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ILPA: Understanding the Legal Framework of Brexit

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Part I: The Withdrawal Agreement, the EU (Withdrawal Agreement) Act 2020, the EUSS, Appendix EU, the Immigration and Social Security Coordination (EU Withdrawal) Bill, and the Snowstorm of Statutory Instruments

In this first section we aim to clarify the relationship of various instruments with one another to give a global picture of what Brexit has meant in legal terms for immigration (and asylum) law in the UK. It is critical to bear in mind the bigger picture as this is the only way to understand how the various parts fit together. This includes what needs to be compatible with what and why. Frequently these instruments must be examined in pairs as they constitute the internal and external dimensions of Brexit. But not all have this mirror effect. The key dates to bear in mind are: Exit Day (the date when the UK left the EU) 31 January 2020 and Implementation Day 31 December 2020 (IP Completion Day) when the UK 'really' leaves the EU.

The Withdrawal Agreement, 2018 and 2020 Acts

The first key pair is the Withdrawal Agreement (signed 12 November 2019) and the EU (Withdrawal Agreement) Act 2020 (enacted on 23 January 2020). The Withdrawal Agreement (hereafter WA) is the agreement between the UK and the EU that the UK left the EU on Exit Day. It is an agreement between the EU (including Euratom) and the UK, an international agreement governed by international law. It sets out the detail of the UK's departure from the EU. There are a number of UK Withdrawal Acts (ie UK national legislation) most importantly the European Union (Withdrawal) Act 2018 (2018 Act) and the European Union (Withdrawal Agreement) Act 2020 (2020 Act). The first provides for the repeal of the European Communities Act 1972 (EC Act 1972) including the so-called 'download and save' provisions that the effects EU secondary legislation continue until changed and parliamentary approval to be required for withdrawal agreement (which was achieved). This Act preceded the WA, providing for the UK constitutional requirements for the WA. The 2020 Act implements the WA undertakings regarding EU citizens[1] into British law. It states that it is "An Act to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU." (section 1). As the UK has a dualist system of law, international agreements do not automatically become part of national law without implementing legislation (the big exception was EU law). In the Brexit debate, it was exactly the automatic effect of EU law in the UK constitutional order (as provided for

[1] In this article we use the term EU citizens to cover all EEA nationals (of course excluding British citizens who are no longer EEA nationals or EU citizens).

in the EC Act 1972) which inflamed the discussion about state sovereignty.

Rather oddly for an international agreement, the WA copies large sections of EU secondary legislation, specifically Directive 2004/38 (the Citizens Directive), into the treaty in Titles II and III. These sections provide for retained rights of residence, work, equal treatment, recognition of qualifications and social security for EU and British citizens who have exercised their free movement rights before these rights end on IP Completion Day. In order to give effect to these international commitments the UK (respecting its dualist constitutional order) had to pass national legislation which domesticated these rights. This domestication was achieved primarily through Part 3 of the European Union (Withdrawal Agreement) Act 2020 which creates rights for EU citizens who had established a treaty right by IP Completion Day in the UK.

The end of free movement of persons forms the cornerstone of the Immigration and Social Security Coordination (EU Withdrawal) Bill which will set in place the framework of the new UK immigration system. Beyond ending free movement of EU citizens vis-à-vis the UK (though of course with no consequence for their rights in the 27 Member States) the Bill saves the position of Irish nationals. Because the intended design of post-Brexit UK law relating to EU citizens is that they should no longer be privileged by a separate regime under which they, like Irish nationals and British citizens, do not require leave to enter, automatic access to the labour market and the entitlement to non-discrimination on the basis of nationality, the Bill removes this privileged status and relegates EU nationals to the same status as other aliens entering or residing in the UK. This means that they require leave to enter or remain from IIP Completion Day. While nationals of the 26 Member States will be subject to a requirement to obtain leave to enter and remain in the same way as other aliens, Irish nationals are carved out by the Bill and they will retain their status as exempt from the leave to enter and remain scheme. This right is not based on reciprocity.

The European Union Settled Status Scheme (EUSS)

Because the objective of Brexit is to end the rule of EU law in the UK, the implementation of the 2020 Act requires a national scheme to implement the retained rights of EU citizens and their family members (contained in the WA and reflected in the 2020 Act). But the introduction of the European Union Settled Status Scheme (EUSS – contained in Appendix EU of the Immigration Rules) which became fully operational on 30 March 2019 and will generally end on 30 June 2021 (with exceptions) predates the Act rather than implementing it. Its purpose is to bring EU citizens living in the UK within national law by requiring them to obtain a national immigration status (pre or settled status). The scheme, in practical terms, anticipates the obligation of the WA to give effect to the UK's commitments under Titles II and II of the WA. Presumably the national power for the scheme derives from Section 3 of the Immigration Act 1971 though this power was not applicable to EU citizens when the scheme was created. The EUSS may find a legislative basis in Part 3 of the 2020 Act which in theory ought to be (at least) co-extensive with Part II WA. That is to say, the rights for EU citizens in the WA and those in the 2020 Act should either be the same with always the UK national entitlement to make the position of EU citizens in the UK more favourable than required by the WA. One of the more bizarre (from a legal perspective) aspects of the EUSS is that it purports to give leave to people who in national law are exempt from the need for leave (until IP Completion Day). So EU citizens with pre or settled status under EUSS from March 2019 until 1 January 2021 were both exempt from immigration control and simultaneously held leave to enter and remain.

Most importantly the EUSS as a mechanism to implement the 2020 Act (and thus also the WA commitments) is problematic as it is designed around residence not the exercise of Treaty rights. The WA only protects those exercising Treaty rights. While this difference has been advantageous for many EU citizens (most importantly ending the rather Byzantine debates about whether an EU citizen had comprehensive sickness insurance for periods when he or she was neither a worker (or work seeker) nor self-employed) it has the consequence that pre-settled status and settled status under the EUSS are not necessarily co-extensive with the requirements of the WA. This affects their long-term durability.

The EUSS is also a trial in UK law of automated decision making on the basis of algorithms and machine learning which includes an electronic-only status. These issues

are beyond the scope of this introduction but arise in the examination of the compliance of the scheme with the WA and UK law in general. Somewhat to the surprise of some observers, the EUSS has been an enormous success. It was highly publicised and the take up rate has now exceeded 4 million people. Undoubtedly some people who registered under the scheme did not need to do so as they had already acquired indefinite leave to remain (or in some cases possibly naturalised as British citizens). The success rate of the scheme has also been astonishing with very few refusals (at the time of writing).

The Statutory Instruments

Since the enactment of the 2018 Act and intensified since that of the 2020 Act, the Home Office has begun to issue statutory instruments, in the form of regulations under both to regulate the situation of EU citizens after IP Completion Day. Most of these EU citizens will already have obtained a status under the EUSS though not all (for instance those who have not yet applied and will take advantage of the so-called grace period, or frontier workers who on account of their residence in their home state do not fulfil the EUSS residence based requirements). Many of these are regulations which effectively re-write the previously applying EU directive and regulations[2] (for instance as regards frontier workers) but with a variety of twists which may raise questions of consistency with the WA commitments.

Effectively, the UK has moved from a fairly straight forward EU regulatory arrangement comprised of an EU directive which was transposed into UK law first by the EEA Regulations 2016 (as amended) and secondly by amendment to many parts of social security law to a system of multiple statutory instruments each covering a separate piece of the whole accompanied by directly applicable (EU) regulations to a national arrangement which has multiple instruments and legal bases. The consequence is to make the coherence of the whole surprisingly difficult to determine.

Part 2: EU law in the UK after Brexit

The 2018 Act was amended by the 2020 Act to take into account certain WA provisions. The EC Act 1972 was repealed on Exit Day (31 Jan 2020) but saved during the implementation/transition period (to 11 pm on 31 Dec 2020 - IP Completion Day).

EU-derived domestic legislation

EU-derived domestic legislation (such as a statutory instrument making regulations to transpose provisions of an EU directive into UK law) as it has effect in domestic law immediately before Exit Day, continues to have effect in domestic law on and after Exit Day, subject to certain qualifications. Any EU-derived domestic legislation which is an enactment passed or made on or after Exit Day and before IP Completion Day is, unless the contrary intention appears, to be read and applied in the same way. EU-derived domestic legislation as it has effect in domestic law immediately before IP Completion Day, continues to have effect in domestic law *on and after that day*. As regards the alteration of EU-derived domestic legislation, regulations may be made under provisions of the 2018 Act or under the 2020 Act, or indeed under any other Act that contains sufficient power. An example of regulations that alter EU-derived domestic legislation are the Immigration, Nationality, and Asylum (EU Exit) Regulations 2019 which, among other things, amend the Immigration (European Economic Area) Regulations 2016 (which transpose aspects of Directive 2004/38/EC into UK law) (note too though that the Immigration (European Economic Area) Regulations 2016, will be revoked by the Immigration and Social Security Co-ordination (EU Withdrawal) Bill when it becomes law).

In addition, regulations making use of EU-derived domestic legislation may also be made under the 2020 Act for the purposes of providing for EU citizens' rights that arise before IP Completion Day and that are preserved by the WA. For example, the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 save aspects of the Immigration (European Economic Area) Regulations 2016 for the purposes of giving effect to WA rights.

Direct EU Legislation

Direct EU legislation is different to EU-derived domestic legislation. It refers to EU laws that applied in the UK without the need for domestic statutory instruments or Acts to be made to give effect to them. The Co-

[2] This is notwithstanding the effect of automatic saving of the regulations discussed below.

ordination of Social Security Regulation (883/2004), which applies to the majority of EU citizens in the UK is one example. Direct EU legislation so far as operative immediately before IP Completion Day, forms part of domestic law on and after that day. Direct EU legislation includes most EU Regulations.[3] However, most of the residence rights of EU citizens in the UK derive from Directive 2004/38 with only some rights for workers specifically protected in Regulation 492/2011.

Savings for Rights under EC Act 1972

A third class of EU law preserved in UK law are rights derived from sources other than EU-derived domestic legislation or direct EU legislation. For example, such rights may be derived from the Treaty on the Functioning of the European Union (TFEU) and have been recognised in Court of Justice of the European Union judgments (CJEU). The 2018 Act takes a muscular approach to their preservation: any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP Completion Day are recognised and available in domestic law by virtue of section 2(1) of the EC Act 1972 , and are enforced, allowed and followed accordingly, continue on and after IP Completion Day to be recognised and available in domestic law and to be enforced, allowed and followed accordingly. As noted above, this includes rights arising under EU Treaties and principles in CJEU judgments. But this does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they arise under Directives transposed into UK law or arise under an EU Directive and are not of a kind recognised by the CJEU or any court or tribunal in the UK in a case decided before IP Completion Day (whether or not as an essential part of the decision in the case). This means, for instance, that EU citizens' rights arising from Directive 2004/38 are not as well protected as EU workers' rights under Regulation 492/2011. It also means that a free movement right derived from Article 21 TFEU (EU citizens' right to move freely) and recognised in a CJEU judgement before IP Completion Day, remains part of UK law unless and until amended or revoked.

Supremacy

The principle of the Supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP Completion Day. It only applies in so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP Completion Day. But this does not prevent the principle of the Supremacy of EU law from applying to *a modification* made on or after IP Completion Day of any enactment or rule of law passed or made before that day if the application of the principle is consistent with the intention of the modification.

Charter of Fundamental Rights

The Charter of Fundamental Rights is not part of domestic law on or after IP Completion Day. The Charter has been an important source of rights for EU citizens, deployed by the CJEU in a number of cases around derived rights (for instance C-34/09 *Zambrano* or C-133/15 *Chavez-Vilchez*). This *does not affect* the retention in domestic law on or after IP Completion Day in accordance with the 2018 Act of any fundamental rights or principles which exist irrespective of the Charter. References to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles. In practice, however, over the past few years, a number of British courts have had increasing recourse to common law and to some extent the European Convention on Human Rights rather than the Charter directly. Note too that as regards Citizens' Rights protected by the WA, the Charter continues to have effect as it forms part of the EU law (as it stood on the last day of the transition period) to be applied.

Challenging Retained EU law

There is no right in domestic law on or after IP Completion Day to challenge any retained EU law on the basis that, immediately before that date, an EU instrument was invalid. But this does not apply so far as the CJEU has decided before IP Completion Day that the instrument is invalid, or the challenge is of a kind

[3] However, the 2018 Act brings into domestic law any direct EU legislation *only in the form of the English language* version of that legislation and does not apply to any such legislation for which there is no such version. This does not affect the use of the other language versions of that legislation for the purposes of interpreting it.

described, or provided for, in regulations made by a Minister. National regulations may (among other things) provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the UK, see Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 (SI 2019/673). In practice it is unlikely that immigration practitioners would be seeking to challenge the validity of an EU instrument (as opposed to its interpretation and application).

General Principles of EU Law and Damages

No general principle of EU law is part of domestic law on or after IP Completion Day if it was not recognised as a general principle of EU law by the CJEU in a case decided before that date (whether or not as an essential part of the decision in the case). There is no right of action in domestic law on or after IP Completion Day based on a failure to comply with any of the general principles of EU law.[4] No court or tribunal or other public authority may, on or after IP Completion Day *disapply or quash* any enactment or other rule of law or quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law. But the general principles of EU law may still be used as a tool to interpret retained EU law.

Damages under EU law are only occasionally important in domestic proceedings, mainly in cases of detention of EU citizens. After IP Completion Day there will be no right to damages in accordance with the rule in Francovich (but there is a two-year extension from IP Completion Day in certain circumstances).

Interpretation re Supremacy, the Charter and the General Principles

The principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after IP Completion Day. The principle of the supremacy of EU law does not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day.

The fact that anything which continues to be, or forms part of, domestic law on or after IP Completion Day under the 2018 Act has an effect immediately before IP Completion Day which is time-limited by reference to the implementation period does not prevent it from having an indefinite effect on and after IP Completion Day.

Interpretation of Retained EU law

A court or tribunal is not bound by any principles laid down, or any decisions made, on or after IP Completion Day by the CJEU, and cannot refer any matter to the CJEU on or after that day. A court or tribunal may have regard to anything done on or after IP Completion Day by the CJEU, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal. Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP Completion Day and so far as they are relevant to it in accordance with any retained case law and any retained General Principles of EU law, and having regard (among other things) to the limits, immediately before IP Completion Day, of EU competences. However, the Supreme Court is not bound by any retained EU case law, and a relevant court or relevant tribunal (it will be the Court of Appeal) is not bound by any retained EU case law so far as is provided for by regulations. Further, no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by. In deciding whether to depart from any retained EU case law the Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law.

Note that a series of definitions which differentiate case law complicate the powers of courts and tribunals in determining what case law is relevant. The main point to note is that retained EU law, retained case law, and retained general principles are those as modified by or under the 2018 Act or other domestic law from time to time.

Status of Retained EU Law

"*Retained direct* ***principal*** *EU legislation*" includes most EU Regulations, as modified by or under the 2018 Act or by other domestic law from time to time.

[4] Note, transitional provision is applicable for 3 years after IP Completion Day, in limited circumstances.

"*Retained direct **minor** EU legislation*" means any retained direct EU legislation which is not retained direct principal EU legislation, as modified by or under the 2018 Act or by other domestic law from time to time.

Regulations to deal with deficiencies arising from Withdrawal

The 2018 Act provides that a Minister may by regulations make such provision as the Minister considers *appropriate* to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU. These are wide powers. They are important in the field of EU citizens' rights. The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 were made under this provision. They alter the rights and obligations on EU citizens as they occur across primary and secondary legislation, for example changes are made to the British Nationality Act 1981, the Housing Act 1988, and the Immigration (Leave to Enter and Remain Order) 2000.

Deficiencies in retained EU law are where the Minister considers that retained EU law:

- contains anything which has *no practical application* in relation to the UK or any part of it or is otherwise redundant or substantially redundant;
- confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it;
- makes provision for, or in connection with, reciprocal arrangements between the UK or any part of it or a public authority in the UK, and the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate
- makes provision for, or in connection with, other arrangements which involve the EU, an EU entity, a Member State or a public authority in a Member State, or are otherwise dependent upon the UK's membership of the EU or Part 4 of the Withdrawal Agreement, which no longer exist or are no longer appropriate,
- makes provision for, or in connection with, any reciprocal or other arrangements which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties or as a result of either the end of the implementation period or any other effect of the Withdrawal Agreement,
- is not clear in its effect as a result of the operation of specified provisions of the 2018 Act,
- does not contain any functions or restrictions which were in an EU Directive and in force immediately before IP completion day (including any power to make EU tertiary legislation), and it is appropriate to retain, or
- contains EU references which are no longer appropriate.

There is also a deficiency in retained EU law where the Minister considers that there is:

- anything in retained EU law which is of a similar kind to any deficiency (specified above), or
- a deficiency in retained EU law of a kind described, or provided for, *in regulations* made by a Minister.

But retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after IP Completion Day. Regulations may make any provision that could be made by an Act of Parliament. Further, Regulations may (among other things) provide for functions of EU entities or public authorities in Member States (including making an instrument of a legislative character or providing funding) to be exercisable instead by a public authority (whether or not established for the purpose) in the United Kingdom, or replaced, abolished or otherwise modified.

Publication and Rules of Evidence

The 2018 Act makes provision for the publication by the Queen's Printer of copies of retained direct EU legislation and related information. As regards evidence: where it is necessary in legal proceedings to decide a question as to:

- the meaning or effect in EU law of any of the EU Treaties or any other treaty relating to the EU, or
- the validity, meaning or effect in EU law of any EU instrument,

the question is to be treated as a question of law. A Minister may by regulations make provision enabling or requiring judicial notice to be taken of *a relevant matter* or provide for the admissibility in any legal proceedings

of specified evidence of (i) a relevant matter,[5] or (ii) instruments or documents issued by or in the custody of an EU entity. Regulations may provide that evidence is admissible only where specified conditions are met (for example, conditions as to certification of documents).

Consequential and Transitional Provision: Regulations

A Minister may by regulations make such provision as the Minister considers appropriate in consequence of the 2018 Act. The power to make regulations may (among other things) be exercised by modifying any provision made by or under an enactment. "Enactment" does not include primary legislation passed or made after the IP Completion Day. No regulations may be made after the end of the period of 10 years beginning with IP Completion Day. A Minister may by regulations make such transitional, transitory or saving provision as the Minister considers appropriate in connection with the coming into force of any provision of the 2018 Act (including its operation in connection with exit day or IP Completion Day).

Human Rights Act 1998 and Retained EU Legislation

Any retained direct principal EU legislation is to be treated as primary legislation. Any retained direct minor EU legislation is to be treated as primary legislation so far as it amends any primary legislation but otherwise is to be treated as subordinate legislation. In the result, retained direct principal EU legislation may be declared incompatible with a Human Rights Convention provision (contained in the HRA 1998) but retained direct minor EU legislation may also be quashed or declared invalid.

Part 3: WA Citizens' Rights as protected by the 2018 Act

The 2018 Act makes general provision for rights provided under the WA. Thereafter, the 2020 Act, Part 3 makes specific provision for EU citizens' rights protected by the WA. But the general provision made by the 2018 Act should not be overlooked. It provides that: All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the WA, and all such remedies and procedures from time to time provided for by or under the WA, as in accordance with the WA are without further enactment to be given legal effect or used in the UK. The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be recognised and available in domestic law, and enforced, allowed and followed accordingly. Every enactment (including an enactment contained in the 2018 Act) is to be read and has effect subject to this. Any question as to the validity, meaning or effect of the domestic provision made for the WA is to be decided as applicable in accordance with the WA.

Part 4: The Immigration and Social Security Co-ordination (EU Withdrawal) Bill

As regards further modifications to retained EU law as it bears on the end of free movement, see also the Immigration and Social Security Co-ordination (EU Withdrawal) Bill: some retained EU law is repealed or modified, principles are set out to attempt to prioritise UK statutory provisions where they conflict with retained EU law, and further powers are given to Ministers to make regulations.

The Bill ends free movement under retained EU law, by repealing the main (so not all) provisions of retained EU law relating to free movement (s 7 of the Immigration Act 1988, the Immigration (European Economic Area) Regulations 2016, etc). It also repeals Article 1 of the Regulation 492/2011(conferring rights on EU citizen workers who move to the UK) and adjusts the effect of the remainder as part of retained EU law. The remainder of the Regulation remains in force as retained EU law but ceases to apply so far as its provisions are (1) *inconsistent* with any provision of an Immigration Act or any secondary rules (statutory instruments) made under those Acts; or (2) *otherwise capable* of affecting the *interpretation, application or operation of any such provision*.

How is one to know if a retained provision is inconsistent with a provision of a particular Immigration

[5] retained EU law, EU law, the EEA agreement,

- the EEA EFTA separation agreement and the Swiss citizens' rights agreement,
- the Withdrawal Agreement, and
- Anything which is specified in the regulations and which relates to a matter mentioned above.

Act or statutory instrument? Only by analysing the provision and, where two views are possible, by testing the matter in the Courts. The same is true for determining whether it is *otherwise capable* of affecting the interpretation, application or operation of such a law. If it is, then and only then will it cease to apply in that context; otherwise it will remain good law. Further, the operation of the remaining provisions of the retained Regulation will in part depend upon which cases happen to reach the Courts and result in judgments determining the points in issue.

The Bill also provides that any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures (retained by virtue of the 2018 Act, as modified by domestic law from time to time) *cease to be recognised and available in domestic law* so far as they:

- are *inconsistent* with, or are *otherwise capable* of affecting *the interpretation, application or operation* of, any provision made by or under the Immigration Acts (including provision made after this provision comes into force), or
- are *otherwise capable* of affecting the exercise of functions in connection with immigration.

First, one must identify a retained EU-derived right, power, liability, obligation, restriction, remedy, or procedure. Then one must consider its force. It ceases to apply insofar as it is (1) *inconsistent* with any provision of an Immigration Act or any secondary rules (statutory instruments) made under those Acts; or (2) *otherwise capable* affecting the *exercise of functions in connection with immigration*.

Once again, how is one to know if a retained provision is inconsistent with a provision of a particular Immigration Act or statutory instrument? Only by analysing the provision and, where two views are possible, by testing the matter in the Courts. The same is true for determining whether it is *otherwise capable* of affecting the interpretation, application or operation of such a law. Separately, how is one to know if it is *otherwise capable* of affecting the exercise of functions in connection with immigration? What are these functions? The Bill also confers a power on the Secretary of State to make by statutory instrument, such regulations as she considers appropriate in consequence of, or in connection with, *any* provision of the part of the Bill concerned with ending free movement. That power may, among other things, modify any provision made by or under primary legislation passed before or in the same Parliamentary session as this Act. Thus, it can be used to change an Act of Parliament; such powers are known colloquially as Henry VIII powers. The power may also be used to modify retained direct EU legislation that has been incorporated into UK law by the 2018 Act.

It is likely that the power will be used to *remove* protection that EU citizens and their family members have across a range of provisions made for them in UK statute law. For example, the Home Office has intimated that the power will be used to amend section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which makes it an offence to attend or leave an asylum interview with an immigration officer or the Secretary of State without a valid passport or equivalent document. Section 2 (4)(a), (b) and (5)(a), (b) provide defences for a person to prove that they are an EU citizen, or a family member of such person exercising EU Treaty rights in the UK. These defences will be removed and Section 2 amended to provide a new defence for a person to prove that they have leave to enter or remain in the UK granted under the EUSS (found in Appendix EU of the Immigration Rules). However, this will not protect EU citizens and their family members who have not secured such leave. Such persons will now be liable to conviction.

Conclusions

The purpose of this outline was to provide a clear overview of the legal framework of Brexit for EU citizens in the UK. We have sought to clarify what the UK constitutional position is regarding the WA, 2018 and 2020 Acts and the sources of rights (and their limitations) in particular after IP Completion Date. While the detail, contained in Appendix EU which is under substantial change and the outcome of the Immigration and Social Security Coordination (EU Withdrawal) Bill, remains in flux, this framework sets out the parameters which limit the degree of flux which is consistent with both WA (international law) and the 2018 and 2020 Acts (national law).

Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020

'The Grace Period Regulations'

The UK will exit the transition period at the end of this year. With that, freedom of movement into the UK will end for EEA, Swiss nationals and their family members, it will also end for British citizens wishing to exercise freedom of movement into the EU.

The Withdrawal Agreement[6] agreed by the UK and the EU protects those who have exercised freedom of movement rights in the UK by the end of the transition period. They will be able to retain the vast majority of their rights (there are related agreements for EEA and Swiss nationals which mirror the majority of these assurances). The UK has adopted article 18(1) of the agreement which sets out various procedural steps that must in place to guarantee the rights of EU citizens in the UK[7] are protected.

In short, the 18(1) procedure requires EU citizens to acquire a new status by the end of a 6 month period that begins from the end of the transition period. This gives EU citizens a 'grace period' during which they need to apply for their new status (if they haven't already by the end of the transition period).

Various pieces of legislation in the UK have been created to give domestic, legal effect to those commitments. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21 will end freedom of movement on 31 December 2020 by deleting extensive amounts of related UK law[8]; The EU Settlement Scheme (legally manifested in large part via Appendix EU of the Immigration Rules[9]) provides a path for EU citizens to acquire their needed new status, so far over 4 million people have applied[10]; Regulations have been made that will create the grace period to protect the legal rights of those who have yet to acquire their new status.[11] This article focuses on the latter ('the Regulations').

On 21 September 2020 the UK Government laid the Regulations that will create this grace period using section 7(1) and (4) of the European Union (Withdrawal Agreement) Act 2020. The Act's explanatory notes set out how (then) clause 7 would be used to create regulations for the purposes of a grace period and, crucially, who would be protected during it:[12]

Subsection (1)(a) enables a Minister of the Crown to specify the deadline for applications for immigration status under the EU Settlement Scheme ... As provided for in the Agreements, this deadline must not be less than six months from the end of the implementation period. This provides for a grace period after the end of the implementation period in which EU law will no longer apply ***but the rights and protections flowing from the Agreements must be available in legal***

[6] This article will focus on the agreement between the EU and UK and will consider the implications for those protected by that agreement. The agreement can be found here: https://ec.europa.eu/commission/publications/withdrawal-agreement-and-political-declaration-official-journal-european-union-12-november-2019_en

[7] This article uses this term to include all EEA, Swiss nationals and their family members protected by EU law (including derivative rights, retained rights etc.).

[8] At the time of writing the legislation had entered a 'ping-pong' between the House of Lords and Commons https://services.parliament.uk/Bills/2019-21/immigrationandsocialsecuritycoordinationeuwithdrawal.html

[9] Appendix EU and EU (Family Permit) are largely self-contained from the other parts of the rules. From simplistic beginnings, they have become increasingly complex https://www.gov.uk/guidance/immigration-rules

[10] https://www.gov.uk/government/news/more-than-4-million-applications-to-the-eu-settlement-scheme important to note that it is still unknown how many people are due to apply to the EU Settlement Scheme.

[11] https://statutoryinstruments.parliament.uk/timeline/rMabEQBt/SI-2020/ note the regulations have been made.

[12] https://publications.parliament.uk/pa/bills/lbill/58-01/016/5801016en.pdf 129 onwards are the most significant to this article.

and practical terms to individuals under the Agreements and members of the protected cohort who have not yet obtained their immigration status under domestic law. (emphasis added)

'Protected cohort' is previously defined in the explanatory notes as:

All those within scope of the Agreements, or within scope of the UK's domestic implementation of the Agreements,[13] *are referred to below as the 'protected cohort'.* (emphasis added)

The note goes on to confirm that the rights created by the clause 7 regulations would apply to this protected cohort. This would include those who have not yet applied to the EUSS during the grace period, as well as those who have a pending application. This would be sufficient to discharge the UK's commitments under articles 18(1)(b), (2) to protect EU citizens eligible for status in the UK during the grace period. It would also fulfil the obligations under article 18(3) to bring those who apply to the EUSS into scope of the protections of the Withdrawal Agreement until a decision is made on their application.

From the above explanation, we can conclude that all those eligible for status via the EUSS should be protected by the clause 7 regulations. Additionally, anyone with a pending application to the EUSS should also be protected by those regulations.

It is therefore surprising that the (now made) Regulations do not do this. The scope of those who they protect is far more limited than those eligible for status under the EUSS.

The Regulations essentially borrow and shape the current Immigration (European Economic Area) Regulations 2016 to preserve lawful status for certain EU citizens and family members until the end of June 2021. In summary, those regulations have been adapted to only protect during the grace period those EU citizens who are qualified persons - i.e. those being workers, self-employed, self-sufficient / students with Comprehensive Sickness Insurance - or have permanent residence, by the end of the transition period. This scope of protection also applies to those with outstanding applications to the EUSS.

This is very different from the scope of the EUSS which essentially requires that EU citizens be merely resident in the UK before the end of the transition period to be eligible. The effect of the Regulations is to leave a significant number of EU citizens unprotected during the grace period as they are not considered "lawful residents" in accordance with the 2016 regulations.

This presents several problems:

Contradiction of commitments the UK Government made to Parliament

The Regulations limited scope of protections contradicts the commitments set out in the explanatory notes quoted above. It also seems at odds with commitments made by the Government during the sixth sitting of the Immigration and Social Security Coordination (EU Withdrawal) Bill before the Regulations were laid.[14]

The UK Government recognised that to register millions of EU citizens living in the UK it would need to adopt a generous, broad EUSS eligibility criteria. It has been consistently the UK's commitment to allow all EU citizens resident in the UK the opportunity to remain and settle. This generosity has not continued for all EU citizens during the grace period and whilst they wait for decisions on their applications.

At odds with the commitments set out in the Withdrawal Agreement

It is arguable that by limiting rights whilst applications are pending to a specific cohort of people is at odds with article 18(3) of the Withdrawal Agreement:

Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, ***all rights provided for in this Part shall be deemed to apply to the applicant****, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).* (emphasis added)

Those eligible for status via the EUSS are indistinguishable from those which the Regulations protect unless further testing is applied. The purpose of 18(3) is to protect everyone with an application

[13] In the context of the explanatory note, the UK's 'domestic implementation of the Agreements' means the EU Settlement Scheme.

[14] https://hansard.parliament.uk/Commons/2020-06-16/debates/cc80f9f1-8de8-49d6-af2f-e3cbe3bddccc/ImmigrationAndSocialSecurityCo-Ordination(EUWithdrawal)Bill(SixthSitting)#contribution-5C8273BC-6F59-46CA-AAFF-91720BF14EF3

regardless of whether they are in scope or not until a decision is made. The Regulations frustrate that agreed purpose.

Furthermore, the purpose of the article 18(1)(b) grace period and the rights conferred during it by article 18(2) is undermined by this approach. The creation of legal ambiguity for those who may be eligible for protection by the Withdrawal Agreement arguably undermines the very purpose of the Article 18(1) procedure.

The Government's response to this criticism is to say that they are not going to grant EU citizens more rights than they already have. This is a peculiar argument to make given the previous commitments and that the purpose of the grace period is not to carry over rights, but to protect people until they apply and whilst their applications are pending.

It is odd for a Government, so set on establishing its own policies away from the EU, to slavishly continue with EU rules in this way when it doesn't need to.

In any event, the Regulations create less rights for EU citizens. With existing EU law, your status at any one point in time is defined by your actions at that point in time - if you're not working, you can just start working the next day to remedy the problem. These Regulations focus on a fixed point in time in the past which can't be changed.

The implications of this approach

Whilst there are contradictions in commitments and concerns about compatibility with commitments under the Withdrawal Agreement, what are the implications?

The UK Government has made clear that the right to rent and work checks will not change for anyone during the grace period. However, whilst the Regulations provide legislative guarantees for those in scope in relation to these assurances, the same cannot be said for everyone else. The same can be said for access to the National Health Service where the Government has given similar assurances without explaining how those who are not covered by the Regulations will be protected. Furthermore, the Government has yet to address how those who will have no 'legal basis' to be in the UK will be protected from prosecution under the various immigration offences set out in the Immigration Act 1971.

These questions, and more, have been put to the Government and answers are pending.[15] To stay up to date on this issue, please sign up to our free newsletter[16] and follow our twitter account @the3million.

Luke Piper is Head of Policy at the3million, the largest campaign organisation for EU citizens in the UK, and has worked with the organisation since 2017. The organisation is attributed to the Government's decision to reverse charges for applications to the EUSS and to commit to protecting citizens' rights in the event of a 'no-deal'. He has practiced immigration law for over 10 years.

Social welfare rights of EEA citizens and their family members after 31 December 2020

At 11 pm on 31 December 2020, UK laws giving free movement rights are revoked by section 1 of the Immigration & Social Security Co-ordination (EU Withdrawal) Act 2020 ("**Immigration Act 2020**").[17] How does this leave the social welfare rights of EU, EEA and Swiss citizens ("**EEA citizens**") and their family members, including those already in the UK, and those who arrive after 31 December 2020?

Under the new laws, there will be four groups of EU citizens and family members for social welfare purposes:

1. **People with indefinite leave to remain ("ILR") under Immigration Act 1971, and Irish citizens.** The vast majority of ILR grants will have been under

[15] t3m further questions to Kevin Foster MP: https://249e1c0f-a385-4490-bfe6-875269a8d3d5.filesusr.com/ugd/0d3854_2cfca06e75fc4fa6841288d12f5e5987.pdf

[16] https://www.the3million.org.uk/subscribe

[17] For commencement, see Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020, SI 2020/1279

Appendix EU of the Immigration Rules (aka the EU Settlement Scheme) ("EUSS") and is labelled by officials as 'EU settled status'.[18] From 31 Dec 2020, Irish citizens are exempt from immigration control, because they are Irish citizens: new s. 3ZA Immigration Act 1971, inserted by Immigration Act 2020, s. 2.

2. **People with limited leave to remain under EUSS, aka 'Pre-settled Status' or PSS.** This is granted for 5 years; the first grants were made in late 2018. There will be people with PSS who do not qualify for ILR until at least 2026.
3. **People who do not have ILR or PSS, but claim to have temporary protection.** This is created by the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regs 2020 (SI 2020/1209) ("**Temporary Protection Regs**").[19]
4. **Everyone else.**

Groups 1 and 2 is easy to understand - it comes from having a valid grant of ILR or PSS. This status will continue unless and until that leave

- Is revoked or invalidate (eg by a deportation order)

or, for PSS, it:

- Is replaced on application by a grant of ILR (or another form of limited leave) or
- Expires because the holder did not make an in-time application for extension, or they did but the application is refused and their appeal rights are exhausted: Immigration Act 1971, s3C – automatic extension of leave – applies to PSS.

Group 3 temporary protection is more complex (details are outside scope of this note). A person who had a right to reside in the UK on 31 December 2020 under the Immigration (European Economic Area Regulations 2016 ("**EEA Regs**") (or is the family member of such a person[20]) has temporary protection at a time when they also meet the requirements of the EEA Regs for a right to reside and, either, it is before 1 July 2021, or they have a pending application or appeal under the EUSS.

Group 4 – everyone else – includes all EU citizens and family members arriving in UK for the first time from 31 December 2020, whether coming as visitors, students, family members, workers or in some other category. The Immigration Rules apply to them as they do to non-EEA citizens. The exceptions are if they fall under Group 1 because they have EUSS leave or entry clearance or under Group 2 because they are the family member of a person with temporary protection.

What are the social welfare rights of these four groups?

Basic policy: no change in rights for Groups 1 – 3; Group 4 have same rights as non-EEA citizens.

Group 1 – people with ILR and Irish citizens

This group has the same social welfare rights as British citizens.

ILR meets the requirement for means-tested social security and child benefit to have leave to remain (for a person who requires it under immigration law) and the leave is unconditional. ILR also meets the social security requirement to have a right to reside (it is not an excluded right to reside). ILR also meets the requirement for homelessness assistance and housing allocation that a person who requires leave has it – and the leave is unconditional.

Under current law, social services to non-UK EEA citizens is restricted to when that is required by EU law or ECHR rights by Schedule 3 to the Nationality Immigration & Asylum Act 2002 ("**Sch 3 NIAA 2002**"). This is because non-UK EEA citizens are defined as a 'class of ineligible person' by para 5 of Sch 3 NIAA 2002. Regulations under the Immigration Act 2020[21] will revoke para 5. EEA citizens with ILR will not otherwise fall under Sch 3 NIAA 2002.

Irish citizens will not be subject to immigration control and so will not require leave to remain and will have a right to reside.

[18] Some EU citizens and family members will have been granted ILR

[19] Also called the 'Grace Period' Regs, but since they operate beyond 30.6.20 I think that is misleading

[20] NB this only applies to family members of people with temporary protection, not those with ILR/PSS. 'Family member' includes all persons who were immediate family members at 31.12.20 and children born or adopted afterwards (unless the EU citizen principal has no parental responsibility for them), see Temporary Protection Regs, reg. 3(6).

[21] Regulation 13 (4)(b) of unpublished draft Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 circulated to MPs, to be made under Immigration Act 2020 s. 4.

Group 2 – people with PSS

People with PSS have the same social welfare rights after 31.12.20 as persons with PSS do before 31.12.20.

Social security and social housing

PSS is an excluded right to reside for means-tested cash benefits, child benefit, homelessness assistance and housing allocation. It does not count as a 'right to reside' under the requirement to have that right.

A person with PSS currently only has a qualifying right to reside if they also have a right to reside under the EEA Regs. This means that people with PSS have a qualifying right to reside if they are working/self-employed, have retained worker/self-employed status while unemployed or sick, are the family member of such a person. They also have a qualifying right to reside if they have in fact acquired the right of permanent residence under Reg 15 (either because of 5 years continuous residence under the EEA Regs, or because they have acquired it early as a retired or permanently incapable person, or their family member). This is so whether or not they have a Home Office document recognising that right to reside.

But note that the following rights to reside under EEA Regs are excluded as rights to reside under benefits/social housing law: initial right to reside, as a jobseeker (but not as a person with retained worker status) and Zambrano.

This will continue to be the law from 31.12.20. Regulations to be made under Immigration Act 2020[22] are expected to label persons with PSS as "members of the post-transition period group" and to apply the EEA Regs to this group, for the purposes of laws on entitlement to cash benefits, homelessness and social housing which require a right to reside. So these people will not have a right to reside under the EEA Regs, but their entitlement to benefits will depend on whether they meet the requirements for such a right under the EEA Regs.

The EEA Regs will be modified to remove rules which breach EU law. The relevant ones are:

- For retained worker status, there will be no requirement to show genuine chance of being engaged (reg 6(4C), (6) (7) (but still applies to people who are only jobseekers)
- For Surinder Singh cases, there will be no requirement to show that the British citizen principal would be a qualified person in UK (reg 9(7))
- In divorce cases, the Reg 10(5)(a) words "on the initiation of proceedings for the termination" are disapplied making the crucial date the actual divorce.

So, where benefits claims or applications for public housing are made or continued by persons with PSS, the DWP/HMRC/local authority will be required to apply the modified EEA Regs to decide whether the person with PSS would currently meet the requirements for a right to reside.

This means some people with PSS will come in and out of entitlement, depending on their work etc. situation. For example, a person with PSS who has never worked may not be entitled. They may then work and become entitled. They may then lose their job before completing one year and not register as unemployed, and so be said to be not entitled.

People in this situation can be advised:

- To challenge the benefits/housing decision on the ground that they meet the requirements for a right to reside;
- To obtain ILR, if they have completed 5 years residence in UK (NB, 5 years with a right to reside is not required), or meet the requirements for earlier ILR (eg retired or permanently incapable).

There may also be people who claim to have a right to reside under EU law, but not under the EEA Regs, e.g. St Prix and Carpenter cases. In these cases, there may be an argument that, for a Withdrawal Agreement compliant interpretation, this right to reside should be treated as a right to reside under the EEA Regs.

How can people without eligibility to cash benefits and social housing be supported?

However, some people with PSS may have no argument under EEA Regs, no way of changing their situation to have an EEA Regs argument, and yet no means of supporting themselves. For example, a single person who has never worked (for example, because they were supported by family) and whose health condition means they cannot work.

[22] See footnote 5 above. The provision for PSS holder is in Schedule 4 of the draft

There are two kinds of solution: change immigration status or obtain social services support (see below).

Changing immigration status:

- The non-eligibility of a person with PSS comes from benefit and housing law, not from the Home Office imposing a condition of 'no recourse to public funds' ("**NRPF condition**"). The benefits and housing authorities have no power to waive this law.
- However, the Home Office does have power to change the immigration status to one which is eligible.
- One possibility is that the Home Office, in their discretion, waive requirements of EUSS and grant ILR earlier than the 5 year period. The person then falls under Group 1.
- Another is that the person is granted leave under Appendix FM, without an NRPF condition. This would provide access to benefits. It would also not affect the person's entitlement to qualify for EUSS after 5 years residence. This is because Appendix EU does not require residence with PSS, simply residence. The one exception is persons whose only EU right to reside is on the basis of Zambrano. Under Appendix EU, periods with a grant of leave to remain other than under Appendix EU do not count towards the 5 year period for a Zambrano case.
- The last possibility is social services assistance – see below

This exclusion of persons with PSS from social welfare is challenge on EU law equal treatment grounds in an appeal from the High Court judgment in *R (Fratila) v Secretary of State for Work and Pensions* [2020] EWHC 998 (Admin). The Court of Appeal heard the appeal in October 2020 and judgment is expected before the end of the year. But that argument was made under Article 12 of the Treaty on the Functioning of the EU. It was not made under Article 23 Withdrawal Agreement (equal treatment) which only comes into effect on 31 December 2020.

Social services

Persons with PSS are entitled to receive social services on the same basis as British citizens. This includes support under Children Act 1991 (both section 17 and leaving care provisions); Care Act 2014 and Localism Act 2011. The requirement in Schedule 3 NIAA 2002 that such support only be provided to avoid a breach of human rights does not apply. This is because Sch 3 NIAA 2002 does not apply to persons with PSS: they are not unlawfully in the UK under para 7.

Persons with PSS who have "needs arising from or related to a physical or mental impairment or illness" which arises from destitution caused by non-eligibility to social security or social housing may be entitled to accommodation and other support under Care Act 2014:

- Under the Care Act 2014 s. 13, entitlement depends on eligibility criteria in the Care and Support (Eligibility Criteria) Regulations 2015 which include that "the adult's needs arise from or are related to a physical or mental impairment or illness": Reg 2(1)(a).
- Needs which arise "because of the physical effects, or anticipated physical effects, of being destitute" are excluded in the case of "persons subject to immigration control": Care Act 2014, s.21. But persons with PSS are not "persons subject to immigration control", as defined by the Care Act 2014 s.21(1) to mean persons "to whom section 115 of the Immigration and Asylum Act 1999 ("IAA 1999") applies". IAA 1999 s. 115 "applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed": s.115(3). Under IAA 1999 s. 115(9) a person who has leave to enter or remain in UK is not "a person subject to immigration control" if their leave is not subject to a NRPF condition, nor was granted on a maintenance undertaking. PSS is unconditional and not granted on a maintenance undertaking.

Group 3 – people who claim to have temporary protection

People who were living in the UK before 31.12.20 and their family members who do not have ILR or PSS may be entitled to temporary protection. These notes assume that the person:

- met the condition of a right to reside under EEA Regs at 31.12.20;
- meets the requirement to be before 30.6.20 or to have a pending application or appeal under EUSS.

The EEA Regs continue to govern the immigration status of these people: Temporary Protection Regs, reg. 3(2).

The EEA Regs are modified in the same way as for people with PSS: Temporary Protection Regs, regs. 5-10.

Social security and social housing

Social security and social housing rights for these persons are the same as those with PSS. Like those persons, they must show they qualify for a right to reside under the modified EEA Regs (or perhaps under other EU law, see above).

Where the person has no right to reside (even though they did on 31.12.20), they may be able to change their immigration status and become eligible for benefits by:

- Obtaining ILR under Appendix EU (PSS will not assist – see above);
- Obtaining leave to remain under Appendix FM with no NRPF condition.

Social services

People who can qualify for temporary protection and do so because they *have a right to reside under EEA Regs* have the same rights as British citizens (and people with PSS) to social services. This is because the exclusion of EEA citizens by Sch 3 is revoked under Immigration Act 2020 (see Group 1) and a right to reside means the person is not unlawfully in the UK under para. 7.

People who do not currently qualify for temporary protection because they *do not have a right to reside under EEA Regs* are subject to Sch 3, because they count as unlawfully in the UK under para. 7. They must however be provided with services covered by Sch 3 if denial would breach a person's ECHR rights. The argument above under the Care Act is not available because these people count as 'subject to immigration control'.

Group 4 – people who do not have ILR, PSS or temporary protection

EEA citizens and family members arriving for the first time after 31.12.20 will be treated under social welfare law in the same way as other non-UK citizens (unless, of course, they fall under Groups 1 – 3).

Social security and social housing

EU citizens and family members with limited leave to remain subject to a NRPF condition, or who have no leave to remain, will not be entitled to means-tested social security benefits, child benefits, homelessness assistance or housing allocation. They will be persons subject to immigration control and not meet the requirements to have a qualifying right to reside.

Social services

EU citizens and family members with limited leave to remain, even if subject to a NRPF condition, *are not* excluded from social services. This is because, just like people with PSS, they are not 'unlawfully' in the UK. But EU citizens and family members who have no leave to remain will be subject to Sch 3 NIAA 2002, and so only eligible for social services if it is required to avoid a breach of their human rights. Local authorities may deny support to those who can leave the UK.

Legal challenges

For people with PSS, the Fratila challenge and possibility of an equality challenge based on Withdrawal Agreement is above.

The denial of means-tested benefits to citizens of certain EEA states who have PSS or a right to reside under temporary protection appears to breach Article 13(4) of the European Social Charter, the Council of Europe instrument to which the UK is a party. Article 13 states:

"Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

1. *to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources,* in *particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;*
4. *to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.*

The UK's Article 13(4) obligation applies to all the EEA states,[23] except for Bulgaria, Cyprus, Liechtenstein, Lithuania, Romania, Slovenia & Switzerland.[24]

Citizens of the other EEA states are "lawfully within" the UK if they have:

- leave to remain, such as PSS, or leave to remain as a visitor, student or worker;
- a right to reside under the EEA Regs, even if it is not a qualifying right for benefits.

The Charter is not incorporated into UK law and the UK has not ratified the individual complaint mechanism under the Charter. However, when exercising powers to make regulations and take decisions in individual cases, the Secretaries of State must have regard to the UK's international law obligations.

Simon Cox, Doughty Street Chambers

Zambrano Rights Under the EU Settlement Scheme

So far, less than a fifth of the Zambrano applications submitted under EU Settlement Scheme (EUSS) have resulted in the applicant being granted leave to remain in the UK. The rest have been delayed or refused. Compared with an overall success rate for applications under the EUSS of over 90%, the success rate for Zambrano carers is conspicuously low. Public Law Project's recent work and training on the EUSS offers some insight into why this is happening; strategic support is available on how to help this group of applicants overcome the hurdles they are facing.

Background

The EUSS provides the basis for EEA citizens, and their family members, who are resident in the UK before the end of the Brexit transition period to apply for indefinite leave to remain ("settled status") or limited leave to remain ("pre-settled status").

The EUSS purports to implement the UK's Withdrawal Agreement (WA) obligations in relation to citizens' rights. The EUSS opened on 30 March 2019, and, on 1 May 2019, it was extended to apply to Zambrano carers, who fall outside of the personal scope of the WA.

The explanatory memorandum to the Statement of Changes to the Immigration Rules that opened up the EUSS to Zambrano carers provides that:

> *The Government has decided that, in light of the particular circumstances of these cases, it is appropriate that their long-term status in the UK should be protected by bringing them within the scope of the EU Settlement Scheme.*

This extension was seen as a positive development for Zambrano carers as, in principle, it provides a free pathway to settled status and access to means-tested benefits.

How has the EUSS worked for Zambrano carers in practice?

The reality has been less positive for most applicants. The latest statistics show that in the period to 30 June 2020, although 93% of all applications under the EUSS were concluded and, of those, significantly less than 1% were refused, only 44% of Zambrano applications were concluded of which 61% were refused. Zambrano applications are being delayed and refused significantly more than any other type of application under the EUSS.

Furthermore, it seems likely that many other individuals who are potentially eligible Zambrano carers are not applying under the EUSS at all. Unlike most applications under the EUSS, which are submitted online, Zambrano carers must request a personalised paper application form from the Home Office. We understand that some applicants have experienced "gatekeeping" by the Home Office in providing these forms.

In addition, some may have considered it more

[23] This note assumes that the UK's obligation applies to the states which did not ratify the 1961 Charter, but have ratified the Revised 1996 Charter (Estonia).

[24] Bulgaria, Cyprus, Lithuania, Romania & Slovenia have not declared themselves bound by Art 13(4). Liechtenstein & Switzerland have not ratified the Social Charter.

appropriate to apply for leave under Appendix FM instead. For a Zambrano carer who has not completed a continuous qualifying period of five years in the UK, and who would therefore only be eligible for pre-settled status under the EUSS, Appendix FM offers a greater prospect of accessing public funds. Although the Appendix FM route to leave may take longer and is expensive, for individuals who are granted leave under Appendix FM and are at risk of destitution, there is the possibility of making an application for the No Recourse to Public Funds (NRPF) condition to be lifted. At present, there is no equivalent mechanism for individuals with pre-settled status to access public funds.[25]

Even in cases where a Zambrano carer has completed a five year continuous qualifying period in the UK, and is therefore potentially entitled to settled status, the significant risk of delay and refusal under the EUSS may lead some applicants to apply under Appendix FM, particularly in cases where there is an urgent need to access public funds.

Why is the success rate so low?

There appear to be two major legal hurdles to Zambrano carers securing status under the EUSS: the "any leave" rule and the Home Office's "post-*Patel*" guidance.

- The "any leave" rule

  This is a condition in limb (b) of the definition of "person with a Zambrano right to reside" in Annex 1 of Appendix EU, which provides that an individual will not be treated as a Zambrano carer for the purposes of the EUSS if they already have leave to enter or remain in the UK under another part of the Immigration Rules. For example, an individual who would otherwise qualify as a Zambrano carer will have their application under the EUSS refused if they have limited leave to remain under Appendix FM.

- "Post-*Patel*" guidance

  Following the Court of Appeal's decision in the case of Patel,[26] the Home Office introduced restrictive guidance for Zambrano carers applying for derivative residence cards (DRCs) under the Immigration (European Economic Area) Regulations 2016. The guidance provides that DRCs will only be granted if the applicants have exhausted their options under Article 8 ECHR and Appendix FM.

The same approach has been incorporated into the Home Office's caseworker guidance on Zambrano applications under the EUSS. However, the EUSS guidance also provides that where an individual has already obtained a DRC then the requirement to have exhausted options under Article 8 and Appendix FM will be deemed to be satisfied.

Overcoming these barriers

For Zambrano carers without DRCs, applying for one now is unlikely to improve their prospects of success under the EUSS due to the post-Patel guidance. In any event, the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 will remove the right to be issued with a DRC from 1 January 2021, although it is expected that applications made prior to that date will continue to be processed.

At PLP's recent training session on securing status for Zambrano carers under the EUSS, Simon Cox of Doughty Street Chambers discussed, among other things, possible arguments for challenging the "any leave" rule and the application of the post-Patel guidance in the context of the EUSS (you can listen to an audio recording of the training here; Simon's talk begins 49 minutes in). Provided an application is or was made after 1 January 2020, the applicant should be entitled to appeal the Home Office's refusal in the First-tier Tribunal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. While there can be no certainty about the likelihood of success at appeal, it is a potential avenue for Zambrano carers who have submitted applications under the EUSS.

When advising a Zambrano carer client on the appropriate steps to take, advisers should make an individualised assessment of what is in their client's best interests, with particular consideration given to whether the individual needs to access public funds.

PLP's EUSS support hub is able to provide second-tier advice in relation to complex EUSS applications, including applications for Zambrano carers. Please email

[25] At the time of writing, judgment from the Court of Appeal in the appeal of Fratila and Tanase v Secretary of State for Work and Pensions [2020] EWHC 998 (Admin) is awaited. This case considers the lawfulness of pre-settled status not being considered a qualifying right to reside for the purposes of Universal Credit.

[26] *Patel v The Secretary of State for the Home Department* [2017] EWCA Civ 2028

PLP's EUSS Hub Coordinator, Christian Davies (c.davies@publiclawproject.org.uk) for more information.

Ollie Persey and Christian Davies, Public Law Project

The Frontier Workers' Scheme

A frontier worker is someone who is employed or self-employed in one country, but resides primarily in another. In the EU context a frontier worker is generally defined as an EU national worker who is employed in one member state but who returns at least once a week to another country in which they reside. EU free movement allowed many people to frontier work with ease, but in the UK Brexit left frontier workers' rights in a precarious position.

To address this Article 24 and 25 of the Withdrawal Agreement make commitments to protect the rights of frontier workers who were pursuing an economic activity in the UK before the end of December 2020 and who continue to do so afterwards. Article 26 allows the UK to require frontier workers to apply for a document certifying that they hold these rights and Article 14 confirms that they will not be subject to exit visa, entry visa or equivalent formalities if they do.

Despite these clear commitments, the UK government was slow to provide information on the implementation or working of any frontier workers' scheme. In response to parliamentary questions raised in 2019 and again in 2020, the Home Office would only confirm that a frontier workers' scheme would be launched and details of the scheme published "in due course".

On 3 November 2020 the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 became law. The regulations establish a frontier workers' permit scheme under which a protected frontier worker can apply for a permit certifying their rights under the Withdrawal Agreement. The permit will allow them to continue to enter and work in the UK after the end of the transition period. The scheme is open to EEA nationals who are frontier working in the UK by 31 December 2020 and who remain a frontier worker after that date. In certain circumstances this will include those who are not working but who retain their status as a frontier worker. From 1 July 2021 it will be mandatory to hold this permit in order to enter the UK as a protected frontier worker. Irish citizens will be able to apply for a frontier worker permit if they wish, but they will not be required to hold one.

When will the frontier workers' scheme open?

The frontier workers' permit scheme will open on the 10 December 2020 and its design appears to be similar to the EU Settlement Scheme, with applications free and online and digital status granted rather than a physical document. With workers being required to hold a permit in order to enter the UK as a frontier worker from the 1 July 2021, the timescales for applying and obtaining a permit will be very short for some workers.

The impact of the scheme on Northern Ireland

The frontier workers' scheme will be crucial to many workers and employers across the UK but it is in Northern Ireland where its impacts will be the most significant. Due to the land border shared with an EU member state, the number of frontier workers in Northern Ireland is higher than in any other part of the UK, and many industries heavily rely on these workers; particularly in border regions. It is estimated that between 23,000 and 30,000 people in Northern Ireland and Ireland are cross-border workers, and that thousands of people cross the land border every day for work. Since the Brexit referendum businesses in Northern Ireland have reported losing their EU workers, partly influenced by the lack of guidance on employment rights after the end of the transition period; including for frontier workers. The response of the UK government to these concerns has been to say that workers and employers have had years to prepare since the referendum; despite the fact that information on schemes like the frontier workers' permit have been published less than three months before the end of the transition period.

Impact assessment and stakeholder engagement

Despite the lengthy period of time in which the frontier workers' scheme was expected, and the clear impacts the scheme will have, there was no public consultation or impact assessment carried out by the UK government. The explanatory memorandum to the legislation confirms

that the government does not have anaccurate assessment of the number of people who may apply to the scheme, instead they are proceeding with a 'working assumption'. It goes on to state the scheme has no, or no significant, impact on business, charities or voluntary bodies or on the public sector and that an impact assessment has not been prepared because no significant impact on businesses has been identified.

It is not clear how the Home Office reached this conclusion, and perhaps it is accurate to suggest the impact on business or the public sector in somewhere like London will not be significant. In Northern Ireland however, where the impact of the frontier workers' scheme on businesses and the public sector as an employer is already being felt, stakeholders feel that their voices have been ignored and the significant impacts overlooked. In October 2020 a joint letter was sent to the Secretary of State for the Home Department from organisations based in Northern Ireland and Ireland, expressing concerns over the implementation of the scheme and its unique impacts in Northern Ireland, as well as broader concerns which will impact workers and employers across the UK. The signatories to the letter requested urgent engagement on these issues before the scheme comes into force. To date there has been no response to the joint letter and with the scheme now launching on 10 December 2020, it looks unlikely that any meaningful engagement will take place.

Home Office communications

Outside of the broad issues raised about the design and functioning of the frontier workers' permit scheme, action is urgently needed to ensure the scheme functions as it should and that frontier workers can access the permit and protect their rights. There has been seemingly no communications strategy for the frontier workers' scheme and to date the Home Office has published limited information on it. In Northern Ireland, organisations working with frontier workers, businesses and employers believe there is a very low level of awareness of the scheme and of the new legislation. Lessons learned from the EU Settlement Scheme show that awareness raising and education campaigns are essential to ensure that everyone who needs to apply, applies on time and to prevent incidents of follow on discrimination against EU nationals in access to employment and housing.

How will frontline advice organisations meet increased demand?

Due to the concentration of frontier workers around the land border, it is also likely that the vast majority of applications will come from this area. Frontline advice organisations in Northern Ireland are likely to receive far higher numbers of requests for advice and assistance with applications to the scheme when compared to their counterparts in Great Britain. Despite this there has been no indication of funding or resources being provided by the government to ensure they are able to meet this new demand. As with most immigration applications there is potential complexity in applying for a frontier worker permit, for example for those with retained frontier worker rights or precarious employment status. The EU Settlement Scheme has shown us that even when an application is claimed to be straightforward, accessible advice and assistance is essential in ensuring people can apply successfully. Frontline advice services in Northern Ireland have not been given any support in ensuring they can meet this need. The Home Office has indicated that as frontier workers and businesses are not viewed as vulnerable, there is unlikely to be any provision made for free advice services.

Conclusion

The Home Office seems to believe that the frontier workers' scheme will have no significant impacts because it will broadly permit frontier workers to continue working in the UK as they do now. However, this only works if frontier workers apply and obtain the required permit within the time frames. If the scheme does not function as it should frontier workers could face loss of employment, the loss of rights and are at risk of falling into 'illegal' working. The direct impact on employers is clear and these impacts become amplified in Northern Ireland. For businesses, employers and workers in Northern Ireland, it is not enough that the Home Office has ticked a box off the Brexit list without any meaningful outreach or engagement. Basic actions from the Home Office such as a focused communications campaign and support for frontline advice services are urgently needed to mitigate potential impacts of the scheme and to ensure the protection of frontier workers' rights.

Úna Boyd of the Committee on the Administration of Justice

The Council of Europe Convention on Establishment 1955

In this article I consider the long-forgotten Council of Europe Convention on Establishment, negotiated in the early 1950s and signed by the UK on 24/02/56. Before the establishment of the EEC, this was one of the first attempts by post-war European states to establish minimum standards of protection for the treatment of non-nationals. Its legacy has been long since superseded by the directly binding protections of the EU Treaties and Directives.

Yet as the UK is now finalising its divorce from the legal structures of the EU, it seems appropriate to consider what existed before the UK joined. In a post-Brexit era does this offer some additional legal protections to EU nationals who arrive in the UK after 1 January 2021?

"Kill it at birth" - The UK's role in the Drafting History

The Convention on Establishment was initially called the Council of Europe Convention on the Reciprocal Treatment of Nationals and was promoted by Italy, which was at that time a net exporter of migrants. Its aim was to harmonise the treatment of the nationals of each member in the territory of the other members in a range of areas including legal protections, the right of entry and residence and the ability to engage in economic activities.[27]

The drafting history drawn from the National Archives reveals a UK position that appears familiar in the light of Brexit – a government wary of constraints being posed on its ability to control immigration and ambivalent about further integration with Europe.

Italy submitted a draft proposal in 1950 which was approved in May 1951 by the Council of Europe's Consultative Assembly. Whilst most member states approved the idea in principle, it is evident that the UK government was hostile from the start.[28] At a foreign office meeting to discuss the proposal, the Home Office representative made it known that they were firmly against it, preferring to maintain bilateral agreements with other European states rather than adopting a wider treaty. The primary obstacle was immigration control with the Home Office concerned they *"would inevitably become involved with a clash over our entry and residence rules"*.[29] The UK attempted to avoid agreeing to further meetings between member states and instead they encouraged the other member states to send detailed comments on the draft convention including alternative drafts. *"This would bring home the difficulties inherent in drafting such a convention and might serve to "kill it at birth"*.[30]

This was at a time when UK immigration control was essentially a subject of arbitrary executive power, with very little judicial oversight. Immigration decision making was governed by Aliens Orders issued under the Aliens Restriction Act 1914[31] which had been passed as an emergency measure at the outset of the first world war. This system was subsequently described as *"one of the least liberal and most arbitrary systems of immigration law in the world"*[32] which compared unfavourably with many other Western democracies.

In the 1950s and 60s the numbers of individuals subjected to deportation was about 100 per year[33] - low when compared to today, yet throughout this period, opposition MPs pressed for legal protections to be introduced on each occasion that the powers of the Aliens Restriction Act had to renewed in Parliament.

[27] Council of Europe, European Treaty Series - No. 19: Explanatory Report to the European Convention on Establishment. https://rm.coe.int/16800c92bb accessed 08/11/20.
[28] Council of Europe letter to member states 01/11/51 TNA LO2/676.
[29] Minute from Meeting of Foreign Office to discuss proposal 12/02/52 TNA LO2/676.
[30] Minute from Meeting of Foreign Office to discuss proposal 12/02/52 TNA LO2/676.
[31] As amended by the Aliens Restriction (Amendment) Act 1919. This extended them from a war-time measure to a measure that needed to be renewed on an annual basis as part of the Expiring Laws Continuance Bill.
[32] Quintin Hogg MP, Hansard HC vol776 c504 (22 January 1969).
[33] See David Renton MP, Parliamentary Under-Secretary of State Hansard HC vol 630 cc388-455 (16 November 1960).

Yet the experiences of earlier attempts to provide legal protections to non-nationals - the Immigration Boards of the early 1900s and an ill-fated experiment with a Deportation Advisory Committee in the 1930s - convinced Ministers that no rights of appeal should be granted to aliens refused entry or faced with deportation. Statutory rights of appeal were resisted, despite pressure in Parliament until the Immigration Appeals Act 1969.

In November 1951 the majority of Council of Europe members decided to set up a committee of experts to consider the proposed convention in detail. The UK attended the meeting in spite of minsters' reservations, in the hope of persuading the other member states of the futility of such an undertaking, but had little success in derailing the project.[34] In the resulting report from the committee of experts, all member states agreed that, in the interests of European co-operation it would be worthwhile to pursue the Convention, except for the representatives of the United Kingdom.[35]

The UK continued to attend the discussions and ultimately went on to sign the treaty, primarily for political reasons and a desire to create a *"favourable psychological atmosphere on the continent"*.[36] Senior officials in the Foreign Office considered that the UK *"would lose a considerable amount of goodwill if we alone of the Council of Europe powers, refused to join in"*.[37] Concerns remained however and it was not ratified until 14/10/69.

The Consequences for UK Immigration Control

The Treaty was eventually ratified by 12 member states.[38] It contains a variety of provisions concerning equal treatment of signatory nationals with regards to private rights, rights at work and legal protections.

Chapter 1 concerning "Entry, Residence and Expulsion" is the most important for the purposes of immigration law. Article 1 requires signatories to *"facilitate the entry into its territory by nationals of the other Parties for the purpose of temporary visits"* with Article 2 requiring them to facilitate the prolonged or permanent residence in its territory of nationals of the other Parties to the extent permitted by its economic and social conditions.

Article 3 concerns expulsion and states the following:

Article 3(1) *"Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against ordre public or morality"*.

Article 3(2) *"Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority"*.

Article 3(3) *"Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature"*.

This had been a particularly contentious issue for the UK during the drafting process since it required a change to the way the UK had been dealing with deportation. The UK resisted provisions that would impose an obligation to provide reasons to an individual facing deportation, but reluctantly agreed to the final draft.

This commitment was implemented by allowing non-nationals facing deportation with more than 2 years residence to make representations to the Chief Magistrate at Bow Street Magistrates. Although the alien would have to be permitted representation if requested, it was not intended that the proceedings would take on the nature

[34] Foreign Office Minutes concerning Meeting of "Committee of Experts", October 1952 & Report by the UK Representative to the Meeting of "Committee of Experts", 30/10/52 TNA FO371/102541.

[35] Council of Europe, Report of the Committee of Experts on the Draft Convention for the Reciprocal Treatment of Nationals, 21/10/52, [12-15] TNA FO371/102541.

[36] Memorandum on Political Considerations affecting the United Kingdom attitude towards the draft convention for the Reciprocal Treatment of Nationals, D.M.Day, Foreign Office, 05/12/52 TNA FO371/102541.

[37] D.M.Day, Foreign Office Minute, 03/11/52 TNA FO371/102541.

[38] Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, UK. French, Austria and Iceland signed but did not ratify.

of a trial. Legal aid funding was considered but rejected by the treasury who argued that there was no convincing case for it.[39] The magistrate's role was to advise whether a deportation order that had already been made should be implemented and the Secretary of State would not be bound by his opinion. It was an extra statutory scheme and would not confer an actual "right" of appeal and this was made clear in Parliament.[40] It should be noted though that the Council of Europe Explanatory Report on the convention describes Article 3 as *"a right of appeal with stay of execution"*.[41] The new policy was announced to Parliament in August 1956.[42] The government believed that this fulfilled the UK's treaty obligations and it went some way towards placating critics of the Aliens Acts. Subsequently, little information was provided about how the procedure operated, it was not clear to MPs what considerations the chief magistrate took into account and critics alleged that the national security exception was being misused.[43] Ultimately it did not diminish the calls of those who continued to call for full rights of appeal for non-nationals facing deportation.

Article 3(3) was also the basis of the UK granting settlement for those with continuous residence of at least 10 years.[44] Following ratification of the Convention in 1969 the UK introduced the 10 year rule, initially as a policy concession and although it strictly only applied to signatories of the Convention, it decided to apply it to all non-nationals. This was subsequently incorporated into the immigration rules.

Another article worth noting is Article 8 which states that:

Nationals of any Contracting Party shall be entitled in the territory of any other Party to obtain free legal assistance under the same conditions as nationals of the latter Party.

This suggests that any attempt to reintroduce a residence test for immigration legal test would breach this obligation.

Finally, chapter IV concerns permission to work for non-nationals. Article 10 requires contracting parties to authorise nationals of the other parties to engage in its territory in any gainful occupation on an equal footing with its own nationals, unless there are cogent economic or social reasons for withholding the authorisation. Article 12 provides that those who have been working lawfully in the UK for 5 years to be able to continue working in that occupation and for those lawfully resident for 10 years to be able to work *"in any gainful occupation on an equal footing with nationals"*.

Relevance Today

Much of what is contained in the Convention on Establishment has never needed to have been contested since by the time it was ratified by the UK in the 1969, the UK was well on its way to joining the EC which would impose enforceable obligations in relation to the free movement of workers.

It is clear that Article 3 is not consistent with the UK's approach to the automatic deportation of all non-nationals who receive a 12-month prison sentence. In particular Article 3(3) applies a higher test to nationals of signatory member states who have resided lawfully for over 10 years. Article 3(2) also provides for an appeal prior to expulsion for nationals of signatory states which would appear to provide an obstacle to any future use of the 'deport first appeal later' procedures.[45]

Whilst EU nationals protected under the EU Withdrawal Treaty are to benefit from EU deportation thresholds in relation to offences committed before the end of transition, the UK is permitted to treat subsequent conduct and the conduct of future arrivals in line with UK deportation law as it would apply to non-EU nationals.[46] A question therefore remains as to whether the UK will continue to honour these commitments.

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The above is based on original research material from a forthcoming PhD thesis on the history of UK immigration adjudication in cases of non-nationals with long residence.

[39] Letter from Treasury to Home Office, 30/07/56 TNA T221/452.
[40] David Renton, Joint Under-Secretary of State for the Home Department, Hansard HC Vol 595 c1429 (20 November 1958).
[41] (n1) [36].
[42] Gwilym Lloyd George, Home Secretary Hansard HC Vol 557 cc174-5W (02 August 1956).
[43] David Weitzmann MP, Stoke Newington and Hackney North, Hansard HC vol 630 cc388-455 (16 November 1960).
[44] See Home Office, Immigration Directorates Instruction Dec/00 Chapter 18: The Long Residence Concession.
[45] Nationality Immigration and Asylum Act 2002 s94B as inserted by Immigration Act 2014 s17.
[46] See 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' Article 20.

Update: EU Immigration and Asylum Law: 23 November 2020

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[developments since June update in ***bold/italics/ underline***]

1. Asylum

Adopted measures (UK opt in to all except 11 and 14-15 and 18-19; Ireland opt in to all except 4, 11 and 14-15).

1. Decision 2000/596/EC on European refugee fund (OJ 2000 L 252/12)
2. Regulation 2725/2000 on Eurodac (OJ 2000 L 316/1)
3. Directive 2001/55 on temporary protection (OJ 2001 L 212/12)
   Regulation 407/2002 implementing Eurodac Regulation (OJ 2002 L 62/1)
4. Directive 2003/9 on reception conditions (OJ 2003 L 31/18)
5. Dublin II Regulation 343/2003 (OJ 2003 L 50/1)
   Commission Reg. 1560/2003 implementing Dublin II (OJ 2003 L 222/3)
6. Directive 2004/83 on refugee/subsid. protection qualification (OJ 2004 L 304/12)
7. Decision on second European Refugee Fund (OJ 2004 L 2004 L 252/12)
8. Directive 2005/85 on asylum procedures (OJ 2005 L 326/13)
9. Eur. Refugee Fund (OJ 2007 L 144/1) – amended OJ 2010 L 129/1, OJ 2012 L 92/1
10. Reg 439/2010 on European Asylum Support Office (OJ 2010 L 132/11)
11. Revised qualification Directive 2011/95 (OJ 2011 L 337/9) – deadline Dec. 2013
12. Reg. 603/2013: revised Eurodac Reg (OJ 2013 L 180/1) – deadline July 2015
13. Reg. 604/2013: revised Dublin Reg (OJ 2013 L 180/31) – applied from 1 Jan. 2014
14. Revised procedures Directive 2013/32 (OJ 2013 L 180/60) – deadline July 2015
15. Revised reception Directive 2013/33 (OJ 2013 L 180/96) – deadline July 2015
16. Asylum and migration fund – general rules (OJ 2014 L 150/112)
17. Asylum and migration fund (OJ 2014 L 150/168)
18. Decision on relocation of asylum-seekers (OJ 2015 L 239/146)
19. Decision on relocation of asylum-seekers (OJ 2015 L 248/80)

Proposed measures

1. Regulation creating EU Asylum Agency (COM (2016) 271, 4 May 2016); Council and EP agreed; new version proposed Sep 2018
2. Regulation recasting Eurodac Regulation (COM (2016) 272, 4 May 2016); Council adopted position, Dec 2016; ***revised: (COM (2020) 614, 23 Nov 2020)***
3. Regulation on resettlement (COM (2016) 468, 13 July 2016); Council and EP still negotiating
4. Regulation on procedures (COM (2016) 467, 13 July 2016); EP adopted position; no Council position yet; ***revised: (COM (2020) 611, 23 Nov 2020)***
5. Regulation replacing qualification Directive (COM (2016) 466, 13 July 2016); Council and EP still negotiating
6. Directive recasting reception conditions Directive (COM (2016) 465, 13 July 2016); Council and EP still negotiating
7. ***Regulation on screening asylum seekers (COM (2020) 612, 23 Nov 2020)***
8. ***Regulation replacing Dublin III Regulation (COM (2020) 610, 23 Nov 2020)***
9. ***Regulation on asylum crises (COM (2020) 613, 23 Nov 2020)***

Comment: The EU Commission tried to restart talks with new and revised proposals in September.

2. Legal Migration

Adopted measures

1. Reg. 1030/2002 on residence permit format (OJ 2002 L 157/1) *[UK opt in]*

   - amended by Reg. 330/2008 (OJ 2008 L 115/1)

2. Reg. 859/2003 on 3rd-country nationals' social security (OJ 2003 L 124/1) *[UK, Ir opt in]*
3. Directive 2003/86 on family reunion (OJ 2003 L 251/12)

   - challenge to validity of parts of the Directive decided in favour of the Council (Case C-540/03 *EP v Council* [2006] ECR I-5769)

4. Long-term residents Directive 2003/109 (OJ 2004 L 16/44)
5. Directive 2004/114 on migration of third-country students, pupils, trainees & volunteers (OJ 2004 L 375/12)
6. Directive 2005/71 on admission of researchers (OJ 2005 L 289/15)
7. Recommendation on admission of researchers (OJ 2005 L 289/26)
8. Decision on asylum and immigration information exchange (OJ 2006 L 283/40) *[UK, Ire opt in]*
9. Decision on European integration Fund (OJ 2007 L 168/18) *[UK, Ire opt in]*
10. Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ('Blue Card' directive) (OJ 2009 L 155/17)
11. Reg. 1231/2010 extending Reg. 883/2004 on social security for EU citizens to third-country nationals who move within the EU (OJ 2010 L 344/1) – *[Ire opt-in]*
12. Directive 2011/55 on long-term resident status for refugees and persons with subsidiary protection: OJ 2011 L 132/1
13. Directive 2011/98 on single permit and common set of rights for workers (OJ 2011 L 343/1)
14. Directive 2014/36 on admission of seasonal workers (OJ 2014 L 94/375) – deadline 30 Sep. 2016
15. Directive 2014/66 on admission of intra-corporate transferees (OJ 2014 L 157/1) – deadline 29 Nov. 2016
16. Directive 2016/801 on admission of students, researchers and others (OJ 2016 L 132/21) – deadline 23 May 2018
17. Regulation 1954/2017 amending residence permit format Regulation (OJ 2017 L 286/9)

Proposed measures

1. Directive replacing Blue Card Directive (COM (2016) 378, 7 June 2016); Council and EP negotiating

3. Borders and Visas

Adopted measures [UK & Ire have opted out of all measures except UK opt in to 1, 3]

1. Reg 1683/95 on common visa format (OJ 1995 L 164/1)

   - amended by Reg 334/2002 (OJ 2002 L 53/7)
   - amended by Reg 856/2008, OJ 2008 L 235/1

2. Reg. 539/2001 establishing visa list (OJ 2001 L 81/1

   - amended by Reg 2414/2001 moving Romania to 'white list' (OJ 2001 L 327/1)
   - amended by Reg 453/2003 moving Ecuador to 'black list' (OJ 2003 L 69/10)
   - amended by Reg 851/2005 on reciprocity for visas (OJ 2005 L 141/3)
   - amended by Reg 1932/2006 (OJ 2006 L 405/23)
   - amended by Reg 1244/2009 lifting visa requirement for some Western Balkan countries (OJ 2009 L 336/1)
   - amended by Reg 1091/2010 lifting visa requirement for other Western Balkan countries (OJ 2010 L 329/1)
   - amended by Reg 1211/2010 lifting visa requirement for Taiwan (OJ 2010 L 339/6)
   - amended by Reg 1289/2013 (OJ 2013 L 347/74)
   - amended by Reg. 259/2014, OJ 2014 L 105/9, lifting visa requirement for Moldova
   - amended by Reg. 509/2014, OJ 2014 L 149/67

3. Reg 333/2002 on visa stickers for persons coming from unrecognised entities (OJ 2002 L 53/4)
4. Reg 693/2003 on FTD and FRTD (OJ 2003 L 99/8)
5. Reg 694/2003 on format for FTD and FRTD (OJ 2003 L 99/15)

6. Decision establishing Visa Information System (VIS) (OJ 2004 L 213/5)
7. Reg 2007/2004 establishing External Borders Agency (OJ 2004 L 349/1)
   - amended by Reg. 863/2007 on border guard teams (OJ 2007 L 199/30)
   - amended by Reg. 1168/2011, adopted Oct. 2011 (OJ 2011 L 304/1)
8. Reg 2252/2004 on biometric passports (OJ 2004 L 385/1)
   - amended by Reg. 444/2009 on biometric passports (OJ 2009 L 142/1)
9. Recommendation on visa issuing for researchers (OJ 2005 L 289/23)
10. Reg 562/2006, borders code: OJ 2006 L 105/1
    - amended by Reg 296/2008, OJ 2008 L 97/60
    - amended by Reg 81/2009, regarding use of the VIS (OJ 2009 L 35/56)
    - amended by Reg 610/2013 (OJ 2013 L 182/1)
    - amended by Reg 1051/2013 (OJ 2013 L 295/1)
11. Two decisions on transit through new Member States, Switzerland (OJ 2006 L 167) - see implementation information, OJ 2006 C 251/20
12. Reg 1931/2006 on local border traffic at external borders (OJ 2006 L 405/1)
    - amended by Reg. 1342/2011 (OJ 2011 L 347/41)
13. Decision establishing European Borders Fund (OJ 2007 L 144)
14. Decisions on transit through Romania, Bulgaria, Switzerland (OJ 2008 L 161/30 and L 162/27)
15. Reg 767/2008 establishing Visa Information System (OJ 2008 L 218/60); third-pillar VIS Decision (OJ 2008 L 218/129)
16. Reg 810/2009 on visa code (OJ 2009 L 243/1)
    - amended by Reg. 154/2012 (OJ 2012 L 58/3)
17. Reg 265/2010 on long-stay visas code (OJ 2010 L 85/1)
18. Reg 1077/2011 establishing agency to manage VIS, SIS and Eurodac (OJ 2011 L 286/1)
19. Decision on travel documents (OJ 2011 L 287/9)
20. Reg 1053/2013 on Schengen evaluation (OJ 2013 L 295/27)
21. Reg 1052/2013 establishing Eurosur (OJ 2013 L 295/11)
22. Reg 656/2014 on maritime surveillance operations (OJ 2014 L 189/93)
23. Decision on transit as regards Croatia and Cyprus (OJ 2014 L 157/23)
24. Borders and visa fund (OJ 2014 L 150/143)
25. Reg 2016/399 codifying Schengen Borders Code (OJ 2016 L 77/1)
26. Regulation 2016/1624 creating new Borders and Coast Guard Agency (OJ 2016 L 251/1)
27. Reg amending visa list Reg to waive visas for Georgia – adopted Feb 2017
28. Reg amending visa list Reg as regards safeguard clause – adopted Feb 2017
29. Reg amending Schengen Borders Code – adopted March 2017
30. Reg 2017/850 amending visa list Reg to waive visas for Ukraine (OJ 2017 L 133/1)
31. Reg 2017/1370 amending visa format Regulation (OJ 2017 L 198/24)
32. Reg establishing entry-exit system (OJ 2017 L 327/20)
33. Reg amending borders code (OJ 2017 L 327/1)
34. Reg 2018/1240 creating European travel authorisation scheme (OJ 2018 L 236/1)
35. Reg 2018/1726 on EU JHA database agency (OJ 2018 L 295/99)
36. Reg 2018/1806 codifying visa list Regulation (OJ 2018 L 303/39)
37. Reg 2018/1860 regarding returns and Schengen Information System (OJ 2018 L 312/1)
38. Reg 2018/1861 regarding borders and Schengen Information System (OJ 2018 L 312/14)
39. Reg 2019/592 amending visa list Regulation to waive visas for UK (OJ 2019 L 103I/1)
40. Reg 2019/817 on interoperability of visas and borders legislation (OJ 2019 L 135/27)
41. Reg 2019/1155 amending visa code Regulation (OJ 2019 L 188/55)
42. Reg 2019/1896 revising the law on Frontex (OJ 2019 L 295/1)

Proposed measures [UK, Ire opt out of all]

1. Reg amending visa list Reg to waive visas for Kosovo (COM (2016) 279, 4 May 2016)
2. Reg amending visa list Reg to waive visas for Turkey (COM (2016) 277, 4 May 2016)
3. Amendment to Schengen Borders Code (COM (2017) 571, 27 Sep 2017) re internal border checks: Council and EP could not agree before EP elections
4. Regulation amending Regulation on Visa Information System (COM (2018) 302, 16 May 2018); Council and EP negotiating
5. New funding programme for borders and visas (COM (2018) 473, 12 June 2018); ***Council and EP agreed***
6. Regulation on ETIAS access to law enforcement databases (COM (2019) 3, 7 Jan 2019); Council position agreed; no EP position yet
8. Regulation on ETIAS access to immigration databases (COM (2019) 4, 7 Jan 2019); Council position agreed; no EP position yet

4. Irregular Migration

Adopted measures [UK opt-in to all except 7, 12, 13, 17, 20, 21, 24]

1. Dir. 2001/40 on mutual recognition of expulsion decisions *(OJ 2001 L 149/34)*
2. Directive 2001/51 on carrier sanctions *(OJ 2001 L 187/45)*
3. Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)
4. Decision *2001/886/JHA* on funding SIS II (OJ 2001 L 328/1)
5. Framework Decision on trafficking in persons (OJ 2002 L 203/1)
6. Directive & Framework Decision on facilitation of illegal entry & residence (OJ 2002 L 328)
7. Directive 2003/110 on transit for expulsion by air (OJ 2003 L 321/26)
8. Conclusions on transit via land for expulsion—adopted 22 Dec. 2003 by Council
9. Reg. 378/2004 on procedure for amendments to Sirene manual: (OJ 2004 L 64)
10. Reg. 377/2004 on ILO network (OJ 2004 L 64/1)
11. Decision on costs of expulsion (OJ 2004 L 60/55)
12. Dir. 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)
13. Reg. 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)
14. Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)
15. Decision on joint flights for expulsion (OJ 2004 L 261/28)
16. Decision on early warning system *(OJ 2005 L 83/48)*
17. Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4)
18. Regulation 1988/2006 on SIS II, amending Reg. 2424/2001 (OJ 2006 L 411/1)
19. Decision on European return programme (OJ 2007 L 144)
20. Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)
21. Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L 168/24)
22. Reg. 493/2011 amending Regulation on immigration liaison officers (OJ 2011 L 141/13)
23. Directive 2011/36 on trafficking in persons (OJ 2011 L 101/1)
24. Reg 2019/1240 on immigration liaison officers (OJ 2019 L 198/88)

Proposals

1. Directive amending returns Directive (COM (2018) 634, 12 Sep 2018); Council agreed position in June 2019; no EP position yet

5. External treaties

Readmission

- Hong Kong *[UK opt in]* (OJ 2004 L 17/23): in force 1.3.04 (OJ 2004 L 64/38)
- Macao - *[UK opt in]* (OJ 2004 L 143/97); in force 1.6.2004
- Sri Lanka *[UK opt in]* (OJ 2005 L 124/43); in force 1.5.2005
- Albania – *[UK opt in]* (OJ 2005 L 124); in force 1.5.2006

- Russia – *[UK opt in]* OJ 2007 L 129 – in force 1.6.2007
- Ukraine, Serbia, Montenegro, Bosnia, Macedonia and Moldova – *[UK opt in]* OJ 2007 L 332 and 334 – in force 1 Jan. 2008
- Pakistan – concluded, Sep 2010 *(OJ 2010 L 287/50)* – in force 1 Dec. 2010
- Georgia *(OJ 2011 L 52)* – in force 1 March 2011
- negotiations approved with Morocco, Algeria, Turkey and China – agreed with Turkey, Jan. 2011; agreement with Turkey signed, June 2012 (COM (2012) 239); in force 1 Oct. 2014
- Turkey extended readmission treaty to third-country nationals in June 2016
- agreement with Cape Verde (OJ 2013 L 281) – concluded Oct. 2013; in force 1 Dec. 2014
- treaty with Armenia concluded, Oct. 2013 (OJ 2013 L 289) – in force 1 Jan. 2014
- treaty with Azerbaijan signed, Nov. 2013; in force 1 Sept. 2014
- Belarus: ***in force 2020***

Other external treaties

- EC/Norway/Iceland re: Dublin Convention: in force 1 March 2001; Protocol in force 1.5.06
- EC/Swiss free movement of persons: concluded 28.2.02 (OJ 2002 L 114); into force 1.6.02
- EC & Switzerland re Schengen, Dublin: applied from Dec. 2008
- 'Approved Destination Status' treaty with China: (OJ 2004 L 83/12); in force 1.5.2004
- Dublin II treaty with Denmark: in force, 1 April 2006 (OJ 2006 L 66/38)
- visa facilitation agreement with Russia: in force 1.6.2007 (OJ 2007 L 129)
- visa facilitation agreements with Ukraine, Serbia, Montenegro, Bosnia, Macedonia, Albania and Moldova: OJ 2007 L 332 and 334 – in force 1 Jan. 2008
- visa facilitation agreement with Georgia: concluded, Jan. 2011
- visa facilitation agreement with Cape Verde (OJ 2013 L 281) – in force 1 Dec. 2014
- visa abolition treaties agreed with six micro-states (Mauritius, Antigua/Barbuda, Barbados, Seychelles, St. Kitts and Nevis and Bahamas): proposals to sign and conclude treaties - COM (2009) 48, 49, 50, 52, 53 and 55, 12 Feb. 2009 – treaties signed and provisionally in force, May 2009, concluded Nov. 2009
- two visa waiver treaties with Brazil agreed – in force 2011 and 2012
- Council mandate to renegotiate visa facilitation treaties with Russia, Ukraine, Moldova, April 2011; new treaties with Ukraine and Moldova in force 1 July 2013
- treaty with Armenia concluded, Oct. 2013 (OJ 2013 L 289) – in force 1 Jan. 2014
- treaty with Azerbaijan signed, Nov. 2013; in force 1 Sept. 2014
- Visa facilitation treaty with Belarus: ***in force 2020***
- proposal to negotiate with Morocco – approved by Council, Dec. 2013

Case Law Update: EU Immigration and Asylum Law: 23 November 2020

Steve Peers, University of Essex

Asylum

Decided cases:

Dublin II and III

Case C-19/08 Petrosian - 29 Jan. 2009

Cases C-411/10 & C-493/10 NS and ME - judgment 21 Dec. 2011

Case C-620/10 Kastrati - Swedish reference - judgment 3 May 2012

Case C-245/11 K - reference from Austrian court - judgment 6 Nov. 2012

Case C-528/11 Halaf – judgment 30 May 2013

Case C-648/11 MA - judgment 6 June 2013

Case C-4/11 Puid - judgment 14 Nov. 2013

Case C-394/12 Abdullahi – judgment 10 Dec. 2013

Case C-695/15 PPU Mirza - judgment 17 Mar 2016

Case C-63/15 Ghezelbash - judgment 7 June 2016

Case C-155/15 Karim - judgment 7 June 2016

Case C-578/16 PPU CK and others, - judgment 16 Feb 2017

Case C-528/15 Al Chodor, Dublin III Reg; opinion Nov 2016; judgment Mar 2017

Case C-490/16 AS, judgment July 2017

Case C-646/16 Jafari, judgment July 2017

Case C-670/16 Mengesteab, judgment July 2017

Case C-643/15 Slovakia v Council, challenge to relocation Decision; judgment Sep 2017

Case C-647/15 Hungary v Council, challenge to relocation Decision; judgment Sep 2017

Case C-60/16 Khir Amayry, judgment 13 Sep 2017

Case C-212/16 Shiri, judgment 25 Oct 2017

Case C-360/16 Hasan, judgment Jan 2018

Case C-647/16 Hassan, judgment May 2018

Case C-213/17 X, judgment 5 July 2018

Cases C-47/17 and 48/17 X, judgment Nov 2018

Case C-661/17 MA, judgment 23 Jan 2019

Case C-163/17 Jawo, judgment 19 March 2019

Cases C-582/17 H and C-583/17 R, judgment April 2019

Case C-517/17 Addis, judgment July 2020

Qualification Directive

Case C-465/07 Elgafaji – subsidiary protection – judgment 17 Feb. 2009

Cases C-175/08 to C-179/08 Abdulla and others – cessation: judgment 2 March 2010

Case C-31/09 Bolbol – exclusion of Palestinians – judgment 17 June 2010

Cases C-57/09 and C-101/09 B and D – exclusion – judgment 9 Nov. 2010

Joined Cases C-71/11 Y and C-99/11 Z - religious persecution – judgment 5 Sep. 2012

Case C-277/11 MM – procedural rights - judgment 22 Nov. 2012

Case C-364/11 El Kott – exclusion of Palestinians - judgment 19 Dec. 2012

Cases C-199/12 to C-201/12 X, Y and Z – LGBT refugees - judgment 7 Nov. 2013

Case C-285/12 Diakite – subsidiary protection – judgment 30 Jan. 2014

Case C-604/12 HN - subsidiary protection - judgment 8 May 2014

Case C-481/13 Qurbani – Article 31 Refugee Convention - judgment 17 July 2014

Cases C-148/13 to C-150/13 A, B and C - judgment 2 Dec. 2014

Case C-542/13 M'Bodj - judgment 18 Dec. 2014

Case C-562/13 Abdida - judgment 18 Dec. 2014

Case C-472/13 Shepherd - judgment 26 Feb 2015

Case C-373/13 T - judgment 24 June 2015

Cases C-443/14 to C-445/14, Alo and others - judgment 1 March 2016

Case C-560/14 MM – judgment 9 Feb 2017

Case C-573/14 Lounani - judgment 31 Jan 2017

Case C-473/16 F, judgment Jan 2018

Case C-353/16 MP, judgment April 2018

Case C-585/16 Alheto, judgment 25 July 2018

Case C-369/17 Ahmed, judgment Sep 2018

Case C-652/16 Ahmedbedkova, judgment Oct 2018

Case C-56/17 Fathi, judgment *Oct 2018*

Case C-713/17, Ayubi, judgment 21 Nov 2018

Cases C-391/16 M and C-77/17 and C-78/17 X and X, *judgment 14 May 2019*

Case C-720/17, Bilali, judgment 23 May 2019

Case C-238/19 EZ (conscientious objection); judgment Nov 2020

Asylum procedures

Case C-69/10 Samba Diouf - judgment 28 July 2011

Case C-175/11 H.I.D. – judgment 31 Jan. 2013

Case C-239/14 Tall - judgment 17 Dec 2015

Case C-429/15 Danqua – judgment 27 Oct 2016

Case C-348/16 Sacko - judgment July 2017

Case C-181/16 Gnandi, judgment 19 June 2018

Case C-404/17, A, judgment 25 July 2018

Case C-175/17 X, judgment 26 Sep 2018

Case C-180/17 X and Y, judgment 26 Sep 2018

Case C-422/18 PPU FR, order 27 Sep 2018

Case C-662/17 EG, judgment 18 Oct 2018

Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 Ibrahim, judgment March 2019

Case C-556/17, Torubarov, judgment 29 July 2019

Case C-406/18 PG, Hungarian case on asylum procedures directive, judgment March 2020

Case C-564/18, Hungarian case on asylum procedures directive; judgment March 2020

Cases C-924/19 and C-925/19 PPU, Országos Idegenrendészeti Főgazgatóság Dél-alföldi Regionális Igazgatóság; judgment 14 May 2020

Case C-36/20 PPU, Ministerio Fiscal (Autorité susceptible de recevoir une demande de protection internationale); judgment 25 June 2020

Case C-651/19 JP, judgment Sep 2020

Reception conditions

Case C-179/11 CIMADE and GISTI - judgment 27 Sep. 2012

Case C-79/13 Saciri and others - judgment 27 Feb. 2014

Case C-601/15 PPU J.N. – judgment 15 Feb 2016

Case C-18/16 K - judgment Sep 2017

Case C-233/18, *DH*, judgment Nov 2019

Relocation of asylum seekers

Joined Cases C-715/17, Commission v Poland; C-718/17, Commission v Hungary; C-719/17, Commission v Czech Republic: judgment April 2020

Pending cases:

Case C-808/18, Commission v Hungary, infringement action on asylum procedures directive; hearing Feb 2020; ***opinion June 2020; judgment due Dec 2020***

Case C-194/19 HA, reference on the Dublin III Regulation; ***bearing due Nov 2020***

Case C-255/19 OA, reference on the qualification directive; opinion March 2020

Case C-322/19 Minister for Justice and Equality, reference on the reception conditions directive and Dublin III Reg; ***opinion Sep 2020***

Case C-385/19 Minister for Justice and Equality, reference on the reception conditions directive; ***opinion Sep 2020***

Case C-507/19 XT, reference on the qualification directive (exception for Palestinians); ***opinion autumn 2020***

Case C-616/19 MS and others, reference on the first asylum procedures directive; ***opinion Sep 2020; judgment due Dec 2020***

Case C-755/19 THC, reference on the asylum procedures directive

Case C-821/19, Commission v Hungary, infringement action on asylum procedures directive; ***bearing due Nov 2020***

Case C-901/19 CF and DNs, reference on the qualification directive (civil wars); ***bearing due Nov 2020***

Case C-921/19 LH, reference on the asylum procedures directive

Case C-8/20 LR, reference on the asylum procedures directive (application in Norway); ***bearing due Nov 2020***

Case C-20/20 EMT, reference on the asylum procedures directive

Legal migration

Decided references from national courts:

Case C-578/08 Chakroun - family reunion Directive – judgment 4 March 2010

Case C-247/09 Xhymshiti - social security - judgment 18 Nov. 2010

Case C-508/10 Commission v Netherlands - long-term residents' - judgment 26 April 2012

Case C-571/10 Kamberaj - long-term residents' directive - judgment 24 April 2012

Case C-15/11 Sommer – students' Directive - judgment 21 June 2012

Case C-502/10 Singh - long-term residents' directive - judgment 18 Oct. 2012

Case C-138/13 Dogan - family reunion directive; judgment 10 July 2014

Case C-338/13 Noorzai - family reunion Directive; judgment 17 July 2014

Case C-469/13 Tahir - long-term residents Directive - judgment 17 July 2014

Case C-491/13 Ben Alaya - students' directive; judgment 11 Sep. 2014

Case C-579/13 P and S - long-term residents' directive; judgment 4 June 2015

Case C-153/14 K and A - family reunion Directive; judgment 9 July 2015

Case C-309/14, CGIL and IMCA - long-term residents' Directive; judgment 2 Sep 2015

Case C-558/14, Khachab - family reunion directive - judgment 21 April 2016

Case C-465/14, Wieland and H. Rothwangl - social security Reg – judgment Oct 2016

Case C-544/15 Fahimian, students' Directive; judgment spring 2017

Case C-449/16 Martinez Silva, single permit Directive; judgment spring 2017

Case C-636/16 López Pastuzano, long-term residents' Directive; judgment Dec 2017

Case C-550/16 A and S, family reunion directive; judgment April 2018

Case C-257/17 C and A, family reunion Directive; judgment Nov 2018

Case C-380/17 K and B, family reunion Directive; judgment Nov 2018

Case C-484/17, K, family reunion directive; judgment Nov 2018

Case C-477/17 Balandin, reference on social security regulation; judgment 24 Jan 2019

Case C-557/17, Y.Z, reference on family reunion directive; judgment March 2019

Case C-635/17 E, reference on family reunion Directive; judgment March 2019

Case C-302/18, X, reference on long-term residents directive; judgment Oct 2019

Case C-706/18 X, reference on family reunion directive; judgment Nov 2019

Joined Cases C-381/18 and C-382/18 GS, references on family reunion directive; judgment Dec 2019

Case C-519/18, Hungarian case on family reunion directive; judgment Dec 2019

Case C-448/19, reference on the long-term residents directive and Directive 2001/40; judgment June 2020

Cases C-133/19, C-136/19 and C-137/19 BMM and others, reference on the family reunion directive; judgment July 2020

Case C-503/19 and C-592/19 UQ, reference on the long-term residents directive; judgment Sep 2020

Pending cases:

Case C-302/19 INPS, reference on the single permit directive; hearing due Feb 2020; ***judgment due Nov 2020***

Case C-303/19 INPS, reference on the long-term residents directive; hearing due Feb 2020; ***judgment due Nov 2020***

Case C-761/19, Commission v Hungary, infringement action on the long-term residents directive

Visas/Borders

Decided annulment actions:

C-257/01 Commission v Council (challenge to Regs. 789/2001 and 790/2001), judgment of 18 Jan. 2005, upholding validity of Regs.

Cases C-77/05 and C-137/05 UK v Council (validity of Border Agency Regulation and passport Regulation); judgment against UK, 18 Dec 2007

Case C-482/08 UK v Council (annulment of decision on police access to VIS, due to UK non-participation); judgment against UK, 26 Oct. 2010

Case C-355/10 EP v Council (annulment of measure implementing Borders Code) - judgment 5 Sep. 2012

Case C-88/14 Commission v EP & Council – validity of visa list – judgment July 2015

Case C-44/14 Spain v EP & Council – validity of Eurosur Reg – judgment 8 Sep 2015

Decided national court references:

Case C-241/05 *Bot* - freedom to travel - judgment 4 Oct. 2006

Case C-139/08 Kqiku - transit legislation - judgment 2 April 2009

Cases C-261/08 Zurita Garcia and C-348/08 Choque Cabrera - Borders Code - judgment 22 Oct 2009

Cases C-188/10 and C-189/10 Melki and Abdeli - internal borders - judgment 22 June 2010

Case C-430/10 Gaydarov - Borders Code – judgment 17 Nov. 2011

Case C-83/12 Vo - visa code - judgment 10 April 2012

Case C-606/10 Association Nationale d'Assistance aux Frontières pour les Etrangers - Borders Code – judgment 14 June 2012

Case C-278/12 PPU Adil - Borders Code - judgment 19 July 2012

Case C-23/12 Zakaria – Borders Code – judgment 17 Jan. 2013

Case C-254/11 Shomodi - border traffic Regulation - judgment 21 March 2013

Case C-291/12 Schwarz - validity of passports Regulation; judgment 17 Oct. 2013

Case C-84/12 Koushkaki - visa code - judgment 19 Dec. 2013

Case C-139/13 Commission v Belgium - breach of passports Reg; judgment 13 Feb. 2014

Case C-575/12 Air Baltic - borders code, visa code; judgment 4 Sep. 2014

Case C-101/13 U - passports Regulation; judgment Nov. 2014

Cases C-446/12 to C-449/12 Willems and others - passports reg; judgment 16 April 2015

Case C-638/16 PPU X and X - humanitarian visas - judgment 7 Mar 2017

Case C-9/16 A, reference on Schengen Borders Code; judgment summer 2017

Case C-403/16 El-Hassani, reference on visa code; judgment Dec 2017

Case C-240/17 E, reference on Article 25 of Schengen Convention; judgment Jan 2018

Joined Cases C-412/17 and C-474/17, Touring Tours, reference on Borders code; judgment 13 Dec 2018

Case C-444/17, Arib, reference on Borders code and returns Directive; judgment 19 March 2019

Case C-680/17, Vethanayagam, reference on visa code; judgment 29 July 2019

Case C-380/18 EP, reference on SIS II and Borders Code Regulations; judgment Dec 2019

Case C-341/18, reference on Borders Code and Visa Code; judgment Feb 2020

Case C-584/18 DZ, Cypriot case on borders code, transit regulation and airline passenger compensation; judgment April 2020

Case C-554/19 FU, reference on the borders code (internal border checks); order June 2020

Pending cases:

Case C-193/19 A, reference on the Schengen borders code; ***opinion July 2020***

Cases C-225/19 RNNS and C-226/19 KA, reference on the visa code; ***judgment due Nov 2020***

Irregular migration

Decided cases (all concern Returns Directive):

Case C-357/09 PPU Kadzoev, judgment 30 Nov 2009

Case C-61/11 PPU El Dridl Hassen - judgment 28 April 2011

Case C-329/11 Achughbabian - judgment 6 Dec. 2011

Case C-430/11 Sagor - judgment 6 Dec. 2012

Case C-522/11 Mbaye - order 21 Mar. 2013

Case C-534/11 Arslan - judgment 30 May 2013

Case C-383/13 PPU G and R - judgment 10 Sep. 2013

Case C-297/12 Filev & Osmani - (entry bans) – judgment 19 Sep. 2013

Case C-146/14 PPU Mahdi; judgment 5 June 2014

Case C-189/13 Da Silva; judgment July 2014

Case C-473/13 Bero; judgment 17 July 2014

Case C-474/13 Pham; judgment 17 July 2014

Case C-514/13 Bouzalmate; judgment 17 July 2014

Case C-166/13 Mukarubega; judgment 5 Nov. 2014

Case C-249/13 Boujlida; judgment 11 Dec. 2014

Case C-38/14 Zaizoune; judgment 23 April 2015

Case C-554/13 Zh and O; judgment 11 June 2015

Case C-290/14 Celaj; judgment 1 Oct 2015

Case C-47/15 Affum - judgment 7 June 2016

Case C-225/16 Ouhrami; judgment July 2017

Case C-184/16 Petrea; judgment Sep 2017

Case C-82/16 K, judgment May 2018

Case C-181/16 Gnandi, judgment June 2018

Case C-754/18, Ryanair, reference on carrier sanctions law; hearing due Dec 2019; opinion Feb 2020; judgment June 2020

Case C-18/19 WM, reference on the returns directive; judgment July 2020

Case C-806/18, JZ, reference on the returns directive; judgment Sep 2020

Case C-233/19 CPAS, reference on the returns directive; judgment Sep 2020

Case C-402/19 LM, reference on the returns directive (emergency medical case); judgment Sep 2020

Case C-568/19 MO, reference on the returns directive (higher national standards option); judgment Oct 2020

Pending cases:

Case C-441/19 TQ, reference on the returns directive; ***(unaccompanied minors); opinion July 2020***

Case C-546/19 BZ, reference on the returns directive (scope of entry bans)

Case C-673/19 M and others, reference on the returns directive (detention of refugees moving between Member States); ***opinion Oct 2020***

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