern slavery will be automatically considered for Discretionary Leave to remain, in line with existing policy for non-EEA national victims. Ministers also committed to having discussions with Sir Iain Duncan-Smith and Lord McColl about the possibility of introducing further measures to provide support to victims of modern slavery.[133]

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[131] HL Deb 9 November 2020 c818-832
[132] HL Deb 21 October 2020 c1576
[133] HC Deb 19 October 2020 c807-8; HL Deb 21 October 2020 c1620-1

Annex: Committee members

Chairs: Sir Edward Leigh, Graham Stringer

Members:

- Davison, Dehenna (Bishop Auckland)
- Elmore, Chris (Ogmore)
- Foster, Kevin (Torbay)
- Goodwill, Mr Robert (Scarborough and Whitby)
- Green, Kate (Stretford and Urmston)
- Holden, Mr Richard (North West Durham)
- Johnson, Dame Diana (Kingston upon Hull North)
- Lewer, Andrew (Northampton South)
- Lynch, Holly (Halifax)
- McDonald, Stuart C. (Cumbernauld, Kilsyth and Kirkintilloch East)
- O'Hara, Brendan (Argyll and Bute)
- Owatemi, Taiwo (Coventry North West)
- Pursglove, Tom (Corby)
- Richardson, Angela (Guildford)
- Roberts, Rob (Delyn)
- Ross, Douglas (Moray)
- Sambrook, Gary (Birmingham, Northfield)

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