

Paper Seven

Immigration



The Brexit Papers are produced by the
Bar Council Brexit Working Group
March 2017



The Impact of BREXIT on UK Immigration

Summary

At present the UK enjoys a combination of free movement from the EU and restricted migration from outside the EU, where the former functions flexibly in response to UK economic needs, as well as supplying the numbers of low-skilled migrants that are required by UK businesses. The migration of EU citizens to the UK may be driven in part by factors in home states, but it also reflects the availability of work in the UK and to that extent is not unrelated to market demand in the UK economy. Any consolidated system of economic migration ought to be designed after consideration of the UK's needs, as well as to attract highly skilled migrants by offering them an appetising 'package' of an inward migration route, together with a path to settlement and citizenship.

A work permit system cannot easily match the way in which the present free movement system allows EU citizens to circulate in and out of the UK, remaining where successful, and returning home in fallow periods. It cannot easily match the way it fills gaps in the labour market, facilitates the supply of services, and stimulates entrepreneurial activity.

- We therefore recommend to the Government a possible intermediate solution, less restrictive than a work permit/prior authorisation system but more restrictive than the current system of free movement. Our suggestions of what could be considered are set out at paragraphs 21-22 of this paper.
- We believe that a possible intermediate solution would be of manifest advantage to the UK, in retaining a model of economic migration that allows for flexible service provision, entrepreneurial activity, and business innovation.

The Impact of BREXIT on UK Immigration

Introduction

1. The issue of migration to the UK was of particular salience in the debate leading up to the referendum. As the UK prepares to leave the EU, the shape that immigration control will take in the future is also controversial. The choices to be made include: (i) ought migration to the UK to be circulatory or ought it lead to settlement, (ii) would a rigid system be desirable or would a flexible one that permits migrants to switch between categories such as work and study be a better option, and (iii) is a market-based approach desirable or ought the state to define and control all aspects of movement? Such choices will be made in the context of a highly polarised public debate that pits concerns about integration and numbers on the one hand against a relaxed approach to diversity and social transformation on the other.

2. Two matters provide the context in which these choices fall to be made. Firstly, while migration to the UK dominates the public debate, there is also the position of British citizens in the remaining EU 27 member states to consider. If there is to be reciprocity between the UK and other member states, then the question of what is to be reciprocated needs to be considered, bearing in mind that the answer will govern the position of British citizens who seek to provide services, work and settle elsewhere in the EU.

3. Secondly, there will need to be transitional arrangements to protect the position of EU citizens (and their family members) who have an EU right of permanent residence in the UK, who are on their way to acquiring such a right, or who have merely been present in the UK for a number of years (such as an EU citizen married to a British citizen). It is not beyond doubt that the power to make provision for those who have acquired rights is solely a matter of EU competence. In so far as it may be a shared competence between the EU and member states, the UK faces the possibility of having to make bi-lateral arrangements with each member state, not least so as to protect the position of British citizens resident in those states. In such circumstances there may be wisdom in taking a broad, generous, approach to the protection of EU citizens who have already migrated to the UK by providing for a form for UK permanent residence for those who currently hold an EU right of permanent residence, a route to the same for those who have yet to complete five years continuous lawful residence under EU law, and indefinite leave to remain for EU citizens who are family members of British citizens.

4. Migration to the UK may be divided into three broad categories: economic migration, family reunion and forced migration (the latter typically leading to a grant of asylum). Free movement by EU citizens around EU member states concerns migration for economic purposes (work, self-employment, vocational training, etc.), as well as family reunion. In addition, the EU operates a Common European Asylum System in which the UK participates. That system sets common standards for the reception of asylum seekers, and the procedure for processing asylum claims and Refugee status determination. It also distributes claims for asylum among member states; something that permits the UK to return an asylum-seeker to the first EU member state she entered.

5. At present, the system of free movement is flexible and market-based. It permits EU citizens to move from one EU member state to another and facilitates migration for work and

settlement. However, it also facilitates circulatory migration whereby EU citizens and their family members move back and forth between their home state and the UK (as host state). The EU citizen knows she may leave the UK and return to her home state without prejudicing her position, as she can always return to the UK at a later point.

6. That position is to be contrasted with a work permit system that is rigid and tightly controlled by the state. Such a system requires migrants to obtain prior authorisation to move for work and settlement. It encourages a migrant worker (and her family) to remain in the host state and to settle there, for fear of losing authorisation to remain there, were she to return to her home state for any length of time. A free movement system reduces the number of economic migrants remaining and settling in a host state, whereas a full system of work permits/prior authorisation encourages those that gain entry to remain and settle with their family members on a permanent basis. Between these two poles are a range of intermediate positions yet to be articulated in the public debate. While the question of whether to adopt one is a political choice and thus for elected politicians, it is right to set out and elaborate an example of the form one might take.

The Current Position

7. Economically active persons with lawful authorisation to work in the UK are found in each of the three categories of migration (economic migration, family reunion and forced migration). For analytical purposes economic migrants may be sub-divided into the following sub-categories: (i) investors/high net worth individuals, (ii) entrepreneurs and other self-employed persons, (iii) other highly skilled migrants, (iv) skilled workers, (v) intra-company transferees, (vi) low-skilled migrants, (vii) temporary migrants such as short-term service providers, (viii) work experience persons, (ix) business visitors, and (x) persons on vocational training. The current UK framework caters for all these categories in one form or other.

8. At present there are three systems of immigration control that regulate the migration of persons to and from the UK. All three systems contribute to immigration and emigration and thus to the figure for net migration.

9. The first system is that enjoyed by British citizens and confers the right of abode in the UK. Beneficiaries have the right to enter and leave the UK without permission and to live and work in the UK. Typically they enjoy access to the full range of social assistance and political rights.

10. The second system is that enjoyed by EU citizens (and their family members of any nationality). Beneficiaries have the right of admission to the UK; the right to seek and take up offers of work and to reside accordingly; and the right to reside as self-employed persons, students, or persons otherwise self-sufficient. After five years of the exercise of such rights (or less in some cases) a right of permanent residence is automatically acquired. Typically such persons enjoy access to a limited range of social assistance and political rights. It is noteworthy that the need of UK businesses for low-skilled migration, seasonal or otherwise, is met largely through this route.

11. The third system is that applied to persons subject to immigration control, for instance those who hail from countries outside the EU, who are sometimes referred to as third country

nationals. Such persons require permission to enter and reside in the UK. The UK Immigration Rules apply exacting criteria and impose conditions upon them. In certain categories the numbers of persons permitted to enter the UK is subject to a cap. Applications for indefinite leave to remain are available in certain migration classes (e.g. for investors and for skilled workers), usually after five years lawful residence (longer in some cases), subject to fulfilment of prescribed conditions. Typically such persons enjoy little or no access to social assistance and no political rights. Of the economic migration subcategories (i)-(x) identified above this system contains no provision for (ii) other self-employed persons, (iii) other highly skilled migrants, or for (vi) low-skilled migrants.

The impact of EU immigration

12. While the UK relies on free movement from other EU states to supply low skilled workers, the evidence does not show that there is a pool of British citizens who are thereby displaced from work. Nor does it show that there is a material impact on wages and salaries. Academic studies demonstrate that EU migration and the taxation of EU citizens in work leads to a net fiscal gain and provides the resources from which the government may fund any extra provision for housing, education, and healthcare.

13. The LSE study '[BREXIT and the Impact of Immigration on the UK](#)' notes that 'there is absolutely no statistically significant relationship (negative or positive) of EU immigration on unemployment rates of those born in the UK' (p. 9)¹. The report also notes that 'Wages of UK-born workers changed at much the same rate in areas with high EU immigration as in areas where the change in EU immigration was low', (p. 10). UK workers are protected by UK employment laws; they are also protected by the fact that the ambit of contribution-based social security schemes and other schemes for social assistance is regulated at UK level.

On and after the UK's departure from the EU

14. On departure from the EU, the second system of immigration control, described above, that of EU free movement, will cease to exist and its beneficiaries will be redistributed to the third system as persons subject to immigration control. While much attention has been paid to the question of what is to happen to EU citizens (and their family members) already present in the UK, the more difficult question to answer is: what choices will be embraced in the newly enlarged system of immigration control?

15. At present the UK enjoys a combination of free movement from the EU and restricted migration from outside the EU, where the former functions flexibly in response to UK economic needs, as well as supplying the numbers of low-skilled migrants that are required by UK businesses. As regards skilled migrants, most are EU citizens exercising rights of free movement. Net inward migration of those exercising EU free movement rights (skilled or otherwise) in the year to September 2015 was 172,000 (source: LSE Study cited above), whereas the UK under its Tier 2 (General) migration route, issues merely 20,700 work permits

¹ See also the UCL study '[The Fiscal Impact of Immigration to the UK](#)' and Oxford University's Migration Observatory reports on '[The Fiscal Impact of Migration in the UK](#)' and '[EU Migration to and from the UK](#)'.

(‘certificates of sponsorship’) a year to skilled migrants from outside the EU seeking to enter the UK on salaries of less than £155,300 per year.

16. The migration of EU citizens to the UK may be driven in part by factors in home states, but it also reflects the availability of work in the UK and to that extent is not unrelated to market demand in the UK economy. It is suggested that any consolidated system of economic migration ought to be:

- (i) Designed after consideration of the UK’s needs, where the latter is defined by evidence-based analysis not merely to embrace current skill shortages but also to stimulate entrepreneurial activity, and
- (ii) Designed to attract highly skilled migrants by offering them an appetising ‘package’ of an inward migration route, together with a path to settlement and citizenship. Highly skilled migrants compare the ‘packages’ on offer in the US, Canada, the EU, and elsewhere, before deciding which country to favour.

17. If a system of UK immigration control is to replace the free movement system as regards economic migration from EU member states, the UK Immigration Rules will need to be redesigned and the administrative resources for immigration control massively expanded, resulting in increased red tape and costs accordingly.

18. If the primary goal of Government is to reduce - in absolute terms - the numbers of persons migrating to the UK, with the UK’s economic and social needs subordinated to that goal, this will impact upon the design of this system. As regards the needs of the UK economy, such an outcome risks impairing what works well at present, imposing a sub-optimal system that ill-fits the society it seeks to serve.

Three key matters

19. Three key matters ought to be borne in mind:

- (i) A consolidated scheme of immigration control, providing for a system of work permits, would be dependent on efforts to identify labour market shortages on a sector-by-sector basis; it would also require applicants to obtain prior authorisation before beginning to work;
- (ii) At present EU citizens exercising rights of free movement are well suited to filling jobs that require the short-term supply of services. EU citizens are able to travel quickly and cheaply to and from the UK as required, and
- (iii) There is no fixed number of jobs in the UK economy (to hold that there is a fixed number is the ‘lump of labour’ fallacy).

20. A work permit system cannot easily match the way in which the present free movement system allows EU citizens to circulate in and out of the UK, remaining where successful, and returning home in fallow periods. It cannot easily match the way it fills gaps in the labour market, facilitates the supply of services, and stimulates entrepreneurial activity.

Possible Intermediate Solution?

21. An intermediate position, which is less restrictive than a work permit/prior authorisation system but which is more restrictive than the current system of free movement, deserves consideration. Consideration might be given to the following:

- (i) The right of admission to the UK for EU citizens, without the requirement to obtain a visa or to seek permission to enter,
- (ii) The ability to seek work without restriction,
- (iii) Free movement for the self-employed and those looking to establish businesses (their migration has not been the subject of controversy),
- (iv) Free movement for students and the self-sufficient (their migration has not been the subject of controversy), and
- (v) Any system of immigration control of employment to be limited to a requirement to register employment, once it has been obtained (similar to the registration scheme introduced in the UK for those EU citizens from the Eastern European countries that joined the EU in 2004).

22. Such a workers' 'registration scheme' has the following advantages:

- (i) It would allow optimum labour market flexibility, while allowing the Government to monitor the numbers of EU citizens coming to the UK to work and for which jobs,
- (ii) As a scheme of economic migration, it would be a choice of the UK Government in the exercise of sovereignty,
- (iii) It would provide data as to the parts of the economy that benefit from economic migration,
- (iv) It would avoid the cumbersome, rigid approach of a work permit scheme requiring prior authorisation before a job offer was accepted,
- (v) The domestic labour force would be protected by the continuing security afforded by UK employment law and, further, by the ability to determine at UK level the terms on which EU citizen workers were to be given access to contributory social security schemes and other forms of social assistance, and
- (vi) It would permit the Government, where necessary, to use its own criteria, to refuse admission or to effect expulsion/deportation.

Conclusion

23. We believe that a possible intermediate solution (as suggested by paragraphs 21-22 above), would be of manifest advantage to the UK, in retaining a model of economic migration that allows for flexible service provision, entrepreneurial activity, and business innovation. It makes no sense to damage what works well at present in furtherance of other objectives when

those objectives may be accommodated in a UK-controlled system that serves the UK economy.

Brexit Working Group
February 2017