James Lee – Written Evidence (BED0010)

Introduction

1. My research expertise is principally on judicial reasoning in supreme courts and the doctrine of precedent. In this response I confine myself to the following issues highlighted in the call for evidence:

- Whether there could be a role for the CJEU in the UK post-Brexit.
- How the Government can deal with questions relating to EU law in the domestic courts post-Brexit and during any period of transition (including the potential for divergence between UK law and EU law).

I do not speak directly to the position under any future arrangements for a supra-national court to govern new disputes post-Brexit. I shall also speak generally to the position in the law of England and Wales and English courts with respect to precedent, because there are some differences of nuance compared to Scots Law, and I do not wish to be imprecise.

2. This response takes no view on the merits of Brexit, but it does take a view on the merits of clause 6 of the Bill. My response is premised on the basis that the United Kingdom will be leaving the European Union, and that it is important that when doing so our institutions of government are preserved as strong and independent, and that private law matters such as consumer rights are the subject of appropriate adjudication. Furthermore, on the government’s own terms, the desire is for Brexit to be ‘smooth and orderly’ and to preserve certainty for individuals, business and the UK as a whole. On that basis, amendments are necessary.

3. In summary, my points are as follows:

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3 See eg, the Prime Minister quoted here: https://www.politico.eu/article/theresa-may-committed-to-smooth-and-orderly-brexit/.

• The wording of clause 6 of the present Bill is inadequate because it relies on an imprecise understanding of how domestic and European courts reason with regard to precedent, and could engender uncertainty.

• As a result, it gives rise to unsatisfactory positions, as it is framed in superficially permissive terms, and risks inviting unnecessary criticism of the judiciary.

• The solution is for the Withdrawal Bill expressly to provide for the status of CJEU decisions after Brexit by stating that such decisions have ‘persuasive authority’.

• The courts can then understand that status and deal with it sensitively, as it fits with the ‘internal grammar of precedent’.

4. Finally, by way of introduction, I commend to the Committee the analysis of the relevant provisions of the Bill carried out by Raphael Hogarth for the Institute for Government.⁵

Clause 6 of The Bill

5. The key provisions for the purpose of this response are to be found in clause 6 of the Bill:

Cl 6 (2) A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.

(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—
(a) in accordance with any retained case law and any retained general principles of EU law, and
(b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

(4) But— (a) the Supreme Court is not bound by any retained EU case law...
(c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

(5) In deciding whether to depart from any retained EU case law, the Supreme Court ... must apply the same test as it would apply in deciding whether to depart from its own case law.

Clause 6(7) provides definitions of the various terms in the preceding sub-clauses, including ‘retained EU case law’ (which I do not reproduce here for considerations of space). As Dr Daly has remarked, ‘Clauses 1-6 form a swamp of definitions, rules and standards designed to avoid chaos by ensuring that EU

⁵ R Hogarth, Brexit and the European Court of Justice (Institute for Government, June 2017) https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf. (I spoke with Mr Hogarth in the preparation of his analysis, although the views in the report are his alone).
law remains enforceable in the immediate aftermath of Brexit. Even seasoned lawyers are not going to enjoy navigating these provisions’.6

**Precedent**

6. The Supreme Court has adopted the same approach to precedent as adopted by the Judicial Committee of the House of Lords to its own decisions. In the Explanatory Notes to the Bill, there is an implicit endorsement of the UKSC practice in only departing when it appears right to do so. 7 The consistent practice of the Court has been to be cautious in departing from previous decisions: in a 2016 case in which the Court did depart from previous authority, Lord Neuberger and Lady Hale nevertheless stated that ‘This Court should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement’.8 The Supreme Court has also reaffirmed the general principles that lower courts are bound by decisions of higher courts in Willers v Joyce (No 2),9 where Lord Neuberger PSC said:

In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known stare decisis, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. Cross and Harris in in their instructive Precedent in English Law 4th ed (1991), p 11, rightly refer to the “highly centralised nature of the hierarchy” of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy.10

7. Lord Neuberger has identified the uncertain potentially generated by a lack of guidance or vague powers or duties to do with CJEU cases: ‘to blame the judges for making the law when parliament has failed to do so would be unfair’.11 The risk here is that the Bill, under the guise of leaving it up to the judiciary, exposes judges to controversies over the extent to which they can and should take into account CJEU decisions after Brexit.12 To the extent that such decision-making involves political choices, the choices should be clearly set out in the Bill. I fully appreciate the difficult political exigencies of the context behind the drafting of the Bill. But such factors should not lead to the avoidance of legal vocabulary to

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7 The Explanatory Notes to the Bill state that the ‘test the UKSC uses is set out in an existing practice statement which sets out that it may depart from previous decisions “where it appears right to do so”’: this is imprecise – the Practice Statement has since been incorporated into the Court’s Practice Directions 4.2.4, since it was confirmed to be part of the court’s approach in Austin v Mayor and Burgesses of the London Borough of Southwark [2010] UKSC 28 at paragraphs 24 and 25.

8 Knauer v Ministry of Justice [2016] UKSC 9, [23].

9 [2016] UKSC 44.

10 Ibid, [4].


12 The notorious article ‘Enemies of the People’, The Daily Mail, 4 November 2016 in response to the first decision in R (Miller) v The Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) is an example of the sort of response that might be anticipated the first time a judge were to consider a CJEU judgment after Brexit.
the detriment of coherence. Rather, a solution should be adopted which fits with how the courts approach precedent.

8. The solution is not to impose duties or powers on the courts, unless such requirements are thought to be needed in a way currently not suggested by the Bill or the Explanatory notes. The key is really the status of the decisions. As seen above, the current Bill effectively confers on pre-Exit-Day CJEU judgments the status of House of Lords/Supreme Court decisions: lower courts are required to follow such judgments, but the UKSC can depart from them. At least for courts below the Supreme Court, pre-Exit-Day decisions having binding authority. The effect, but not express terms, of the Bill envisages the courts being able to take post-Exit-Day CJEU judgments into account but not being bound by them. That means ‘persuasive authority’.

9. One concern for government is no doubt that suggesting that the CJEU has ‘persuasive authority’ might be politically delicate. ‘Taking back control’ may be thought to be incompatible with still being “persuaded” by the CJEU. Some explanation of the concept of "persuasive authority" will be needed to allay any (misconceived) concerns about continuing ECJ hegemony. Stating that post-exit-day CJEU judgments have ‘persuasive authority’ involves saying that:

- the Courts are not bound by post-exit-day CJEU cases, but
- the Courts are also not banned from referring to them either
- post-exit-day, the CJEU has the same status as any other foreign court.

The last point, that by calling it ‘persuasive authority’ the CJEU no longer has any special legal status, might help to sell the idea to sceptics. If wording of Bill is currently meant to be permissive and not-too-interfering with the courts, then ‘persuasive authority’ delivers on that, and fits what I would call the ‘internal grammar of precedent’ for the English courts: how judges think and speak about precedent. As academic colleagues have pointed out, clause 6 already invents enough new definitions and rules: drawing upon existing concepts would be more efficient and still approach the ‘red line’ of ending the jurisdiction of the CJEU.

10. Indeed, the majority of the Supreme Court has already referred to the likely status of post-exit-day cases: ‘decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority’. To be clear, this was a passing comment on the proposed legislation rather than the current draft and so one must not place

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13 In another context, Lord Wright referred to the possibility of the House of Lords being able to depart from its previous decisions as meaning that ‘Precedents would still be precedents, though not coercive but merely persuasive’: Lord Wright, ‘Precedents’ (1943) 8 Cambridge Law Journal 118, 144.

14 See Fothergill Respondent v Monarch Airlines Ltd [1981] AC 251, Lord Diplock at 284: ‘As respects decisions of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system’ and further Frankland v The Queen [1987] AC 576, 593-5.

15 See Daly above.

16 R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, [80] (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge JJSC)
weight on it. But if that is how the courts will understand the terms of clause 6 as drafted, it makes sense to revise it to use precise terminology. If the status of persuasive authority is not intended to be adopted, then the Bill should be revised to make clear what is intended. Again, otherwise there is a risk that a national court will be castigated for calling a decision of the CJEU ‘persuasive’ in a post-Exit-Day case.

11. Equally, if there are thought to be particular areas in which the courts should tread especially carefully, whether fisheries, agriculture and so on, then the Bill should highlight the factors which ought to be taken into account, or the weight to be afforded in particular areas. And it may be that there will be a transitional period in which the CJEU retains jurisdiction and would therefore still have the same authority as pre-Exit-Day judgments. But subject to such provisions there should be a general rule.

12. Various areas of less overtly politically controversial law are derived from European law and found in primary legislation. An example would be the product liability provisions in the Consumer Protection Act 1987, which, broadly, provide that producers are liable for damage caused to a consumer by a defect in a product. The Act implements the Product Liability Directive 85/374/EEC. The aims of these provisions may be understood in a number of ways as offering consumer protection, as being a product of the membership of the single market or other purposes, and so may or may not be affected by specific guidance. But assuming that there is no specific legislation in the area and the Consumer Protection Act is unaffected by any legislative provisions in the transition, the Act will continue to apply and national courts will have to consider CJEU decisions on the Directive.

13. I offer a hypothetical example to illustrate some of the difficulties. Let us say that a consumer suffers an injury as a result of a defective toaster, at some point after Exit Day, and wishes to bring a claim under the 1987 Act. Before Exit Day, the CJEU had given a judgment (‘Decision A’) interpreting the meaning of ‘defect’ in the provisions of the Product Liability Directive which would mean that the claim was bound to fail. After Exit Day but before the claimant’s injury, the CJEU issues another decision (‘Decision B’) which restores the law to how it was understood prior to Decision A, and so the claim would on those terms be able to succeed. A consequence of the present provisions of the Bill is that Decision A would count as retained EU case law, while the first instance judge could only ‘have regard’ to Decision B. The judge would thus (presumably) be bound to apply Decision A, forcing the claimant to take their case to the Supreme Court in order to have the consumer-friendly interpretation in Decision B recognised in English/UK law. This illustrates the difficulty of the red line approach to CJEU decisions.

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17 Section 2.
19 As found in section 3(1) of the 1987 Act: ‘there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect’.
20 The wording of the clause in this respect is not quite clear but the intention is stated in the Explanatory Notes paras 102 to 109.
14. Finally, one must note that the CJEU does not adopt the same approach to precedent as common law courts. Although the differences can be overplayed, the effect of clause 6 is to preserve in aspic the jurisprudence of the CJEU in a way that does not facilitate the straightforward resolution of disputes. The preservation of case law in this way is problematic.

Conclusion

15. English courts already draw upon the case law of foreign courts where it is appropriate to do so and/or recorded as relevant; such case law, as we have seen, is described as having ‘persuasive authority’. After Brexit, the courts would not have to take post-exit-Day case law into account, but could do if it might assist. The suggested Amendments to the Bill are necessary to preserve the independence and the integrity of the judiciary, and to provide for the certainty required for adjudication after Brexit. Basing clause 6 on a coherent understanding of the doctrine of precedent will maintain the reputation of English law for clarity and rigour in the application of its principles in the post-Brexit era.

19 January 2018

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