GREENER UK

Wildlife and Countryside LINK

Consultation on the departure from retained EU case law by UK courts and tribunals

A response from Greener UK and Wildlife and Countryside Link

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Introduction

This response is submitted on behalf of Greener UK, a group of 13 major environmental organisations, with a combined public membership of over 8 million and Wildlife and Countryside Link, the largest environment and wildlife coalition in England, which brings together 57 organisations to use their strong joint voice for the protection of nature.[1,2]

Background and context

1. The Ministry of Justice's consultation paper seeks views on the use of the power in section 6(5A) of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) enabling the government to provide additional courts or tribunals with the power to depart from retained EU case law. The consultation paper identifies two policy options:

    a) To extend this power to the Court of Appeal of England and Wales and its equivalents in other UK jurisdictions; or

    b) To extend the power, in addition to the Court of Appeal and equivalent courts, to the High Court of Justice of England and Wales and its equivalents in the other UK jurisdictions.

    The paper also seeks views on the test which a relevant court or tribunal must apply in deciding whether to depart from retained EU case law.[3]

2. What the consultation does not do is seek views on the existing arrangement for the end of the implementation period, namely only the Supreme Court being able to depart from retained EU case law. We question this omission. Nor does the consultation invite responses on other possible alternatives, for example requiring a referral to the Supreme Court should a lower court or tribunal be minded to depart. In our view, this approach is too narrow.

3. Extending the power to depart from retained EU case law to the lower courts would increase the risk of inconsistency in the application of the law, including with regard to the test to be applied to determine whether to depart from that case law. It would also increase the risk of re-litigation of long established precedents and principles of law. In our view pursuing either option would create serious issues for legal certainty and the rule of law.

4. This matter is not merely theoretical or abstract in nature, but of real and substantive significance for environmental protection legislation, and hence the quality of our environment in the UK.

    a) Firstly, some 80% of UK environmental legislation has been shaped by the EU. The jurisprudence of the Court of Justice of the European Union (CJEU) has therefore played a very significant role in how our domestic courts have interpreted EU environmental law. Increasing uncertainty with regard to how the jurisdictions of the

UK apply retained EU case law will therefore have a significant impact on environmental standards and legal protections.[4]

b) Secondly, the UK is a Party to the UNECE Aarhus Convention and is therefore obliged to take the requisite measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention (see Article 3(1)). Proposals that may undermine the clarity, certainty and consistency of future environmental protection across the UK should therefore be avoided. To ensure compliance with this and more generally the three pillars of the Aarhus Convention, the associated retained CJEU case law judicial interpretation is key and there is a need to avoid the inconsistency and uncertainty that the two preferred options would bring.[5,6]

Legal certainty

5. Clear and predictable laws are vital to a properly functioning legal system based on the rule of law. The government recognised in the White Paper to the European Union (Withdrawal) Act 2018 (the White Paper) that

   "*for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means*".[7]

   Indeed, the European Union (Withdrawal) Act 2018 provides for retained EU law to be interpreted in accordance with pre-exit case law, save where the UK's highest courts decide that it is appropriate to depart from that case law. As the White Paper expressly acknowledged

   "*this approach maximises legal certainty at the point of departure*".[8]

6. In addition, the House of Lords Select Committee on the Constitution concluded that regulations to extend the ability to depart from retained EU case law to lower courts and tribunals raises substantial constitutional concerns:

   "105…If the meaning of UK law, as retained EU law will become after exit day, is to be altered, it should be for Parliament to change, not for ministerial guidelines to reinterpret.

   *106. We do not believe it is appropriate for courts other than the Supreme Court and the Scottish High Court of Justiciary to have power to depart from the interpretations of EU case law. **Allowing lower courts to reinterpret EU case law risks causing significant legal uncertainty** that would be damaging to individuals and companies. **It would also increase court workloads as judgments involving departures are contested on appeal.***

   …

   *108. **We cannot see the case for such broad and constitutionally significant regulation-making powers, and are not convinced by the rationale offered by the Government…."*** (emphasis added)[9]

7. This common sense position rightly places the authority and responsibility for departing from retained EU case law with Parliament and the Supreme Court. This approach means primary legislation – which is subject to rigorous scrutiny – produces a clear source of legal authority that the public and businesses can continue to rely on when ordering their lives and affairs around retained EU case law, with no expectation these laws could suddenly change other than in exceptional circumstances when determined by the UK's final court of appeal. As the White Paper explained, EU case law governs important

matters such as the calculation of holiday pay entitlements for UK workers and what is subject to VAT in the UK. EU case law has also established vital precedents and principles of environmental law to help ensure our environment is protected, the air we breathe is clean, our water is unpolluted and the correct level of protection is afforded to habitats and species. Exposing established interpretation of the rules to unanticipated changes by the lower courts would create much uncertainty for the public and businesses. Retained EU case law should therefore only be amendable in the Supreme Court.

8. Extending the power to depart from retained EU case law to lower courts could also risk the re-litigation of long established legal precedents and principles. Certain areas of law covered by retained EU case law may be re-litigated by those seeking to overturn long held EU decisions and CJEU judgments. The prospect of re-litigation could also lead to the UK legal system becoming overwhelmed by a large number of new cases, many of which would require the UK Supreme Court ultimately to determine issues that have long been settled under retained EU case law, thus introducing a new administrative burden to our courts system.

9. If lower courts are not bound by existing EU case law there could be a proliferation of different decisions on the same legal point from lower courts, which are not necessarily binding on other courts and tribunals, including those in other UK jurisdictions. The same applies to 'retained domestic case law relating to retained EU case law' – an undefined category of law introduced by the consultation – which lower courts should not be permitted to depart from. This would further undermine legal certainty. Not all lower decisions of courts and tribunals are reported, which makes it harder for the public and businesses to establish what the law is. As the UK Supreme Court noted in Knauer v Ministry of Justice

   "*it is important not to undermine the role of precedent in the common law. […] it is important that litigants and their advisers know, as surely as possible, what the law is. Particularly at a time when the cost of litigating can be very substantial, certainty and consistency are very precious commodities in the law. If it is too easy for lower courts to depart from the reasoning of more senior courts, then certainty of outcome and consistency of treatment will be diminished, which would be detrimental to the rule of law*."[10]

10. It is therefore vital that the power to depart from retained EU case law is limited to the UK Supreme Court. Additional courts and tribunals should not be designated with the power to depart from retained EU case law. The Supreme Court is uniquely placed in the UK's multi-jurisdictional court structure in being able to avoid divergent approaches to retained EU case law across jurisdictions and being accustomed to settling complex matters of law. Furthermore, the Supreme Court sits with a minimum of five members on its panel, whereas the Court of Appeal sits as three and other courts one – this ensures a more rigorous testing of the legal arguments with a number of more experienced judges. Businesses and the public will have greater certainty and be able to organise their affairs in the knowledge that retained EU law will continue to apply unless and until amended by Parliament, or departed from by the Supreme Court in accordance with common law principles.

Devolution

11. While we appreciate that the Withdrawal Act applies across the UK, the consultation does not pay sufficient regard to the fact that many areas are devolved to the Northern Ireland Assembly, the Scottish Parliament and Senedd Cymru. This includes the majority of environmental standards, requirements and protections.

12. Furthermore, the consultation could have been more explicit in recognising the different legal jurisdictions and contexts within the UK, including emerging legislation such as The UK Withdrawal from The European Union (Continuity) (Scotland) Bill (the Scottish Continuity Bill) and the Northern Ireland Protocol, which provides for the continued application of 19 EU Directives and Regulations in Northern Ireland.

13. In exercising their power to make regulations we would therefore expect ministers to seek to engage at an early stage with colleagues from the devolved administrations so that their views and advice can be reflected in decisions. Indeed, given the devolved status of the criminal and civil law, we suggest that this power would sit more appropriately with devolved ministers in respect of their jurisdictions, and the amendment should be subject to a Legislative Consent Memorandum.

14. For example, it is difficult to see how either option proposed in the consultation would be compatible with the Scottish Government's proposals in the Scottish Continuity Bill, including those designed to 'keep pace' with EU environmental standards and requirements and to apply EU environmental principles. Subject to our organisations' (and their respective partners) comments on that bill, it represents principles that we support. We would therefore encourage the MoJ to engage with the Scottish Government to ensure that these proposals are compatible with both the devolution settlement generally and the Continuity Bill.

UK Supreme Court test

15. The government's preferred view is that the test to be applied by any additional court or tribunal is the test applied by the UK Supreme Court in deciding whether to depart from its own case law. That test permitted the House of Lords (and now by extension the UK Supreme Court) to depart from its own case law '*when it appears right to do so*'. It is generally accepted that the power will only be used sparingly. The consultation paper cites two circumstances where the power could be used (where a previous decision does not reflect modern public policy or where a previous decision causes uncertainty), but there are a number of other justifications that have been established in subsequent case law.[11,12,13,14]

16. Although the House of Lords and UK Supreme Court have rarely used this power, the vagueness of the condition '*when it appears right to do so*' has meant that the test has been applied in a disparate way. In certain cases, the age of the precedent to be relied on has been a persuasive factor in following not departing from it, while in other cases the age of the precedent has led to the House of Lords departing from it.[15,16]

17. Similarly, the extent to which the UK Supreme Court will defer to the legislature on principles of existing case law depends on a number of different factors. In Arthur JS Hall & Co v Simons, it was argued that any intervention should be left to Parliament. Lord Steyn disagreed, considering it would be an "*abdication of our responsibilities*" to so do. By contrast, in Austin v Southwark LBC the fact that the legislature had recently passed an Act which provided a "carefully crafted" process to deal with the issues created by an earlier case law precedent was held as the reason not to depart from existing case law. While it is clear that the House of Lords and UK Supreme Court have shown significant restraint in determining when it is right to depart from existing case law, it is difficult to formulate any precise rules and would therefore be difficult for lower courts to exercise the power in a consistent way. While the Supreme Court is experienced at considering 'when it appears right to' depart from its own case law and balancing the complex and wide ranging considerations required to make such a decision, other courts may not have the necessary seniority, experience and cross-jurisdictional overview. [17,18]

18. Indeed, the House of Lords and the UK Supreme Court have highlighted the dangers of departing from existing case law in anything other than exceptional circumstances. Building on the principle established in Miliangos v George Frank (Textiles) Limited that changes in public policy could constitute a reason to depart from existing case law, in Arthur, the court noted that a previous decision

    "*ought not to be overruled by the House simply because the Committee would have taken a different view about the requirements of public policy in 1967. It should be overruled only if (i) it is necessary to overrule it in order to decide the appeals, and (ii) it is clear that circumstances have changed in such a way as make its original rationale irrelevant or wrong in modern conditions.*"[19]

19. However, it is unclear from the consultation paper whether departure from the EU *itself* constitutes sufficient motivation to consider a departure from established case law.

20. In Jones v Kaney Lord Hope and Baroness Hale refused to depart from a previous decision regarding the immunity of expert witnesses in court proceedings because it would have far reaching consequences that would be difficult to predict. Baroness Hale noted that this case illustrates "*how hard it is to apply that wise guidance [from the 1966 practice statement] in practice*". Finally, in Murphy v Brentwood DC the court decided to depart from previous case law which had "*long been regarded as unsatisfactory*", and had caused a great deal of uncertainty and subsequent litigation. In particular, the court noted that to decline to depart from existing case law was to require distinctions to be made which have

    "*no justification on any reasonable principle and can only be described as capricious. It cannot be right for this House to leave the law in that state*". [20,21]

Conclusions

21. We are therefore of the firm view that the power to depart from retained EU case law should not be extended to other courts and tribunals beyond the UK Supreme Court as this would have the following potential adverse consequences:

    - Greater risks to legal certainty in the UK and a proliferation of different decisions on the same legal point from lower courts. In addition, the test used by the UK Supreme Court in deciding whether to depart from its own case law is not capable of being easily understood and applied in practice with reference to existing precedents.

    - The vagueness of the term 'when it appears right to do so' has meant that the test has been applied in a disparate way and it would therefore be difficult for lower courts to exercise the power consistently. In order to fulfil the government's aim of legal certainty at the point of departure from the EU, the power to depart from retained EU case law must be restricted to the UK Supreme Court.

    - The ensuing inconsistency of approach between the courts in England/Wales, Scotland and Northern Ireland at all levels is likely to undermine the UK's obligation to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Aarhus Convention as set out above.

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On behalf of Greener UK and Wildlife & Countryside Link

Endnotes

[1] https://greeneruk.org/
[2] https://www.wcl.org.uk/
[3] Ministry of Justice consultation on the departure from retained EU case law by UK courts and tribunals
[4] European Environmental Bureau written evidence to the assessment of EU/UK environmental policy inquiry (AEP0054)
[5] Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998
[6] Article 3(1) states: "Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention".
[7] Department for Exiting the European Union, Legislating for the United Kingdom's withdrawal from the European Union
[8] *Ibid*
[9] HL Paper 5 European Union (Withdrawal Agreement) Bill published 14 January 2020 https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/5/5.pdf
[10] [2016] UKSC 9
[11] Originally set out in the 1966 House of Lords Practice Statement (Judicial Precedent).
[12] [1966] 1 WLR 1234
[13] Supreme Court Practice Direction 3 at para. 3.1.3
[14] Murphy v Brentwood [1991] 1 A.C. 398
[15] See for example dicta of Viscount Dilhorne in R v National Insurance Comr, Ex p Hudson [1972] AC 944
[16] See for example Miliangos v George Frank (Textiles) Ltd [1976] AC 443
[17] [2011] 1 AC 355
[18] [2002] 1 AC 615
[19] [2002] 1 AC 615
[20] [2011] UKSC 13
[21] [1991] 1 A.C. 398

This response is supported by the following Link members:

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