

## Through the looking glass, darkly: housing law in a post-Brexit UK

As the country comes to terms with the result of June's national referendum, Dean Underwood takes a look at post-EU housing law, through a dark, Brexit looking glass.

*" 'Why is a raven like a writing desk?' [said the Hatter] 'Come, we shall have some fun now!' thought Alice. 'I'm glad they've begun asking riddles...'"*

**Alice's Adventures in Wonderland,  
Chapter 7, A Mad Tea Party**

In June 2016, the UK electorate voted to leave the European Union or, to use the vernacular, to Brexit.

The result - foreword to arguably the most important chapter in the UK's recent constitutional history - heralds a significant change in the UK's relationship with the EU.

Since June, it has caused political and economic uncertainty: leadership contests; a new Cabinet; the devaluation of sterling; and a fall in the UK's credit rating.

At a more prosaic level, it has prompted questions about the potential effect of Brexit on areas of UK business and law, not least housing law.

Will rules governing the procurement of services by public bodies survive Brexit and, if so, what will they look like? What will Brexit mean for EU nationals seeking assistance under Parts VI and VII of the Housing Act 1996? What of the European Convention on Human Rights ('ECHR')? Will Brexit result in any significant change to housing law?

Trade press and social media alike have been replete with questions. Like Alice, at the start of The Mad Tea Party, commentators looked forward to the intellectual 'fun' of Brexit's many riddles ... and to their answers.

### **Post-Brexit housing law: a Hatter's riddle?**

Rarely, however, have so many questions yielded so few answers.

Commentators have been quick to point out that Brexit will not affect the application of the ECHR in the UK. Neither being a signatory to the ECHR nor the Human Rights Act 1998, which gives effect to it in domestic law, depends on the UK's membership of the EU.

Answers to other questions have, however, been atypically tentative. Why so?

In short, the effect of Brexit on housing providers and on domestic housing law will depend on the UK's future relationship with the EU. As Alice might have said to the Hatter, "The answer to your riddle, dear Hatter, rather depends on the writing desk!".

More particularly, it depends on which of four existing relationships with non-EU members it most resembles: on the one hand, those with Norway and Switzerland, which - broadly - allow free trade but require the free movement of people; or, on the other, those with Canada and the World Trade Organisation, more limited as they are in both rights and obligations.

If the former then, put simply, EU law would still apply and, broadly, the UK would be obliged to uphold the Single Market's fundamental freedoms – the free movement of people, goods, services and capital. If the latter, the Government would have far greater discretion to decide which aspects of EU law, if any, continue to bind the UK and to what extent.

It is simply too early to say, however, which of these relationship models the UK's future relationship with the EU will most resemble. Moreover, tormenting though it is, it is unlikely that the detail will become clear soon.

Brexit proper will not begin until the Government invokes Article 50 of the Treaty on the European Union.

Theresa May has indicated, however, that the Government will not invoke Article 50 before 2017; and Conservative Party Chairman, Patrick McLoughlin MP has committed only to doing so before the next general election on 7th May 2020.

While it is likely to come under increasing pressure to begin Brexit sooner rather than later, therefore, the Government has given itself - potentially - a 3½ year window in which to begin the process.

Further, once that process has begun, the Government and EU will have two years - or such longer period as member states unanimously agree - to complete exit negotiations. In default of any earlier agreement, the UK will cease to be a member of the EU at the end of that period.

EU law as we know it will continue to apply in the UK until that time.

Quite what the scope of the Government's exit negotiations will be is presently unclear. Indeed, it is not yet known whether exit negotiations will encompass negotiation about the UK's new trade relationship with the EU, or whether that relationship will be the subject of further negotiation, after exit negotiations are complete.

With the above in mind, therefore, questions about the effect of Brexit on domestic housing law are likely to lack any certain answer for some time.

They are, however, no Hatter's riddle: unlike the latter, they at least will receive an answer at the end of this chapter in the UK's constitutional history. We, at least, will eventually know what the figurative writing desk looks like.

### **So, why is a raven like a writing desk?**

In the meantime, naturally, speculation abounds; and it would be remiss, surely, not to indulge in a little here.

#### Procurement

EU directives governing the procurement of supplies, services and works by public authorities are, arguably, one of the more controversial of the EU's influences on the administration of social housing in the UK.

Domestically, they are given effect by the Public Contracts Regulations 2015.

In simple terms, the Regulations oblige public authorities wanting to procure supplies, services or works exceeding a prescribed value to follow the Regulations' procedures before awarding a contract to suppliers.

The underlying policy is to facilitate free and open competition in and between EU member states for the provision of supplies, services and works; and to increase value for the money that public authorities spend on them.

The rules have long been criticised, however, for introducing unnecessary and costly red tape into the administration of domestic social housing. In 2011, for example, the National Housing Federation estimated that compliance with EU procurement requirements cost the housing sector £30m annually - money that might otherwise be invested in the provision of social housing. That has led some to question - hopefully perhaps - whether the rules will apply in a post-Brexit UK.

While it is difficult to answer that question with certainty, knowing so little at present about the figurative writing desk, it seems unlikely that they - or a similar set of procurement rules - will not apply post-Brexit.

Public procurement rules play an important role in EU competition law, helping to uphold the free movement of people, goods and services in particular. Accepting the rules - or their effective equivalent - is likely to be important, if not pre-requisite, to gaining free access to the Single Market and to any meaningful trading relationship with the EU in the future.

Even if the Government does not agree to implement the EU's procurement directives in future, therefore, it is likely to have to formulate and implement its own; and they are unlikely to reduce the much-lamented red procurement tape significantly.

Current procurement rules are, after all, as much about preventing corruption as they are about allowing open competition; and that is unlikely to change, it is suggested, in a post-Brexit UK.

It is possible of course that, with negotiation, some organisations - private registered providers in particular - might be excluded from the list of public authorities to whom the rules apply. In that regard, the National Housing Federation has indicated that it may discuss this issue with the Government. If it does so, the deregulation provisions of the Housing and Planning Act 2016 may yet add grist to that particular mill.

It is equally possible that the Government will succeed in reducing at least some of the existing red tape.

For the time being, however, it is far safer to assume that housing providers - local authorities and other registered providers alike - will have to comply with the red tape of procurement rules post-Brexit.

#### Eligibility for housing

It is far more difficult, it is suggested, to make the same assumption of a status quo in respect of EU nationals' eligibility for housing in the UK, whether under Part VI of the Housing Act 1996 or Part VII.

There are, it is estimated, approximately 3 million non-British EU nationals living in the UK and, according to the Department for Communities and Local Government, in 2014/2015, 4% of social housing lettings were made to EU national tenants.

Their eligibility for assistance under Parts VI and Part VII of the 1996 Act depends on their immigration status and, more particularly, on their reason for being in the UK.

Broadly, EEA nationals - including EU nationals - have extended leave to remain in the UK, beyond an initial three months, if they are self-employed, working, looking for work, self-sufficient or studying. Thereafter they may, in certain circumstances, acquire permanent leave to remain: for example, if they have resided and worked in the UK for a continuous period of 5 years.

At present, it is unclear whether the UK will remain a member of the EEA when it leaves the EU and, if it does not, whether it will renew its membership thereafter. It is equally unclear what the right of EEA nationals already residing in the UK will be, or what rights those coming to the UK in the future might expect.

Like so many other matters, therefore, the future eligibility of EU nationals for housing assistance will depend on the outcome of the Government's negotiations with the EU. It is conceivable that they will remain materially the same. It is equally conceivable that they will diminish.

The importance that immigration acquired in the campaign to leave the EU has, however, led some to speculate that the eligibility of EU nationals will indeed diminish. They are surely right to point out that their eligibility is no longer guaranteed.

Parts VI and VI of the 1996 Act, however, as presently enacted, help to give effect to the Single Market's fundamental freedoms, not least of which the free movement of people. That freedom, as noted above, is integral to the EU's trading agreements with other non-EU European countries – Norway, Iceland, Liechtenstein and Switzerland – and is likely to be important, if not pre-requisite, to the UK gaining favourable access to the Single Market in the future.

At present, therefore, to go further than acknowledge the precarious position of EU nationals - and that any change to their rights may affect a significant part of the housing sector - is potentially hasty.

Like Alice, therefore, we will have to continue to mull the many possibilities without the hope of a clear answer for some time to come.

#### Brexit's indirect effects

In the meantime, one of Brexit's indirect effects may of course be that Parliament has insufficient time to enact or bring into force the raft of housing-related legislation recently introduced in- or passed by Parliament.

Brexit will place a heavy burden on Parliament, Government and the civil service. Disentangling the UK from the EU, politically and legally, is likely to occupy much of their time and resources for the foreseeable future. As former permanent secretary at the Foreign Office, Sir Simon Fraser, recently observed in the Financial Times, "It is the biggest administrative and legislative challenge that government has faced that I can remember, possibly since 1945. It would be a pretty all-consuming task for many Whitehall departments."

Whether, therefore, in the face of that challenge, there is time in the Parliamentary calendar to enact the Crown Tenancies Bill, the Homelessness Reduction Bill, the Housing (Tenants' Rights) Bill, the Renters' Rights Bill and other housing-related bills, many of which are at early stages of the Parliamentary process, remains to be seen. Equally, whether there is time to bring the many and diverse provisions of the Housing and Planning Act 1996 into force is unclear. What is clear, it is suggested, is that their progress is at best in jeopardy.

## **Conclusion**

At the end of the Mad Tea Party, Alice sighs wearily and chides the Hatter, "I think you might do something better with the time,' she said, 'than waste it in asking riddles that have no answers'."

Speculation about Brexit's implications for domestic housing law is no waste of time. Intellectually it is - depending on your predilections - 'fun'. It certainly helps to inform debate about post-Brexit UK and, potentially, the Government's position in forthcoming negotiations with the EU.

Had Alice asked a just few questions about the Hatter's infamous writing desk, she might have formed a different view about his riddle!

The answers to these questions are, however, unclear and it is doubtful that they will become clearer in the near future.

For the present, therefore, we will continue to peer through the Brexit looking glass, darkly, and hope for clarity. Whether that is forthcoming before the end of this particular constitutional chapter, or whether - like Alice - we have to endure a Mad Hatter's Tea Party beforehand - only time will tell.

**Dean Underwood**  
**Cornerstone Barristers**