**Brexit and the future of UK immigration**

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Immigration was arguably the key issue in the UK’s EU referendum, in its own right and tied in with the issue of “sovereignty”. Yet there was no clarity in the public debates about the EU’s role in immigration issues. And with prominent Leave campaigners admitting shortly after the referendum that the free movement of workers might continue, while political leaders refuse to reassure EU nationals already in the UK, the “What next” question is particularly pertinent for immigration.

This piece will consider the extent to which the EU has actually influenced or controlled UK immigration laws, alongside domestic policy and case law on immigration, in order to offer observations about the likely consequences of “Brexit”.

*Labour migration and the EU*

In this piece I will not discuss in any detail the likely future of the free movement of workers. Simply put, if the UK wants to retain access to the common market, it will have to accept free movement of other EU states’ workers. In that scenario, UK nationals would likely retain a reciprocal right of free movement for work. If, on the other hand, the UK chooses to sacrifice access to the common market, it will be able to limit entry of other EU nationals to a greater extent and UK citizens will correspondingly lose the right to visa-free entry and work in other EU states.

The demands of the economy and public services for both skilled and unskilled labour are likely to remain. When the government imposed a cap on skilled migration in 2010, problems rapidly arose with recruitment of sufficient staff for crucial public services like the National Health Service, at least partly because of arbitrary policy changes within the Home Office and a failure to understand the different contexts for recruitment in major cities and more remote rural areas (Pemberton, 2010)[[1]](#footnote-1). Politically motivated (rather than evidence-based) policy making is unlikely to go away post-Brexit.

EEA migration has filled much of the demand for unskilled labour, such as seasonal agricultural workers, enabling a change in the immigration rules to exclude most non-EEA unskilled labour. Some commentators advocate an Australian-style points-based system to replace free movement. A points-based system (PBS) already exists for most categories of student and labour migration, including entrepreneurs, set out at Part 6A of the Immigration Rules. It comprises paragraphs 245AAA to 245ZZE plus several appendices, the impenetrable numbering reflecting the fact that it was inserted into a pre-existing set of rules. Removing the supply of visa-free workers will most likely create a demand for workers who do require a visa, with the attendant high application fees and the famous administrative inefficiency of the post-austerity Home Office.

*The EU and protection migration*

Leave campaigners notoriously implied a link, in one of their campaign posters, between EU membership and queues of refugees at Europe’s internal borders. There are three main components to protection – asylum in line with the Refugee Convention, humanitarian protection under Article 3 of the European Convention on Human Rights and “subsidiary protection” under the EU Refugee Qualification Directive, from a risk of serious harm arising from indiscriminate violence in a situation of internal armed conflict. The latter might apply to a person from Syria who was not personally targeted for persecution but who nevertheless would be at risk of harm because of the high level of violence towards civilians. The UK’s status as signatory to the Refugee Convention long predated its membership of the EU. It is not clear what will happen to the Human Rights Act or to the UK’s status as signatory to the European Convention on Human Rights. However, the UK has a policy of not returning people to active conflict zones which as much pragmatic as it is humanitarian, since the Home Office cannot send escorts to enforce removal to conflict zones.

As part of the EU project, member states sought to “harmonise” asylum systems to ensure some level of consistency under a Common European Asylum System (CEAS). To that end, various directives (asylum procedures, reception conditions, qualification) were adopted, setting out minimum standards which each member state should abide by. The Reception Directive (among others) was recast with provisions that would limit the length of detention but the UK chose not to sign up, suggesting that the EU has limited power to influence the UK’s asylum system.

Could the UK abandon even these minimum standards after Brexit? Possibly so: it is already the only European country which allows for indefinite detention of foreign nationals under immigration powers. Certainly the UK has gradually eroded social rights for those seeking asylum in recent decades (Guentner et al, 2016)[[2]](#footnote-2) but again from a pragmatic viewpoint, there has to be a system for determining who is a refugee. Within that there has to be some provision of accommodation and subsistence support and provision for legal aid at some point in the process, otherwise the system itself becomes unworkable.

The CEAS is backed by the Dublin Regulation which is essentially the mechanism for enforcing European countries’ agreement that a person should claim asylum in the first European country they reach, rather than, for example, one where they have relatives or can speak the language. The Dublin Regulation applies to all member states plus Norway, Switzerland, Iceland and Liechtenstein. It is worth noting that this particular piece of European co-operation “benefits” the UK more than most other countries, in the sense of being able to expel asylum seekers who have already passed through another European country, simply because of its geographical location. The UK may therefore not wish to abandon it.

It follows that the UK’s withdrawal from the European Union will have minimal impact on protection migration – either in terms of the numbers of people seeking asylum here or of the conditions they encounter on arrival.

*The role of the EU in deportation of “foreign criminals”*

In a speech in 2011, then-Home Secretary Theresa May famously argued for the repeal of the Human Rights Act because she claimed it had prevented the deportation of an illegal immigrant because he had a pet cat. This story was twice published in the press and discredited before May’s speech. The truth was that the man in question was not an illegal immigrant at all but a student who had later applied for further leave to remain on a different basis, namely family life with his same-sex partner. The couple had a long-term relationship and had set up home together, putting down roots, one symbol of (intended) permanence being their shared pet cat. The Home Office conceded the case at court on the basis that the man fell within the requirements of their policy for same-sex relationships, therefore their decision to refuse him leave to remain was legally wrong. Deportation, which can be ordered following a criminal offence, was never in question. Fatally, the judge joked at the end of the hearing that the cat would not after all need to get used to Bolivian mice.

There are individuals who have successfully resisted deportation after criminal offences on the grounds of having family life in the UK which is protected by Article 8 of the Human Rights Act. They are few, however, and most fall into one of two categories. The first is people with children in the UK who are either British citizens or have lived more than seven years in the UK. In these cases, the best interests of the children must be taken into account because of the Children Act, a variety of policy frameworks and the United Nations Convention on the Rights of the Child (UNCRC). Until 2009, the UK maintained an immigration reservation to the UNCRC allowing it to ignore the best interests of a child who was not British, until civil society and international pressure forced the withdrawal of that reservation.

The second category is people who arrived as children and lived much of their lives in the UK, often without realising their insecure immigration status. In those cases they may be treated as “home grown” criminals whose offending behaviour clearly developed in the UK, a principle partly derived from a European Court decision, *Maslov v Austria*.[[3]](#footnote-3) The guidance given in that case, applying the European Convention on Human Rights was however no stronger than the list of factors which already had to be taken into account under the immigration rules. Even in these cases, the seriousness of the offence may be judged to outweigh family life.

There is a third category of people who cannot be deported, even after losing an appeal against deportation, namely those who are either undocumented or stateless. The latter do not possess the legal nationality of any country so no country is obliged to accept them (back). The former are nationals of a country but have no travel documents and their national authorities are either unwilling to provide documents, dispute the person’s nationality or simply have no presence in the UK: Iran (breakdown in diplomatic relations), Sudan (authorities stopped documenting nationals for around 20 months), Jamaican (one official on long-term sick leave!). Again, this inability to deport “foreign criminals” has nothing to do with the EU, the Strasbourg court or the Human Rights Act.

*What next after withdrawal?*

In fact I argue the European Court of Human Rights has had minimal impact on the UK’s ability to control immigration. It concluded that the Article 6 right to a fair hearing does not apply to immigration cases[[4]](#footnote-4). It acquiesced with the UK’s detained fast track system, permitting the detention of asylum seekers for administrative convenience[[5]](#footnote-5) and has never prevented the indefinite administrative detention of migrants, despite the UK being the only European country which allows this. Further, as Dembour (2015) has shown, the European Court of Human Rights was slow to declare migration-related cases admissible at all and slower still to risk offending national governments over the issue.[[6]](#footnote-6)

As the pet-cat episode demonstrates, public debate over immigration is characterised by misunderstanding and misleading reporting. Compared with the “Byzantine complexity” of the immigration law criticised by judges,[[7]](#footnote-7) there is intrinsic appeal in the simplicity of a headline declaring that an “illegal immigrant” could not be “deported” because he had a pet cat, notwithstanding its wholesale lack of accuracy.

Misinformation about migrants’ access to benefits and social housing and about the basis on which they may obtain leave to remain in the UK create public resentment which is used to justify ever harsher policies. The main policy trends currently are 1) deliberate creation of a “hostile environment”; 2) increasingly compelling the general public to act as immigration enforcement officers by requiring them to check rights to take up employment, rent accommodation, open bank accounts, hold driving licences, marry and so on; and 3) cuts to legal aid for immigration, a pending huge increase in appeal fees and reduction of in-country appeal rights. Harsh policies in turn make it harder for migrants to regularise their immigration status, criminalising more people and feeding back into the cycle of hostility.

This brief analysis of the role of the EU in UK immigration law and policy suggests that withdrawal from the EU is unlikely to have a significant effect on migration, given the minimal impact that EU law and institutions have on UK immigration control. Rather the main current will continue to be domestic policy. What next? More of the same.

1. Pemberton, S. and Scullion, L.C., (2010) The implications in North West England of the migrant cap on non-EU workers: A case study of the health and social care sector. [↑](#footnote-ref-1)
2. Guentner, S., Lukes, S., Stanton, R., Vollmer, B.A. and Wilding, J., (2016) Bordering practices in the UK welfare system. *Critical Social Policy*, p.0261018315622609. [↑](#footnote-ref-2)
3. Application no.1638/03, [2008] ECHR 546, [2009] INLR 47 [↑](#footnote-ref-3)
4. *Maaouia v France* Application no.39652/98 [↑](#footnote-ref-4)
5. *Saadi v UK* Application no.13229/03 [↑](#footnote-ref-5)
6. Dembour, Marie-Bénédicte (2015) *When Humans Become Migrants: A Study of the European Court of Human Rights with an Inter-American Counterpoint.* Oxford University Press. [↑](#footnote-ref-6)
7. *Pokhriyal* [2013] EWCA Civ 1568 [↑](#footnote-ref-7)