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The Retained EU Jurisdiction to Suspend Remedies in English and Welsh Law: *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2021] EWCA Civ 1573

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ABSTRACT

Before the United Kingdom withdrew from the European Union (EU), domestic courts did not have the discretion to suspend public law remedies. Such a discretion did exist within the sphere of EU law, the exercise of which lay with the Court of Justice of the European Union (CJEU). The European Union (Withdrawal) Act 2018 purported to translate directly applicable EU law, with specified omissions, into domestic law (retained EU law). As a result, for the first time, UK courts acquired the discretion to suspend the effect of public law remedies, such as quashing orders, albeit within the sphere of retained EU law.

In *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Others* [2021] EWCA Civ 1573 (*Open Rights Group (No 2)*), the Court of Appeal faced an application to exercise this discretion to suspend the disapplication of the "Immigration Exemption" in the Data Protection Act 2018. In answering this application, Lord Justice Warby gave shape to this new domestic jurisdiction. The judgment is significant for three key reasons. Firstly, it identifies an anterior question to be answered when English and Welsh courts are called upon to enforce a rule of retained EU law—namely, whether the rule of law in issue was capable of translation into English and Welsh law. Secondly, Warby LJ's judgment appears to model, if not explicitly identify, the correct approach to answering that question. Finally, the

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judgment provides guidance for the exercise of the discretion. Despite claiming to adhere to the CJEU's high threshold for exercising the jurisdiction, close analysis of the Court's reasoning appears to indicate a lowered threshold for its exercise by English and Welsh courts in the sphere of retained EU law.

Keywords: retained EU law; suspended remedies; Brexit; European Union (Withdrawal) Act 2018; legal certainty

I. INTRODUCTION

In 2008, in *Kadi v Council and Commission*, the European Court of Justice (ECJ) annulled sanctions imposed on Mr Kadi, who was suspected of having funded al-Qaeda.[1] The annulment, however, was to be suspended for "a brief period" to "allow the Council to remedy the infringement found".[2] The Court took this step because it considered that immediate annulment "would be capable of seriously and irreversibly prejudicing the effectiveness" of the sanctions regime.[3] There existed no counterpart to this jurisdiction in domestic English and Welsh law. This position changed with the enactment of the European Union (Withdrawal) Act 2018 (EUWA 2018), which "photocopied" the corpus of European Union (EU) law on the Implementation Period completion day (IP completion day) and purported to translate it with specified omissions into domestic law.[4] As such, for the first time, domestic United Kingdom (UK) courts acquired a domestic statutory jurisdiction to suspend relief in public law challenges, albeit within the sphere of retained EU law.

It is perhaps ironic that the UK Parliament, not long after the UK's withdrawal from the EU, is considering a proposal to create a general jurisdiction to suspend public law remedies. Clause 1 of the Judicial Review and Courts Bill would empower UK courts to suspend quashing orders (cl. 1(1)(a)) or remove or limit any retrospective effect of the quashing (cl. 1(1)(b)). This is the context in which this judgment arrives; it seems that, despite Brexit, suspended remedies will be a feature of UK public law for the foreseeable future. Lord Anderson of Ipswich, a veteran advocate in the Court of Justice of the European Union (CJEU), has welcomed this:

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1 Case C-402/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, ECLI:EU:C:2008:461, [373]–[376].

2 ibid [375]. The suspension was to last for three months, see ibid [376].

3 ibid [373].

4 For the IP completion day, see: the European Union (Withdrawal Agreement) Act 2020, s.39(1), and the European Union (Withdrawal) Act 2018, s.1A(6). For the translation of EU law into domestic law as "retained EU law', see: the European Union (Withdrawal) Act 2018, ss 2-7.

"[p]erhaps because I have become used to these remedies in practice, I believe that each has its place, if not at the top of the judicial toolbox, then certainly somewhere within it".[5]

In this emerging area of English and Welsh law, *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2021] EWCA Civ 1573 (*Open Rights Group (No 2)*) stands as an important intervention by the Court of Appeal.[6]. Since the case is relatively recent, it is unsurprising that it has not yet been the subject of extensive academic study. It may also be that *Open Rights Group (No 2)* has been overshadowed by *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Others* [2021] EWCA Civ 800 (*Open Rights Group (No 1)*), in which the Court of Appeal identified the incompatibility that gave rise to *Open Rights Group (No 2)*. This article seeks to address this gap by teasing out the three key lines of reasoning in Warby LJ's judgment: (a) the identification of the anterior question of whether an EU rule of law is capable of translation into English and Welsh law; (b) Warby LJ's modelling of the approach to be taken in answering that question; and (c) the providing of guidance for English and Welsh courts in the exercise of the retained EU discretion to suspend public law remedies.

II. History of the Proceedings

The appellants brought the judicial review claim against the Home Secretary and the Secretary of State for Digital, Culture, Media and Sport in August 2018. The appellants were two non-governmental organisations (NGOs): the Open Rights Group, a digital rights NGO; and the3million, a grassroots organisation representing EU citizens resident in the UK. The two organisations sought a declaration that the "Immigration Exemption" in paragraph 4 of Schedule 2 to the Data Protection Act 2018 (DPA 2018) was non-compliant with Article 23 of the UK General Data Protection Regulation (GDPR). The application was first heard by Supperstone J, who dismissed the application in October 2019.[7] Singh LJ granted leave to

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5 HL Deb 7 February 2022, vol 818, col 1351.

6 *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2021] EWCA Civ 1573 (*Open Rights Groups (No 2)*).

7 *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2019] EWHC 2562 (Admin).

appeal in November 2019. The appeal was heard by Lord Justice Underhill V-P, and Lord Justices Singh and Warby.

The Immigration Exemption disapplies some data protection rights where the application of those rights would be likely to prejudice immigration control.[8] Article 23 of the GDPR authorises such exemptions. The status of the GDPR in domestic law is clear. The EU GDPR was translated directly into English law as the UK GDPR. It retains supremacy over other domestic instruments enacted before IP completion day.[9] This means that conflicts between the UK GDPR and other domestic legislation enacted prior to IP completion day, including primary legislation such as the DPA 2018, must be resolved in favour of the GDPR.

The issue, then, was whether the Immigration Exemption in the DPA 2018 is compatible with Article 23 of the GDPR. This provision authorises exemptions from certain data protection rights through a "legislative measure" where the exemption "respects the essence of fundamental rights and freedoms" to safeguard "specific objectives". These objectives are set out in Article 23(1)(a) to (j). Besides these specific objectives, Article 23(1)(e) also permits the safeguarding of "other important objectives of general public interest". At first instance, Supperstone J found that the exemption was a matter of "important public interest". For this reason, the Immigration Exemption in the DPA 2018 was found to be compliant with the GDPR. On appeal, the Court of Appeal unanimously held that the Immigration Exemption did not fall within the scope of authorised derogations in Article 23 GDPR.[10]

Having made this decision, the Court of Appeal acknowledged that there arose the issue of whether relief could, and if so should, be suspended. Arrangements were made for a separate hearing, which resulted in the judgment at issue in this note.

III. Jurisdiction to Suspend Relief

Where a court finds that national primary legislation is incompatible with retained EU law, the appropriate remedy is declaratory relief.[11] This was the case during the UK's membership of the EU. It is not, and was not, constitutionally possible for domestic courts to quash primary legislation. Instead, courts could make a declaration to the effect that the incompatible provision

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8 *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2021] EWCA Civ 800 [1] (Warby LJ) (*Open Rights Group (No 1)*).

9 European Union (Withdrawal) Act 2018, s.5(2).

10 *Open Rights Group (No 1)*, ibid [53]–[54].

11 *R v Secretary of State for Transport, ex p Factortame Ltd and Others* [1990] 2 AC 85; [1991] 1 AC 603; [1992] QB 680. See also *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 [67].

in the primary legislation had been disapplied.[12] This was the remedy sought by the appellants. It was not disputed that this disapplication declaration remedy subsisted after the UK's withdrawal from the EU with regard to retained EU law. At issue was whether the CJEU's jurisdiction to suspend disapplication of inconsistent domestic law had been translated into English and Welsh law.

The origins of this jurisdiction can be identified in domestic and EU case law. Lord Mance JSC had, *obiter*, observed that such a suspension would be possible in *R (Chester) v Secretary of State for Justice*.[13] In *R (National Council for Civil Liberties) v Secretary of State for the Home Department and Anor*, the Divisional Court found that such a jurisdiction existed and thought it appropriate to exercise it.[14] *Liberty* concerned the inconsistency of Part 4 of the Investigatory Powers Act 2016 with the e-Privacy Directive 2002/58. The inconsistency in Part 4 was twofold. First, it permitted the retaining of communications data in the area of criminal justice without limiting its use to combating "serious crime". Second, it permitted this retention without regard to the requirement in EU law of prior review by a court or independent administrative body. The common thread between *Liberty* and the instant case, *Open Rights Group*, is the failure of domestic law to comply with procedural safeguards found in (retained) EU law. It is the inconsistent absence of law, not the presence of inconsistent law, that required remedy. Disapplying an inconsistent provision is safely within the judicial function; inserting a safeguard scheme to achieve consistency is not.

Since *Liberty*, the Grand Chamber of the CJEU has recognised and given shape to this jurisdiction in three cases. These authorities are *La Quadrature*, *Gewestelijke*, and *B v Latvia*.[15] *La Quadrature* is the key EU authority for this suspensory jurisdiction. Its *ratio* is in two parts: (a) "where a subsidiary rule of (national) law is inconsistent with a dominant rule of (EU) law and must therefore be overridden, there must be a judicial power to delay the implementation of the dominant rule, where that is necessary for compelling reasons of legal certainty"; but (b) "in the interests of legal certainty, that judicial power must be reserved to the CJEU".[16] The first element of this jurisdiction establishes the power and the condition for its exercise—"for compelling reasons of legal certainty". This limb does not pose any issue of translation into

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12 *R v Secretary of State for Employment, ex p Equal Employment Commission* [1995] 1 AC 1.

13 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [72]–[74] (*Chester*).

14 *R (National Council for Civil Liberties) v Secretary of State for the Home Department and Anor* [2018] EWHC 975 (Admin), [2019] QB 481 [17] (*Liberty*).

15 Cases C-511/18, C-512/18, and C-520/18, *La Quadrature du Net and Others* [2021] 1 CMLR 31; Case C-24/19, *A v Gewestelijke Stedenbouwkundige Ambtenaar van het Department ruimte Vlaanderen* [2021] CMLR 9; Case C-439/19, *B v Latvijas Republikas Saeima* [2022] 1 CMLR 9, ECLI:EU:C:2021:504.

16 *Open Rights Group (No 2)* (n 6) [27]. See Cases C-511/18, C-512/18, and C-520/18, *La Quadrature du Net and others* [2021] 1 CMLR 31.

English and Welsh law. The second limb does pose a problem. As Warby LJ notes, "slavishly literal application of the second element of the ratio would defeat the first" element. Since UK courts can no longer make preliminary references to the CJEU, the literal translation of the second limb into domestic law would render the jurisdiction a nullity.[17] The Court was therefore required to answer a further question: if the jurisdiction was retained in domestic law, what form did it take?

IV. The Status of Retained EU Law

These two issues arise from the blanket retention of EU law, case law, and general principles of law in the EUWA 2018. The Court of Appeal considered the mechanism of retention "clear enough".[18] First, UK courts must now decide issues as to the validity, meaning or effect of retained EU law for themselves; they are no longer able to make references to the CJEU.[19] Second, the general rule is that UK courts are to decide any such questions in accordance with relevant retained case law and principles of EU law (EUWA, s.6(3)). "Retained case law" and "retained general principles" are those principles established and decisions made before IP completion day. UK courts are not bound but "may have regard" to those principles established or decisions made after IP completion day.[20]

This is the general position. A special set of rules, however, apply to a "relevant court", of which the Court of Appeal is one.[21] Subject to one of the exceptions (none of which applied in this case), "relevant courts" are not absolutely bound by retained EU case law.[22] The test for a relevant court to depart from EU retained law is "the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court".[23] Lord Gardiner LC laid down this test in *Practice Statement*: the Court may "depart from a previous decision when it appears right to do so", but it "will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law".[24] Since *La Quadrature* and *Gewestelijke* were decided before IP completion day, the Court of Appeal was not in the instant

17 *Open Rights Group (No 2)*, ibid.
18 ibid [23].
19 EUWA 2018, s.6(1)(b).
20 EUWA 2018, s.6(1) and (2).
21 The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525), Regulation 3(b) (Regulations 2020).
22 EUWA 2018, s.6(4)(ba); and the Regulations 2020, Regulations 1 and 4.
23 EUWA 2018, s.6(5A)(c); and the Regulations 2020, Regulation 5.
24 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

case absolutely bound by them but was required to decide the case in accordance with them unless it felt it was right to depart from them.[25] *B v Latvia* was decided after IP completion day. Accordingly, the Court of Appeal was able to "have regard" to it.[26]

V. The Form of The Retained Jurisdiction to Suspend Relief

This legislative scheme for the retention of EU law provides three possible approaches to this suspensory jurisdiction. The first is that, since only the CJEU could exercise the power in *La Quadrature* and *Gewestelijke* to suspend relief regarding substantive laws, the retained suspensory power cannot be exercised by UK courts. This would be based on a literal reading of the retained EU case law. Warby LJ rejects this as "unduly mechanistic" and "tending to subvert rather than promote the legal policy that underlies this aspect of the CJEU jurisprudence".[27] This reasoning has potential wider implications for the body of retained EU law. The approach suggested by Warby LJ is a purposive one of adapting retained EU law to give effect to the underlying legal policy of the rule of law in issue.

The second option is to exercise the Court's power as a "relevant court" under Regulation 5 to depart from the second limb of *La Quadrature*.[28] Warby LJ considers that, following Lord Gardiner LC's test, such a departure was permissible because it would not cause "legal disorder".[29] Warby LJ, however, prefers a third approach, which is conceptually anterior to the potential exercise of the power in Regulation 5. Warby LJ considers the second limb "simply incapable of direct transposition into the domestic legal order as it now stands".[30] According to this analysis, the power to depart from EU case law might be exercised in relation to the first limb of *La Quadrature*. This piece of EU case law was transposed into English and Welsh law. It cannot be exercised in relation to the second limb, however, since the second limb was not translated into domestic law. Regarding the second limb, there is no retained EU law from which to depart.

In this way, Warby LJ's judgment is not merely an authority for the exercise of this suspensory jurisdiction in domestic law; it is an authority for determining whether principles of EU law or case law are capable of translation into UK domestic law. This is conceptually prior to any question of whether to depart from retained authorities. This is significant because it

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25 *Open Rights Group (No 2)* (n 6) [24].
26 ibid.
27 ibid [27].
28 The Regulations 2020 (n 19) Regulation 5.
29 *Open Rights Group (No 2)* (n 6) [28].
30 ibid.

means that such analysis may be deployed by courts other than the "relevant courts" in Regulation 3. The purpose of limiting the power to depart from retained EU case law was, presumably, to reduce scope for legal uncertainty. Depending upon the creativity of lawyers and judges in first-instance courts and tribunals, such certainty may now be dependent on the creation of a body of domestic case law on the translation of EU law.

The proper approach to this anterior analysis is unclear. Warby LJ notes that, in the instant case, both the "departure route" and "non-translation route" are possible.[31] For this reason, he felt it was "not necessary to reach a definitive conclusion on the matter".[32] More than this, he considered it "better not to do so".[33] This is a missed opportunity to give guidance to lower courts that do not possess the Court of Appeal's power to depart from retained EU case law. For now, first-instance judges and lawyers will need to infer the proper approach from Warby LJ's analysis. First, Warby LJ identifies the purpose of the rule of law in question, the second limb of *La Quadrature*: to "ensure the law is interpreted and applied uniformly across the Union".[34] Temporary suspension of relief was only possible with the approval of the CJEU. The second step is a comparative analysis of the EU and English and Welsh legal systems. Outside the EU, the underlying policy of the second limb falls away. As Warby LJ notes, the English and Welsh system does not rely on a system of referrals on points of law: "courts and tribunals at all levels are duty bound to decide legal issues on which there is no precedent that binds them".[35] In Warby LJ's view, this comparative structural analysis of the EU and English and Welsh systems leads to the conclusion that this principle "has not been translated because it cannot be translated".[36] Before IP completion day, first-instance courts and tribunals were able to suspend relief when so authorised by the CJEU via the preliminary reference procedure. The falling away of the second limb of *La Quadrature* leaves first-instance courts and tribunals free "in principle" to suspend relief.[37]

For first-instance courts, which otherwise do not have the power to depart from EU case law, it would seem that the proper approach to the issue of "non-translation" of an EU rule of law is: (a) to identify the purpose of said EU rule of law; (b) to situate it in the framework of the EU legal system; (c) to identify the means by which the same result is achieved in the English and Welsh system; and (d) to find that the EU rule of law has not been translated if it

31 ibid [31].
32 ibid.
33 ibid.
34 ibid [29].
35 ibid.
36 ibid.
37 ibid.

can be mapped onto an existing feature of the English and Welsh system. Obsolete, non-translated EU rules of law may include other fetters imposed by the CJEU on national courts to protect the unity and uniformity of EU law. The second limb of *La Quadrature* is an example of such a fetter.

VI. The Exercise of The Retained Jurisdiction

Having established the retention of this jurisdiction in modified form, the Court considered the test for the exercise of this power. Linked to this test is the guidance for when to exercise this power. The following test can be derived from the retained authorities, *La Quadrature* and *Gewestelijke*: (a) this jurisdiction should be exercised exceptionally on the basis of "overriding considerations of legal certainty"; (b) the interests of legal certainty must be so compelling that it is necessary "for them to take priority over the need to implement the dominant legal provision, and disapply the subordinate law";[38] (c) this means that immediate disapplication would cause "serious difficulties" with respect to legal certainty; and (d) the party seeking to rely on the suspension has acted in good faith. The latter two propositions are derived from *B v Latvia*, which was decided after IP completion day. Nonetheless, the Court of Appeal "had regard" to it, as permitted by EUWA 2018, s.6(2).[39]

The threshold for the exercise of this jurisdiction is high. The only relevant factor is legal uncertainty, the interests of which must be, as Warby LJ notes, "so compelling", not merely "compelling". The strict standard of this test "reflects the key point, that any suspension represents a disapplication of legal rights which the legislature has conferred on natural or legal persons".[40]

The relevant principles for how to exercise this power can also be derived from the retained case law: (a) only temporary suspensions are possible; (b) the suspension should only last as long as is "strictly necessary" to ensure minimal interference with the normal legal order and the rights of those who would rely on the dominant legislation (*Gewestelijke*); (c) this does not mean a period of time that the Government would find politically or administratively convenient (the only factor that is considered is legal uncertainty, not political or administrative convenience); and (d) "[t]he court must be satisfied that the period of suspension is really needed, to avoid legal uncertainty."[41]

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38 ibid [32].
39 For these propositions, see ibid [32]–[33].
40 ibid [32].
41 ibid [33].

Warby LJ considered the initial approach of the Government to be "far too relaxed".[42] The standard for determining the duration of the suspension was that suspension was "really needed in the interests of legal certainty" for the "whole period of delay".[43] The Respondent was required to itemise the steps to be completed, giving estimates of time for them, to plead its proposed duration of the suspension. Despite misgivings over the Government's lack of urgency up to that point, Warby LJ accepted the Government's proposal to suspend the disapplication until 31 January 2022.[44] As a result of this collaborative approach, relatively little analysis in the judgment is dedicated to this issue.

The more analytically interesting issue is the Court's decision to exercise the jurisdiction in the first place. The threshold for the exercise of the jurisdiction is high—a position in the retained EU authorities, endorsed by Warby LJ. It is clear that the only relevant consideration is legal certainty. Without stating this, however, Warby LJ appears to consider two other factors. The first is the type of inconsistency. As in *Chester* and *Liberty*, reconstruction of a legislative scheme was necessary, "not complete destruction".[45] The reason for the finding of inconsistency was the absence of safeguards required by Article 23(2), rather than the derogations themselves.[46] Warby LJ appears to consider this context, along with the Government's stated intention to devise and implement the necessary safeguards, as relevant to the question of whether to exercise the jurisdiction. Going beyond strict analysis of legal certainty, Warby LJ considers the "serious practical difficulties" that immediate disapplication of the Immigration Exemption would cause for the Home Office.[47] Warby LJ relies on the findings in the Main Judgment, which show that the Immigration Exemption "has been and still is extensively relied on by the Home Office".[48] In light of this, Warby LJ finds that "the extent and significance of such disruption lends convincing support to the case for overriding, for a period of time, the substantive rights at issue".[49]

Respectfully, this conclusion is not consistent with the case law that Warby LJ endorses earlier in his analysis. These considerations are issues of political and administrative convenience. The case law is clear that the right of the individual to rely on their dominant EU rights may only be exceptionally overridden, and only in the interests of legal certainty. The

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42 ibid [41].
43 ibid [41].
44 ibid [46], [55].
45 ibid [35].
46 ibid [36].
47 ibid [38].
48 *Open Rights Group (No 1)* (n 7) [16]–[17].
49 *Open Rights Group (No 2)* (n 6) [38].

thrust of the judgment's analysis is more concerned for the right of the Home Office to rely on the inconsistent provision of domestic law than the rights of individuals to rely on their dominant substantive rights. The purpose of the strictness of the test is to prevent suspensory relief from being used in this way. The focus on the interests of legal certainty, and the need for these interests to be "so" compelling, ensures that this is a narrow derogation from the ordinary rule. The scope of what constitutes "interests of legal certainty" requires careful definition to prevent the subversion of the legal policy of the rule. If it can extend to administrative inconvenience, the rule loses its narrow scope. Lord Gardiner LC's Practice Statement is useful on this point. In this statement, legal certainty embraced private law relationships such as "contracts, settlements of property and fiscal arrangements", as well as criminal liability. The concept of legal certainty is for the benefit of natural and legal persons, who should be able to conduct themselves without worrying that the underlying legal basis for their dealings and conduct might change without notice or ease of comprehension. It might be the case that immediate disapplication of the Immigration Exemption causes the Home Office great practical difficulties. But this is not the same as legal uncertainty. If anything, the legal position of the Home Office would have been quite clear, if unwelcome: until the Government introduced an Article 23 compliant Immigration Exemption, the Home Office would not be able to rely on it.

A stronger argument in favour of suspending relief is offered later in the judgment when Warby LJ rejects Ben Jaffey QC's suggested partial suspension of relief. Warby LJ observes that Parliament has "progressively imposed significant legal responsibilities on private sector actors, such as employers, landlords, and transport operators."[50] This policy is backed up, in places, by criminal sanctions for those who fail to discharge their duties.[51] Given the potential impact of immediate disapplication on private actors, such as employers and landlords, legal uncertainty is potentially a relevant concern. But none of this is certain. The strictness of the test necessarily demands careful analysis of affected legal relationships and the potential impact of disapplication. The unanswered question in the judgment is whether disapplication of the Immigration Exemption would cause landlords and employers any difficulties—let alone serious difficulties, as required by the high threshold of the test. Warby LJ holds that the Court can "reliably infer that a major shift in the law would cause significant disruption for the private sector".[52] Respectfully, the strictness of the test demands more than an inference. It cannot be

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50 ibid [49].
51 For example, the Immigration Act 2014, s 33A.
52 *Open Rights Group (No 2)* (n 6) [50].

possible, except in the rare truly self-explanatory situation, for the strict "serious difficulties" (*B v Latvia*) threshold to be cleared without analysis of the impact of the change on affected classes of persons. Without this, "legal uncertainty" becomes too impressionistic a concept to provide a disciplined restraint on the exercise of this jurisdiction.

Given all this, it may be that the Court of Appeal did in fact decide to exercise its power in Regulation 5 to depart from retained EU case law. This would be despite the Court's statement to the contrary. On close reading of Warby LJ's judgment, it appears that factors other than legal certainty may be considered by courts deciding whether to exercise the retained suspensory jurisdiction. One such factor is the type of inconsistency identified by the Court. Where the inconsistency is the absence of a safeguard, as in this case as well as in *Chester* and *Liberty*, the Court may be justified in suspending relief. Another factor appears to be administrative inconvenience, although only to those relying on the inconsistent law at the time of judgment and not to those tasked with devising and implementing a new law.[53] Warby LJ appears to have been influenced by the potential of immediate disapplication to disrupt the operations of the Home Office. It is possible that government departments may raise similar points in future hearings on the issue of suspending relief. Such considerations are, according to the strict test in the retained EU case law, not relevant. This case may be seen as setting a precedent for their relevance in future English and Welsh cases.

VII. Conclusion

The claimants in this case were two NGOs. One can only speculate how the absence of a specific "wronged" individual affected the course of proceedings. Perhaps the Court of Appeal might have been more reluctant to exercise the suspensory jurisdiction if it had been faced with a litigant who stood to lose personally from the decision not to make an immediate declaration. As it was, the only party personally affected by the decision was the Home Office. This might explain the unexpected attention given to what ought to have been, according to the retained case law, an irrelevant consideration.

The analysis underpinning this judgment points to a lower standard than the strict standard inherited from the CJEU (and endorsed on the face of the judgment). If the underlying logic of the legal policy is examined, this makes little sense. The rule arose in the multi-level jurisdiction of the EU. The potential for inconsistency between national and Union law did, and

[53] ibid [33].

does, lead to concerns for legal certainty.[54] This suspensory jurisdiction was a tool to be used exceptionally to mitigate the most compelling instances of legal uncertainty caused by the principle of primacy, where immediate disapplication would cause "serious difficulties". On this analysis, the rule has a more modest role to play in the domestic UK jurisdiction outside the EU. As the UK legislates in areas that are currently served by retained EU law, the importance of this suspensory jurisdiction will decrease. The potential for uncertainty arising from the principle of primacy of EU law is much reduced, and likely to decline further. If the conditions for its exercise in the EU system were tight, they ought to be as tight or tighter in the UK jurisdiction. It would be contrary to principle, as affirmed in the judgment, for administrative inconvenience to become a relevant factor in deciding whether to suspend an individual's enjoyment of a dominant right.

[54] For example, issues arising from the "incidental effect" of directives. See Case C-194/94, *CIA Security International SA v Signalson SA and Securitel Sprl.* [1996] ECR I-2201, ECLI:EU:C:1996:172.