



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 8 January 2020

Session 5



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Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE

1st Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Neil Bibby (West Scotland) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Angela Constance (Almond Valley) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Patrick Harvie (Glasgow) (Green)

*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*John Mason (Glasgow Shettleston) (SNP)

*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gerald Byrne (Scottish Government)

Francesca Morton (Scottish Government)

Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament
Finance and Constitution
Committee

Wednesday 8 January 2020

[The Convener opened the meeting at 09:30]

Decision on Taking Business in
Private

The Convener (Bruce Crawford): Good morning, and welcome to the Finance and Constitution Committee's first meeting in 2020. This is an opportune time to wish everybody a happy new year. As usual, I ask for mobile phones at least to be put in silent mode, so that they do not interfere with proceedings.

Agenda item 1 is to decide whether to take item 3 in private. Do members agree to do so?

Members indicated agreement.

European Union (Withdrawal
Agreement) Bill

09:30

The Convener: Item 2 is evidence from Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, on the legislative consent memorandum for the European Union (Withdrawal Agreement) Bill. The cabinet secretary is joined by supporting Scottish Government officials. Gerald Byrne is head of constitution policy in the constitution and United Kingdom relations division, Francesca Morton is a solicitor in the solicitors constitutional and civil law division, and David Barnes is head of EU exit strategy and negotiations. I welcome all of you to the meeting and invite the cabinet secretary to make an opening statement, if he wishes to do so.

The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell): Thank you very much, convener. I will be brief. I wish the committee a happy new year. I am sure that this will not be the last occasion on which I appear before it in 2020.

The principal aim of the European Union (Withdrawal Agreement) Bill is to implement the withdrawal agreement that was concluded by the UK and the EU on 17 October 2019. I say quite clearly, at the outset, that given that the people of Scotland have rejected the proposal to leave the EU at every electoral opportunity that has been presented to them, the Scottish Government could not and will not recommend that the Scottish Parliament give its consent to the bill, which would implement that agreement in domestic law.

There are other strong reasons for not giving approval, which lie in the detail of the bill. This is the third iteration of the bill. Members will recall that it was first brought together at the time of the Theresa May agreement. It was reissued in a slightly different form in October and has been reissued again. The common themes, as the bill has progressed, have been a growing reluctance to accept scrutiny—indeed, there is a dislike of scrutiny—and a desire to centralise power in the hands of the Executive, and particularly in the hands of the Prime Minister, and to create a harder Brexit. Let me give members just one example. Extraordinarily, clause 26 of the bill would give ministers the right to tell courts how to interpret and what precedent to interpret.

The bill is a thoroughly bad bill that presages a thoroughly bad Brexit.

I notice that Mr Tomkins's amendment to my motion for debate in Parliament this afternoon indicates that accepting and implementing the

results of referenda is the key issue. I speak as a member of a Government that has accepted and implemented the results of two referenda. Obviously, because Scotland is not independent at the moment, that was done with the first referendum: the result of the 2014 referendum was the decision by the people of Scotland not to be independent, and the Scottish Government implemented that.

The material change in circumstances came in 2016, when the UK as a whole voted to leave the EU. That decision was imposed on the people of Scotland against their wish: they did not vote for leaving the EU. Even so, from the end of 2016 onwards, the Scottish Government proceeded to offer a range of compromises that would have avoided the situation that we find ourselves in today. Unfortunately, the UK Government did not accept any of those compromises on any occasion, and has pursued a harder and worse Brexit during that time.

There are a number of other provisions in the bill that we will, no doubt, talk about; I will be happy to talk about them. However, the Scottish people should not accept the bill, and the Scottish Parliament should therefore not accept it.

I look forward to the committee's questions and to the debate this afternoon, in which I will continue with the burden of my argument. I hope that Parliament will accept that argument at decision time today.

The Convener: I will begin by dealing with aspects of the bill that you have just hinted at. In a letter that was sent to you on 18 December, the UK Government said:

"We have also committed that we will not normally use the power for UK Ministers in areas of devolved competence without the consent of the relevant devolved administration. The Government respects and will continue to uphold the devolution settlement."

However, this committee has consistently argued that UK ministers having the power to make statutory instruments on devolved matters without there being a statutory requirement to seek the consent of the Scottish ministers or the Scottish Parliament cuts across the devolution settlement. Does the Scottish Government support that view? What is your perspective on that?

Michael Russell: Let me put the issue in the context of the three and a half years of negotiation. Tomorrow, the 21st meeting of the joint ministerial committee on EU negotiations will take place. In that time, there has been scant, if any, respect shown for the devolved Administrations, and very little, if any, respect shown for the devolved competences. There is a view that, when push comes to shove, the UK Government can do precisely what it wishes to do.

There is voluminous correspondence between me and UK Government ministers on those matters, but one issue will suffice as an illustration of where we are. The proposals for the independent monitoring authority do not include the devolved Administrations being able to, essentially, select the person who will speak on devolved matters. It would be a simple matter for the UK Government to accept that the consent of the devolved Administrations would be required in such cases. Indeed, one would think that it would be axiomatic that it would do that.

However, in correspondence on that matter over a whole year—I looked at it this morning; it starts with a letter from Kwasi Kwarteng and concludes with letters that are still to be answered—there has been no concession on that. The UK Government still intends to put in place a system that will allow it to impose or dismiss people without the agreement of the devolved Administrations. Moreover, the bill moves that forward a stage, because its provisions will mean that the powers of the independent monitoring authority can be removed and given to another body. Therefore, in fact, rather than just not being consulted, we could be completely ignored.

That has been the common theme in how the UK has operated. It is important to say that, because we have tried very hard to discuss and to negotiate, but have got nowhere, as the bill shows.

The Convener: Alex Rowley wants to ask questions on relationship issues. You have gone straight into that, so I will bring him in next.

Alex Rowley (Mid Scotland and Fife) (Lab): In his letter to you of 18 December, Steve Barclay wrote:

"In your letter of October 22 you welcomed the level of engagement on previous versions of the Bill."

Could you say more about that?

Michael Russell: The original withdrawal agreement was the responsibility of a number of ministers, but Suella Braverman had responsibility for the bill when she was in the Department for Exiting the European Union. To be fair to her, she was very courteous and discussed aspects of the bill when it was in draft form. That was a positive thing. Although we still do not believe that the Government would, in the end, have changed the substance of the bill, there was at least a conversation going on. The situation has since deteriorated.

Suella Braverman was, and is, a strong Brexiteer—we do not agree about Brexit—but she is one of the few UK ministers to have recognised the importance of trying to establish a reasonable relationship on these matters. Her officials met my officials, and I could talk to her directly, as the bill

developed. After she resigned—it is difficult to remember exactly when resignations happened, because there have been so many of them—the subsequent minister was Kwasi Kwarteng, who did not have any great interest in the matter, other than in signing letters containing platitudes.

We still hear those platitudes today. I have seen, in its press comment this morning, that the UK Government has said that it works with the devolved Administrations, as if everything is wonderful. Everything is not wonderful: it is an extraordinarily difficult set of relationships that have got even worse since the Johnson Government was elected. If you look at the bill, you will realise why that has happened: it is because the Johnson Government intends to do whatever it wants. It may have won the election south of the border, but it did not win it north of the border. I am absolutely clear and adamant that the people of Scotland have said that they want the right to say what their own future should be. That is the big dividing line.

I would be delighted to be able to sit down and go back to where we were at the end of 2016, when there was a possibility that the ideas that we were putting forward could have influenced where we were going. However, our experience of 2017, 2018 and 2019 has been of increasing refusal to accept any of the arguments that we have put forward, and of determination to do things only in the UK Government's way, no matter whether it has electoral support in Scotland.

Alex Rowley: Labour will support the Scottish Government in the debate this afternoon, for the reasons that are set out in the motion that you have lodged. However, we accept that, as a result of the general election, the UK will leave the EU. Therefore, we have the question of the relationship and the powers that we should have as an equal partner at the table. There should be a partnership of equals among the nations of the United Kingdom: you are saying that that is not happening.

Michael Russell: It is no secret that I believe in independence. Alex Rowley has known that about me since we first met 30 years ago, or something like that. I accept that there is a place for working as equals and I would welcome that, but it has not happened and the UK Government shows no intention of making it happen. I do not expect to hear at the joint ministerial committee meeting tomorrow a revelation that everything has changed and we are now sitting round the table as equals. My experience in the past three and a half years is that that is not what the UK Government thinks.

If, tomorrow, we were to agree to negotiate a way forward by, for example, accepting that the part of the UK that voted to leave is entitled to do so and that the special status for Northern Ireland

is taken as read, and by considering what special status Scotland could have in the circumstances and that there is an issue that needs to be addressed, that would not be enough for me, but it would be a big step forward. However, there is no acceptance that there is an issue that needs to be addressed.

I quoted a UK Government spokesperson. He or she—I do not know which it was—also said today that the Prime Minister has produced a “great deal” that is good for every part of the United Kingdom, although—in brackets—not Northern Ireland. There is still the possibility of a special deal for Scotland. As I said, that would not be enough for me, although I would welcome it and I would take it, but there is no sign of it.

Murdo Fraser (Mid Scotland and Fife) (Con): You were clear in your opening statement that the Scottish Government is opposed to Brexit. I do not share that view, but I respect it and I am sure that, equally, you respect my position. Back in 2018, you were also clear that, as a matter of principle, the Scottish Government would not support any motion for legislative consent on EU exit bills. I take it that that is still your position.

Michael Russell: It is.

Murdo Fraser: In that case, really, no matter what was in the bill, you would refuse legislative consent as a matter of principle.

Michael Russell: As I said, I would refuse legislative consent because the people of Scotland did not vote to leave the EU. There are a number of good additional reasons for refusing legislative consent to the bill.

Murdo Fraser: You have answered my question. Thank you.

Michael Russell: I recall that Murdo Fraser used to be opposed to Brexit. At least I am consistent.

Murdo Fraser: I am a democrat, cabinet secretary. We had a referendum, and I believe that we should respect the outcome of referendums.

Michael Russell: I am a democrat, too, and have also been very consistent in my view.

Murdo Fraser: Let us not get into that, because it is a matter for the debate this afternoon.

Michael Russell: I know that it is embarrassing for you, but that is the situation.

Murdo Fraser: I can assure you that I am not the one who is embarrassed.

The Convener: Mr Rowley wants to calm things down, so he can come in.

Alex Rowley: Given that—as I said—the result of the general election is that we are leaving the EU, I take it that the Scottish Government will push for an exit from the EU that best protects Scotland’s interests by having much closer alignment to the customs union and the single market. I assume that, as our representative in Government, you will go to the JMC meeting tomorrow to set out the clear case for minimising the damage to Scotland.

Michael Russell: Although I will be going to that meeting tomorrow, I regret that I cannot say that I am looking forward to it. I continue to argue strongly for the least damaging Brexit, as was laid out in “Scotland’s Place in Europe”, which we published in December 2016; that is, to have continued membership of the single market and the customs union. A version of that is being implemented in Northern Ireland, which it would be possible to implement in Scotland. If, tomorrow, that is on the table and is being offered, I am willing to negotiate on it seriously.

09:45

The Convener: Patrick Harvie is also interested in relationships and what the Delegated Powers and Law Reform Committee wrote to us about yesterday.

Patrick Harvie (Glasgow) (Green): I will follow up on the quote from the Steve Barclay letter that Alex Rowley read out. This paragraph seems to draw a distinction between previous versions of the bill and the current version. It says:

“you welcomed the level of engagement on previous versions of the Bill”.

You talked about Suella Braverman’s role and said that there has been a deterioration in the situation. The next sentence says:

“I would like to join you in recognising the engagement that has taken place between our administrations to develop this Bill.”

Has there been any dialogue in development of the current bill? There have been politically very significant changes to the withdrawal agreement, including changes that move matters from the withdrawal agreement into the political declaration, changes that rule out extensions to the transition period, changes that remove the requirement for parliamentary oversight at Westminster, and changes that downgrade workers’ rights and measures to protect child asylum seekers.

Michael Russell: We saw the bill only the day before its publication. There was no attempt to tell us about, or discuss with us, the changes that were being made.

Patrick Harvie: Is it, in that case, entirely unclear what Mr Barclay is referring to in that sentence?

Michael Russell: I have to say that such phrases are stock phrases that appear in the letters—there are many of them. Some politeness in such relationships is understandable, because otherwise the relationship would be even worse than it is.

That paragraph says clearly that we

“welcomed the level of engagement on previous versions of the Bill”.

We did discuss them, but the UK Government did not ask us whether we agreed and did not say that had we said no, it would have withdrawn a bill. The day before the bill appeared, officials had a conversation about changes to it. They saw the bill then—that is it.

Patrick Harvie: Thank you.

One of the changes is to clause 31, which is about parliamentary oversight and scrutiny of the negotiating mandate, the on-going discussions, and approval of any future relationship with the European Union. The previous version also required that negotiating objectives be consistent with the political declaration. That has all been taken out. Acknowledging that the negotiation of a future relationship is very clearly a UK competence, do you think that there is a danger that that change makes it much more likely that a future relationship will be agreed and approved by ministerial decision alone? That in itself would directly cut across devolution in more substantial ways than the bill does.

Michael Russell: Let me go back one step to say that I do not entirely accept that such negotiations are a UK competence. In negotiations on devolved competences, there has to be a role for the devolved Administrations. The nature of that role has not been resolved; it has been under discussion for at least 18 months and probably longer, but we do not have a resolution. It will be discussed again tomorrow. It is not an absolute.

Nor is it an absolute that our involvement would be about only devolved competences. The memorandum of understanding recognises the difference between devolved competences and issues that affect devolved competences. We have to be careful about what we conclude in that area.

I spoke in my opening remarks about lack of scrutiny. The lack of scrutiny and the reluctance to accept scrutiny are very clear. No role is being accorded to the UK Parliament, let alone the Scottish Parliament, in these matters, and there is in the present bill no role in relation to the final treaty. It is alleged that subsequent legislation will

deal with that, but we have to be very careful about the commitments that are being made. Commitments were made, for example, to make changes to the bill from last October that have not taken place, so I do not now give any credence to commitments that are made without concrete evidence.

The reality is that the changes will cut across devolution: elements in the bill will blatantly do that. Although the changes do not and will not stop Parliament giving its view, it is right to say that they vastly diminish the ability of this Parliament to have a formal role, and they stop the Westminster Parliament having one.

Patrick Harvie: I also want to ask about the letter from the Delegated Powers and Law Reform Committee of yesterday. It acknowledges that the time for scrutiny is absurdly constrained and that it, this committee and Parliament have almost no time in which to scrutinise the bill. The DPLR Committee has raised a number of issues. Are you in a position to say anything on the record yet about the questions that the DPLR Committee raised in its letter?

Michael Russell: I will be happy to address those questions this afternoon in Parliament. I am not in a position to do so here and now, because I have been considering the letter only this morning. However, I will endeavour to address the issues this afternoon, because people have a right to know my response. I agree with the DPLR Committee about the constrained timescale. I recall there being massive criticism from Conservative members of this Parliament about the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, but that was not dealt with in just three days. That is the apt comparison.

Adam Tomkins: On the question of timing that Mr Harvie raised, do legislative consent procedures in this Parliament normally happen after the last amending stage of the relevant legislation in Westminster?

Michael Russell: Such procedures can happen up to the last amending stage. The way in which we have handled them has varied. Gerald Byrne may want to address this question.

Gerald Byrne (Scottish Government): We normally try to have legislative consent in place before the last amending stage in the first house, which allows the UK Parliament to reflect the views of this Parliament. However, we also acknowledge that Westminster bills change as they go through the second house, so there is the opportunity for supplementary legislative consent motions to be brought forward in the second house. Generally, we try to have legislative consent before the last amending stage in the first

house but, as the Cabinet secretary says, the process can take place up until the last amending stage in the second house.

Michael Russell: Can I add something? There is a different procedure in Wales and Scotland, as we know. However, in addition, on this occasion, Wales supports the series of amendments in the House of Lords, which I hope will make a difference to the bill. We will support the efforts to alter the bill in the House of Lords, although the chances of that succeeding are minuscule. It is also right, as Gerald Byrne indicated, that this Parliament's view is heard while the bill is still proceeding through the House of Commons.

Adam Tomkins: When do you anticipate that the last amending stage in the second house, the House of Lords, will take place?

Gerald Byrne: I have not seen the parliamentary timetable for the House of Lords yet, but it will perhaps be towards the end of January. I am not entirely sure that we have seen a timetable yet. I will check with Francesca Morton, who might know.

Adam Tomkins: I am told that, if the bill is amended in the House of Lords, there will then be a ping-pong stage, which has been provisionally set down for 22 January. Given that today is only 8 January, why does there seem to be a rush to consider the question of consent today, not only here in the committee this morning but in the chamber this afternoon? We have another week and a half, which is not as ideal as a month and a half, but it is at least some parliamentary time.

Michael Russell: It is for the reason that Gerald Byrne indicated. I want to make sure that—certainly on this occasion—the House of Commons has the opportunity to consider our position. That is where we are. We could come back to the bill. You may say, “Perish the thought,” but we could come back to it if there were substantial changes in the House of Lords.

John Mason (Glasgow Shettleston) (SNP): I am interested in some of the comments concerning Northern Ireland and how that affects us in Scotland. I take the general point in paragraph 58 of the Scottish Government paper that Scotland is

“at a competitive disadvantage in relation to Northern Ireland”,

but there are also some specific points in relation to clause 21 and 22, on the

“Main power in connection with Ireland/Northern Ireland Protocol”.

There seems to be some suggestion in the paper that, as well as UK ministers, Scottish ministers might be involved in implementing the protocol. Could you explain that?

Michael Russell: Broad powers exist in clauses 21 and 22. The power to make alterations to the protocol lies with both sets of ministers, but we are not entirely sure why that is the case, to be honest. It would be far better if there were greater clarity in the matter than is provided for in clauses 21 and 22, but the power lies with both sets of ministers.

Francesca Morton (Scottish Government): We do not have details from the UK Government as to what might be required under clauses 21 and 22. Clause 5 does a lot of the heavy lifting in implementing the withdrawal agreement by transposing a lot of it automatically. In the UK Government's delegated powers memorandum, it expressed the view that much of what needs to be done under the protocol will be achieved by clause 5. There is not a huge amount of detail about what might be in the regulations, but we will follow that up in terms of what would be required.

Michael Russell: There is the point, too, that amending devolution statutes by secondary legislation does not seem to us like a particularly wonderful idea, to put it modestly.

John Mason: I suppose that I am struggling a bit to understand all this, but I accept that there is a lack of clarity. Could the provisions be touching on the issue concerning Northern Ireland, and the whole question of whether there will be a boundary in the Irish Sea, whether we will be affected and whether there will be tariffs and so on, or do we just not know?

Michael Russell: The provisions could be touching on that issue. If you look at the situation with Northern Ireland, it is unclear what will happen in terms of trading relationships, requirements for paperwork and how the system will operate. Michael Dougan's point on this is very interesting. We have heard from Brexit apologists for some time about the wonderful potential of the UK single market, but the UK single market is in fact destroyed already by this one action, because if there was such a thing as the UK single market, it now has a big hole in it—the Northern Ireland hole. It is pretty extraordinary that the Prime Minister has accepted that, because it completely blows out the water many of the other arguments that he has made. The confusion on the issue remains. When I was in Stranraer in early December, considerable concerns were expressed to me about what it would mean for Cairnryan. However, we do not know—nobody presently knows. We had the extraordinary spectacle of the local MP, who is the Secretary of State for Scotland, complaining about the possible effects on Stranraer of a policy that he is imposing. Even he does not know what the effect of the policy would be. We have to wait and see.

Francesca Morton: With regard to how the powers might be used, the UK Government has said:

“the UK will be required to set up the framework necessary to give effect to the obligations contained in the Protocol. This will require amendments to domestic legislation and retained direct principal EU legislation”.

That is to do with technical matters that might come up. The implementation of the protocol necessitates more than just preserving the status quo; it looks beyond that to what might happen if there are developments with EU law and how they might affect the protocol and Northern Ireland's compliance with them.

John Mason: We do not have a concrete example, though.

Michael Russell: No.

Adam Tomkins: I just want to clarify what you said, cabinet secretary. Did you say that, in your view, amending devolution legislation by secondary instruments is not a very good idea?

Michael Russell: Not in the way in which it is drafted in this bill.

Adam Tomkins: So you are not in favour of section 30 orders and you are not seeking any more.

Michael Russell: I realised the moment that I said it that Professor Tomkins was going to leap on section 30. The implication relates to this bill—the bill is badly drafted and it contains powers that we think are undesirable. I am in favour of a section 30 order, and if you have one in your pocket, I would be glad to have it.

Adam Tomkins: Just to clarify, the Government's position is that amending devolution legislation by secondary instruments is all right sometimes.

Michael Russell: The Government position is that the bill is a bad bill.

Alexander Burnett (Aberdeenshire West) (Con): Paragraph 13 of annex A to paper 1—the legislative consent memorandum—refers to the modelling that the Scottish Government has done of the costs of leaving the EU. What information can you share as to the basis of that model?

Michael Russell: I am sorry, but can you repeat that? I did not get the first part of the question.

Alexander Burnett: Paragraph 13 of annex A raises the modelling that the Scottish Government has done of the costs of leaving the EU. What information can the cabinet secretary share about the basis of that model? Is the model being updated as information becomes available, and has the Government applied it to, or separately

modelled, other scenarios such as Scotland separating from the UK?

10:00

Michael Russell: That is all fully published material. It starts with the “Scotland’s Place in Europe” document from December 2016 and runs through a whole range of published material, which is freely available; some copies may well be left, and it can also be found on the Scottish Government website. We have published vastly more material than the UK Government has done on what we believe that the costs would be, and we have compared that to other models. Indeed, later this month—I think—we will publish another assessment that considers the impact of Brexit.

That assessment, which we have commissioned ourselves, will be on the social inequality impacts of Brexit, and it will be far more comprehensive than anything that the UK Government has even attempted; it has not attempted to do that. As such, I am pleased with that. Nonetheless, if, having reviewed all that material, Alexander Burnett thinks that there are unanswered questions, I am happy to answer them.

Gordon MacDonald (Edinburgh Pentlands) (SNP): We talked earlier about the independent monitoring authority, and the cabinet secretary highlighted his concerns about the appointment process. However, the Steve Barclay letter refers to

“giving devolved ministers a strong role in relevant appointments to the board of the IMA”.

Keeping in mind that there are two concerns—one about the appointment of the chair and the other about a member who knows about “relevant conditions in Scotland”, whatever that means—will the cabinet secretary clarify what, in his view, the situation is?

Michael Russell: That discussion has gone on since the first indication that there was to be an independent monitoring authority. If there are to be three members who have experience of the law and practice in Scotland, Wales and Northern Ireland, it has been our view and the Welsh view—and, had they been present, I think that it would have been the Northern Irish view—that those members should be chosen by the devolved Administrations, or, at the very least, that their appointment should be agreed by the devolved Administrations. We have argued that very strongly; there should be no other question.

That was raised very early on in the process; there is a file of correspondence, backwards and forwards, in which I refer to it. However, I suppose that the definitive word on the issue came to me in a letter from James Duddridge of 20 October, which I am happy to make available to the

committee if it has not seen it. It lays out in an annex the appointments to the board of the IMA and it is in essence the UK Government’s final word on the matter. It runs over two pages and it is a fairly complex thing but, at the end of the day, what it says is that it decides. Whatever happens, and no matter the amount of consultation that takes place, in the end, the UK Government decides in three areas. The first is the chair of the body, in that it chooses the chair. It can consult, but it does not have to listen. The second is terms and procedure; that is, it decides not just the appointments but the terms and procedure of appointment for those three members. Thirdly, it also takes any decision to dismiss any of those members. In other words, in the end, it does not matter what our position is. It is like the Sewel convention—in the end, it does not matter.

That goes back to Mr Rowley’s point about equality of status. If there were an intention to have equality of status, it would be reflected here. In relation to these provisions, we have to ask ourselves why the UK Government would do this. There would surely be nothing easier than to say, “We accept that you do not want to leave, but we are telling you to leave and you will have to leave, so we accept that that there has to be some compromise on this.” However, there is no compromise at all. Whatever is, is—and that is it. That is where we are now. I went back to the minister, James Duddridge, on 22 October and made it clear that I do not agree with that. However, that was to no great effect and, in our view, the bill continues to be unacceptable in those regards.

Gordon MacDonald: How much power will the independent monitoring authority have over devolved public authorities in areas of devolved interest?

Michael Russell: It will have considerable authority. For example—this is an issue that is worth examining—the independent monitoring authority can inquire into the actions of a devolved public authority if it believes that it is not observing the regulations. The commitment from the UK Government is that it will consult the devolved Administration minister before that happens. In addition, as a huge concession, it said that we can go to it and ask for it to happen. However, we cannot do anything about it if we think that it should not happen—the UK Government will simply do it anyway. That is important, but the other issue, which I referred to earlier, is that the powers of the IMA can be transferred to another body and there is no guarantee that even the limited provisions would also pass to it. Therefore, it is perfectly possible that we could find ourselves with the provisions being completely meaningless very quickly and there is no way that we can influence that.

Gordon MacDonald: Thanks very much.

The Convener: Cabinet secretary, you mentioned the Sewel convention. The committee has been concerned for some time about the impasse that exists between the Scottish and UK Governments in relation to that. We have always thought that it needs to be addressed as a matter of urgency. Indeed, if that could be resolved, it might be crucial to the future relationships between the two Governments and between the Scottish Parliament and the UK Government. Is any discussion on Sewel on-going at the moment?

Michael Russell: The simple fact about the Sewel convention, if I may quote electioneering material, is that no should mean no; if the Scottish Parliament says no to something, that is what it should mean. The last time we discussed the Sewel convention would have been at the June meeting of the JMC in Manchester, when I continued to discuss it with David Lidington. There has been no discussion of it with the new Administration.

There has to be a procedure by which the Scottish Parliament can say that it does not consent to something and that is the final word on it, or everything is meaningless, but we have not even been able to have a meaningful discussion about that. The previous Prime Minister was very opposed to discussing it. I do not believe that David Lidington was opposed to discussing a means to make the convention work, and there are such means, but presently there is nothing.

It is connected to the intergovernmental review—all these bits are connected. That review has been going on for more than 18 months—almost two years—and all the targets that were set for when various things should happen have been missed. We have no idea what the new Government intends to do with that review. There is also the Lord Dunlop review, for which I have no idea what the terms of reference are or what he is trying to do. A report is apparently due to be delivered to the Prime Minister shortly, but I have no idea what will happen with that. That is where we are.

Patrick Harvie: That brings us to the context of this whole discussion, which has been unspoken so far. We all know that the UK Government has already passed very significant legislation in devolved areas without the consent of this Parliament and that it will do that again with the European Union (Withdrawal Agreement) Bill. If the Scottish Parliament decides not to give consent to that bill this afternoon, the reality is that none of us expects that decision to be respected. We have a UK Government that is willing to go through the motions of seeking consent, but there is no indication that it is willing to respect consent decisions.

Is there any reason to think that, if the withdrawal agreement bill is passed in its current form or anything like it, we will not have a UK Government that routinely uses the powers that it is given without the consent of this Parliament, or regardless of whether such consent is given?

Michael Russell: No, of course there is not. I hope that the Scottish Parliament says that it will not approve the bill today, and I think that it is likely that the National Assembly for Wales will say that when it considers it. If there was a Northern Ireland Assembly, it would be up to it what it said but, as far as I can see, there would be a majority there for remain. However, that would have no effect.

That is a very serious set of circumstances, because it sets at naught the devolved process. Scotland is particularly badly impacted, because it could be argued that Northern Ireland has a set of special arrangements in place and that Wales voted for Brexit. However, Scotland did not vote for Brexit and has consistently not voted for it, yet the views of its Parliament will be ignored.

You say that the UK Government has asked for legislative consent, but it has done so in a pretty mealy-mouthed way. In the letters from James Duddridge in October and Steve Barclay in December, an extraordinary artificial distinction is drawn between seeking legislative consent for clauses in the bill and approving the bill. That is mere sophistry. It is designed to pretend that the process is about the technicalities of the legislation rather than the political process. That pretence should be rejected absolutely.

We have heard similar arguments today. This is about Scotland not agreeing to leave the EU and the fact that compromises that have been offered by the Scottish Government have not been accepted. You are right that the UK Government's intention will be to completely ignore the views of the Scottish Parliament, the Welsh Assembly and—probably, if it were in session—the Northern Ireland Assembly.

Angela Constance (Almond Valley) (SNP): Following on from Gordon MacDonald's questions on the independent monitoring authority, for the record, could you state what you consider to be the problem with EU citizens having to apply for rights that they already have?

Michael Russell: I think that there are two objections to that, one of which is a practical objection to the process. During last night's House of Commons debate on the withdrawal agreement bill, there were opportunities for changes to be made to the settled status scheme, but they were rejected on every occasion. That was very concerning, because the settled status scheme is not working well for people. I know of a number of

constituents who have pre-settled status when they should have settled status who have found that the system does not work for them. The UK Government needs to recognise that the system that it has set up is not working in the way that it should and that it needs to be reviewed.

In addition to the practical issue, which is that it is not a particularly well-run scheme that is producing results that are unacceptable for some people, there is a political and moral objection. People—some of whom have spent their entire working lives as citizens in this country, working alongside us—are now being told that they will have the right to stay and continue to work here only if they go through that process, which they find offensive, because it tells them that, as EU citizens, they are different from the people they are sitting next to. They are being forced to get recognition and to jump through hoops to do so. I know people who have left the country rather than put up with that, and I know people who are immensely distressed by the process. All MSPs will have met constituents who are in that situation.

I would like to be able to offer each and every one of those people a guarantee about their future in Scotland, but migration is not a devolved matter, so I cannot do that. What I can say is that I believe that, regrettably, they will have to apply if that is the law, but if someone has applied and has received settled status, the Scottish Government should be prepared to defend their right to stay here if any attempt is made to change the circumstances or to act in a way that is, frankly, illegal. The Scottish Government should make that commitment, but I would love to go further.

I would also like freedom of movement to be retained, as it is immensely advantageous for Scotland in two ways: it is advantageous for our business and industry when people come here and it enriches our society; and it is advantageous for Scottish people to be able to go elsewhere. It is extraordinary that that boon and benefit, which all of us have experienced, is being thrown away and treated as if it were something harmful. We should be very clear that that represents a major deterioration in our rights as citizens and a major insult to the EU citizens who live and work among us.

Angela Constance: Thank you—

The Convener: Apologies, Angela, but before you continue, I think that Alex Rowley wants to ask a supplementary question.

Alex Rowley: Does the Scottish Government have any statistics on the situation that you described? I have spoken to people who have worked here for all their adult lives, who are very worried and are talking about leaving.

Michael Russell: We have statistics from the UK Government on how many people have applied to the scheme and what the rate of acceptance is. The only other statistics that we would have—I have not seen them, but I can inquire about them—would be those on people who have used the service that we have set up through the citizens advice bureaux. However, those statistics might be very crude, because they will not include, for example, people who have gone to see their MSP.

Do we have any other statistics?

Gerald Byrne: I am not aware of any, but I am not the expert on that. We can find out for Mr Rowley.

Michael Russell: We will find out and we will get back to him.

Angela Constance: I want to ask a few questions on the removal of previous commitments to child refugees and workers' rights. As we know, the bill will remove obligations on the UK Government to seek agreement or negotiate with the EU on child refugees—who are some of the most disadvantaged and vulnerable children in the world—and on families who are seeking to be reunited. Those obligations are to be removed and we are told that there will be a statement on what they will be replaced with.

Do you have any insight into what will be contained in that statement? Do you agree that there is a risk when there is absolutely no guarantee that the UK will continue to sign up to the Dublin III regulation? If it does not continue to do so, that will result in the removal of the right of unaccompanied child refugees to be reunited with their families in the UK or elsewhere in Europe.

10:15

Michael Russell: If you were looking for just one reason to reject the bill, that would be one of the many strong reasons for doing so. I have no idea what will be in the promised statement; nobody has any idea what will be in it. Among all the things that the UK Government would decide to do, it would be an extraordinary decision to walk away from the Dublin III regulation.

The regulation is advantageous on both sides. It is advantageous for unaccompanied children in Europe who have been separated from their families and who want to come to the UK, but there are also children in the UK who can go to Europe as a result of it. It is about bringing families together. I cannot for the life of me imagine why any Government would refuse to sign up to it. There is some indication that, because it is a European protocol, the UK Government should automatically withdraw from it and then endeavour

to put something in its place. However, even if you believed in that level of Brexit, surely you would put something in its place before you withdrew from the protocol, so that there was no risk to any individual child. Even with that explanation, it is the wrong thing to do.

What is proposed is very damaging. It is not the same—I know that Angela Constance knows a great deal about this—as what is called the Dubs amendment to the Immigration Act 2016, which sought to deal with unaccompanied children who did not have families. Even then, we had an indication of extraordinary antipathy to a humanitarian action. The Dubs amendment dealt with 3,000 children, but the UK Government then said that it would accept 480. We do not even know whether that number has been met—we have no indication of whether it has been or will be met. I cannot imagine what motivates a Government to behave in that way towards very vulnerable children, but the UK Government is acting in that way. That is in the bill—or, rather, it is not in the bill, because it has been removed from the bill.

Angela Constance: My final question is about the removal of the provisions to safeguard workers' rights, which is to be replaced with a new, separate bill further down the line. I suspect that you will not have had any indication of what will be in that bill, although you can correct me if I am wrong. Can you say a bit more about the removal of the safeguard in question in clause 26, which provides for regulations to be made that would allow lower courts or tribunals not to be bound by EU law in certain circumstances?

Michael Russell: We have indicated that the concern that we have about the removal of workers' rights involves a number of issues. One of those relates to clause 26, which would further limit the ability of the courts to take into account previous judgments, and that would affect workers in those circumstances. Obviously, it would lower standards and protections if we could not rely on—we do not yet know what we would not be allowed to rely on—previous judgments.

There are several strong reasons for objecting to that. One of those is to do with the impact that it would have on the Scottish Government's fair work agenda, which is very different from the UK Government's work agenda. We have a comprehensive fair work plan, and it is important to us that it is observed. That plan is based on the rights and protections that exist through the European Union and which are part of our system. The UK Government is going to undercut and remove those; there is not the slightest doubt about that. Why would we believe that people who have fought against extending workers' rights for their entire political lives would suddenly be

converted to continuing them without legislative protection? You would have to be very gullible to believe that.

The reality of the situation is that not only workers' rights and protections but human and environmental rights will be undermined. I do not think that there is any doubt about that, and I am not prepared to accept assurances on the matter, because the evidence points us in the opposite direction. It leads us to ask, "Why would you take these things out of an agreement unless you intended to interfere with them in a negative way?" There would be no reason to do so. If there was no such intention, those things would just be left in the agreement.

What I think the UK Government fails to understand—this has been the hallmark of the negotiations over the past three and a half years—is what the EU is and how it operates as a rules-based organisation. The UK Government fails to understand that, if it is going to withdraw from the level playing field, that will be a red line that has consequences. The history of the past three and a half years has shown that, if red lines are set, they lead to inevitable consequences, and that is what we are seeing here. If getting out of the level playing field is a red line, the consequence will be, at the very best, a very low-standard, pretty irrelevant free trade agreement that contains lots of ifs and buts and exceptions, because the integrity of the single market is enormously important to the EU.

I say again that there has been no understanding of that. It is part of the failure to understand the Irish situation. The integrity of the single market is vital, and it would be fatally undermined if somebody was trying to be part of it but would not observe the requirements on employment and other rights.

Tom Arthur (Renfrewshire South) (SNP): Following the unlawful prorogation of Parliament by the Prime Minister, at least two other substantive pieces of Brexit legislation that were subject to LCMs fell—the Trade Bill and the Agriculture Bill. My understanding is that an agriculture bill will be introduced this month. As for a trade bill, I do not know what is going to happen. Can you give an indication of how many Brexit-related LCMs you expect Parliament to consider over the remainder of the current session?

Michael Russell: It is difficult to say at present. Gerald Byrne might give you an estimate, but before I ask him to do so, let me make a point about where we are. Again and again, we have made a distinction between those things that are required to be done to ensure that there is a body of law on which we can all rely and those things that are political, which we will not accept. There are issues, for example, to do with agricultural

payments and an error that the UK Government made in the withdrawal agreement.

Gerald Byrne: Yes, indeed—there is a gap in the legislative framework.

Michael Russell: There is a gap in the framework, which will require an amendment to allow the continuation of agricultural payments. We made the exception for medical treatment in Europe, and that will be done for agricultural payments, too. What is needed to ensure that we have a reliable corpus of law will be undertaken.

I do not know whether Gerald Byrne has an estimate of what will be required. We have done an awful lot already.

Gerald Byrne: We are expecting reintroduction of the bills on agriculture and fisheries, as you would expect. As the cabinet secretary mentioned, direct payments to farmers will be the subject of a specific piece of legislation. Francesca, are there any others?

Francesca Morton: The Trade Bill has been mentioned already.

Gerald Byrne: The Trade Bill will need to come back as well, so the ones—

Tom Arthur: Does the Trade Bill need to come back or will the UK Government seek to revert to the Ponsonby principle, which used to govern trade relations?

Francesca Morton: I think that the intention is to bring back powers in the Trade Bill to allow for the implementation of international obligations, particularly under the procurement agreement.

Tom Arthur: If I may, I will rephrase my question, cabinet secretary. You identified earlier that, through each successive iteration of the legislation that we are considering today, there has been a centralising tendency and an increasing disregard for the devolution arrangements across these islands. Is there a concern that those bills as reintroduced will reflect that tendency?

Michael Russell: If we take the example of the bill that we are discussing, I note that, each time we have seen it, it has got worse. That is a distinct possibility.

I again make a distinction between those things that require to be done so that there is not a gap in the law or in payments, as in agriculture, and those things that are a political tendency, which we will resist. If you are asking whether we will resist the bills if they get worse politically, the answer is yes, but we will also ensure that we do not create circumstances in which individuals or groups of people are severely adversely affected.

Tom Arthur: You identified the strained nature of the relations between your officials and officials at DExEU. Is more collaboration and co-operation going on in those other areas where there is a requirement to ensure that there is continuity in the body of law? Is work being done there in a more collaborative fashion?

Michael Russell: I think that it is fair to say that the normal relationships with UK Government officials and ministers that I have been used to as a minister over the past 12 years are at a low ebb. When it comes to ministers, there is obviously an element of politics. When it comes to officials, it is no secret that there is considerable nervousness in the UK civil service about what is taking place and how it is taking place, but there is also a determination on the part of UK Government officials to do their masters' bidding, which means that they are not very friendly towards devolution. I do not think that that affects personal relationships, but that is where we are.

Tom Arthur: Thank you.

The Convener: I thank the cabinet secretary and our other witnesses for their contributions.

10:25

Meeting continued in private until 11:25.

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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