

GARDEN COURT



CHAMBERS

Session 2 - After Brexit: How to use retained EU law in your Public Law practice from 2021 onwards

Adrian Berry, Garden Court Chambers
Abigail Holt, Garden Court Chambers
Dr Ruth Fox, Hansard Society
Oliver Persey, Garden Court Chambers



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Session 2 - After Brexit: How to use retained EU law in your Public Law practice

Abigail Holt, Garden Court Chambers

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Recap – filtering domestic law

To jettison the unwanted elements of EU retained law and to start the process of diverging from EU in

A great deal of the heavy lifting of this process will be through statutory instruments, especially the section 8 aimed at weeding out “deficiencies”

Enabling legislation is not limited to EU(W)A 2018, but includes the European Communities Act 1972.

Committees in the House of Commons and House of Lords are responsible for sifting of statutory instruments.



Slew of SIs

This week shown spreadsheet of **1,091** Brexit S.I.s laid in Parliament since August 2018!

Search against “Health and Safety” threw up 64 SI’s

Carriage of explosives, Chemicals safety and Genetically Modified Organisms, Fertilisers and Ammonium Nitrate Material
Ship (materials) Recycling, Carriage of dangerous goods by road, Health and safety on shipping and fishing vessels,
Railway (Safety, Access, Management etc)
Blood Safety
Environmental Air quality
Persistent Organic Pollutants, Pesticides and Fertilisers
Product safety
Chemical safety and importation of chemicals, Disposal of chemicals
Mutual recognition of certain conformity assessments done by 3rd countries (consumer protection and health safety)
Justification of use of Ionizing Radiation
Radioactive substances
Accident reporting for shipping and railways



EU-derived health & safety protections continue?

The Health and Safety (Amendment) (EU Exit) Regulations 2018 (SI 2018/1370)

This enactment ensures that EU derived health and safety protections will continue to be available in domestic law after the UK has left the EU. These Regulations do not make any policy changes beyond the intent of ensuring continued operability of the relevant legislation.



Another story? (Elf'n'safety?)

Workplace Health & Safety

Important Regulations have been made under the Health and Safety at Work Act 1974

“Six Pack” Regulations which came into force **originally** 1 January 1993

Largely replaced the Factories Act 1961

(Most have been updated since 1992)



“Six-pack” regulations continued

The Management of Health & Safety at Work Regulations [Implement Framework Directive 89/391 and (partially) the Temporary Workers Directive 91/383]

Fundamental change was to impose a duty that employers should make a suitable and sufficient risk assessment of the risks to health and safety of the workforce – employees and non-employees]

Manual Handling Operations Regulations [Implement the Manual Handling Directive 90/269]

Display Screen Equipment Regulations [Implement Directive 90/270]

Workplace (Health, Safety and Welfare) Regulations [Implement the Workplace Directive 89/654]

Provision and Use of Work Equipment Regulations [Implement the Work Equipment Directive 89/655]

Personal Protective Equipment (PPE) Regulations [Implement the Personal Protective Equipment Directive 89/656]



Amendment of Health & Safety at Work Act 1974?

Legislation.gov.uk website says:

Exit from the EU:

There may be changes and effects to this Legislation not yet recorded or applied to the text

New legislation with 'EU Exit' in the title that references (and therefore may change) this legislation item:

Due to a high volume of changes being made to legislation for EU exit, we have not been able to research and record them all. More information is available about [EU Legislation and UK Law](#). The following results are legislation items with 'EU Exit' in their title that directly reference and therefore may change this item of legislation. To understand whether or not the text of this legislation is up to date, please check those references in the following pieces of legislation.



Subtle change to Health & Safety at Work Act 1974

Amended by s69 of the Enterprise and Regulatory Reform Act 2013

Enterprise and Regulatory Reform Act 2013 was passed with the express intention of reducing the burden of health and safety legislation on business.

Simple breach of statutory duty not enough – a claimant now has to prove negligence on the part of an employer.

Subtle changes – for example – where previous H&S S.I. imposed strict liability, this was removed.

For example: where an employee was injured by defective equipment, previously the employee only had to prove that the equipment which caused his injury was defective.

Now the employee has to show that the *employer failed to take reasonable care* to provide safe plant and equipment.

Now the Directive is no longer applicable, it will be easier in future for the Government to change the Regulations to make it more difficult for injured parties to sue for the consequences workplace accidents.



PPE

Personal Protective Equipment very much in the news as a result of the C-19 pandemic.

The Personal Protective Equipment (Enforcement) Regulations 2018 provide a system for the enforcement of the 2016 Regulation

In January 2021 Office for Product Safety & Standards Published:

“Regulation 2016/425 of the Personal Protective Equipment (Enforcement) Regulations 2018 As they apply to Equipment being supplied in or into Great Britain from 1 January 2021 (Guidance 3)”

(The Guidance references “COVID-19 PPE” but it is not entirely clear when the Guidance is referring to “general” PPE or PPE designed to protect against COVID-19).



PPE cont.

The European Commission published Recommendation 2020/403 on 13 March 2020

[5] *While not a binding piece of legislation, the steps set out in it were adopted by the UK Government as a temporary measure in the interests of ensuring the safety of UK healthcare workers by speeding up supply of essential COVID-19 PPE.*

From January 2021:

“Temporary” arrangements apply in England, governed by the Personal Protective Equipment (Temporary Arrangements) (Coronavirus) (England) Regulations 2020 (“the 2020 PPE Regulations”).
[Albeit only until March 2021]

HSE obliged to assess “conformity assessment”

Given other litigation surrounding PPE, concerns are raised.



(Very) general themes

EU(W)A 2018: accessibility of law and access to justice?

- Civil cases – costs consequences – legal research more burdensome
- Litigants in Person – Judges to assist LIPs to present their case.
- No resources for Judiciary to do detailed legal research required in any case impacted by complex EU Retained law and the subsequent legal evolution!
- Law as technique?
- Increasingly reliant on data managements and electronic searching technique
- Access to the law reduced to specialists and contingent on accurate coding to identify the requisite details of the law.



Retained EU Law: Worked Examples in Immigration and Social Security

Adrian Berry, Garden Court Chambers

12 February 2021



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EU Immigration Law

Case Study:

Question: Does the child (in education) of an EU Citizen former worker still have a right of residence in the UK? Does his primary carer (who could be a third country national) still have such a right? i.e. if they come to the UK in 2021.

- Remember the cases of *Baumbast* C-413/99 and *Teixeira* C-480/08
- Both cases made by reference to the Workers' Regulation: then it was Regulation 1612/68, now it is Regulation 492/11
- At 11 pm on 31 December Regulation 492/11 was in force in the European Union
- It is now part of Retained EU law?



EU Immigration Law

Answer:

- Without more, Regulation 492/11 *would form part of UK law* as retained direct EU legislation under s 3 of the European Union (Withdrawal) Act 2018.
- (Remember that EU Regulations were directly applicable without the need for transposition into UK law).
- Further, a right of residence derived from the need to render the Regulation effective and recognised in case-law (*Baumbast, Teixeira*, etc.) would fall to be considered as a right retained in UK law under s 4 of the European Union (Withdrawal) Act 2018.
- Do any exceptions in s 5 and Sch 1 apply? – No



EU Immigration Law

Answer:

- Thus, without more, where there is a conflict between a provision of Regulation 492/11 or an EU right recognised in Court of Justice case law and a restrictive provision of UK immigration law made *before the end of the transition period* (e.g. the need for leave to enter or remain under ss 1 and 3 of the Immigration Act 1971), the *principle of Supremacy* (s 5 of the European Union (Withdrawal) Act 2018) would apply and the provisions of Regulation 492/11 or the EU case law right would trump the domestic provision and so apply to confer a right to reside.
- In that case, could the Supreme Court (or Court of Appeal) depart from *Baumbast* and *Teixeira*? - Yes, in certain circumstances: see s 6 of the European Union (Withdrawal) Act 2018 and SI 2020/1525.



EU Immigration Law

Answer:

- But is there more?
- What about Regulations made under s 8 of the European Union (Withdrawal) Act 2018?
- I.e. What about the *Immigration, Asylum and Nationality (EU Exit) Regulations 2019*? See Reg 47 and Sch 1.
- They do not mention Regulation 492/11. Does that mean we succeed?.....



EU Immigration Law

Answer:

....Sadly not. There is the *Immigration and Social Security Coordination (EU Withdrawal) Act 2020* to consider:

1 Repeal of the main retained EU law relating to free movement etc

Schedule 1 makes provision to—

- (a) end rights to free movement of persons *under retained EU law*, including by repealing the main provisions of retained EU law relating to free movement, and
- (b) end *other EU-derived rights*, and repeal other retained EU law, relating to immigration.



EU Immigration Law

Answer:

When is S 1 and Sch 1 of the *Immigration and Social Security Coordination (EU Withdrawal) Act 2020* in force?

- From 11 pm on 31 December 2020, see *Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020* SI 2020/1279, reg 4
- What does Sch 1 say?
- See Article 4.....



EU Immigration Law

Answer:

- Article 1 of the Workers Regulation [Regulation 492/11] is omitted
- Articles 2 to 10 of the Workers Regulation *cease to apply so far as—*
 - (a) they are *inconsistent with 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 interpretation, application or operation of any such provision.*
- Is this a problem? Yes, we need to rely on Article 10



EU Immigration Law

Answer:

- The provision of Regulation 492/11 we need to rely on is *inconsistent* with the Immigration Acts: as ss 1 and 3 of the Immigration Act 1971 provide that persons subject to immigration control require leave to enter or remain in the UK.
- So Article 10 of the Workers Regulation cannot be relied on.
- What about the rights to reside recognised in the cases of *Baumbast* and *Teixeira*?



EU Immigration Law

Answer:

Article 6 of Sch 1 of the the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 provides:

6 (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*.

EU Immigration Law

Answer:

Is there any other provision we need to check? Yes, see *s 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020*:

Consequential etc. provision

(1)The Secretary of State may by regulations made by statutory instrument make such provision as the Secretary of State considers appropriate in consequence of, or in connection with, any provision of this Part.

(2)The power to make regulations under subsection (1) may (among other things) be exercised by modifying—

(a)any provision made by or under primary legislation passed before, or in the same Session as, this Act;

(b)retained direct EU legislation.



EU Immigration Law

Answer:

- Have any Regulations been made under s 5 of the *Immigration and Social Security Coordination (EU Withdrawal) Act 2020*? – Yes
- See the *Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020*
- Do they in fact deal with retained direct EU legislation? No, so on this occasion we do not need to consider them further.
- Do they cover terrain that overlaps with the *Immigration, Asylum and Nationality (EU Exit) Regulations 2019* made under s 8 of the *European Union (Withdrawal) Act 2018*? – Yes
- Is this confusing? - Yes



EU Immigration Law and....Employment Law

The Question re-stated: Does the child (in education) of an EU Citizen former worker still have a right of residence in the UK? Does his primary carer (who could be third country national) still have such a right? I.e. if they come to the UK in 2021.

The Answer: No

But...remember that the Workers' Regulation (amended) remains good law where not in conflict with immigration law.....so see, for example Article 7...



Article 7:

1. A worker who is a national of a Member State *may not, in the territory of another Member State, be treated differently* from national workers by reason of his nationality in respect of any *conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.*
2. He shall enjoy the same *social and tax advantages* as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have *access to training in vocational schools and retraining centres.*

EU Immigration Law and....another issue

Retained EU direct EU law may be modified by Regulation or its effect may be qualified; Retained EU rights may be disapplied by Regulation

- See the *Immigration, Asylum and Nationality (EU Exit) Regulations 2019* made under s 8 of the European Union (Withdrawal) Act 2018
- Those Regulations make changes to UK statutes and statutory instruments, *and....*
- They also *revoke* certain provisions of retained direct EU legislation that relate to immigration (regulation 47), *and*



EU Social Security Law

- The *Co-ordination of Social Security Regulation (883/2004)* was in force on IP day (11 pm, 31 December 2020). Is it now retained direct EU legislation under s 3 of the European Union (Withdrawal) Act 2018? - No
- See s 6 of the *Immigration and Social Security Coordination (EU Withdrawal) Act 2020* and the power to modify retained direct EU legislation relating to social security co-ordination and...
- See also the *Social Security Co-ordination (Revocation of Retained Direct EU Legislation and Related Amendments) (EU Exit) Regulations 2020* revoking Regulation 883/2004 from IP day (11 pm, 31 December 2020).
- And...



EU Social Security Law

- ...Remember the Social Security protection provided by the Citizens' Rights provision in the *Withdrawal Agreement* (for those within scope) and s 13 of the *European Union (Withdrawal Agreement) Act 2020* giving further effect to it, and
- Remember too that the UK's *EU Trade and Cooperation Agreement* also has a *Protocol on Social Security Coordination* for 2021+ employed and self-employed persons; see also s 26 of the *European Union (Future Relationship) Act 2020* in that regard.

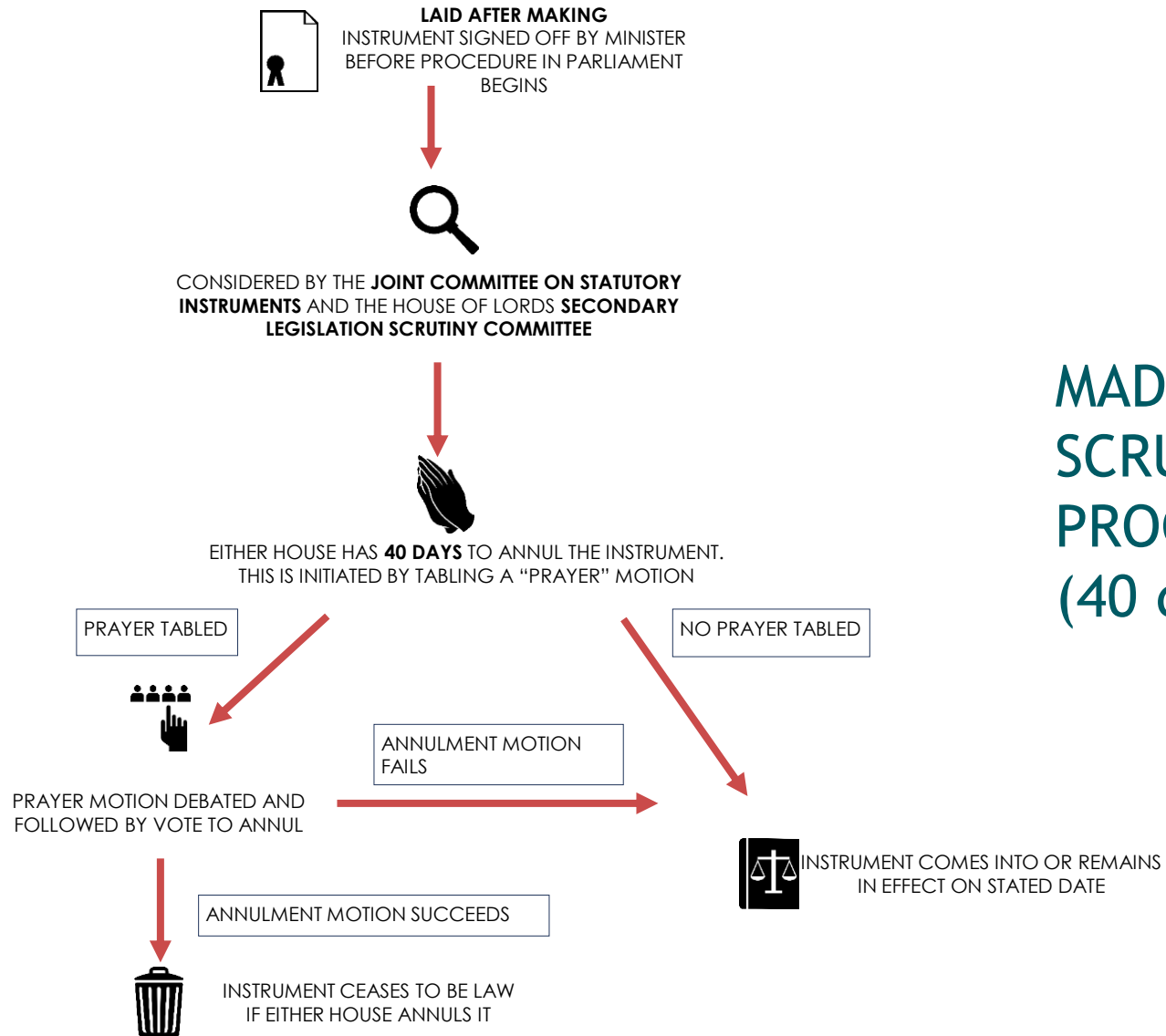


Statutory Instrument Tracker

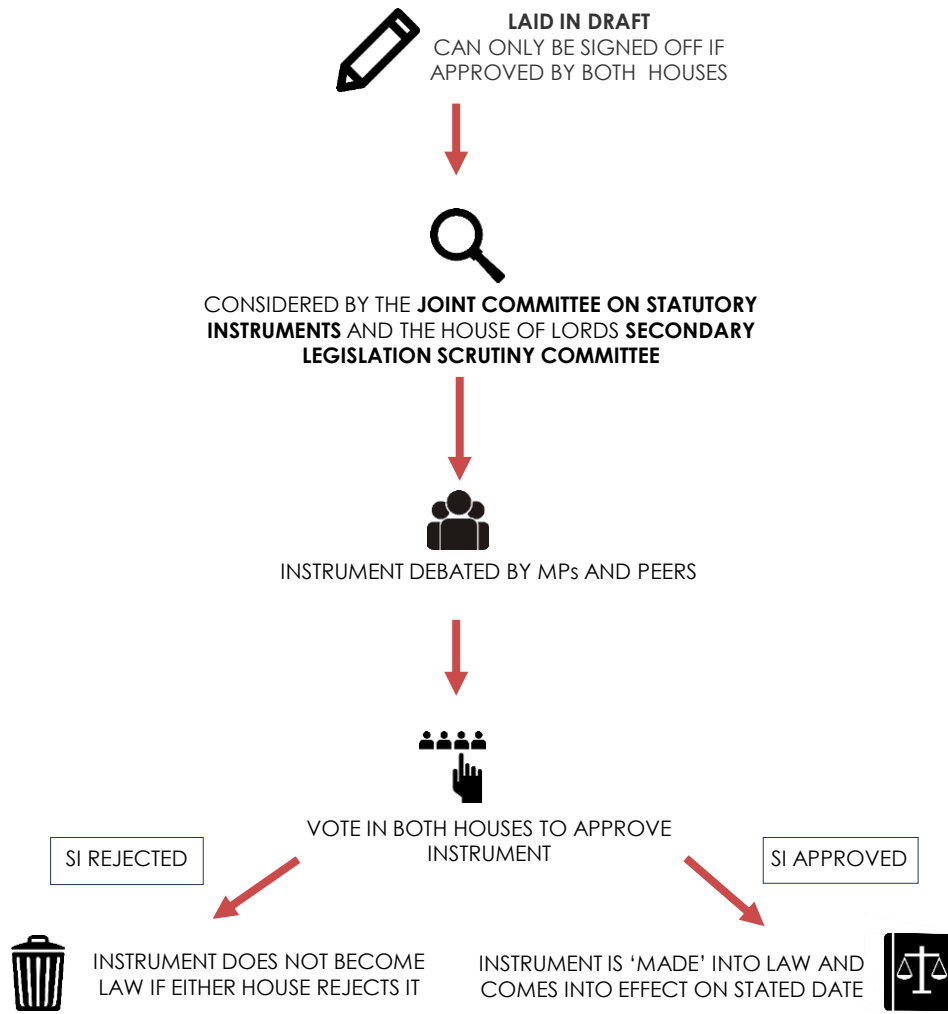
Demonstration

Dr Ruth Fox, Director, Hansard Society

February 2021



MADE NEGATIVE SCRUTINY PROCEDURE (40 days)



DRAFT AFFIRMATIVE SCRUTINY PROCEDURE (4-6 weeks)

Retained EU law: worked examples

Ollie Persey, Garden Court Chambers

12 February 2021



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EU-derived domestic legislation

S1B (7) In this Act "*EU-derived domestic legislation*" means any **enactment so far** as—(a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,

(b) **passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,**

(c) relating to—(i) anything which falls within paragraph (a) or (b), or

(ii) any rights, powers, liabilities, obligations, restrictions, remedies or procedures which are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, or

(d) relating otherwise to the EU or the EEA,

but does not include any enactment contained in the European Communities Act 1972 or any enactment contained in this Act or the European Union (Withdrawal Agreement) Act 2020 or in regulations made under this Act or the Act of 2020.



EU-derived domestic legislation- worked example

The Equality Act 2010?

- Consolidated disparate equality legislation- e.g. Race Relations Act, Disability Discrimination Act, Sex Discrimination Act etc.
- ‘operating’ for a purpose/ ‘relating otherwise to the EU/EEA’? see e.g. domestic racial equality legislation *ahead* of Council Directive 2000/ 43 / EC (Race Directive).
- EU court decisions: pre-IP completion day 6(3) EUWA (‘so far as’ unmodified/ relevant)/ post-IP completion day s6(2) EUWA (‘may have regard’)
- Supremacy? (s 5(3) EUWA) – live question as to whether EU-derived domestic legislation is ‘supreme’?
- If it is retained EU law then it is vulnerable to amendment via s8 EUWA.



Brexit statutory instrument

Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019) (2019 N.579)

- *AMEND Conservation of Habitats and Species Regulations 2017, which implement the Habitats Directive (EC 92/43/EEC) ‘2017 regulations’*
- *Inter alia: add a new clause into 2017 regulations “in co-operation with any other authority having a corresponding responsibility, manage, **and where necessary adapt**, the national site network, so far as it consists of European sites, with a view to contributing to the achievement of the management objectives of the national site network”*
- S 8(1) EUWA: “prevent, remedy or mitigate - (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU”. Ss 8(2) and 8(3) EUWA exhaustive list of “deficiencies retained in EU law”.
- [2020-07-30-clientearth-mcs-briefing-on-the-conservation-of-habitats-and-species-amendment-eu-exit-regulations-2019-ce-en.pdf](#)



Challenging SIs – grounds and tips

- ***Ultra vires*** – close textual analysis of the power the SI is made under and the retained EU law being amended
- ***Human rights-*** proportionality likely to be key
- ***Other public law heads of review*** – potentially! Will depend on the SI.
- ***What procedure was the SI made under?*** *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250; *R (Javed) v Secretary of State for the Home Department* [2002] QB 129
- ***Timing:*** prematurity and ripeness – the importance of the *Hansard Society SI Tracker!*
- ***SIFT*** – the brilliant work of Alexandra Sinclair and Dr Joe Tomlinson of *Public Law Project*



Thank you

020 7993 7600

| info@gclaw.co.uk

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