Annex 1: Legality of the Language Proficiency Provisions

Q2: Is the Code of Practice clear in its alignment with any existing legal obligations that you must adhere to, such as the Equality Act 2010 or Welsh Language (Wales) Measure 2011? If not, please suggest how it could be better aligned with those obligations or any others not already included.

1 Introduction

The question which ought to be posed is, 'Are the provisions of Part 7 of the Immigration Bill 2015 consistent with the UK's obligations in EU law?' The answer is that they are not.

2 Discrimination on grounds of nationality

2.1 Treaty and other legislative provisions

Article 18 TFEU states:-

"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

Article 21.1 TFEU states:-

"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

In particular, Article 45 TFEU states:-

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…

4. The provisions of this Article shall not apply to employment in the public service."

In relation to free movement of workers, Article 45 is underpinned by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, which codifies directly enforceable obligations originally included in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

These legislative provisions are subject to the provisions of the Charter of Fundamental Rights of the European Union (CFREU), in particular, Article 21 (Non-discrimination), paragraph 2 which states:-

"Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

2.2 'Employment in the public service'

These provisions purport to introduce a scheme of language proficiency tests for 'customer-facing' public sector workers, to varying degrees, in Great Britain, but not Northern Ireland.

Article 45.4 TFEU excludes from the scope of free movement of workers "employment in the public service". However, as with any exception to a fundamental right or freedom in EU law, this exclusion must be strictly construed.

The position is summed up in 'Commission Staff Working Document, Free movement of workers in the public sector' (Brussels, 14.12.2010 SEC(2010) 1609 final).

Only certain posts within the public sector are subject to Article 48.4. According to the Court of Justice (CJEU) in Case 149/79 (Commission v. Belgium), Article 45(4) TFEU covers "posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality".[1]

Therefore, only a very limited number of posts in the public sector may be reserved to home nationals. Even so, it is also clear that, once such posts are opened out to non-home EU citizens, there can be no discrimination on grounds of nationality towards them.

The Commission Working Document states:-

"–Article 45(4) TFEU makes an exception to the general right to free movement of workers. It states that 'The provisions of this Article shall not apply to employment in the public service.' However, this exception is of limited scope: the CJ[EU][2] has ruled that it only covers restrictions of access to certain posts in the public service to the nationals of the host Member State. For any other aspect of access to a post (e.g. recognition of qualifications) <u>or determining working conditions</u> (e.g. taking into account professional experience and seniority), equal treatment of migrant workers with national workers must be guaranteed. This means that once a post is open to migrant workers[3], or if a returning migrant worker is applying for or occupying a post reserved for nationals, no different treatment can be justified by invoking Article 45(4) TFEU" (emphasis added).

2.3 Language proficiency tests and free movement rights

---

[1] Commission Staff Working Document, p 11.

[2] Case 152/73, Sotgiu ECR [1974] 00153; Case C-248/96, Grahame, Hollanders ECR [1997] I-06407;
Case C-392/05, Alevizos ECR [2007] I- 03505.

[3] even if a Member State opens up a post which it could reserve to its nationals.

Article 3.1 of the 2011 Regulation provides:-

“Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

(a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

(b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

The first subparagraph shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.”

2.3.1 Breach of Article 3.1(b)

Hence, language proficiency may be taken into account under Article 3.1(a) but not Article 3.1(b). **It is under Article 3.1(b) that these measures are fatally flawed.**

Although the Explanatory Notes to the Bill and the ‘Overriding Impact Assessment’ refer only to the improvement in public services, The Conservative Party Manifesto refers specifically to this manifesto pledge in a chapter entitled ‘Cutting Your Taxes, Making Welfare Fairer and Controlling Immigration’. Under a heading, ‘We will promote integration and British values’, it is stated:-

“Being able to speak English is a fundamental part of integrating into our society. We have introduced tough new language tests for migrants and ensured councils reduce spending on translation services. Next, we will legislate to ensure that every public sector worker operating in a customer-facing role must speak fluent English.”

This interpretation of these proposed measures, as having as “their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered”, is bolstered by their inclusion in an Immigration Bill and by assertions by the Minister of State in the Cabinet Office responsible for the Bill, Rt Hon Matthew Hancock MP, who stated, prior to the tabling of the Bill:-

“We are controlling immigration for the benefit of all hard-working people. That includes making sure that foreign nationals employed in customer-facing public sector roles are able to speak a high standard of English.

“We have already introduced tough new language requirements for migrants, now we will introduce new legislation in the forthcoming Immigration Bill to deliver the commitment made by the Prime Minister to go further.”[4]

These measures therefore have the principal, if not exclusive, aim “to keep nationals of other Member States away from the employment offered” and, as

[4] Press release ‘All public sector employees who work directly with the public to have fluent English’ (2 August 2015)(https://www.gov.uk/government/news/all-public-sector-employees-who-work-directly-with-the-public-to-have-fluent-english).

such, contravene Article 3.1(b) of the 2011 Regulation, which is directly enforceable in UK law.

Therefore, were these provisions to be enacted in the forthcoming Immigration Act, they would, according to the opening sentence of Article 3.1, be “provisions laid down by law, regulation or administrative action or administrative practices of a Member State [which] shall not apply”. As such, public sector employers could ignore them and any EU worker subject to them could take legal action against any measures directed against them.

They would also be open to judicial review, for example, by the Local Government Association or any public sector employers’ association, amongst others.

2.3.2 Discriminatory aspects of language proficiency tests

The Commission Working Document deals with language proficiency tests as follows:-

“For anyone wishing to work in another Member State the ability to communicate effectively is obviously important and a certain level of language knowledge may therefore be required for a job. The CJ[EU] has held that any language requirement must be reasonable and necessary for the job in question and cannot constitute grounds for excluding workers from other Member States.[5] Employers cannot demand a particular qualification as only way of proof.[6]

While a very high level of linguistic knowledge may be justifiable in particular situations and for certain jobs, the Commission considers that a requirement to be a mother-tongue speaker could lead to indirect discrimination on grounds of nationality. Also a requirement to have a language competence equivalent to a mother tongue level would in most cases be disproportionate in the light of the case law mentioned above (i.e. a language requirement must be reasonable and necessary for the job in question).”[7]

Recent case law of the CJEU indicates that, in the circumstances of these proposals, they may well amount to direct, rather than indirect, discrimination. In CHEZ Razpredelenie Bulgaria [2015] EUECJ C-83/14 (16 July 2015)(http://www.bailii.org/eu/cases/EUECJ/2015/C8314.html), the CJEU was considering the application of the Race Directive to the installation of outdoor electricity metres in Roma-dominated urban areas in Bulgaria.

At §76 of its judgment, the CJEU produces a formulation of direct discrimination as follows, “it is sufficient, in order for there to be direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43, that that ethnic origin determined the decision to impose the treatment.” (emphasis added)

---

[5] Case C-379/87, Groener ECR [1989] 03967.
[6] Case C-281/98, Angonese ECR [2000] I-04139.
[7] Commission Staff Working Document, p 18.

In the circumstances in which these provisions have been introduced, including the announcement of their purpose by the relevant Minister of State, it is strongly arguable that migrant status "determined" the decision to introduce the measures.

Given that the EJEU's case law on discrimination provisions apply equally to Article 45.2 TFEU (namely, "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment"), it would appear that these proposed provisions are contrary to Article 45.2 TFEU, which is 'directly effective' and therefore directly enforceable in UK courts and tribunals.

If they are directly discriminatory, no justification defence arises. If they are to be considered, at least, as indirectly discriminatory, in that they place EU workers 'at a particular disadvantage', the CJEU in CHEZ made clear that, to be justified, they must pursue a 'legitimate aim'. The 'aim' of these measures is stated to be to control immigration, which is not a 'legitimate aim' in EU law. Even if it could be argued that the 'legitimate aim' is to 'improve public services', the CJEU in CHEZ made clear that there must be an evidence base to establish the legitimacy of the aim in question and that 'common knowledge' is not sufficient.[8]

However, in the Impact Assessment on English Language Requirement for Public Sector Workers, there are merely a couple of 'anecdotes' about language proficiency and no evidence at all. It appears that the legitimacy of the aim is put down to a 'manifesto commitment', what amounts to one line in an 81 page document, which is not an acceptable basis to establish the legitimacy of an otherwise indirectly discriminatory measure.

The means, even to achieve a 'legitimate aim' of improving public services, must be 'appropriate and necessary'. There is no evidence that these measures are 'necessary' to improve public services. They may well have a highly discriminatory effect on migrant workers in the public sector and hence are disproportionate to the purported aim to be achieved.

It should also be noted that the CHEZ judgment developed an innovative approach towards what has been described as 'associative discrimination' after its judgment in Coleman. The Court concluded that, once discrimination is established, a claimant does not have to be a member of the 'protected group' and that such a person could make a claim, "irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure."[9]

As such, any non-EEA migrant workers, or indeed any UK workers, would have a claim if they were subject to the application of these proposals.

In consequence, these proposals are irredeemably discriminatory under Article 45.2 TFEU.

---

[8] See §§116-7 of the judgment.
[9] See at § 60 of the judgment.

2.3.3 Wider considerations on language proficiency tests

It is clear from the Commission Working Document (see above) that, while language tests are permissible, requiring 'mother tongue' proficiency is not permissible in relation to many public sector jobs. The original 'manifesto commitment' referred to 'fluency' in English (or Welsh, as the case may be).

The ordinary meaning of 'fluent' can be 'articulate', 'eloquent',[10] 'able to speak with ease' or 'effortlessly expressed'.[11] This appears to be equivalent to 'mother tongue' proficiency. Admittedly, the Bill confusingly defines 'fluent English' as being "if the person has a command of spoken English which is sufficient to enable the effective performance of the person's role."[12] However, the draft Code of Practice appears to seek to establish some form of 'blanket minimum' for 'customer-facing' public sector jobs, which in any event, may well go further than those standards of proficiency might are permissible in EU law.

3 Discrimination on other grounds

3.1 Language proficiency tests and wider EU non-discrimination rights

In the circumstances, it in unnecessary to consider, at any length, whether these proposals contravene the provisions of the Race and Framework Directives.

Both Directives have a 'nationality' exception. For example, Article 3.2 of the Race Directive states:-

"This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

As the CJEU stated in CHEZ, all exceptions to non-discrimination principles must be strictly construed, particularly in light of Article 21 CFREU. In the circumstances of the introduction of these provisions, declared by a minister to be an immigration measure but is officially 'for the improvement of public services', it is arguable that the measures should not be considered to be "based on nationality".

In any event, it is also arguable that reference to 'difference in treatment' should only cover directly, and not indirectly, discriminatory treatment.

In these circumstances, there is an arguable case that these measures are at least indirectly discriminatory on grounds of race and ethnic origins.

Article 2.3 of the Race Directive defines 'harassment' as follows:-

"Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the

---

[10] Thesaurus: English (UK)
[11] Encarta Dictionary: English (UK)
[12] Clause 47(8) of the Bill.

purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Given the ‘complaint-based’ system of so-called ‘enforcement’ of this proposed scheme, there are grave dangers of harassment of public sector workers for whom English is not their first language.

In these circumstances, there are numerous opportunities, under the Race Directive, to challenge the implementation of these measures, including by way of judicial review, in this case, for example, by the Equality and Human Rights Commission.

Briefly, on the Framework Directive, the draft Code of Practice claims that “2.9. [f]luency does not relate to accents regional or international, dialects, speech impediments or the tone of conversations.”

However, there are grave dangers that workers with speech impediments may suffer direct discrimination or harassment as a result of the implementation of these proposals.

3.2 Equality Act 2010

All the EU measures considered above are ‘directly effective’ against public bodies. In those circumstances, the Equality Act 2010 would not come into play. Nevertheless, it is worth spending a moment to consider the application of the 2010 Act.

Schedule 3 Part 4 (Nationality and ethnic or national origins) provides, in paragraph 17:-

“This paragraph applies in relation to race discrimination so far as relating to—

(a) nationality, or

(b) ethnic or national origins.

(2) Section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment.

(3) A relevant person is—

(a) a Minister of the Crown acting personally, or

(b) a person acting in accordance with a relevant authorisation.

(4) A relevant authorisation is a requirement imposed or express authorisation given—

(a) with respect to a particular case or class of case, by a Minister of the Crown acting personally;

(b) with respect to a particular class of case, by a relevant enactment or by an instrument made under or by virtue of a relevant enactment.

(5) The relevant enactments are—

(a) the Immigration Acts”

However, if the ‘relevant enactment’ is unlawful in EU law, it cannot be applied under this provision. In any event, it is arguable that putting a measure in an Immigration Act, when it is supposed to be for the ‘improvement of public services’ should call into question the applicability of this exception.

In relation to any disability discrimination claims, paragraph 16 of the same Schedule only applies to immigration decisions.

Therefore, there is ample opportunities to pursue tribunal cases in relation to direct and indirect discrimination and harassment on grounds of race and disability.

4 Conclusions

These ill-considered provisions are unlawful in a number of respects and will trigger a wide range of litigation, in terms of judicial review and court and tribunal cases.

1) The measures are unlawful under Article 3.1(b) of the 2011 Regulations as having a principal, if not exclusive, aim “to keep nationals of other Member States away from the employment offered”.

2) The measures are directly discriminatory under Article 45.2 TFEU as they are ‘determined’ by the migrant status of customer-facing public sector workers.

3) In any event, they are indirectly discriminatory under Article 45.2 as they place migrant workers at a particular disadvantage, there is no evidence of a ‘legitimate aim’ and are not ‘appropriate and necessary’.

4) The use of the terms ‘fluent’ and ‘fluency’ indicate a ‘mother tongue’ proficiency, which is not permissible in EU law. An attempt to define these terms to mean what they do not ordinarily mean will be a source of confusion.

5) An attempt to apply ‘blanket standards’ across the public sector will very likely contravene EU standards on language proficiency.

6) Despite the ‘nationality’ exceptions in the Race and Framework Directives, and the ‘nationality’ exception in 2010 Act, it is likely that the application of these measures will leave public bodies open to extensive litigation, primarily on grounds of race and ethnic origins, but also on grounds of disability, in relation to direct and indirect discrimination and harassment claims.

7) If enacted, these provisions will be subject to judicial review on any of the grounds set out above.

8) The provisions in Part 7 of the Immigration Bill are irredeemably flawed and there is nothing which could be included in a Code of Practice to save them.