Brexit and Migration

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EXECUTIVE SUMMARY

The UK will leave the EU on 29 March 2019, either with or without an agreement. If the current Withdrawal Agreement (WDA)\(^1\) is signed and ratified, a transition period extending free movement until the end of 2020 would apply. Thereafter, the future relationship of the UK with the EU as regards mobility and migration is unknown. This study examines four substantive issues relating to the UK’s departure from the EU and mobility and migration. These issues are:

- the UK’s existing participation in EU measures on migration and mobility (chapter 1),
- the rights of EU citizens and UK nationals to move between the EU and the UK including family reunification (chapter 2),
- models for future cooperation between the EU and the UK in the field of migration and mobility (from the EU’s perspective) (chapter 3), and
- the role of the Court of Justice of the European Union and its jurisprudence in migration and mobility (chapter 4).

Existing participation

The UK’s existing participation in EU law on migration and mobility can be divided into two periods: before and after the Maastricht Treaty (1993). Free movement of EU citizens, already part of EU law when the UK joined the EU in 1973, applies fully to the UK. EU law has never countenanced the separation of the single market’s four freedoms – free movement of goods, persons, services and capital – allowing access to some and not to others. Delays to the free movement of workers have been applied to acceding Member States (for up to seven years) but not to other forms of migration and mobility. So, when the UK joined the EU it embraced the single market and its four freedoms.

However, from 1993, and the Maastricht Treaty calling for the abolition of border controls on the movement of persons within the EU, the UK became increasingly concerned about border and migration control. By the time of the Amsterdam Treaty in 1999, the UK had negotiated with the other Member States an opt out so that it would not be engaged by EU migration and mobility measures in respect of third country nationals\(^2\) nor would it be obliged to join what had become the Schengen area without internal border controls on the movement of persons (which also became part of EU law in 1999). Thus, the UK was a full member of the single market but only an occasional visitor to the EU’s area of freedom, security and justice.

In chapter 1 of the study we set out in detail every measure and the status of the UK in respect of it. Suffice it to note here that from 1999, the UK’s immigration policy has become ever more divergent from that of the EU. While EU citizens continue to have full free movement rights, including with their family members to move to and live in the UK after 1999, the UK became increasingly concerned about the arrival of third country nationals, even when these were family members of EU citizens (or UK nationals returning to the UK). The UK continues to participate in EU agreements with third countries on readmission but not on visa waiver. However, the UK is bound by other third country agreements to which the EU had acceded and which include reciprocal migration and mobility rights.

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2 The concept third country national (TCN) refers to any person who is not a citizen of the EU.
Migration and mobility rights
The biggest difference which the UK’s departure from the EU will cause in this field is disruption to EU citizens’ and UK nationals’ migration and mobility rights on the territory of the other. After the departure, UK nationals will become third country nationals on the territory of the EU-27. This will mean that unless agreement is reached to the contrary, they will be subject to EU measures on third country nationals such as the Long-Term Residents Directive, or the Blue Card directive. In effect, UK nationals will be covered by a patchwork of EU measures and national law. EU citizens in the UK will be covered by UK immigration law. In order to protect the position of all people who have exercised free movement rights between the UK and the EU, very extensive provisions have been included in the Withdrawal Agreement (WDA), a proposed agreement between the EU and the UK to regulate an orderly departure, covering the continuity of rights of those who have used their free movement rights.

The objective of the Withdrawal Agreement is to limit to a minimum the disruption to people’s lives which the UK’s departure is likely to cause. It guarantees work and residence rights and the entitlement to non-discrimination on grounds of nationality. All categories of EU citizens and UK nationals are covered in the Withdrawal Agreement from visitors to pensioners and the economically inactive. Assuming the successful conclusion of the Withdrawal Agreement, the issue going forward will be ensuring consistent and faithful implementation of the Withdrawal Agreement. To this end the Withdrawal Agreement has extensive provisions on supervision, oversight and the continuing jurisdiction of the Court of Justice of the European Union (CJEU) regarding the situation of those EU citizens and UK nationals who have already exercised their free movement rights. A transition period is included in the Withdrawal Agreement to end on 31 December 2020 during which period people would still be entitled to move and start acquiring migration and mobility rights under the EU rules. Chapter 2 explains in depth these provisions.

Models for future cooperation
One of the open questions for both the EU and the UK is what kind of future cooperation in the fields of migration and mobility is desirable. The EU has extensive experience in negotiating agreements with third countries (and groups of third countries) in this field. One of the guiding principles of the EU’s approach has been to offer closer cooperation to those states which participate in the Schengen area of no border controls than to others. This is because the reciprocal security assured by the Schengen rules on visas and border controls means there is greater confidence both parties can have in extending free movement and mobility rights within the area. Thus, the EFTA-EEA states (Iceland, Liechtenstein and Norway) and Switzerland all enjoy full free movement rights with a few minor modifications to adjust to the fact that there is no common citizenship project at work with these states. Thereafter, the EU has negotiated agreements which include parts of mobility and migration. Visa waiver agreements which abolish visa requirements for visitors have been self-standing agreements dealing only with the one issue. Workers’ rights, primarily non-discrimination on grounds of nationality but not general access to the labour market have been included in trade agreements covering a wide range of issues. The right of establishment (including self-employment) has included access to the territory for self-employed activities as well as non-discrimination and is generally included in trade agreements. Service provision is the most commonly included provision in trade agreements and includes a dimension of mobility for service providers (now usually based on the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO)). Students, pensioners and the economically inactive are rarely granted mobility rights in EU agreements with third

countries. **Coordination of social security** on the traditional EU terms of non-discrimination, aggregation of contributions and export accompany all agreements with provisions on workers. The detail of these models is found in chapter 3. What kind of agreement might be acceptable to the EU and the UK after the latter’s departure, will depend on the degree of **reciprocity** which the parties will countenance. All agreements have reciprocal obligations so the treatment of EU citizens and UK nationals would have to follow this pattern.

**The Court of Justice of the European Union**

The role of the Court of Justice of the European Union has been of great importance to the realisation of free movement rights in the EU. It is worth remembering that **UK legislation** implementing free movement rights has been at the core of 21 judgments of the Court in the ten-year period 2008–2018. This is not insignificant as it indicates a degree of uncertainty on the part of judges in the UK about the correct interpretation of EU free movement rights. The Court’s role in providing one definitive interpretation of EU rights has been central to the development of EU law. The confidence that all Member States have that EU law is applied in the same manner across the EU and that in the event of disagreement there is a Court charged with providing a solution for all, has been central to making free movement of persons work. Divergent interpretations of EU law undermine its authority and effectiveness. **Harmonisation** is key to the smooth operation of EU law generally. Thus, the continuing jurisdiction of the Court to matters of free movement of persons arising in the UK after Brexit is a matter of much concern. The Withdrawal Agreement, if signed and ratified, provides a **continuing role** for the Court until the end of the transition period (31 December 2020). Thereafter a Joint Committee will be established to settle disputes. This issue is dealt with in depth in chapter 4.

**Recommendations**

Conclusions and recommendations are subject of chapter 5. The first **priority** of the EU as regards migration in the Brexit context is to secure, in a durable manner, the **rights of EU citizens and UK nationals** who have exercised free movement rights and invested their lives in the territory of the other party. The Withdrawal Agreement provides a good basis to achieve this objective. The Commission has indicated that its objectives in the negotiations of the Withdrawal Agreement did not extend to UK nationals resident in the UK or returning there. This means that some **rights** which these people currently have will fall away and **are not protected** by the Withdrawal Agreement. The **future relationship** of the EU and the UK regarding mobility and migration after the end of the transition period (assuming that the Withdrawal Agreement is signed and ratified) can take one of a number of forms. Depending on the willingness of the parties, a very close relationship could be negotiated such as that of the EEA states or if there is no desire for such a privileged relationship, something very distant with virtually no rights of mobility or migration such as the EU Canada Agreement.

INTRODUCTION

This study is about the future relationship between the UK and the EU following the UK’s withdrawal from the EU in the field of migration, including future movement of EU citizens and UK nationals between the EU and UK, i.e. the consequences of Brexit in the field of mobility and migration excluding asylum.

Brexit Vote

On 23 June 2016 in a UK referendum which had no legally binding force, 72% of the registered voters cast their vote. The voters were almost equally divided into 52% (leave) and 48% (remain). With reference to the total electorate this meant 35% voted to remain, 37% voted to leave, with a remaining part of 28% non-voters. The turnout varied between 63% in Northern Ireland, 67% in Scotland, 72% in Wales and 73% in England. Voters in Scotland (62%) and Northern Ireland (56%) voted in majority to stay in the EU, whereas in England (53%) and Wales (53%) the majority voted to leave the EU.

Chart 1 Brexit Vote

Source: BBC <www.bbc.com/news/politics/eu_referendum/results>; Centre for Migration Law, Radboud University

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4 Following the invitation of 28 March 2018 to submit an offer for a study within the framework contract IP/C/LIBE/FWC/ 2013-006/LOT 4 (Brexit and Migration), the Odysseus Network submitted an offer on 10 April 2018, which was accepted by the European Parliament on 7 May 2018. The subject Brexit and asylum is developed in another study: contract IP/C/LIBE/FWC/2013-006/LOT 3.
The decision to hold a referendum had been a campaign promise of the (then) prime minister as a result of very substantial discord in the prime minister’s own party over the UK’s membership of the EU. When the prime minister’s party won a majority in parliament on 7 May 2015 the die was cast leading to the UK’s departure from the EU. After a series of negotiations with EU leaders about possible modifications to EU law which the (then) prime minister demanded in return for his support to the “remain” campaign in the national referendum (which mainly revolved around the treatment of EU citizens coming to the UK or working and living there already) the referendum date was set. The referendum campaign was highly divisive in the UK political class with the two main parties divided about their positions.

Following the announcement of the result, the UK prime minister resigned and was replaced. After some constitutional dispute in the UK on 29 March 2017 the next prime minister triggered article 50 TEU which permits a Member State to leave the EU with a two-year negotiation period. This was formally done by handing over a letter to Donald Tusk, the President of the European Council. After authorizing the opening of negotiations with the United Kingdom, the Directives were set for the negotiation of an agreement with the UK setting out the arrangements for its withdrawal from the European Union. During the remainder of 2017, position papers were published on matters needed for an orderly withdrawal of the UK from the Union. In December 2017, the Commission communicated to the European Council on the state of progress of the negotiations. It took, however, until March 2018 before a couple of drafts of the Withdrawal Agreement (WDA) were published, the latest on 19 March 2018. In this Withdrawal Agreement, i.e. the draft of 19 March 2018, three issues emerged as central:

- the divorce bill – what was the UK’s contribution to the EU budget on the basis of existing commitments;
- the position of EU citizens in the UK and UK nationals in the EU Member States; and
- the Irish border.

**Study**

This study focuses on the second issue: the position of EU citizens and UK nationals regarding the territory of the other. It also takes into account the issue of the Irish border.

We will examine this from three perspectives. After we have mapped the instruments of the EU on migration and mobility in which the UK participates (chapter 1), we will investigate the contents and consequences of the Withdrawal Agreement for migration and mobility issues. The draft Withdrawal Agreement provides for a complex and intricate set of rights for EU citizens living in the UK (including those who move to the UK during the proposed transitional period, which would end on 31 December 2020). We set out the terms of this agreement in chapter 2 and explain its consequences for: (1) the position of UK nationals exercising their free movement rights in the EU, and (2) of EU citizens exercising their free movement rights in the UK. In chapter 3 we will examine the possible models for a future relationship between the UK and EU regarding movement of persons.

The EU has designed a variety of agreements with neighbours about mobility and movement of persons which reflect the degree of integration of the third country into the EU’s project of border control free movement. Agreements with other states which do not share that objective also include some degree of mobility or migration provisions. These are examined by class of agreement. One of the constant concerns of the EU is ensuring that any agreement with the UK – both the Withdrawal Agreement and any future agreement – will be subject to a consistent and coherent application, implementation and interpretation. The importance of this for people’s lives is self-evident. Thus, a substantial section is devoted to this issue. We therefore examine in chapter 4 the applicability of the case law of the Court of Justice of the EU during and after the transition period and give an overview of the most important judgments, especially those with an impact on the UK legislation. The chapter furthermore explains the consequences of the Withdrawal Agreement for the jurisdiction of the Court.
of Justice of the EU, especially with regard to the situation of EU citizens and UK nationals after the UK’s departure. In the last section of this chapter, we give an overview of the rules on judicial review and dispute resolution in a number of cooperation models between the EU has and third countries, with a special focus on the role of the Court of Justice. This information can serve as a source of inspiration for further elaborations on future models and possible consequences for the position of the CJEU.

In chapter 5 we set out the conclusions and recommendations to the European Parliament regarding the position of EU citizens and UK nationals.

**Terminology**

In this report we have used - as far as possible - the terminology set out in article 2 of the Withdrawal Agreement (WDA), i.e. the draft version of the Withdrawal Agreement of 19 March 2018.\(^5\)

- **Member State** means Member State of the (European) Union (or EU);
- **Member States (excluding the UK)** means the (collective of all) current Member States of the EU excluding the UK; (also referred to as EU-27);
- **(European) Union citizen** (or EU citizen) means any person holding the nationality of a Member State;
- **United Kingdom national** (or UK national) means a national of the United Kingdom;\(^6\)
- **third country** means a non-EU Member State;
- **third country national** means a non-EU citizen.

This terminology, however, is not in complete conformity with some sources we have used, particularly regarding statistics. The available UK statistics (as used in Table 3 and 4) mention **British citizen** which has a slightly different, i.e. broader meaning, than the term **UK national**. According to Macdonald’s, the meaning of **British citizen** for the purpose of the right of abode and freedom from immigration control in the UK domestic context is different from the meaning of **British national** (under international human rights law) or **UK national** (for the purpose of free movement and residence under EU law).\(^7\) However, this slight difference in meaning has no bearing on the analysis in this report.

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