MISCELLANY

Departure from the EU

1 Shortly before Christmas Day 2020, negotiators on behalf of the European Union and the United Kingdom reached an agreement on post-Brexit trade which was acceptable to their respective principals. The agreement was published shortly thereafter. Extraordinarily, the States of Jersey and the States of Guernsey convened on Sunday 27 December in order to consider reports from their respective executives as to whether the Channel Islands should have certain parts of the agreement extended to them. Both Assemblies agreed to that extension, although there is a 90 day "cooling-off" period during which it is open to both parties (*i.e.* the EU and the UK) to repudiate that extension. On 30 December 2020, the UK Parliament ratified the agreement. Time does not allow for a detailed examination of these important decisions in this issue of the *Review*.

A Jersey perspective

2 However, it is possible to report that, on Monday 21 December 2020, the Minister for Home Affairs made the Immigration (EU Withdrawal) (Commencement) (Jersey) Order 2020. In this two-line order, Jersey has bidden *adieu* to the free movement of EEA citizens[1] under Jersey's immigration laws as from the end of the transition period.[2] Free movement in Jersey law was enshrined in s 7 of the Immigration Act 1988 as extended by Order in Council. Persons did not require leave to enter or remain in Jersey if they were entitled to enter or remain in the United Kingdom by virtue of an enforceable Community right or provisions made under s 2(2) of the European Communities Act 1972.

3 The death blow to s 7 in the United Kingdom has been dealt by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (c.20) ("the 2020 Act") which passed into law on 11 November

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[1] Citizens of the EU, EEA, EFTA states of Iceland, Norway and Liechtenstein, and of Switzerland (referred to collectively as EEA citizens) and their family members.

[2] On 31 December 2020, at 11 pm (as the closing days of free movement were eked out), it was a gloomy irony that hardly any movement was possible under current Covid-19 restrictions.

2020. Among various provisions for ending free movement, but protecting the status of Irish citizens, the 2020 Act confers powers on the Secretary of State "by regulations [to] make such provision as the Secretary of State considers appropriate in consequence of, or in connection with" the ending of free movement at the end of the transition period.[3] These powers extend to "modifying any provision made by or under primary legislation passed before, or in the same Session as, this Act"; and include making supplementary, incidental, transitional, transitory or saving provision, and making different provision for different purposes. These are wide powers indeed.

4 If s 7 on the Jersey statute book was to be repealed, the 2020 Act needed to be extended to Jersey under the power to do so by Order in Council (which had been included in the United Kingdom Bill in a form of wording agreed with the governments of Jersey, Guernsey and the Isle of Man). More was needed however than the mere repeal of s 7. Appropriate provision would need to be made in Jersey as well *in consequence of, or in connection with* the ending of free movement at the end of the transition period.

5 In drafting the Order in Council, UK and Jersey legal advisers discussed whether the wide regulation-making powers of the Secretary of State under the 2020 Act ought (or ought not) to be extended to Jersey in modified form so as to become an Order-making power of the Minister for Home Affairs. Some doubt was expressed on the UK side. Nonetheless the result was an Order in Council—the Immigration (EU Withdrawal) (Jersey) Order 2020, registered by the Royal Court on 18 December 2020[4]—which does empower the Jersey Minister to make such provision by Order as the Minister considers appropriate in consequence of, or in connection with, the ending of free movement. Especially eye-catching is the power of the Jersey Minister—

> "to modify [by Order] any provision extended by, or made by or under, an Order in Council on or before the appointed day extending legislation of the United Kingdom to Jersey"

and this includes making supplementary, incidental, transitional, transitory or saving provision, and making different provision for different purposes.

6 The Commencement Order made by the Minister for Home Affairs—referred to in para 2—provided (effectively) for the Order in Council to come into force at 11 p.m. on 31 December 2020.

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[3] Under s 5 https://www.legislation.gov.uk/ukpga/2020/20/section/5/enacted
[4] L.9 of 2020 https://www.jerseylaw.je/laws/enacted/Pages/L-09-2020.aspx

7 The progress of this Order in Council leads one to reflect on what are precisely "the Immigration Acts" in each jurisdiction that effectively implement by statute the common travel area ("CTA") (given that the CTA in itself is an administrative arrangement)? Is there any legal or constitutional necessity for them to take the form of Acts of Parliament extended by Order in Council to the respective Island jurisdictions?

8 It is sometimes thought that the CTA binds the Island jurisdictions to extending United Kingdom Immigration Acts by Order in Council instead of making provision by Jersey, Guernsey or Isle of Man statute. Any such thought is misconceived. A look at s 9 of the Immigration Act 1971 ("the 1971 Act") in the United Kingdom shows that the "immigration laws" of each component jurisdiction are self-contained. Section 9(1) provides that Schedule 4 to the Act "shall have effect for the purpose of taking account in the United Kingdom of the operation in any of the Islands of the immigration laws there". The form that such "immigration laws" take is a matter for the jurisdiction concerned. The 1971 Act does not require the immigration laws of Jersey, Guernsey or the Isle of Man to take the form of United Kingdom legislation extended by Order in Council or, irrespective of form, to align to a given extent with the immigration laws of the United Kingdom.

9 The United Kingdom is not without leverage, however, were any one of the Island jurisdictions to enact immigration laws that adversely affected the operation of the CTA. Section 9(5) in the United Kingdom provides that—

> "If it appears to the Secretary of State necessary so to do by reason of differences between the immigration laws of the United Kingdom and any of the Islands, he may by Order exclude that island from [s 1(3) of the 1971 Act which provides that intra-CTA journeys are not subject to control under the Act or to the requirements for leave to enter] for such purposes as may be specified in the Order, and references in this Act to the Islands shall apply to an island so excluded so far only as may be provided by Order of the Secretary of State."

10 Section 9(5) of the 1971 Act only serves to emphasise that the policy underlying the immigration laws of each jurisdiction is for determination by the relevant jurisdiction. It would seem that it has been out of practical convenience, rather than out of legal or constitutional necessity, that extension by Order in Council has customarily been used to enact immigration laws in the Islands. Indeed, such laws in Jersey could quite properly take the form of a Jersey law passed by the States, instead of United Kingdom Acts extended by Order in Council. Given the recent inclusion of a

permissive extent clause in the Fisheries Act by the UK Government without Guernsey and Jersey's consent it may be that such an alternative course will be pursued by the Islands' respective governments in the future.

A Guernsey perspective

11 The position in Guernsey is not quite the same as in Jersey, but the effect on EEA nationals post-Brexit is broadly similar. It should be noted however, that in Guernsey the Lieutenant Governor still has an important role to fulfil in relation to decisions regarding leave to enter and remain (as well as in decisions relating to deportation). For example, the Lieutenant Governor issues directions concerning leave to enter and remain granted under the immigration rules, and has issued directions concerning lapse of leave to remain in Guernsey (as a result of being absent from the UK and the Islands) acquired by EEA citizens or family members under Appendix EU to those rules (implementing the EU Settlement Scheme). The current Directions of the Lieutenant Governor Concerning Leave to Enter and Remain 2019[5] were issued on 3 April 2019, and were amended by the Immigration and Social Security Co-ordination (EU Withdrawal) (Bailiwick of Guernsey) Regulations 2020 (Guernsey Statutory Instrument 2020 No 151).

12 As regards rights of EEA citizens, the Immigration and Social Security Co-ordination Act 2020 contained specific provisions for ending the free movement of EEA nationals, protecting the status of Irish citizens and providing for consequential, transitional and savings provisions to be made. As the Bailiwick of Guernsey (including the jurisdictions of Alderney and Sark) is part of the CTA with the United Kingdom, the Isle of Man, the Bailiwick of Jersey and the Republic of Ireland and in order to ensure a consistent approach across the CTA, the Committee for Home Affairs in Guernsey was content to recommend that relevant provisions of the 2020 Act be extended to the Bailiwick in order that they may have similar effect in the Bailiwick. The policy letter was approved in Guernsey (October 2020), Alderney (October 2020) and Sark (November 2020) and the Immigration (Guernsey) Order 2020[6] was subsequently made by Her Majesty the Queen in Council on 16 December 2020 to give effect to this policy. Subsequently, the States of Guernsey Committee for Home Affairs made the Immigration and Social Security Co-ordination (EU Withdrawal) (Bailiwick of Guernsey) Regulations 2020 on 18

[5] Guernsey Statutory Instrument 2019 No 53.
[6] UK Statutory Instrument 2020 No 1560.

December 2020 to make consequential and transitional amendments and enact other provisions in consequence of the end of free movement of EEA citizens and family members in Guernsey.

13 Notwithstanding the need to ensure a consistent approach, it was also acknowledged that each jurisdiction has different needs. The Bailiwick of Guernsey introduced an EU Settlement Scheme, similar to the scheme proposed in the UK, on 1 April 2019. The scheme protects the rights of those EEA nationals and their non-EEA family members who have been living and working in the Bailiwick of Guernsey on or before 31 December 2020 and will enable EU citizens, and their family members, resident in Guernsey at the point that the UK leaves the EU to have their immigration rights secured by applying for "settled status" or "further permission to remain". However, the Committee for Home Affairs in Guernsey decided to distinguish some elements of the Island's immigration policy from the UK's. This means that the UK's points-based system will not be replicated in the Bailiwick. Instead, the Committee for Home Affairs will combine the process of applying for an immigration work permit with the population employment permit (under Guernsey's population management regime) before applicants are granted permission to enter and work. Alderney, Sark and Herm are not currently covered under the population management regime and will be subject to a separate immigration work permit application process. EU/EEA/Swiss nationals who have registered on the EU Settlement Scheme are exempt from this requirement. This deviation will ensure that businesses are able to continue accessing the important EU/EEA/Swiss workforce for vital sectors such as hospitality and care homes. A key change is that EU/EEA/Swiss nationals coming to the Bailiwick to work will have to apply for a visa, prior to travel.