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EU Referendum Position Papers

ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at www.ilpa.org.uk

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The implications of UK withdrawal for immigration policy and nationality law: Irish aspects

Bernard Ryan, Professor of Law, University of Leicester, 18 May 2016

Introduction

This paper addresses the Irish dimensions to a UK decision to withdraw from the EU, in the immigration and nationality policy spheres. It addresses the implications of withdrawal for common travel area arrangements with the Republic of Ireland (section 1) and for the special status of Irish citizens in the UK (section 2).

In the paper, it is assumed that the Republic of Ireland would continue as a Member State of the EU. That has been the position of the Irish Government since the referendum was announced, and there is no evidence of significant support in the Republic of Ireland for a membership referendum, or for withdrawal from the EU.

It is also assumed that Northern Ireland would remain within the UK. Opinion poll evidence in 2014 showed a clear majority (60-40) in favour of Northern Ireland's remaining within the UK, rather than unification with the Republic of Ireland.[i] After a UK decision to withdraw, it must be considered unlikely that there would be an increase in those supporting a change in Northern Ireland's constitutional position.

The common travel area

Overview

In this context, the term 'common travel area' refers to administrative arrangements providing a special immigration control regime as between the UK and the Republic of Ireland.[ii] Arrangements of this kind have been in place for the most of the period since the Irish Free State was established in 1922.[iii] In practice, the aims of these arrangements have been to ensure relative freedom of movement between the two states, and to establish forms of co-operation between the two states' immigration authorities.

The primary explanation for the durability of these arrangements has been the assumption of the UK authorities that it is impractical for the Irish border to be an immigration frontier.[iv] One result has been support by Northern Irish unionists for the common travel area, in order to avoid immigration control on journeys between Northern Ireland and Great Britain.[v]

The many social and economic connections between the Republic of Ireland and all parts of the UK are a second factor pointing towards relative freedom of movement between the two states. This aspect of the common travel area is generally favoured by the Irish Government. It also appeals to nationalist opinion in Northern Ireland, which supports any lessening of the *de facto* consequences of the partition of the island of Ireland.

A third factor underlying common travel area arrangements is that these favour the free movement of labour. For most of the period since 1922, that meant movement of Irish workers to Great Britain. With greater economic development in the Republic of Ireland since the mid-1990s, the pattern has been more varied, with movement in both directions.

Current arrangements

The legal framework relating to the common travel area is quite different in the two states.

In *UK law*, by virtue of section 1(3) of the Immigration Act 1971, immigration control does not apply to persons arriving from the Republic of Ireland. Persons arriving from the Republic of Ireland have leave to enter automatically, subject to the provisions of the Immigration (Control of Entry through Republic of Ireland) Order 1972. Article 3 of the 1972 Order excludes several categories of person from the benefit of section 1(3), including visa nationals not in possession of a visa. Article 4 of the Order deems certain other persons to have leave only for three months, including persons whose nationality means that they do not require visas.

Of particular significance is an exemption within Article 4 to these deemed leave arrangements. In its original version, Article 4 of the 1972 Order exempted *Irish* citizens alone. That provision was however replaced in 2014 by an exemption for EEA/ Swiss nationals and their family members who have a right to enter deriving from EU free movement law.

Under *Irish immigration law*, everyone who is not an Irish or a British citizen is classed as a 'non-national'.[vi] Under the Immigration Act 2004, immigration controls apply automatically to all 'non-nationals' who arrive from the UK by air or sea, and *may* be imposed upon 'non-nationals' who arrive by land from Northern Ireland. Individuals who arrive by land must obtain immigration permission to be in the state within one month. This framework is however to be read with the EU free movement of persons rules, which confer rights of entry and residence upon EEA/Swiss nationals and family members.

The two states' authorities have long co-operated in immigration control in practice. One area where extensive co-operation is evident concerns the list of states whose nationals require a visa to enter: currently, 103 states are subject to visa requirements in both states, seven in the UK alone, and seven in the Republic of Ireland alone. A more recent development saw the launching in October 2014 of a joint British-Irish visa, which allows nationals of China and India to visit both states for up to three months, on the basis of a visa issued by either state. There is also co-operation to ensure that individuals cannot use one state as a back door to the other. That is linked in turn to provision in the immigration law of each state for entry to be denied to a person who intends to travel to the other, but who would not be admitted there.

At the EU level, these arrangements between the UK and Republic of Ireland are reflected in three Protocols annexed to the Treaty on the Functioning of the EU. Protocol 19, which is concerned with the Schengen open borders zone, provides that the Republic of Ireland and the UK are not automatically covered by Schengen rules, or by proposals to develop them. Protocol 20 allows the UK and Republic of Ireland to 'continue to make arrangements between themselves relating to the movement of persons between their territories ('the Common Travel Area')'. Protocol 21 provides that each of the UK and the Republic of Ireland may unilaterally choose to opt in to immigration or asylum legislation other than Schengen rules, or to discussion of proposals relating to such legislation.

Implications of withdrawal

In the event of UK decision to withdraw, it is to be presumed that the underlying reasons for the common travel area would continue to apply. The political consensus in support of the common travel area in Northern Ireland would probably be an especially significant factor.[vii]

Continuing with common travel area arrangements also appears to be compatible with EU law. There is no obvious legal reason why the Republic of Ireland should not retain the benefit of Protocols 19 and 20 after UK exit, allowing it to maintain special co-operation arrangements with the UK outside the Schengen zone.

After a UK decision to withdraw, reform of common travel arrangements might nevertheless be considered. In the words of the Government's March 2016 document *Alternatives to Membership* 'It is not clear that the Common Travel Area could continue to operate with the UK outside the EU, and Ireland inside, in the same way that it did before both countries joined the EU in 1973.'[viii]

One contextual factor would be the possible emergence of customs checks on goods moving between the two states. In the event of a UK withdrawal, much would depend on the terms of its subsequent relationship to the EU. To the extent that customs checks applied to goods moving across the border on the island of Ireland, or to traffic between the Republic of Ireland and Great Britain, there would be pressure for controls on the movement of persons as well.

Three specific factors in the immigration policy field that point towards reform of common travel area arrangements may also be suggested.

The need to amend UK legislation in any event. If the UK left the EU, an amendment to Article 4 of the 1972 Order (above) would be required in any event. The 1972 Order currently contains an exemption for all those with rights deriving from EU free movement law in the UK, something which would make no sense in the event of withdrawal. Would an exemption for Irish citizens alone be restored? For reasons explained in section 2 (below), that question would probably be linked to a wider set of issues about the status of Irish citizens in UK immigration law.

EU free movement rights in Ireland. If the UK withdrew from the EU, and did not agree to the free movement of persons within a post-exit arrangement, the implications of EU free movement rights in the Republic of Ireland would need to be addressed. The issue would be that EEA and Swiss nationals and their family members could be present or resident lawfully in the Republic of Ireland, but free in practice to enter the UK without permission to do so.

A pragmatic response to this scenario appears the most likely. One solution would be for all or most EEA/Swiss nationalities to be exempted from overall UK visa requirements. Alternatively, persons with those nationalities, and potentially their family members, with residence documents issued in the Republic of Ireland, might be permitted to enter the UK without a visa, even if they would otherwise be visa nationals.

Dublin transfers. At present, the UK and Ireland are among the 32 states covered by the Dublin III Regulation. That legislation permits applicants for international protection to be transferred to another participating state *inter alia* where that was the participating state they first entered, or that was where they first applied for protection. Eurostat data shows that, between 2008 and early 2014, the UK made 1334 Dublin requests to the Republic of Ireland, and received 815 requests from it. In the same period, the UK actually transferred 753 persons to the Republic of Ireland, and received 357 transfers from it.

Both states might therefore find it attractive to have a post-withdrawal arrangement concerning the transfer of applicants for international protection. This could in theory happen *under* the Dublin Regulation—assuming it survives in something like its present form—if the UK continued to participate. Alternatively, it could be achieved through a modification of historic common travel area arrangements.

Given these reasons to consider adjustments to the common travel area arrangements, wider changes cannot be ruled out. One possibility is that the UK might adopt the Irish approach of applying immigration control to entry by air and sea only. Another possible incremental change would address rights of travel between the two states for residence permit and visa holders.

There would also be scope for a more comprehensive arrangement or international agreement between the two states to emerge. That would potentially address the following points:

- the extent of immigration control on travel by air and sea, and by land
- rights of entry and residence for British and Irish citizens
- rights of travel for those with a residence permit or visas issued by one of the states
- responsibility for international protection applications, and
- the procedures by which visa policy and operational co-ordination would be arranged.

The status of Irish citizens in the UK

Overview

Irish citizens are not considered 'foreign' in Britain, something which is linked to various rights and arrangements that directly or indirect favour them. In the event of a decision to withdraw, with the Republic of Ireland remaining inside the EU, the appropriateness of that special status might well be re-examined, either generally or in relation to specific rights.

Current arrangements

The fundamental provision concerning the status of Irish citizens in Britain is the Ireland Act 1949, which was passed when the Irish state withdrew definitively from the Commonwealth. Section 2(1) of the 1949 Act declares that 'notwithstanding that the Republic of Ireland is not part of [Her] Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK.' It goes on to provide that 'references in any Act of Parliament, other enactment or instrument whatsoever ... to foreigners, aliens [etc..] ... shall be construed accordingly.'

In practice, the main rights which are currently associated with the 'non-foreign' status of Irish citizens are the following.

As explained above, Irish and other EEA/ Swiss citizens travelling directly from the Republic of Ireland are not subject to a requirement to obtain leave to enter the UK.

The position of Irish citizens in UK immigration law is anomalous. Irish citizens became subject to immigration control under the Commonwealth Immigrants Act 1962, but that legislation was not used to prevent entry and residence by them, other than in the event of an exclusion or deportation order. Since 1 January 1973, Irish citizens have also in principle been subject to the control under the Immigration Act 1971. However, from that date, Irish citizens entering *from the Republic of Ireland* benefitted from the exemption in the 1972 Order discussed above. In addition, progressively from that date, entry and residence by *all* Irish citizens - including those who enter the UK from elsewhere, or who were born there - has been protected by EU law.

The position of Irish citizens within nationality law is also anomalous. Irish citizens are treated as 'settled' in the United Kingdom from the date they take up ordinary residence.[ix] This permits Irish citizens to naturalise after five years' continuous residence, and enables their children born in the United Kingdom to acquire British citizenship from the date of residence. This is a more generous regime than that applicable to other EEA and Swiss citizens and their family members, who typically require five years' residence in order to become 'settled', and a further year's residence to naturalise. The precise rationale for this generous regime is uncertain, however, with neither the common travel area nor the Ireland Act 1949 appearing sufficient as an explanation.

Together with Commonwealth citizens, resident Irish citizens have full political rights in the UK, i.e. the rights to vote in all elections, to stand for election to the House of Commons, and to be members of the House of Lords.

Residence elsewhere in the common travel area, including in Ireland, counts towards the 'habitual residence' test of eligibility for non-contributory benefits in the UK.[x] This is of

particular relevance to Irish citizens moving from Ireland, and also protects other EEA and Swiss nationals moving from there.

There is an additional Northern Ireland dimension to consider. The 1998 Belfast Agreement recognised 'the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose', and that such persons had the 'right to hold both British and Irish citizenship is accepted by both Governments.' Taken together, these two statements permit a person from Northern Ireland to *rely upon* their Irish citizenship alone, even if they legally hold British citizenship as well.

Implications of withdrawal

After a decision to withdraw, the following questions concerning the legal position of Irish national appear the most likely to arise.

The Ireland Act 1949. In the event of the Republic of Ireland remaining within the EU, with the UK outside, questions might be posed as to whether it remains appropriate to classify it, and its citizens, as 'non-foreign'. If changes were made, they would potentially affect all of the entitlements referred to above.

Position in immigration law. If the UK decided to withdraw from the EU, it would be necessary to resolve the question of the position of Irish citizens in immigration law.

If there was continued support for the common travel area principle, the most likely outcome is a general exemption from immigration control, in line with the position of British citizens in Irish law (above), so as to permit both entry and residence by Irish citizens. An exception could be made for exclusion and deportation cases.

The alternative would be a form of visa waiver for Irish citizens, regardless of where they enter from. This would permit entry and short-term stay, but not residence. The limited nature of this solution would also be difficult to reconcile with continued support for a common travel area between the two states.

Position in nationality law. A resolution of the position of Irish citizens within immigration law would permit clarification of their position in nationality law. At what point would they become 'settled' so as to permit them to acquire British citizenship by naturalisation, and their children to acquire it by virtue of birth in the UK?

Political rights. The political rights of Irish citizens in the UK have previously been questioned. In his review of citizenship law for the Government in 2008, Lord Goldsmith disagreed with the right of Irish and Commonwealth citizens to vote in parliamentary elections.[xi] Were that suggestion acted upon, it would probably have implications for membership of the House of Commons and Lords as well.

The Belfast Agreement is a significant constraint in this area. In 2008, Lord Goldsmith's solution was to preserve the right to vote for Irish citizens from Northern Ireland alone.

It is possible that these questions would re-emerge in the event of withdrawal from the EU by the UK. It is not however possible to predict the likely outcome at this stage.

Conclusions

Based on the analysis here, the following conclusions may be suggested as to the likely implications of a UK decision to withdraw upon the relationship with the Republic of Ireland, in relation to immigration and nationality law and policy:

- The overall common travel area principle would probably continue to be supported by the two states.
- It would probably be thought necessary to make specific adjustments to common travel area arrangements, e.g. to take account of persons with EU free movement rights in the Republic of Ireland, or to cater for international protection applicants

- There could be pressure for wider changes to common travel area arrangements, such as the application of immigration control to air and sea travel from the Republic of Ireland to the UK, or rights of travel. These might lead on to consideration of a more comprehensive agreement between the two states.
- It would be necessary to resolve the position of Irish citizens within UK immigration law and nationality law.
- A wider questioning of the special status of Irish citizens in the UK, including their political rights, is also a possibility.

References

[i] 'Northern Ireland says 'yes' to a border poll... but a firm 'no' to united Ireland', *Belfast Telegraph*, 29 September 2014.
[ii] Separate arrangements between the UK and the Channel Islands and Isle of Man are not addressed here.
[iii] See generally Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855-874.
[iv] Recent support for this assessment of the Irish border may be found in HM Government, *Scotland Analysis: Borders and Citizenship* (January 2014), p. 49.
[v] The exception is a period during and after world war two (1939-1952), when immigration control applied to those arriving in Great Britain from either jurisdiction in the island of Ireland.
[vi] Immigration Act 1999, section 1(1), read together with Aliens (Exemption) Order 1999.
[vii] This consensus is emphasised by Christine Bell in 'Brexit, Northern Ireland and UK-Irish Relations', *Centre on Constitutional Change*, 26 March 2016.
[viii] HM Government, *Alternatives to membership: Possible models for the UK outside the EU* (March 2016), p. 12.
[ix] This position is set out in published guidance: see Home Office, *European Economic Area (EEA) and Swiss nationals: Free movement rights*, (12 November 2015), p. 24.
[x] See for example, Universal Credit Regulations 2012 (SI 2013 No. 376), Regulation 9.
[xi] *Citizenship: Our Common Bond* (2008), p 75. He proposed preserving the position of existing residents.

EU free movement in practice at home and abroad

Matthew Evans, Director, The AIRE Centre (Advice on Individual Rights in Europe), 10 May 2016

Introduction

At its core the EU project remains a common or single market, involving reciprocal commitments so that not only products (goods and services) but also the factors of production (labour and capital) can circulate freely.

The free movement for workers and others exercising economic freedoms (eg service providers and recipients) has now largely been subsumed into the status of citizenship of the EU. Movement and residence in all Member States for EU nationals remains a defining feature of EU citizenship, so that UK nationals, as Union citizens, may in principle live anywhere they choose within the EU, and vice versa. The ultimate goal of EU citizenship policies is to simplify and strengthen the right of free movement and residence of all Union citizens.

Treaty provisions on free movement for EU citizens

The body of law relating to free movement for natural persons is based on several sources of EU law:

- Treaty on the Functioning of the EU (TFEU)
- Treaty of European Union (TEU)

- EU secondary legislation adopted on the basis of the TFEU, such as the Citizens' (Free Movement) Directive[xi] 2004/38/EC), and
- case law of Court of Justice of the European Union (CJEU) which interprets and applies the above provisions

The EU treaties, including secondary legislation like the Citizens' Directive, have 'direct effect'. This means they can be cited and used by EU citizens to enforce their rights before national courts.

Who determines who is a citizen of the Union?

The significance of the various sources of EU law is that the legal concept of citizenship was formally introduced into the European Communities (EC) treaties by the Maastricht Treaty in 1992. Union citizenship is now addressed in Part II of TFEU[xi] (Articles 20–24). Citizenship is also given a formal constitutional status in the EU legal order, through its inclusion in Article 9 TEU which provides that 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'.

So citizenship status is determined by reference to Member State nationality: all (and only) Member State nationals are European citizens (though people who are not EU citizens known as Third Country Nationals or TCNs, have derivative rights, through being family members of EU citizens for instance).

Member States have a largely unfettered power to determine the scope of their own nationality law[xi], and thus (collectively) to control who are the citizens of the EU. However, since a ruling of the CJEU in 2010[xi], it has been confirmed that Member States must have due regard to the status of European citizenship when determining matters of nationality.

The formal status of citizenship of the Union built on previous rights to free movement, residence and non-discrimination for workers, service-providers and service recipients (interpreted to include students since 1985[xi]), and others entitled to free movement under the various directives. The CJEU, together with national courts, have been key actors in the development of EU citizenship, with EU legislation reflecting many ideas initially developed by the judiciary (such as the Citizens' Directive).

The vast majority of citizenship rights are enjoyed by mobile European citizens who have exercised rights of free movement throughout the Union. However, citizenship also extends rights of movement and residence in certain circumstances to the non-economically active (retirees for instance), although they usually need to have health insurance and sufficient resources so as not to become an 'unreasonable burden' on the host state.

What rights does EU citizenship bring to individuals?

European citizens enjoy a bundle of social, legal and political rights by virtue of their status. If you are an EU citizen, you (and your family) have the freedom of choice to decide where to reside, work and study in any of the 28 EU Member States, though the law imposes a number of limits on these EU rights. See the ILPA position paper on rights of entry and residence.

Rights derived from EU citizenship, which each UK citizen enjoys, include (among many others) rights relating to equal pay for equal work between men and women and the right to adequate rest and limited working hours (the Working Time Directive). Other individual rights include:

- the right to travel and move freely within the territory of Member States (Article 20(2)(a) and 21(2) TFEU)[xi]
- the right not to be discriminated against on the grounds of nationality (Article 18 TFEU)

- the right to vote and stand as candidates in elections to the European Parliament and in municipal elections wherever they live in the EU, under the same conditions as nationals of that State (Article 20(2)(b) TFEU)[xi]—this is an important basis for the EU's democratic legitimacy as European Parliament elections in England, Scotland and Wales use proportional representation (in Northern Ireland by the Single Transferable Vote system)
- if their own country is not represented, the right to be assisted by another EU country's embassy or consulate outside the EU, under the same conditions as a citizen of that country (Article 20(2)(c) TFEU)
- the right to petition the European Parliament, apply to the European Ombudsman and address the EU institutions (in any of the 23 EU languages), and to obtain a reply in the same language (Article 20(2)(d) TFEU), and
- the right to organise or support, together with other EU citizens, a citizens' initiative to call for new EU legislation.

So Union citizenship means enhancing EU rights and making sure that EU citizens can enjoy them in their everyday life. This includes fostering citizens' participation in the political life and development of the EU. An example is the European Commission's first EU Citizenship report in 2010, where new rules were introduced to ensure UK and other EU citizens could rely on being protected by a full set of passenger rights whether they travel by air, rail, ship, bus or coach. Passengers were similarly given the right to information, assistance and, in certain circumstances, compensation in case of cancellation or long delay[xi].

Conversely, the general principle that migrant EU citizens should be treated equally with national citizens is not unlimited. So Member States retain a degree of control in certain fields such as access to social security, which are dependent on residence, their economic activity, degree of integration in the host state and the nature of the benefit claimed[xi].

In the UK, the vast majority of EU nationals who come to the UK do so to work (not claim benefits)[xi], traditionally filling many vacancies in the agricultural and horticultural industries and making a positive fiscal contribution[xi]. These jobs, given their temporary nature and low levels of pay, tend not to be taken up by British workers. However, many Europeans also work in strategically important jobs in other parts of the British economy, and are overrepresented in higher-skilled[xi] as well as lower-skilled professions such as in the NHS[xi].

In terms of UK citizens living or wanting to work abroad, many British citizens [xi]have moved to Europe for work, study or personal reasons, with around 1.8 million British nationals living in another European country for a year or longer, and 2.2 million living in the EU for at least part of the year. The government recently revealed that these remain the most up-to-date figures that they have[xi]. The stereotypical image of British citizens in Europe is that of the retired pensioner living on the Costa del Sol. However, retirees are not the only British people to benefit directly from free movement and EU citizenship. It has also enabled British entrepreneurs to set up businesses in Europe, and provided UK workers with employment opportunities in other countries. In 2013, the German government, for example, launched a scheme that aimed to fill skills gaps in Germany by recruiting British apprentices.[xi]

Without free movement and residence rights, UK citizens who wish to move to, or remain in, an EU Member State, but who do not yet have long-term resident status, would be subject to possible quotas and EU-preference rules on labour migration. Highly-skilled British professionals could no longer simply be able to move to another Member State and take up work, but would have to apply for a Blue Card as provided for under EU law[xi], or qualify as an intra-corporate transferee both of which would subject them to more restrictive rules than for EU citizens. Less skilled workers and self-employed British citizens would also be entirely subject to national laws on their admission (although they would have some limited equality rights under the Single Permit Directive[xi]).

As EU citizens, UK nationals also benefit from various health protections, both when travelling

abroad and also when at home in terms of food safety. They have the right to:

- receive necessary healthcare in any EU country if they unexpectedly fall ill or have an accident during a visit to another EU country, under the same conditions as people insured in the host country—they can claim reimbursement either in the country that they are visiting while they are still there or when they go back to the country where they are insured
- choose to get planned healthcare (sometimes needing to seek prior authorisation from the insurer) in another EU country and be reimbursed for it at home, fully or partially depending on the circumstances
- benefit from harmonised food safety standards—compulsory checks take place throughout the agri-food chain to ensure that plants and animals are healthy and that food and animal feed is safe, of high quality, appropriately labelled and meets EU standards.

What about the wider and economic benefits of EU citizenship?

The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods, workers, services (and the right of establishment) and capital. Article 26(2) TFEU makes reference to 'the internal market', described as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaties.

The single market provides benefits for all Europe's 500 million citizens. For instance, academic and professional qualifications are recognised across the EU. Article 53 concerns legislative competence in respect of the mutual recognition of diplomas and certificates and other qualifications. This provides the most significant legal basis for the harmonisation of national legislation so as to facilitate freedom of establishment (and services). Below are some examples of the wider benefits of EU citizenship to individuals.

Setting up a business

The single market allows businesses to operate unhindered in all Member States. Companies have the opportunity to grow as they wish, establishing themselves in another EU country under the same conditions or to offer cross-border services from their own home base. Legal services are an example of a sector which has benefited enormously from the internal market. 76% of the UK top 50 law firms have at least one office elsewhere in the EU. The ability to open new offices stems from freedom of establishment (Articles 49 and 50 TFEU), but this is underpinned by the possibility for firm employees to move to those new locations[xi].

Education and research

Non-discrimination on grounds of (other) EU nationality has been said to be 'particularly important in the field of education' in view of the aims of Article 165(2) TFEU to 'encourage mobility of students and teachers'[xi].

The EU funds cutting-edge research in the UK, and on a level that many scientists believe would be impossible to maintain[xi] post-Brexit.

There are also many EU wide programmes from Comenius (school education), to Erasmus (higher education), Leonardo da Vinci (vocational training), to Grundtvig (adult education) and finally Jean Monnet (university-level teaching and research in European integration) which create opportunities for individuals (and teachers/institutions) to benefit from educational and cultural exchange across Europe. They also boost the skills and employment prospects of those taking part.

More than three million European students have, for instance, benefited from the EU's 'Erasmus' youth mobility scheme since it was established in 1987, including large numbers of British citizens. The British Council say that $1bn will be allocated to the UK alone over seven

years under Erasmus and that nearly 250,000 people from the UK will be able to undertake activities abroad with the programme[xi].

There are currently EU rules on admission of students[xi] and scientific researchers[xi]. However, in the event that the UK left the EU, there would be no requirement to award UK citizens who wanted to study in EU Member States equal treatment as regards access to grants tuition fees or admission quotas as there is now[xi]. British students would also have more limited rights to work during their studies, and no right as such to stay on after their completion[xi].

Sharing of personal data

Data protection and privacy from 'Big Brother' oversight has become a major cause of concern to the public in recent years[xi] and these concerns have found their way to the courts.

On 6 October 2015, the CJEU issued the *Schrems* judgment declaring the European Commission's 15-year-old 'US Safe Harbor decision' invalid[xi]. That earlier decision enabled US companies to self-certify that company practices ensured an adequate level of protection for personal data under the EU Data Protection Directive, thus permitting the company to transfer data from the EU to the US. The *Schrems* decision holds that US law does not afford adequate protection to personal data. Now any companies with offices in both the EU and US, any European company that outsources work to the US, and any company that sends information from the EU to the US need to independently verify that company transfers of personal data from the EU to the US meet the level of data privacy protection considered adequate by the EU Data Protection Directive[xi].

Mobile phone roaming charges

On 30 June 2015, the European Parliament and the Council of Ministers reached an agreement[xi] to end data roaming charges, which will make it much cheaper to make calls and use the internet wherever you are in the EU. This was the culmination of ten years of work by the European Commission. Since 2007, prices for roaming calls, text messages and internet data have fallen by 80%. The price of using the internet on mobile phones while in other EU countries is now 91% cheaper than in 2007.

Consumer Protection

The Consumer Rights Directive[xi] is an EU measure that gives EU citizens extra rights when buying in the UK and the EU. All EU members have agreed to it. In summary they:

- align and harmonise national consumer rules in several important areas, such as on the information consumers need to get before they purchase something, and their right to cancel online purchases—increased harmonisation means that consumers can rely on the same rights, wherever they shop in the EU
- strengthen consumer rights, ensuring a higher level of protection regardless of whether consumers are shopping on the high street or online, in their own country or elsewhere in the EU—for example, consumers will now have clearer information on prices, wherever and whichever way they shop, as traders will have to disclose the total cost of the product or service, as well as any extra fees.

Environmental Protection[xi]

EU policy (Articles 191–193 of TFEU and Article 5 TEU) can be seen as contributing to a number of economic and social changes in this area.

The common EU approach to environmental protection avoids the inconsistencies and fragmentation likely to arise from the alternative model of primarily national or regional regimes for addressing climate and environmental issues. For companies operating at a European level this is a vital aspect of EU legislation and the reason why so many UK companies are keen to maintain European standards and legislation wherever possible.

EU measures have also helped to stimulate innovation across the EU. For example,

innovation in the car industry has been driven by binding standards on emissions which came into place after the demise of a voluntary approach. This has helped the UK car industry to remain competitive at a time when manufacturers in less regulated zones such as the US have failed to adapt so rapidly.

References

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Free Movement and Criminal Law

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Introduction

One of the claims frequently made by critics of freedom of movement is that free movement of EU citizens is unlimited, even when these citizens have committed criminal offences. The purpose of this note is to provide an overview of the growing inter-relationship between EU free movement law and criminal law and to demonstrate the current limitations that criminal law imperatives can place on freedom of movement. At the same time, it will stress that derogations to free movement on grounds of security and criminal policy must be interpreted restrictively and applied in full compliance with fundamental rights, including the EU Charter of Fundamental Rights.

The note will focus on four main areas of intersection between free movement law and criminal law:

- the relationship between criminal law and security of residence—by looking at the extent to which Member States can expel EU citizens under the Citizens' Directive
- the avenues provided to Member States when EU citizens possessing criminal convictions move to their territory—by focusing on the operation of the EU system of exchange of information on criminal records
- the powers granted by EU law to pursue individuals who are deemed to have committed criminal offences and individuals who have fled a prison sentence under the European Arrest Warrant (EAW) system, and
- the expanding surveillance of movement and mobility into and within the European Union, by examining current proposals to establish a European Union 'PNR' (Passenger Name Record) system, under which carriers are obligated to transmit a wide range of personal data of all passengers to national authorities prior to travel.

Deporting EU citizens: criminal law as a limit to protection against expulsion and exclusion

The Citizens' Directive provides security of residence for EU citizens living in another Member State by allowing expulsion in limited and clearly defined circumstances on the grounds of public policy and public security (Article 28).

This includes a sliding scale of enhanced protection, so that EU citizens who have obtained permanent residence can only be expelled on 'serious' public security or public policy grounds, and those who have continuously resided in another Member State for the last 10 years can only be expelled from that state on 'imperative' grounds of public security.

The Citizens' Directive also allows Member States to exclude the entry of EU citizens on public policy and public security grounds, which is also subject to specific limitations (Article 27).

Whilst Member States, 'essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs' (*PI* Case C-348/09 (discussed below)), the concepts of public policy and public security have autonomous EU meanings and a key task for the Court of Justice of the EU (CJEU) has been to define them for the purposes of Articles 27 and 28.

The Court has interpreted the public policy ground to require a 'genuine and sufficiently serious threat to a fundamental interest of society' (see eg *Rutili* Case C-36/75). Member States may demonstrate that the activity in question falls within the rubric of public policy by demonstrating the existence of measures taken against their own nationals in comparable circumstances. Many criminal penalties will fall within the public policy ground of expulsion and/or exclusion, provided they are, following an individualised assessment, 'sufficiently serious'. The definition of public security is different. It has recently been described as '[a] threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests' (*Tsakouridis* Case C-145/09).

Criminal law considerations have arisen particularly in two recent cases, where the CJEU has broadened the scope of the public security ground of expulsion, thus further facilitating the expulsion of EU citizens.

In *Tsakouridis*, the Court noted that the fight against crime in connection with drug dealing as part of an organised group could fall within the concept of public security. The Court took into account the existence of a secondary EU criminal law instrument, namely Framework Decision

2004/757/JHA, which lays down minimum rules regarding the constituent elements of criminal acts and penalties in the area of illicit drug trafficking. The Court emphasised the special characteristics of this criminal activity, in particular the negative consequences of drug addiction and its extraordinary economic and operational resources and transnational links. It concluded that dealing narcotics as part of an organised criminal group could reach a level of intensity that might directly threaten the physical security of the population as a whole or a large part of it, thus making it a threat that could lead to an expulsion on imperative public security grounds (ie even following 10 or more years' residence).

In *PI*, the Court confirmed that the commission of another criminal offence, the sexual exploitation of children, could also fall within the scope of the public security exception. The Court referred to the EU competence in adopting legislation in criminal matters and particularly to Article 83(1) TFEU, which includes the sexual exploitation of children among the crimes of particularly serious nature and cross-border dimension where the EU legislature may intervene. It also made reference to Directive 2011/93/EU (on combating the sexual abuse and sexual exploitation of children and child pornography) as the outcome of the exercise of this competence. According to the Court, sexual exploitation of children as well as all of the other the criminal offences stated in Art. 83(1), TFEU may constitute a serious threat to the calm and physical security of the population and thus fall within the concept of 'imperative grounds of public security' so long as the way these acts were committed carry particularly serious characteristics. Such serious offences may constitute particularly grave threats to one of the fundamental interests of society, which in turn may directly threaten the calm and physical security of the population.

In *Tsakouridis* and *PI*, the Court expanded considerably the concept of public security to include breaches of criminal law even where these breaches (even in cases of serious crime), may not necessarily have the effect of threatening the population as a whole. Especially in *PI*, the Court has appeared to use Article 83(1) TFEU not for its intended purpose (ie as a provision determining the competence of the EU to impose criminal liability), but as symbolic criminal law enabling Member States to justify considerable inroads into security of residence for EU citizens. [xi]

In addition to providing definition and content for the concepts of public policy and public security, the case law of the CJEU also establishes a number of principles, common to the consideration of both grounds of expulsion and/or exclusion. These include requirements that the decision to deport or exclude an EU citizen must be based exclusively on his/her personal conduct, that the person facing deportation must be a 'present threat', and that the decision must respect the principle of proportionality and the fundamental rights of the person facing exclusion and/or expulsion as well as those of his/her family members.

For some examples of the UK Home Office's approach, see its guidance to caseworkers: Exclusion of EEA nationals and their family members from the UK.

The issue of exclusion and expulsion of EU citizens also featured up in the renegotiated settlement agreed between the UK and EU in February 2016. The agreed measures will be implemented if the UK votes to Remain. They include the Commission revisiting the serious and imperative grounds thresholds at the time of a future revision of the Citizens' Directive, and in the meantime issuing new guidance to 'clarify':

- that Member States may take into account past conduct of an individual in determining whether their conduct poses a present threat to public policy and public security
- that Member States may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned, and

- the definitions of serious grounds of public policy and imperative grounds of public security

Checking EU citizens' criminal records: the EU criminal record exchange system

Another claim that is made is that free movement enables the entry into the territory of Member States of EU citizens who have been convicted of criminal offences in their Member States of nationality or residence.

However EU law has developed an extensive mechanism of exchange of information of criminal records of EU citizens, which should enable national authorities to have a full picture of the criminal record status of EU citizens who enter their territory.

There are two main elements of the EU-wide system of exchange of criminal records, which are detailed below. Note that the UK also has access to information on the Schengen Information System database in relation to policing and criminal justice matters, for which see the separate paper in this collection on the EU's borders: Schengen, Frontex and the UK.

Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States calls for the establishment of a central authority for managing criminal records in each Member State. In addition, it places the central authority of the convicting Member State under the obligation to inform the central authorities of other Member States immediately of any convictions handed down within its territory against the nationals of such other Member States, as entered in the criminal record. Information provided includes information on the nature of the criminal conviction, the offence giving rise to the conviction and the contents of the conviction.

A parallel Decision on the establishment of the European Criminal Records Information System (ECRIS) establishes ECRIS as a decentralised information technology system based on the criminal records databases in each Member State composed of interconnected software enabling the exchange of information between Member States criminal records databases and a common communication infrastructure that provides an encrypted network. These legislative instruments have provided a solid EU-wide mechanism of exchange of criminal records, which according to the European Commission has led to significant progress in improving the exchange of criminal records information within the Union.

This view is shared by the UK Government, which has noted that the EU system 'has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of the previous offending of EU nationals being prosecuted. The previous conviction information can be used for bail, bad character and sentencing, as well as by the prison and probation service when dealing with the offender once sentenced'.

After the Paris attacks, the Commission has proposed legislation extending the exchange of criminal records to third-country nationals, a move which the UK Government seems to support in principle.

Bringing to justice individuals fleeing prosecution or custody: the European Arrest Warrant system

The Framework Decision on the European Arrest Warrant is the most emblematic and widely implemented EU criminal law instrument. It aims to compensate for the freedom of movement enabled by the abolition of internal borders by ensuring that Member States' justice systems

can reach extraterritorially in order to bring individuals who have taken advantage of the abolition of borders to flee the jurisdiction to face justice. The Framework Decision applies the principle of mutual recognition and has established a system which requires the recognition of EAWs and the surrender of individuals wanted for prosecution or to serve a custodial sentence with a minimum of formality, automaticity, and speed.[xi] A key innovation introduced is the in-principle abolition of the non-extradition of own nationals.

Mutual recognition is based on mutual trust, founded on the presumption that EU Member States are in principle human rights compliant. This presumption of trust has been recently highlighted by the CJEU in its Opinion 2/13 on the accession of the EU to the European Convention on Human Rights, where the Court elevated mutual trust into a principle of fundamental importance in EU law.

However critics of the EAW system have rightly pointed out that the presumption of trust is not always justified, with human rights violations being ascertained across EU Member States by the European Court of Human Rights on a regular basis. A key question related to the legitimacy of the EAW system is whether it can operate on the basis of blind trust, or whether national authorities have any leeway to examine the consequences of executing Warrants for the human rights of the requested persons.

EU law has dealt with the human rights concerns arising from the operation of the EAW system in three main ways: by allowing national authorities to consider refusing to execute warrants if there are concerns that execution would result in human rights breaches; by introducing a test of proportionality in the operation of the EAW system; and by legislating for human rights, namely adopting legally binding instruments harmonising defence rights legislation in addition to aiming to facilitate the operation of mutual recognition.[xi] In terms of taking into account human rights by the executing authorities, it is noteworthy that with the exception of a general human rights clause (Article 1 (3)) - the operative provisions of the Framework Decision do not include a ground of refusal to execute an EAW on human rights grounds. However, a number of EU Member States, including the UK in the Extradition Act 2003, have 'goldplated' transposition by expressly including human rights grounds for refusal in nationally implementing law. Significantly, the CJEU has recently confirmed that execution may be refused on human rights grounds.

Preventing the entry of individuals deemed to pose security threats: the introduction of an EU PNR system

Thus far the analysis has focused on individuals who are within the criminal justice system—either the subjects of criminal convictions or the subjects of criminal prosecutions. However, EU security law—in particular within a counter-terrorism framing—is increasingly moving to limit free movement also at stages before the criminal justice process, with the aim of not punishing, but preventing wrong-doing. The emphasis on prevention, with a focus on the surveillance of movement, has appeared prominently in the US context after 9/11. A key example has been the introduction of US law requiring airlines flying into the USA to send to US authorities a wide range of personal data on all passengers travelling (so-called passenger name record/'PNR' data). The EU has had to comply with this request, legitimising the transfer of personal data via the signature of a number of transatlantic agreements, the last one—and currently in force—signed in 2012.

Although a number of efforts have been made by EU institutions to introduce such a system in EU law, human rights concerns and political push-back by the European Parliament has resulted in the stalling of efforts for the introduction of an 'EU' PNR model. However, this was until the Paris attacks. Since Paris, widening the net of surveillance in a catch-all basis, to also include citizens (targeting 'foreign fighters') has resulted in swift initiatives towards the internalisation of a PNR transfer model in EU law. At the time of writing, the EU PNR Directive

has been agreed by the Council and the European Parliament and is awaiting publication in the Official Journal. It introduces an EU PNR system for flights flying into the EU, with Member States being given the option to apply it also to intra-EU flights. A system of generalised surveillance of movement, including the movement of EU citizens, is thus established in the EU. This development cements the move from the control of movement of third-country nationals to also the control the movement of EU nationals into and within the EU.[xi] The Directive has been welcomed by UK security professionals as a significant step towards the security of the EU and the UK.[xi] However, its compatibility with both human rights and free movement law remains to be tested. In terms of human rights law, the Directive introduces a system of generalised surveillance which may fall foul of the right to privacy as defended by the CJEU in the cases of *Digital Rights Ireland* and *Schrems*. The Directive may also fall foul of free movement and Schengen law, in particular following the interpretation of the extent of the permissibility of police checks under the Schengen Borders Code by the CJEU.[xi]

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Sovereignty and legitimacy: the UK and the EU

Adrian Berry, barrister, Garden Court Chambers and Rowena Moffatt, barrister, Doughty Street Chambers, 29 April 2016

Introduction

The relationship between the UK and the EU raises issues about the UK as a sovereign power, and as to the legitimacy of the EU and its institutions. A concern common to both issues is that power ought to be exercised on a democratic basis.

Sovereignty

What is sovereignty?

Sovereignty is concerned with who holds and exercises authority. As a term, it does not always help identify which people or institutions wield actual power.

Sovereignty has an internal aspect. In the UK, sovereignty is commonly understood to rest with the Crown in Parliament. It also has an external aspect—a state is sovereign when it has legal and political freedom from external control. The UK, in common with other states in the international legal order is recognised as being a sovereign power. No other state or organisation has authority over it or exercises power coercively over it so as to render its sovereignty illusory. That said, the fact that a state such as the UK is sovereign says little about the constraints to which it may be subject. Both the USA and Mali are sovereign states. Yet each possesses a different measure of power and is subject to different constraints.

Sovereignty and the EU

As a sovereign state the UK has the authority to enter into international agreements with other sovereign states. It has exercised a power to do so by making treaties with other sovereign states in Europe so as to create and maintain the EU. The UK is free to withdraw from those treaties at any time. It is also free to remain within and continue to participate in the EU.

The EU is a body created by multilateral treaties made between sovereign states. In making those treaties the states concerned have decided that certain activities are best done together. Accordingly, they have decided to confer particular powers on EU institutions to further that objective.

In areas where states have agreed that the EU is to have a role, the EU has powers to:

- make rules and regulations (a legislative function)
- to make decisions (an executive function), and
- to adjudicate upon disputes and interpret those rules so that they are uniformly applied (a judicial function).

However, the Member States remain the ultimate arbiters of the EU's fate. They may revise the EU treaties to take powers away from it. They may terminate the treaties, in which case the EU would cease to exist. Individual states may withdraw from the EU or, perhaps, simply denounce the treaties and cease to be bound by them. The final say rests with states. Their authority to exercise that power comes from their status as sovereign states democratically accountable to their electorate and people.

How EU law works

The EU has a legislature, a law making institution, whose laws bind its Member States. EU law is composed of primary and secondary legislation. EU primary legislation is found in treaties. The two which govern the EU are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

EU secondary legislation is comprised of three sorts of rules:

- Regulations
- Directives, and
- Decisions.

Regulations and Directives set out rules that apply to all, whereas Decisions are directed at specific authorities or individuals. Regulations are directly applicable, which means they enter into UK law directly without the need for separate UK legislation. Directives require transposition into domestic law, leaving Member States with choices over the form and method of legislation to be used to transpose them.

EU law applies only where the EU treaties (as interpreted by the courts) say it does. The EU treaties are made by Member States acting as sovereign states and are binding international agreements between them.

The EU treaties include statements about the EU's areas of competence, its objectives, its institutional rules, and the relationship between the EU and its Member States. Where there is no EU competence over an area of policy, EU law does not apply. Every action taken by the EU, including the making of secondary legislation, must have its legal basis in the EU treaties.

Unlike EU primary legislation, which is made by the Member States, EU secondary legislation is made by the EU legislature. The majority of such secondary legislation is made under the 'ordinary legislative procedure' (Article 294 TFEU). For the purpose of this procedure the EU legislature is composed of two bodies:

- the European Parliament (directly elected by EU citizens), and
- the Council of Ministers (ministers from the governments of each Member State).

Legislation is proposed by the European Commission (a body with both administrative and executive functions) but is made by the Parliament and the Council of Ministers.

National parliaments also have a role to play. They may not veto EU legislative proposals but the 'yellow' and 'orange' card system permits them to require a proposal to be reviewed or stopped if a sufficient number of them object to it.

Both the European Parliament (generally by simple majority) and the Council of Ministers (generally by qualified majority, occasionally by unanimity) must accept a legislative proposal for it to be enacted. There can be up to three readings of a legislative proposal by each institution. A conciliation committee, composed of members of each institution, seeks agreement if the proposal is rejected following the second reading. Rejection by either institution on the third reading terminates the legislative process. The majority of EU legislation is adopted after the first reading.

The areas covered by EU law are numerous. They include not only sectors related to the internal market, such as competition and trade, but also areas as diverse as agriculture, employment, the environment, transport and asylum.

The UK Parliament and EU law

The UK Parliament has decided that primary and secondary EU legislation has the force of law in the UK. It has done so by enacting the European Communities Act 1972 (ECA 1972).

ECA 1972, s 2(1) permits EU law to operate in the UK. It gives effect to directly applicable EU laws, as well as those EU laws that need to be transposed into UK laws.

Through ECA 1972, ss 2(4) and 3(1), the UK Parliament has made provision for EU laws to prevail over inconsistent national laws. The UK Parliament made this law and the UK Parliament has the power to revise or repeal it. Thus EU law prevails over national law only for so long as the UK Parliament permits it to do so. The UK Parliament retains control.

Under ECA 1972, where necessary, national institutions must interpret national laws compatibly with EU law. In the rare case where such interpretation is not possible, they must dis-apply national law. The purpose of making EU law prevail over national law in each Member State is to enable EU law to be applied uniformly and consistently across Member States. It is the states themselves (including the UK) that have decided that EU law should so operate.

The supremacy of EU law over conflicting national law is a defining feature of the EU legal order. Does this mean that the UK is no longer sovereign? The answer is 'no'. On the international plane, the UK is free to withdraw from the EU or to terminate its agreement to be bound by the EU treaties. Domestically, Parliament may repeal ECA 1972. Sovereignty in both its external and internal aspects has been preserved.

Three inter-related observations may be made about sovereignty in the EU context. First, as is clear from both the terms of ECA 1972 and domestic Supreme Court judgments (see for example *Assange* [2012] UKSC 22 and *HS2* [2014] UKSC 3), the decision to give EU law supremacy over national law, as well as the decision over the future of the UK's membership of the EU lies with the UK—that is to say with its Parliament and government.

Secondly, while the supremacy of EU law circumscribes the UK's freedom of action in certain respects, pooling powers with other states and delegating them to EU institutions does not detract from the UK's status as a sovereign state. As a sovereign power, the UK has chosen freely to pool powers over particular areas of policy and may choose to stop doing so in the future. Of course, pooling powers can mean a Member State not getting what it wants in all instances. The UK will not always get its way on particular points at the law making stage and, unless it has secured the power to opt-out to any measures (as it has in the areas of third-country immigration to the EU, asylum and criminal justice) it will have to abide by the resulting measure. But compromise is an inevitable part of most deals, and since entering the European Economic Community (as it then was) the UK has considered that it is better to continue to

sign up to the deal, and to work on and negotiate each new measure as best as it can in the national interest, rather than to walk away and lose all of the benefits. Were it to be outside the EU, the UK would still have to make deals with the EU on matters currently decided within the EU. In doing so, the UK would not always get its way and would have to compromise in order to secure the best outcome.

Thirdly, there are often sound reasons for Member States to leave regulatory decision-making at the EU level—particularly in relation to subjects that are cross-border in nature and which affect the interests of other Member States. Matters such as trade in goods and services, customs controls, and environmental protection are cross-border in nature and readily lend themselves to close co-operation through multi-lateral institutions such as the EU.

With these considerations in mind, it is important to disentangle the UK's status as a sovereign state from the question of the definition and articulation of its national interest though the powers at its disposal.

Concerns about the EU's law making powers may be dressed up as concerns about sovereignty, but are more likely to be, in fact, concerns about the content of the national interest and the methods by which it may best be furthered.

Legitimacy

As we have seen, the EU exercises power to the extent permitted to do so by Member States. Even if, as is the case, the ultimate source of power or sovereignty may be said to reside in the Member States, is the power exercised by EU institutions legitimate?

Questions about legitimacy may be divided into those concerning the quality of the system issuing the power (legitimacy of process), and the quality of the power itself (legitimacy of substance).

Legitimacy of process: a democratic deficit?

As regards the legitimacy of its processes, a common criticism of the EU system is that it has a democratic deficit in its legislative and decision-making processes, as compared to the equivalent processes in its Member States. A system of legislation and decision-making that lacks adequate democratic processes may lack accountability and legitimacy.

In modern liberal democratic states, the dominant conception of democracy is representative—whereby citizens delegate power to govern to representatives who are elected periodically. The EU system, albeit that it is a creation of international agreements between states, has democratic elements in its legislative and decision-making processes. It has a representative parliament, the European Parliament, that is directly concerned in making EU legislation and which scrutinises the decisions and actions of other EU institutions. EU citizens elect Members of the European Parliament (MEPs), allocated in proportion to the population size of each state.

Among the EU institutions, there is also the Council of Ministers—composed of ministers from the elected governments of each Member State. The Council of Ministers has decision-making powers and, together with the European Parliament, makes EU laws. In addition, there is the European Council, composed of the heads of government of each Member State. Both the Council of Ministers and the European Council are composed of ministers who enjoy democratic mandates in their own states.

Thus, while the EU is an international organisation, nonetheless it has democratic features and operates on democratic principles. What is the case, therefore, that it lacks democratic legitimacy?

A number of reasons may be advanced. First, there are institutional considerations. The role of the European Commission (a body composed of nominees rather than elected representatives) in proposing legislation may be seen as inconsistent with democratic

accountability. However, as legislation is made by the Council of Ministers and the European Parliament, this reason is hard to sustain. In addition, although the legislative role of the European Parliament has increased incrementally over the years as Members States have chosen to confer greater powers on it, it is often seen as not scrutinising the actions of EU institutions as effectively as national parliaments scrutinise their own governments.

Moreover, turnout for European Parliament elections is consistently very low, weakening the democratic mandate of the institution. In 2014, MEPs were elected with a Europe-wide turnout of 42.6%.

Finally, there are concerns about the effectiveness of the scrutiny of EU institutions by EU citizens themselves. For many EU citizens, Brussels seems very remote culturally, geographically, and linguistically. There is also very little media scrutiny of the actions of EU institutions. For example, there is no well-known, EU-wide newspaper or press agency reporting on the work of the EU institutions, and the latter are seen to lack openness and transparency as a result.

Legitimacy of substance

As regards the legitimacy of its substantive policy-making, the question of the socio-economic benefit of the EU features prominently on both sides of the Brexit debate. Yet, to a large extent, any answer to the question of whether or not the EU institutions enjoy substantive legitimacy depends on the particular circumstances of each person or persons affected by EU laws, policies and decisions. For example, farmers and employees, who largely benefit from protective EU rules, are likely to experience more socio-economic benefit from membership than a small or medium-sized business faced with EU regulation and employment protection laws. This makes it difficult to claim that the substance of EU law is a reliable touchstone of legitimacy on a wider basis.

Popular 'buy-in'

There is a final aspect to legitimacy that requires consideration. Even if the system of power and the use of the power itself can be said to be objectively 'good', can the system still be said to be legitimate if only modest numbers of EU citizens demonstrate subjective or popular 'buy-in'?

It may be observed that a system has legitimacy only if it can be said that there is a willingness on the part of a sufficient number of people to obey those in power because they have sufficient faith in them. Popular trust in the EU is challenged significantly by the economic downturn, by the Eurozone crisis and by the forced migration crisis. Can the EU be considered a legitimate source of public policy making if a large number of its citizens say otherwise?

To assert that the EU does not have legitimacy in these circumstances is troubling for at least two reasons. First, to do so subsumes the legitimacy debate wholly within the referendum itself. It reduces the question of legitimacy to a simple 'yes' or 'no' vote—a vote for Brexit would conclude that the EU has no legitimacy, whereas a vote to remain would decide the opposite. As seen from the discussion above, legitimacy is a concept far denser than such a binary decision-making process allows. Further, the question of whether the EU institutions are legitimate is arguably a prior question to whether or not the UK should remain an EU Member State.

Secondly, in general terms and in part due to the absence of proper media coverage, the EU remains relatively unknown and little understood in the UK.

There is no denying that the EU currently faces significant challenges. That said, in terms of assessing its legitimacy, it is important to bear the following in mind:

- the UK is a sovereign state and will continue to be so if it remains in the EU, and
- the EU system, although a multilateral treaty arrangement between states, has democratic features that reflect, without usurping, the democratic traditions found in its Member States.

For some, perceived problems relating to questions of legitimacy may be addressed best by institutional reforms. For example, there is a suggestion that MEPs should be chosen by national parliaments rather than by direct election.

As regards popular buy-in, while a culture of misinformation and a lack of information about the EU persists, the numbers of those considering the EU favourably will be restricted artificially. There is a risk that the EU is a system not properly understood in the UK—a state of affairs that would ill-equip British citizens to make an informed choice in the referendum.

Free movement of persons and the single market

Catherine Barnard, Trinity College, Cambridge 10 May 2016; Case studies 1,3 and 4 provided by Laura Devine Solicitors

Introduction

This note considers the centrality of migration to the EU's single market. It also considers the relevant EU Treaty provisions and the rights they confer on both individuals wishing to work in another Member State and companies wishing to establish themselves or provide services in another Member State. It concludes with an examination of the alternatives available to the UK in the event of Brexit.

Context of free movement

Immigration has been the most sensitive issue in the period leading up to the referendum. The Leave campaign argues that 'Brexit is the only way we can control immigration'. The Remain camp argues that:

'The free movement of people helps Britons study, work and retire to Europe. A total of 2.2 million [the figure is now updated to 1.2 million (although this probably misses some unregistered emigrant Britons)] Britons live in other EU countries—almost as many as the number of EU citizens living here.'

What is clear from ONS data is that last year approximately 257,000 EU nationals came to the UK under EU law rules on free movement but 273,000 came to the UK from the rest of the world under UK domestic immigration rules (net migration of EU citizens was estimated to be 172,000 up from 158,000 in the year ending September 2014; non-EU net migration was 191,000, similar to the previous year (188,000)). In other words, even where the UK does have control there is more non-EU immigration than EU immigration.

Table 1 - Top 6 recent countries of origin for EU migrants, 2011-2015

	2011	2015	Change
Poland	615,000	818,000	203,000
Romania	87,000	223,000	136,000
Spain	63,000	137,000	74,000
Italy	126,000	176,000	50,000
Hungary	50,000	96,000	46,000
Portugal	96,000	140,000	44,000
All EEA	**2,580,000**	**3,277,000**	**696,000**
Top 6 recent EEA sending countries	1,037,000	1,590,000	553,000
% of top 6 recent EEA in all EEA	**40%**	**49%**	**79%**

Source: Migration Observatory analysis of LFS data, quarterly averages, all ages.

The four freedoms

The EU rules on free movement of persons form one pillar of the so-called 'four freedoms' (the free movement of goods, services and capital being the other three). Together these four freedoms make up the 'single' or 'common' market. According to Article 3 of the Treaty on European Union (TEU), the free movement of persons is now considered the core of the EU's area of freedom, security and justice: the EU offers its citizens an area in which free movement of persons is ensured (the 'freedom component') but 'in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (the 'security component').

The founders of the EU believed there were large economic benefits of free movement of workers, namely allowing the allocation of labour to its most efficient use (ie labour should move from areas of high unemployment to low). However, as Portes points out, in fact, economic theory is ambiguous on whether factor mobility (in this context, the free movement of labour and capital) is a complement or a substitute to free trade (the free movement of goods and services). He continues:

'In a standard Heckscher-Ohlin model, they are pure substitutes. Either free trade or factor mobility will increase the efficiency of resource allocation and will maximise overall welfare; it is not necessary to have both[...] However, the general consensus among economists is that labour mobility, like trade, is welfare-enhancing, although there may be significant distributional effects.'

The advent of the single currency may have changed this situation. According to Mundell, in the absence of the ability by states to use their exchange rate as an adjustment mechanism, an optimal currency area needs other adjustment mechanisms, in particular labour mobility. Thus free movement of persons is no longer just politically desirable but it is also economically essential for the operation of the single currency. Free movement is a safety valve.

Rules on free movement

The relevant Treaty provisions

As we have seen, the right for people to move freely from one state to another is a distinguishing feature of a common market. Yet although Article 3(c) of the Treaty Establishing the European Economic Community (now repealed) provided that the Community (as it then was) aspired to the 'abolition of obstacles to freedom of movement for...persons', the reality is rather different. In order to qualify for free movement, the individual or company has to be both:

- a national of a Member State (with nationality being a matter for national—not Union—law), and
- be engaged in an economic activity as:
  - a worker (see now Articles 45–8 of the Treaty on the Functioning of the European Union (TFEU))
  - a self-employed person/company/branch or agency (see now Articles 49–55 TFEU), or
  - as a provider or receiver of services (see now Articles 56–62 TFEU).

Those falling within the scope of these 'fundamental' freedoms enjoy the right to free movement subject to derogations on the grounds of public policy, public security, and public health, as well as a more tailored exception for employment in the public service. These rights also apply to nationals of the EEA states (Norway, Liechtenstein, and Iceland). This is considered further below.

While the main thrust of this note will cover the free movement of economically active 'natural' persons (ie individuals), it should be emphasised that EU law allows companies established in one Member State to set up branches, agencies or subsidiaries in other Member States. Not only has this right benefitted 'EU' companies but it has also benefitted companies from non-EU Member States, wishing to gain a foothold in the single market. So a US corporation might establish a company in London and then, relying on EU law, set up branches, agencies or subsidiaries in other Member States (see case study 1).

Case study 1

'A company which provides asset management, investment planning and fund management services throughout the US is currently looking to open an office in the UK to be able to access the rest of Europe. The main purpose of opening the UK office is to enable broader distribution of investment funds in Europe.'

Citizenship of the Union

Since the Maastricht Treaty, all nationals of an EU Member State have also become 'Citizens of the Union' under Article 20 TFEU with rights to move and reside freely in the EU subject to the limits laid down by EU law. For those who are not economically active, these new rights appeared to offer them greater protection under EU law than they had enjoyed previously, although recent case law of the Court of Justice of the European Union (CJEU) has cast doubt on this. For those who are economically active, the citizenship provisions have not added much to their EU rights.

For citizens moving to another Member State their rights are more fully articulated by the Citizens' Directive 2004/38/EC and, for workers, Regulation (EU) 492/11 and the Enforcement Directive

2014/54/EC. Coordination of social security arrangements is covered by Regulation (EC) 883/2004.

UK's 'New Settlement' deal

The importance of free movement of persons, as a key element in the single market package, was recently reasserted by the UK's New Settlement deal negotiated in Brussels on 18-19 February 2016. This deal was sufficient to enable the Prime Minster, David Cameron to say he would campaign to stay in the EU. The New Settlement deal did contain a reassertion of the importance of the four freedoms:

'The establishment of an internal market in which the free movement of goods, persons, services and capital is ensured is an essential objective of the EU.'

The key rights

The Treaty and secondary legislation contains four main rights for EU migrants, which we shall briefly examine.

The right to leave, to enter and to reside

The Treaty and the secondary legislation allow all EU nationals (and their family members—see below) to leave one Member State, enter another and reside there. These rights are not conditional on EU nationals having a visa; they only need to have travel documents (passport or identity card).

The majority of the Member States of the EU are members of the Schengen area, which is a borderless travel zone. So a migrant worker going from Belgium to the Netherlands, perhaps on a daily basis as a so-called 'frontier worker', does not need to show any travel documents. However, due to an opt-out, the UK retains its borders and the right to check the travel documents of everyone who crosses its frontiers. The Schengen Agreement was initially a separate, intergovernmental agreement, but the Amsterdam Treaty incorporated the Schengen 'acquis' (ie legislation) into EU law.

The right to work

The Treaty and the Citizens' Directive both give EU nationals the right to work as a worker (dependent on the employer), a self-employed person (independent of the hirer) or as a provider of services. The large majority of those who have come to the UK in recent years have come as migrant workers. Best guesses suggest there are about 3 million EU nationals living in the UK (see Table 1), but this may be an underestimate. Over the past 4 years, more than 2 million EU nationals have registered for UK National Insurance numbers which are required for (legal) access to employment. Evidence suggests that the principal driver for migration is work, although many in the Leave campaign dispute this.

Many EU migrants come to the UK to do low skilled jobs, working in the fields picking daffodils, cabbages and the like, and these are the workers who most often feature in the public's mind. Yet many employers say their business could not function without them (see Case study 2).

Case study 2

A medium-sized agricultural business in East Anglia, principally farms cabbages and sends them for processing, mostly for coleslaw. The farm manager said the business needs around £1.5m of labour annually, and 'it all comes from the continent'. Most of the farm's permanent staff are Polish. It is far from obvious to the farm owner how he could find a workforce without bringing in overseas workers.'

However, it is not just in agriculture that EU migrant workers are working. The food processing, catering and hospitality sectors are highly dependent on migrant labour.

There are EU migrant workers at all skill levels in the UK. Less discussed, but still of considerable importance, has been migration by high skilled EU workers to the UK (see Case study 3). The same basic rules apply whatever the skill level of the individual.

Case study 3

'A sovereign wealth fund with offices and significant investments around the world, set up an office in London to provide advice and support on investments in Europe, including in the technology industry. The London office strengthens collaborations with European countries and increases the fund's exposure in developed countries.

The London office is headed by the Executive Director who is an EEA national with a right to reside and work in the UK under European free movement law.'

Not only does EU law allow for free movement of workers but it also permits EEA companies to bring their third country national (TCN) workers to work in the UK temporarily as, for example, builders on a UK construction site. This is sometimes referred to as the Van der Elst situation, following a decision of the CJEU interpreting Article 56 TFEU. The rights of these so-called 'posted' workers are covered by the Posted Workers Directive 96/71/EC. In fact, in the UK, there are relatively few posted workers working here under EU law.

The right to bring family members

One of the most important rights laid down by the Citizens' Directive is for EU nationals who move to other Member States to bring their family members with them, irrespective of the nationality of those family members. Those family members also have the right to work. This has proved an important way for bringing talent to the UK (see Case study 4).

Case study 4

'A successful technology start-up in London required a Chief Technology Officer to assist with its growth. The company was unable to identify a British national or settled worker in the UK but found a highly skilled US national to take up the position, which had a basic salary in the order of £99,500. This individual was able to join as Chief Technology Officer without delay owing to his right to work in the UK as the spouse of an EEA national.'

The right to equal treatment

Underpinning Articles 45, 49, and 56 TFEU is the principle of non-discrimination on the ground of nationality (or seat, in the case of corporations). Thus, migrants and their family members must enjoy the same treatment as nationals in a comparable situation. This covers matters as diverse as terms and conditions of employment, and social and tax advantages. The principle of equal

treatment means that, as the law now stands, migrant workers cannot be denied in-work benefits: they must enjoy them on the same terms as nationals.

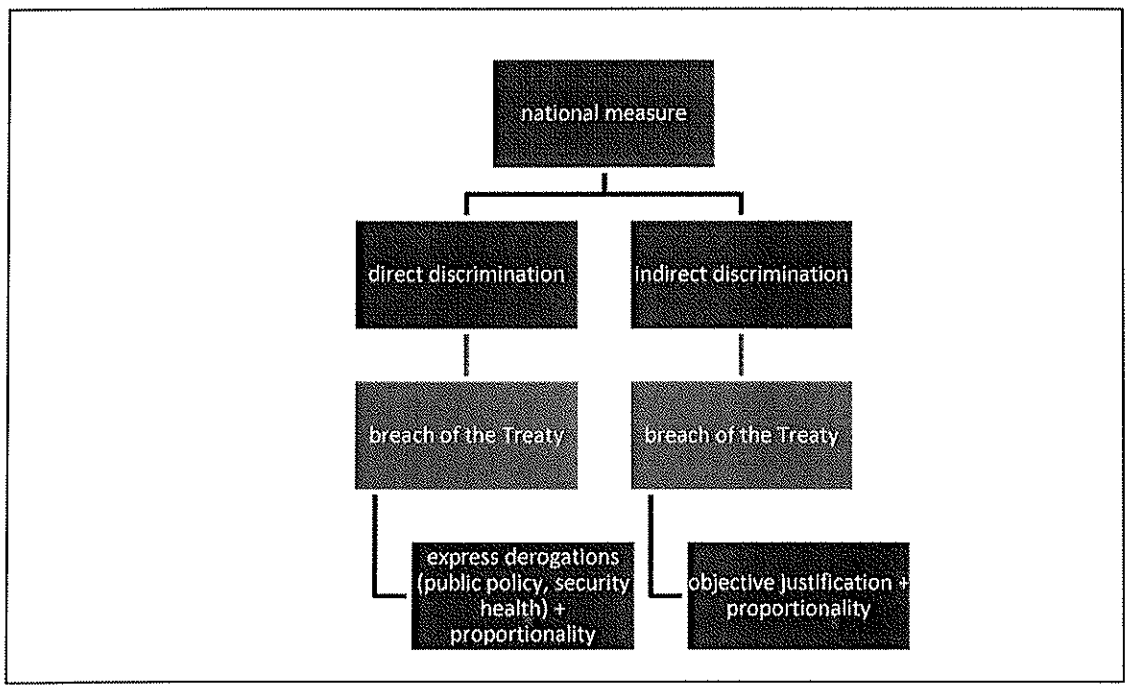
However, the principle of equal treatment is not as straightforward as first appears. It outlaws both direct and indirect discrimination (see Fig 1).

Direct discrimination involves overt, less favourable treatment on the grounds of nationality. It is unlawful unless it can be justified on the grounds of public policy, security and health. Usually Member States fail to make out this defence. This issue arose in respect of UEFA and FIFA's rules requiring football clubs like Manchester United to limit the number of foreign players being fielded in a particular match. Since the rules were directly discriminatory and could not be saved for reasons of public policy, they were contrary to Article 45 TFEU and have since been abolished.

Indirect discrimination is the situation where a rule says nothing about nationality on its face but in fact disadvantages migrant workers. A good example is a requirement to have been resident in the host state for a period of time prior to the right to receive a particular benefit. Such rules are unlawful under EU law (because it is harder for an EU migrant to satisfy the requirement than for nationals) unless the requirement can be objectively justified and the steps taken are proportionate. This means that a state is able to defend its rules by pointing to a good reason connected with the public interest justifying its rule. So, in the case law the CJEU has accepted that states can impose a residence requirement before a migrant is entitled to receive certain benefits. This requirement is justified on the grounds that the individual must establish a 'genuine link' with the territory of the host state. However, the residence requirement must be proportionate—one year probably would be; five years would not.

More recent case law has shifted the emphasis away from discrimination and towards market access. So the CJEU has said that a non-discriminatory restriction on free movement which hinders free movement will be caught by the Treaty unless the rule can be objectively justified. So in the well-known football case, Bosman, the requirement that the buying club pay the selling club a transfer fee for an out of contract player, while non-discriminatory (the same rule applied whether the buying club was in same state as the selling club or a different state), restricted free movement and could not be justified. The rules have now been abolished.

Fig 1: The non-discrimination principle



The impact of Brexit

If the UK votes to leave the EU on 23 June 2016, the Prime Minster will start the Article 50 TEU process which means that he will notify the European Council. Article 50 then provides that:

'In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.'

Thus, while there is no obligation on the EU to negotiate alternatives to full membership, it is likely that the UK will ask for alternatives to be considered.

One possibility would be for the UK to become a member of the European Free Trade Agreement (EFTA) and then join the European Economic Area (EEA). The European Economic Area (EEA) Agreement enables three of the four EFTA Member States (Iceland, Liechtenstein and Norway) to participate in the EU's Internal Market. If this option is adopted, the current rules, as outlined above, would continue to apply. The UK would not, however, have any formal input into the drafting and adoption of future EU legislation to which the UK would continue to be bound.

A second possibility would be for the UK to join EFTA and then have a series of bilateral agreements with the EU, as do the Swiss. Switzerland has over 120 separate bilateral agreements with the EU (but crucially not in the field of financial services). Under this approach, the UK would not have full access to the single market because access would depend on the existence of an agreement. It would still have to make contributions to the EU's budget and, in return for access to the single market, it would still have to comply with single market rules.

A permutation of the Swiss model would be for the UK to enter into its own UK-EU free trade agreement involving one single agreement in return for which the EU is likely to demand that the UK accept the principle of free movement of persons. This would provide greater continuity over access to the single market, but, as with the Norwegian/Swiss options, the UK would not have influence over the drafting of EU legislation to which it would be bound. Norway and Switzerland both have higher immigration per head of population from the EU than the UK, as of 2013.

A third possibility would be for the UK to enter into a customs union with the EU, such as that which exists between Turkey and the EU, which covers trade in industrial products and some agricultural products. This does not, however, apply to persons. So in this scenario, as in the scenario in which no agreement is reached regulating the UK's future relationship with the EU, the UK would be reliant on the protection provided by the World Trade Organisation (WTO). The WTO does have a General Agreement on Trade in Services but not on other aspects of free movement of persons. In these situations UK immigration law alone would apply.

Rights of Entry and Residence

Steve Peers, University of Essex, 17 May 2016

Introduction

The free movement of EU citizens to the UK (and vice versa) is a key feature of the UK's EU membership. However, it is too simple to describe this as a 'loss of control of British borders' — because the UK retains the right to check people at its borders, and can apply its own law to the large majority of non-EU citizens, who make up the majority of net migrants to the EU.[1] Furthermore, although the free movement of EU citizens is generous compared to ordinary

immigration law, it is not unlimited.

Rights of entry and residence

The free movement rights of EU citizens and the limitations upon these rights are set out in the EU Treaties and legislation. Among these sources, the main rules on the free movement of EU citizens are set out in an EU law known in practice as the 'Citizens' Directive'. That Directive provides that EU citizens and their family members can move to another member state initially for a period of three months, without any conditions other than having a passport or identity card (Article 6).[ii] However, during this time, the EU citizen does not have any right to social assistance benefits (Article 24(2). The question of subsequent access to benefits (including in-work benefits) is set out in another paper in this collection.

After three months, the Citizens' Directive says that EU citizens and their family members can stay subject to further conditions: they are either workers or self-employed; or have 'sufficient resources' not to burden the social assistance system, along with health insurance; or are students in a post-secondary institution, if they have health insurance and declare that they will not be a burden to the social assistance system (Article 7(1)). Jobseekers can stay after three months and look for work, as long as they 'can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged' (Article 14(4)(b)).

EU citizens have the right to be joined by their family members: defined as a spouse or (subject to conditions) civil partner, children under 21 or dependent, or dependent ascending or descending relatives of the EU citizen or that citizen's spouse. Member States must also 'facilitate' the admission of a broader category of family members, who do not however have an unlimited right to enter and stay (unmarried partners, and other dependent relatives). There is no income threshold requirement (besides the underlying obligation for the EU citizen sponsor to qualify under the terms of the Citizens' Directive in the first place), and no requirement of 'prior lawful residence' in the UK or another Member State.

In principle EU free movement law does not apply to UK citizens in the UK who seek to be joined by their non-EU family members. Those UK citizens are subject to the much stricter UK rules on family reunion instead. However, according to the *Surinder Singh* judgment (as subsequently confirmed and clarified by the CJEU), UK citizens can move to another Member State, spend some time there with a non-EU family member, and then return to the UK.

It is important to be aware that the UK renegotiation deal agreed by the UK government and the EU on 20 February 2016 would allow the UK to impose extra constraints upon EU citizens who have third-country national family members (Annex VII to the EU summit conclusions of February 2016). EU law will be changed to show that non-EU family members would have to show 'prior lawful residence' in a Member State before they can join an EU citizen who has moved to another Member State. The EU Commission will also issue guidance to suggest to Member States that it might be easier to restrict family members from joining a citizen on the return to his or her own Member State.

After five years' legal stay on the basis of the Citizens' Directive, EU citizens and their family members can obtain permanent residence status, meaning that they no longer have restricted access to social benefits and no longer are required to meet the conditions mentioned above for an extended right of residence (Articles 16-21). If a marriage ends before that date, the family members of an EU citizen can still stay in the country, subject to certain conditions (such as a

prior period of residence, to make sure that the marriage is genuine; see Articles 12 and 13). Separate rules also state that where an EU citizen was a worker and left the country, his or her children can stay, as can the non-EU parent that looks after them (see, for instance, the judgments in *Texeira* and *Ibrahim*).

Exclusion and expulsion

As for EU citizens or their family members who may be a threat to security, the Citizens' Directive allows for expulsion, entry bans or refusal of entry for those who are a threat to 'public policy, public security or public health' (Articles 27-33). These limits are discussed in a separate paper in this collection, but it should be noted that it is possible to apply an entry ban at the UK border (Article 32), and all EU citizens who seek to come to the UK are checked at the border before entry. Restrictions must be proportionate and 'based exclusively on the personal conduct of the individual concerned'. People cannot be excluded on general preventive grounds, but on 'personal conduct' which 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(1)). British authorities can check on an individual's police record after entry (Article 27(2)). For those who are in the territory, there is greater protection against expulsion over time, but there is never any absolute ban on expulsion (Articles 27(2) and 32). By way of example, the Court of Justice of the European Union (CJEU) has accepted that drug traffickers and child abusers can be expelled, no matter how long they have resided on a country's territory.

It is also possible to expel EU citizens on grounds that they rely on social assistance, but they cannot be expelled automatically because of an application for such assistance, and workers, self-employed people and jobseekers with a genuine chance of finding work cannot be expelled on such grounds either (Article 14(3) and (4)). Nor can people be expelled purely because their passport or identity card expired (Article 15(2)). Anyone expelled on such 'economic grounds' has the same procedural rights as people expelled for non-economic reasons, and cannot be subject to an entry ban (Article 15(1) and (3)).

Citizenship

What about dual citizens? An EU citizen who is also the citizen of a non-Member State can always rely on the EU citizenship to invoke free movement rights, even if they acquired that nationality recently (CJEU judgment in *Micheletti*). However, people who are citizens of two Member States can generally only invoke EU free movement law if they have moved between Member States (CJEU judgment in *McCarthy*). So, in that case, a dual citizen of the UK and Ireland who had always lived in the UK could not invoke her Irish nationality to bring her non-EU husband to the UK on the basis of EU free movement law.

According to the CJEU judgment in *Kaur*, EU law does not affect the UK rules on different categories of national citizenship. While there are no EU-wide rules on how non-EU citizens resident in the EU can obtain citizenship, it should be noted that Member States usually make the grant of citizenship to non-national residents subject to a condition of lawful residence,[iii] and deny citizenship status to those convicted of crimes. Indeed, even lawful residents can lose their right to reside if they are convicted for a serious crime.

However, the CJEU's *Rottmann* judgment made clear that EU law can affect the *loss* of national citizenship: in that case Member States must justify the grounds (fraud) on which citizenship might

be lost, and also put procedural protection in place. The thinking behind the *Rottmann* case is that it should not be possible to easily lose the citizenship of the EU. In the judgment in *Ruiz Zambrano*, the CJEU went further, deciding that the 'effective enjoyment' of EU citizenship meant that the non-EU parent of an EU citizen could not simply be deported or denied a work permit—because this would effectively result in the EU citizen having to leave the territory of the EU. The CJEU has not yet clarified what happens if the other parent (who might often be a citizen of that Member State) is still able to look after the child concerned. Nor has it yet clarified the limits on expelling a non-EU parent of a UK child on criminal grounds (the parent in *Ruiz Zambrano* was an irregular migrant, but not a convicted criminal). Cases pending before the CJEU (*CS* and *Chavez-Vilchez*) should clarify these issues.

Future enlargement

Finally, what about future EU enlargements? It should be noted that no further enlargement is likely for a number of years—least of all with Turkey, which has only agreed one out of 35 negotiating chapters in over ten years of negotiations. The last three enlargements have been subject to seven year waiting periods for citizens of most of the new Member States (in relation to seeking employment). Although the UK decided not to apply the waiting period in full for the Member States which joined in 2004, it applied such a waiting period for the later enlargements and could do so again in future. In fact, since EU enlargement is subject to the unanimous consent of each government and approval by national parliaments, the UK could insist on a longer transitional period before full free movement of new Member States, or even rule out enlargement or free movement from the new Member State altogether.

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[i] Office of National Statistics, *Migration Statistics Quarterly Report*, Feb. 2016.

[ii] Directive 2004/38 (OJ 2004 L 158/77).

[iii] See Art 6 of the Council of Europe's European Convention on Nationality (ETS 166), which 12 Member States have ratified.

EU Citizens' Access to Welfare Benefits: Past, Present and Future

Desmond Rutledge, Barrister, Garden Court Chambers 13 May 2016

Introduction

Since the UK joined what is now called the European Union (EU), migrant workers, who are nationals of other EU member states, and their family members, have enjoyed extensive rights of residence in the UK under EU law.

The non-discrimination provisions in EU law mean that those EU citizens who are exercising EU rights of free movement in the UK are – as a matter of principle - entitled to the same tax, housing and 'social advantages' in the UK as British citizens. It has been settled by the courts that social security benefits are part of these advantages.

The eligibility rules for EU citizens

How the rules developed over time

Until the mid-1990s, EU citizens exercising rights of free movement were entitled to receive

benefits on the same basis as British citizens. Over time, UK legislative changes have been introduced that, as regarding EU citizens migrating into the UK, restrict or exclude access to mainstream welfare benefits.

In 1994, a habitual residence test was introduced for the main UK means-tested benefits. The aim of the test was to stop someone claiming welfare benefits in the UK where such a person had only recently arrived in the Common Travel Area (the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland). The test was aimed principally at EU citizens but it applied to British citizens as well.

In May 2004, the habitual residence test was altered by the addition of the requirement of a 'right to reside' as a precondition for accessing mainstream benefits. Only those EU citizens who are able to demonstrate that they have a legal right of residence in the UK, based on EU law, can access mainstream welfare benefits. This right to reside requirement is contained in the relevant benefit regulations but it is underpinned by the provisions that regulate EU free movement in the UK: the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

Around the same time, additional restrictions were introduced for nationals from eight of the Accession States (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia (the A8 states)) that joined the EU on 30 April 2004. Nationals of these countries, who wanted to work in the UK, had to register their employment under the Worker Registration Scheme. Such restrictions lasted from 1 May 2004 until April 2011.

Similar but harsher restrictions were imposed on nationals of Romania and Bulgaria (A2 nationals) from 1 January 2007 (when their countries joined the EU) until 31 December 2013. They were only classed as 'workers' if their employment was categorised as authorised work under the Workers Authorisation Scheme (subject to certain exemptions). A similar scheme was put in place for Croatian nationals when their country joined the EU in July 2013.

Changes since 2014

More recently, further changes have been driven by the view, repeated in Government press statements, that the UK is 'vulnerable to benefit tourism' (because entitlement to certain benefits is based on residence rather than contributions based on the person's employment record), and that this acts as an 'incentive' to EU citizen migrants and to those from Eastern Europe in particular.

Against this highly-charged political background, in 2014, the Coalition Government introduced a package of measures aimed at limiting EU citizens' access to benefits as newly-arrived work-seekers. These changes also affected EU citizens who were already settled in the UK but who then become unemployed. The principle changes being:

- a statutory presumption that entitlement to income-based Jobseeker's Allowance (JSA) would end after three months for newly-arrived work seekers, and after six months for former workers now unemployed, with a limited discretion to extend entitlement to income-based JSA, but only if the EU citizen can produce evidence of an actual job offer.
- the removal of any entitlement to Housing Benefit for certain EU citizen jobseekers (who were not former workers);
- a complete exclusion from income-based JSA and benefits for children until the EU citizen has been living in the UK for a period of three months.

- the introduction of a minimum earnings threshold to help decision makers determine whether an EU citizen is or was in 'genuine and effective' work.

Universal Credit

The rules for Universal Credit (UC) have also been amended with EU citizens in mind. First, newly arrived EU citizens are barred from claiming UC as jobseekers. Secondly, anyone in self-employment will, after 12 months been deemed to be working 35 hours a week have an income equivalent of the national minimum wage rate (regardless of their actual income), if they seek to claim means-tested benefits.

Future changes to in-work benefits

In 2015, the Government turned its attention to *in-work* benefits for EU citizens as the next 'problem' that needed to be solved. Prior to the 2015 Election, David Cameron proposed that EU citizen migrants could be denied in-work benefits (e.g. tax credits) until they had been in the UK for four years. This proposal was agreed at a meeting of the European Commission in February 2016 in an effort to reach a "new settlement" for the UK. The agreement provides that access to in-work benefits can be limited to newly-arrived EU workers in the UK for up to four years in order to (take into account of the "pull factor arising" from the UK's in-work benefits regime.

It was also agreed that child benefit paid to EU citizens in the UK, for their children living outside the UK, but in the territory of the EU, will no longer be paid at UK rates but at a rate that reflects the conditions - including the standard of living and child benefit paid - of the country where the children live. The settlement applies to 'new claims made by EU workers in the host Member State'; but after 1 January 2020, it 'may' be extended to 'existing claims already exported by EU workers'.

The main types of benefits

The main benefits that EU citizens and their families can access if they satisfy the relevant eligibility rules are:

- *Income-replacement benefits* which meet the day-to-day living costs of those who are unemployed or unable to work because they are sick. Such benefits include income-based JSA, income-related Employment and Support Allowance (ESA), Universal Credit (UC) and, in limited circumstances (e.g. as a family member of an estranged partner), Income Support (IS). These benefits are subject to a right to reside condition.
- *Additional income benefits* which deliver additional income to people *in work* and with children, such as Tax Credits and Child Benefit (CHB). These benefits are subject to a right to reside condition.
- *Extra costs benefits* which provide support to alleviate the extra costs associated with disability and housing costs, such as Housing Benefit (HB), which is subject to a right to reside condition, as well as Personal Independence Payment (PIP), Disability Living Allowance (DLA) and Carer's Allowance (CA), which are subject to a past presence test such that the claimant must be living in the UK for at least 2 years prior to making the claim.

When can EU citizens claim benefits? - a summary

Under the current rules, EU citizens are eligible or ineligible for the following benefits:

- EU citizens who are currently working in the UK in work that is 'genuine and effective' can access in-work benefits, including Working Tax Credit.
- EU citizens who are first-time work seekers in the UK are not entitled to HB, and their entitlement to income-based JSA (as well as other benefits) is limited to three months (subject to a short extension if they have a job offer).

- EU citizens who are currently registered as looking for work, who have worked in the UK and have retained their worker status through employment only are entitled to income-based JSA (and out-of-work benefits) up to a limit of six months (subject to a short extension if they have a job offer).
- EU citizens who are currently temporarily incapable of work but who have been in 'genuine and effective work', either through employment or self-employment in the UK, are entitled to income-related ESA and other out-of-work benefits
- EU citizens who are on a break from employment due to maternity may still be entitled to IS or income-based JSA for up to 52 weeks: see *Saint Prix v Secretary of State for Work and Pensions* (C-507/12).
- EU citizens who have acquired a permanent right to reside (i.e. those who have resided in the UK legally for more than five years as workers or family members of workers) can access benefits on the same basis as British citizens.

EU citizens excluded from benefits

EU citizens who become unemployed are excluded from mainstream benefits if they do not find work within three months (or for former workers six months). For those who are unable to work, e.g. due to a long-term disability or caring responsibilities, they can be denied benefits in order to prevent them from becoming an unreasonable burden on the UK's social assistance system.

Case law has confirmed that a refusal of benefit to an EU citizen in these circumstances does not require an individual assessment of the claimant's personal circumstances: see *Mirga v Secretary of State for Work and Pensions & Anor* [2016] UKSC 1.

Housing Assistance

EU citizens wishing to access housing assistance (for example because they are homeless) are subject to similar eligibility rules to those EU citizens claiming welfare benefits, save that work seekers are not eligible for any housing assistance.

Conclusions

It will be apparent from the above that the eligibility rules governing EU citizens' access to welfare benefits are strongly linked to an EU citizen either being engaged in work or retaining a link to previous employment. Those EU citizens who manage to remain in work (or retain their worker status), for a continuous period of at least five years will acquire a permanent right to reside in the UK. However, many EU citizens struggle to meet the residence test because they are only able to obtain transient or casual work associated with certain industries, for example, agriculture, catering, hospitality etc. which pay minimal earnings under zero hours contracts. Further many EU citizens are unable to produce the necessary documentation needed to establish an entitlement to benefit. Against this background, talk of the UK being vulnerable to benefit tourism appears far-fetched.

Further Reading

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The UK Referendum on the EU and the Common European Asylum System

Elspeth Guild, Partner, Kingsley Napley, 29 April 2016

Introduction

The issues of refugees' arrival, reception and protection have been particularly evident in the political debate in the UK and elsewhere in the EU over the past six months. The images of people fleeing Syria and Iraq and travelling across Europe searching for a place of safety have touched the hearts of many. The obstacles and state action designed to prevent refugees from arriving in safety in Europe has also attracted much criticism.

One way to deflect the unease which many people in the UK feel about the treatment of refugees in Europe, including those trying to get to the UK camped in filthy conditions in Calais and other French ports, has been to blame the EU for the problem. This note sets out a short history of the Common European Asylum System (CEAS) and the most recent reliable data on the arrival of asylum seekers in the EU in 2015.

What is the CEAS?

The CEAS has its roots firmly in the EU's 1992 project designed in the mid 1980s to complete the internal market by abolishing border controls on the free movement of goods, persons, services and capital. It is this 1992 project which forms the basis of the Schengen area without internal controls on the movement of people. Concerns were expressed by interior and home affairs ministries of the then Member States in the 1980s about the abolition of border controls—in particular as regards asylum seekers and refugees. As a compromise to address these concerns, the EU agreed that asylum seekers and refugees would be excluded from the right to free movement without controls on persons. Instead they would be subject to a specific regime which would require them to apply for asylum, in practice, in the first Member State through which they arrived. This is generally called the 'Dublin' principle after the city in which the first agreement was signed.

Also in the early 1990s, the Member States agreed among themselves a series of issues including:

- the definition and rights of refugees and beneficiaries of international protection
- procedures for determining applications and principles of safe countries of origin, and
- safe third countries for asylum seekers to be returned to.

It was not until 1999 that the CEAS was actually created through amendments to the EU treaties to give the EU institutions competence over asylum. At that time, the UK negotiated a right to opt out of any binding legislation of the CEAS which it chose not to apply, but it could only opt out once, and could not opt in and then out.

With the creation of the CEAS, the EU entered into the field of asylum which was already heavily

populated by international obligations which all Member States had accepted. The first is the UN Refugee Convention 1951 and its 1967 Protocol which prohibits states from sending a refugee (including an asylum seeker) to a country where he or she would be at risk of persecution. Thereafter, the UN Convention Against Torture 1984, again ratified by all EU Member States prohibits sending anyone to a country where there is a real risk that he or she would suffer torture. In 2006 the UN adopted the Convention Against Enforced Disappearances which also prohibits sending anyone to a country where there is a real risk that he or she would be subject to an enforced disappearance. Almost all Member States have signed and many have ratified this convention. The European Court of Human Rights interprets the European Convention on Human Rights as also prohibiting the sending of anyone to a country where there is a real risk that he or she would suffer torture, inhuman or degrading treatment or punishment. So the CEAS has to be consistent with the obligations which the Member States already had, and further, according to the EU treaty, it must be consistent with the UN Refugee Convention (with regard to the guidance of the UNHCR on its proper implementation).

The first phase of legislative activity of the CEAS was completed in 2005 by which time four key measures had been adopted:

- the Dublin Regulation setting out the rules around which asylum seekers would be allocated to Member States for processing of their asylum applications—to make the Dublin Regulation work, the EU created a database of the fingerprints of all asylum seekers (EURODAC) in order to be able to check where they ought to be
- the Reception Conditions Directive setting out the minimum standards of reception (housing, support, health care etc) which states must provide to asylum seekers.
- the Qualification Directive defining the status of refugee and beneficiary of subsidiary protection and the rights which attach to each of the statuses, and
- the Procedures Directive establishing the procedural standards which much apply to the determination of all asylum applications.

The UK opted in to all these measures and transposed them into national law. In 2013 the EU agreed the second phase of the CEAS moving from minimum standards to common standards in all four areas covered by the measures adopted by 2005. The UK opted out of all of these re-cast measures with the exception of the new Dublin Regulation. But it remains bound by the first phase measures. The reason why the UK opted in to the first phase measures was that the government of the time considered that this would be in the UK's best interests. By the time the second phase measures were negotiated, the UK government had changed and there was no longer a consensus that participating in further EU integration on asylum law was advantageous for the UK.

The CEAS has been much criticised by practitioners and academics as being too harsh on asylum seekers. The Dublin system in particular has come in for consistent criticism as it creates uncertainty and hardship for the asylum seeker who may have good reasons for wanting to make his or her asylum application in a country other than the one which is designated under the EU rules—such as the individual who arrives in Greece but has close family members in the UK. The same issue arises in respect of people stuck in Calais who do not want to apply for asylum in France as they have family and other links in the UK. They fear that if they apply for asylum in France it will be a very long time, if ever, before they will be able to join those family members in the UK. The person then is threatened with removal to another Member State where he or she does not want to be and is prohibited from applying for asylum where he or she does want to be. Although the European Commission has calculated that in practice only 3% of asylum seekers are ever subject to a Dublin transfer, the threat affects many asylum seekers negatively.

The UK government is a strong supporter of the Dublin system, not least as it results in few asylum seekers being entitled to apply for asylum in the UK because its geography is far from the

entry points through which asylum seekers enter the EU. Thus the chances are very good that some other Member State will be responsible for the asylum seeker before he or she gets anywhere near the UK. This is the issue of the so-called Calais jungle where people who want to apply for asylum in the UK are required by the EU rules to apply for asylum in France (where they do not want to be). Although there is much speculation about why asylum seekers want to apply in one Member State rather than another, under EU law they are entitled to the same conditions of reception during the process of determining their claims, and the same rights (work, education etc) when they are recognised as refugees or beneficiaries of international protection. So there is no objective reason based on benefits for an asylum seeker to want to make an application in one Member State rather than another.

The problem of people drowning in the Mediterranean on their way to seek asylum in the EU is not one directly related to the CEAS. Instead it is the result of EU (including the UK's) border controls. People in need of international protection generally cannot take scheduled flights to Europe as they do not have the necessary passports and visas. Without these documents the carriers will not allow passengers to embark, as the carriers will be fined on arrival. Thus the only option for people seeking asylum in Europe is frequently to place their lives in the hands of smugglers—the only 'travel agents' who will deal with them. Having created the problem of death in the Mediterranean through border control rules, the EU has then set out trying to save people from drowning in the Mediterranean using coast guards and military assets.

Outcomes of the CEAS and the possible consequences of UK withdrawal

What are the outcomes of the CEAS? The first problem is that for asylum seekers there are still very substantial differences in protection rates depending on where they have applied for asylum in the EU. This is the case even for asylum seekers from war-torn countries where the asylum claims are primarily on the basis of the generalised violence in the country of origin.

Refugee Recognition Rates by selected Member State and country of origin: 2013/14[iii]

Afghanistan

	% of (EU) applications[iii]	% given protection
Germany	7	67
UK	8	14
Netherlands	2	50
Austria	25	98
Denmark	6	37

Iran

	% of applications[iii]	% given protection
UK	8	57
Germany	Not available	73
Belgium	Not available	61
Austria	3	97
Netherlands	Not available	45

Iraq

	% of applications (2014)[iii]	% given protection
Germany	6	87
UK	Not available	37
Sweden	10	52
Netherlands	4	42
Austria	19	97

According to EUROSTAT, the EU's statistical agency, the number of people seeking asylum in the EU in 2015 topped 1.2 million—about twice as many people as applied for asylum in the preceding year. The worsening violence in Syria, Iraq and Afghanistan are central in explaining this rise in numbers.

This is the picture of asylum seekers in the EU:

	Q4 2014			Q1 2015			Q2 2015			Q3 2015			Q4 2015			Q4 2015	Change in %		Applicants per million population (1)	Last 12 months
	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.		between Q3 2015 and Q4 2015	between Q4 2014 and Q4 2015	Q4 2015	
EU-28	82 845	58 990	62 780	81 450	66 150	61 940	59 085	58 090	90 140	119 200	141 250	165 305	167 060	154 605	104 360	426 025	1	131	840	1 255 640
Belgium	1 540	1 145	1 405	1 210	1 070	1 160	1 110	1 615	2 315	3 130	5 160	6 360	5 525	5 530	4 810	15 865	8	288	1 410	38 990
Bulgaria	1 400	1 355	1 480	1 055	1 025	1 110	1 120	1 325	1 605	1 850	1 435	2 060	3 530	2 395	1 660	7 585	42	79	1 056	20 165
Czech Republic	100	70	110	85	90	170	105	85	85	75	85	100	115	115	110	335	28	20	30	1 235
Denmark	1 840	1 105	755	830	425	459	545	870	1 075	1 030	1 810	2 680	3 625	5 020	2 665	11 305	105	205	1 995	20 825
Germany	18 225	19 030	17 055	22 905	24 065	28 895	25 830	25 105	34 075	36 505	36 305	44 480	58 125	57 685	46 725	162 540	39	194	2 000	441 800
Estonia	25	10	5	5	15	30	30	10	25	20	10	45	20	10	10	40	-46	-9	30	225
Ireland	130	155	170	215	200	210	265	255	335	280	330	405	265	290	210	765	-25	69	165	3 270
Greece	745	580	790	925	895	780	655	1 005	1 000	1 955	980	940	845	1 000	1 160	3 005	4	42	275	11 370
Spain	720	630	600	935	850	1 220	1 330	1 855	1 290	1 145	1 030	1 405	1 470	1 740	1 225	4 435	24	127	95	14 600
France	5 580	4 555	5 380	4 025	5 135	5 610	5 175	4 355	5 150	5 330	5 240	7 070	7 735	7 145	8 595	23 475	33	51	355	70 570
Croatia	40	25	15	10	15	15	10	5	5	10	5	20	20	15	10	45	35	-43	10	140
Italy	8 690	6 785	5 610	4 740	5 075	5 430	4 600	5 130	5 265	8 510	8 775	11 105	10 365	8 270	6 075	24 710	-13	16	405	83 245
Cyprus	185	140	120	155	125	150	145	120	135	155	120	330	235	245	190	670	9	50	790	2 105
Latvia	30	15	30	15	15	15	25	30	50	30	20	45	70	10	5	85	-8	12	40	330
Lithuania	30	65	65	15	25	5	25	25	10	35	30	20	35	20	25	80	-6	-49	30	275
Luxembourg	125	110	85	85	95	85	70	85	95	90	165	365	375	425	430	1 230	97	288	2 185	2 350
Hungary	5 250	6 885	13 790	11 655	16 405	4 750	6 485	9 800	16 385	30 870	46 720	30 495	490	195	175	865	-99	-97	90	174 435
Malta	125	75	115	65	160	120	105	160	115	140	115	170	230	190	130	545	28	74	1 270	1 695
Netherlands	1 900	1 250	1 225	890	735	805	1 135	2 260	2 925	2 980	5 325	6 425	6 965	6 225	3 375	19 565	33	347	1 160	43 035
Austria	2 875	3 540	4 050	3 875	3 060	2 770	3 715	6 190	7 485	8 555	8 560	10 545	12 015	11 655	7 135	30 805	12	192	3 590	85 605
Poland	600	535	520	485	470	485	540	525	700	985	1 235	1 400	1 260	1 095	985	3 340	-10	102	90	10 255
Portugal	40	60	40	40	80	60	80	80	90	70	75	70	70	65	50	180	-17	29	20	830
Romania	185	80	85	100	75	160	205	85	85	85	110	75	90	85	65	240	-11	-34	10	1 225
Slovenia	40	15	35	15	10	20	15	10	15	10	20	40	20	45	35	100	41	13	50	260
Slovakia	25	30	35	15	10	25	5	20	5	5	5	5	5	15	160	180	959	100	35	270
Finland	405	310	385	305	310	345	335	510	760	1 455	2 665	10 805	6 985	5 690	1 785	14 460	-4	1 211	2 640	32 150
Sweden	7 545	5 515	6 310	4 340	3 515	3 560	3 405	4 950	6 045	7 515	11 270	23 735	38 535	36 075	13 275	87 885	107	354	9 015	156 110
United Kingdom	3 255	2 615	2 505	2 740	2 200	2 385	1 920	2 525	3 025	4 260	3 600	4 010	5 040	3 360	3 295	11 695	-1	40	180	38 370
Iceland	:	:	:	:	:	:	:	:	:	:	:	:	55	45	35	135	:	:	:	:
Liechtenstein	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:
Norway	1 010	825	730	580	480	480	520	1 160	1 075	1 335	2 285	4 085	6 570	8 105	1 005	17 685	109	589	3 425	30 470
Switzerland	2 215	1 545	1 375	1 450	1 300	1 375	1 270	2 070	3 665	3 785	3 785	4 410	4 635	5 565	4 750	14 950	25	191	1 815	38 060

(1) Relative to population as of 1st of January 2015
: data are not available

As can be seen, the UK does not receive a substantial proportion of the EU's asylum seekers. Most other large Member States receive considerably more. Yet, the press and our political leaders are anxious about the numbers of asylum seekers entering the EU. The UK has chosen not to participate in any of the EU's relocation plans to move asylum seekers from overburdened Greek and Italian islands to other Member States. Instead, the UK government has embarked on a programme of re-settlement of refugees from Turkey and elsewhere in the region, but outside the EU, to the UK directly.

The CEAS is a rather dynamic field of EU legislative activity, but not one in which the UK has chosen to be centrally engaged. The European Commission proposed in April 2016 that the various parts of the CEAS be codified into one single legal framework. This proposal is currently on the table.

The consequences of a UK withdrawal from the EU on the CEAS are not likely to be large for the other 27 Member States, but may be problematic for the UK. At the moment the UK is bound by the first phase measures of the CEAS on minimum reception conditions, the definition of refugee and beneficiary of international protection, and the procedural rules. It participates in the Dublin re-cast rules on responsibility sharing of asylum applications. A UK withdrawal would mean that the UK would need to re-negotiate its participation in the Dublin system if it wants to continue to have the possibility of sending asylum seekers to other Member States to have their asylum applications processed there. At the moment the UK is a substantial net beneficiary of the Dublin system, sending a lot more requests to other Member States to take back asylum seekers than it receives. Though whether the numbers are sufficient to merit the effort is unclear. According to EUROSTAT, the Dublin returns with the UK's closest neighbour, France are as follows:

Year	Incoming Dublin requests from France to UK	Requests accepted	Incoming Dublin requests from UK to France	Requests accepted
2011	226	63	289	182
2012	226	59	191	71
2013	195	46	186	73
2014	158	Data not available	174	74

A decision to leave the EU would put the UK in a similar position to Denmark—which participates in the Dublin system, but not in any of the other measures of the CEAS. However, the European Commission announced in April 2016 that it would be proposing a new consolidated instrument on asylum bringing all the CEAS measures into one Directive. It has also proposed substantial changes to the system with a view to creating a more regulated and coherent asylum system across the continent. If the UK wants to participate in this new system, it will only be able to do so if it remains in the EU.

The EU's Borders: Schengen, Frontex and the UK

Bernard Ryan, Professor of Law, University of Leicester, 19 May 2016

Introduction

This paper is concerned with the relationship of the UK to the framework of immigration control at EU borders. That framework has two main elements: the absence of immigration control at the shared internal borders of Schengen states, and provision for common rules and action in relation to the external border.

The paper begins with an outline of the main elements of the EU's internal and external borders framework, in so far as that is concerned with immigration control (sections 1 and 2, respectively). It goes on to summarise developments in the EU framework prompted by the migration crisis of 2015-2016 (section 3). The position of the UK within the current regime is then addressed (section 4). The implications of this policy area for the June 23 referendum campaign are

indicated in the paper's conclusion.

The Schengen zone

Treaty foundations
The origins of the EU's border regime lie in an international agreement between five member states—Belgium, France, West Germany, the Netherlands and Luxembourg—signed at Schengen in Luxembourg on 14 June 1985, to move towards open borders.[iii] A more detailed 'Schengen implementing convention' was agreed in 1990. Its Title II addressed immigration control, including rules on the crossing of internal borders, control at external borders, and visas.[iii] The two agreements and the further decisions of the Schengen Executive Committee. came to be known as the 'Schengen *acquis*'—in other words, the Schengen rules. The Schengen border-free zone actually came into being on 26 March 1995, once legal and operational pre-conditions were in place.

The EU's Treaty of Amsterdam, agreed in June 1997, put in place a broad set of powers over borders, immigration and asylum matters within the European Community Treaty. Building upon these new powers, a Protocol to the Treaty of Amsterdam—now Protocol 19 to the TFEU—provided for the incorporation of the previous Schengen *acquis* into EU law. When the Treaty of Amsterdam came into force on 1 May 1999, the Schengen *acquis* concerning immigration control, borders control and visas was classed as falling under the new Article 62 EC. After modifications to the powers and treaty structure by the Treaty of Lisbon (in force on 1 November 2009), the relevant Treaty provision is Article 77 TFEU.

As of 2016, there are 26 states within the Schengen zone, who have agreed to the abolition of internal border controls as between one another. These include 22 of the 28 EU Member States. Ireland and the UK are outside by choice, as a result of arrangements put in place by the Treaty of Amsterdam (see further below in relation to the UK). Bulgaria, Croatia, Cyprus and Romania are in a different position: they are bound by the Schengen *acquis*, but internal border controls have not as yet been abolished in relation to them.

The Schengen zone also includes four non-EU states, by virtue of international agreements. Iceland and Norway joined the zone on 25 March 2001, in order to preserve the Nordic Passport Union with Denmark, Finland and Sweden.[iii] Switzerland, which has a land border with four EU states, joined the Schengen zone on 12 December 2008.[iii] Switzerland was followed by Liechtenstein, which has an open border with it, as of 19 December 2011.[iii]

Internal border controls
The main Schengen rules relating to border controls on persons are now contained in the Schengen Borders Code, as amended.[iii] The fundamental provision of the Code sets out the general principle that internal borders 'may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.'[iii]

The Schengen Borders Code provides for the temporary re-introduction of internal border controls in two situations. Firstly, where there is a 'serious threat to public policy or internal security' in a Member State, that state may unilaterally re-introduce controls.[iii] The state in question is obliged to notify the other Member States and the Commission, and to inform the Council of Ministers (as such) and the European Parliament. This procedure should be followed in advance if the threat is foreseen, but may be followed after the fact if the threat was not foreseen.

Secondly, where serious deficiencies in external border control put the 'overall functioning' of

the Schengen zone at risk, the Council of Ministers, acting on a proposal by the Commission, may decide to recommend the introduction of internal border controls to one or more Member States.[iii] This may be done for periods of up to six months, to a maximum of two years. This provision was added in 2013, largely in response to a controversy between France and Italy in 2011, when France had sought to block the entry of Tunisian nationals who had arrived after the Arab Spring, and to whom the Italian authorities had issued short-stay humanitarian residence permits.

A related set of provisions, contained in the Schengen Implementing Convention 1990, confer legal rights upon categories of non-EU third-country nationals to cross Schengen internal borders, and to stay in other Schengen states for periods of up to three months.[iii] The persons who benefit are those who hold a Schengen short-stay visa, or who are exempt from the requirement to hold one, and those with residence permits or long-stay visas issued by one of the Schengen states.

Supporting measures

The practical operation of the Schengen zone is supported by the Schengen Information System. (Its current version is known as 'SIS II'.) This is an inter-state database containing information about persons and property of interest to state authorities. The reasons for entering information relate primarily to policing and criminal justice matters, including extradition, missing persons, surveillance and the seizure of property.[iii]

Immigration alerts are also entered on SIS II for third country nationals who are to be refused entry.[iii] These alerts are mandatory for persons who have been convicted of an offence 'carrying a penalty involving deprivation of liberty of at least one year', or in respect of whom there are either 'serious grounds' for believing that they have committed a serious criminal offence or 'clear indications of an intention' to do so, in the territory of a Member State. Alerts concerning refusal of entry are optional in the case of third country nationals who are subject to a re-entry ban, having been expelled, refused entry or removed from a Member State because of non-compliance with its immigration law.

A further core element in the system is a Commission-led evaluation mechanism established by EU Regulation 1053/2013.[iii] This Regulation provides for an annual programme of evaluation of Member State compliance with their obligations under the Schengen *acquis*. These evaluations are based in part on inspections, which include both pre-announced and unannounced site visits to the state concerned. While this mechanism covers all elements of the Schengen *acquis*, it has proven to be especially relevant to situations of migration pressure at the external border.

External borders

The counterpart of the abolition of internal borders within the Schengen zone is common arrangements by Schengen states concerning their shared external border. The principal arrangements of this kind concern Schengen states' obligations as regards the external border, and the Frontex agency.

External border rules

The Schengen Borders Code, referred to above, contains a series of provisions concerning the conduct by Schengen states of border control at the external borders of the Schengen zone. The following may be highlighted in particular:

- As a general rule, external borders may be crossed only at border crossing points and at fixed opening hours.[iii]

- All persons crossing the external border should be checked by border guards.[iii] At present, persons with rights of movement under EU law are subject to a minimum check of their identity, based on their travel documents, and security checks of databases are permitted only on a 'non-systematic basis'; in contrast, 'third country nationals' (i.e., all other persons) should be subject to systematic entry and exit checks.[iii] It is likely however that the Code will soon be amended to require, as a general rule, systematic checks on persons with rights of movement under EU law as well, in order to determine whether they pose a security threat.[iii]
- Third country nationals' entry is subject to requirements to hold a valid passport or other travel document, to hold a residence permit or (if required) a visa issued by a Schengen state, to justify their intended stay, and to have sufficient means of subsistence. They should not be admitted if an alert has been entered on the Schengen Information System, or they are otherwise considered a security threat.[iii]
- Member states should engage in effective border surveillance to prevent unauthorised crossings and cross-border criminal activity.[iii]

Frontex

The EU arrangements concerning the external border also include the European Agency for the Management of Operational Cooperation at the External Borders. This body, generally known as Frontex, came into existence on 1 May 2005, and is based in Warsaw.

Frontex does not engage in external border operations of its own. Rather, its mandate is to provide support to Member States in *their* external border control. In practice, Frontex's main operational activities are (1) arranging assistance to 'host' border states by 'guest' officers and vessels from other Schengen states, and (2) organising joint flights for the return to countries of origin of migrants without status.

The legal framework relating to Frontex is contained in EU Regulation 2007/2004.[iii] Border surveillance operations at sea in which Frontex is involved are governed by obligations set out in the Sea Borders Regulation of 2014.[iii]

The EU border regime and the 2015-2016 crisis

The migration crisis of 2015 and 2016, which has mainly involved migrants initially arriving by irregular means in Greece and Italy, has had many implications for the EU border regime. Two are discussed here: the re-imposition of controls at Schengen internal borders, and the increasing role of Frontex.

Re-introduction of internal border controls

Until the summer of 2015, the possibility for Schengen states to temporarily re-introduce border controls had generally been used for three reasons: to limit the entry of political protesters, to control travel to large sporting events, and in the aftermath of terrorist attacks. They had not generally been used to control or to limit migration, whether by EU citizens or nationals of third countries. The exception was the temporary re-imposition of controls by France on entry by land from Italy in April 2011 (referred to above).

It is therefore significant that the events of 2015-2016 have led to internal border controls being re-introduced in several states in response to irregular migration.[iii] The first states to take this step were Germany and Austria in September 2015. At the time of writing, they and three other states (Denmark, Norway and Sweden) have had temporary border controls in place for between four

and eight months. Three further states (Belgium, Hungary and Slovenia) have introduced controls for briefer periods.[iii]

The response of the EU institutions has had two elements. Firstly, they have accepted the validity of the temporary re-imposition of controls by Member States. In October 2015, the Commission accepted the validity of the controls put in place by Germany and Austria.[iii] More recently, on 12 May 2016, recognising that ongoing difficulties remain with border control in Greece, the Commission and Council authorised the five states currently operating internal border controls for migration control reasons to continue those controls for an initial period of six months.[iii]

Secondly, the EU institutions have sought to create the conditions for the normal operation of the Schengen zone. One mechanism has been dialogue with Greece, with the Commission and Council making a series of recommendations to it in February 2016.[iii] Another has been negotiation with Turkey, the centrepiece of which was the 18 March 2016 agreement on migration control between it and the European Council.[iii]

Developments with Frontex

The 2015-2016 migration crisis has had particular implications for Frontex, both in its current operations, and as regards its future role.

At the operational level, the crisis has led Frontex to significantly increase involvement in border control activity in Greece and Italy. Frontex has organised operations with those states for a number of years, most recently under the names 'Poseidon' for Greece, and 'Triton' for Italy. In the current period, Frontex has been involved in border surveillance, and in screening and registration of arrivals in both countries. It also has a central role in organising and providing staff for return operations from Greece to Turkey.[iii]

Looking to the future, the crisis led to a Commission proposal on 15 December 2015 that Frontex should become the European Border and Coast Guard Agency.[iii] This Agency would have an enhanced role, including conducting assessments of the capacity of Member States to meet border control challenges, which could lead to recommendations to the Member State concerned. If those recommendations were not acted upon, or if there was migration pressure at the external border which put the 'functioning of the Schengen area' at risk, the Commission would have power to authorise the Agency itself to implement the required measures. In such a scenario, the Member State concerned would be under a duty to co-operate with the Agency.

The Council's position, set out on 8 April 2016, is less radical.[iii] In its version, there should be a 'European Border Guard Agency', with 'Frontex' retained as its working name. Any decision authorising the Agency to take action in a Member State would however be taken by the Council of Ministers, rather than the Commission. Moreover, the Member State in question would have the express possibility not to co-operate. In that situation, the Council of Ministers could decide, after a Commission proposal, to authorise specified other Schengen states to reintroduce border controls on a temporary basis, just as can currently happen under the Schengen Borders Code. Council authorisation, and the Member State's right to reject Agency intervention, are also contemplated by the draft European Parliament report on the proposal.[iii] The final legislation is therefore likely to be similar to the Council's version.

The UK and the EU Border Regime

Throughout the period since the initial Schengen Agreement was signed in 1985, the consistent policy of UK Governments has been for the UK to remain outside the border-free zone. Accordingly, in June 1997, when the Treaty of Amsterdam brought the Schengen *acquis* within EU law, the UK secured a special arrangement which has endured in its essential element to the present.[iii] Under what is now Protocol 19 to the TFEU, the UK is not automatically covered by Schengen rules, or to 'build upon' them.[iii]

The UK does have the possibility to request to participate in parts of the Schengen *acquis*. There are several limitations, however. Firstly, approval of a UK request requires the unanimous approval of the Council of Ministers. Secondly, where such approval is given, it is likely to be coupled with a provision deeming the UK to be bound by subsequent measures in the same area. Thirdly, if the UK decides *not* to participate in a subsequent measure, its participation in the earlier measure(s) is likely to be terminated. Finally, the Court of Justice has ruled that the UK cannot participate in an individual Schengen measure which is closely linked to an aspect of the Schengen *acquis* in which it does *not* participate.[iii]

In practice, the UK has sought to participate in Schengen provisions concerned with policing and criminal justice, and has been permitted to do so by the other Member States.[iii] That permission extends to access to the Schengen Information System in relation to those matters.[iii] The UK does not however have access to the alerts concerning refusal of entry. This is a subject on which the current Government has recently raised the possibility of an *ad hoc* agreement, to provide for exchange of equivalent information between the UK and some or all Schengen states.[iii] Any such agreement would circumvent the restrictions upon the UK participation in the Schengen *acquis* implied by the Schengen Protocol. For that reason, its political and legal acceptability within the EU must be considered an open question.

In the case of Frontex, when the initial Regulation of 2004 was under discussion, the UK sought to opt in to the discussion, relying upon its rights under the Schengen Protocol. That was resisted by the Schengen states within the Council of Ministers, who argued that the UK could not participate, as it was outside the Schengen zone. The Council's view on the point prevailed when the matter reached the Court of Justice of the EU.[iii]

As a result, the UK is not a full participant in the Frontex system. Instead, the Frontex Regulation makes provision for it in three ways[iii]:

- Frontex is obliged to facilitate operational cooperation with the UK.[iii] In this context, the Regulation expressly states that the UK may be involved in joint return operations which benefit from Frontex assistance.
- Participation in Frontex operations by the UK may be authorised on a case-by-case basis by the Frontex Management Board, acting by an absolute majority of its members.[iii]
- A UK representative attends Frontex Management Board meetings, without a right to vote.[iii]

In practice, the UK does frequently participate in Frontex operations. This can be seen from the most recent Frontex general report, which shows that, during 2014, the UK was involved in the following Frontex-supported operations: a Schengen–wide airport joint operation; two land, sea and return operations concerning the external borders of Bulgaria and Greece; two sea border operations hosted by Italy; and, a joint return operation for which the UK was itself the lead state.[iii]

Conclusion: What are the implications for the referendum?

If the decision in the referendum was to remain within the EU, the key point is that the UK's non-participation in the Schengen immigration arrangements appears to be accepted politically within the EU. That was reflected in the *Decision concerning a new settlement for the UK within the EU*, taken within the European Council meeting of 18-19 February 2016. In the Preamble to the Decision, it was noted that the UK has specific entitlements under the Treaties, and the right 'not to participate in the Schengen *acquis* (Protocol No 19)' was included among them. By implication, Protocol 19 is therefore among the provisions covered by the statement in the Decision that 'The rights and obligations of Member States provided for under the Protocols annexed to the Treaties must be fully recognised and given no lesser status than the other provisions of the Treaties of which such Protocols form an integral part' (Section C, para 4).

The Government must therefore be thought correct in its assessment that the Schengen arrangements are part of the 'special status' of the UK within the EU. In its words, 'the UK has remained outside the Schengen border-free area, which means that we maintain control over our own borders. The UK will not join the Schengen border-free area.'[iii]

The UK does *not* though have the freedom to selectively opt in to EU borders measures. In particular, it is an external participant in Frontex, and is unable to access immigration alerts within the Schengen Information System. The effect of the former has been mitigated by the UK's participation in Frontex operations on an *ad hoc* basis. It is less certain however that a way round the lack of access to SIS immigration information will be found.

In contrast, if the decision was to 'leave', it is hard to see any advantage to the UK in this area. It would lose its current possibility to participate in Frontex operations where it considers that to be in its interest. Equally, the chances of an agreement to share immigration data with the Schengen zone states would presumably be even less outside the EU than they are within it.

References

[i] Later published in [2000] OJ L 239/13.
[ii] Later published in [2000] OJ L 239/19.
[iii] Agreement of 18 May 1999, [1999] OJ L 176/36.
[iv] Agreement of 26 October 2004, [2008] OJ L53/32.
[v] Council Decision 2011/842, [2011] OJ L 334/27.
[vi] See now EU Regulation 2016/399 [2016] OJ L 77/1. This replaced the Code of 2006, contained in EU Regulation 562/ 2006.
[vii] Schengen Borders Code, Article 22.
[viii] Schengen Borders Code, Articles 25-28.
[ix] Schengen Borders Code, Articles 29-30.
[x] Schengen Implementing Convention, as amended, Articles 19-21. These provisions do not apply to third country nationals who benefit from the EU free movement of persons.
[xi] Schengen Implementing Convention, Articles 95 and 97-100.
[xii] EU Regulation 1987/ 2006, Article 24.
[xiii] This replaced a member state-led system which had been established in 1998.
[xiv] Schengen Borders Code, Article 5.
[xv] Schengen Borders Code, Article 8.
[xvi] The persons who benefit from this provision are EU citizens, citizens of Iceland, Liechtenstein, Norway and Switzerland, and the qualifying family members of any of these.
[xvii] See COM (2015) 670, 15 December 2015 and Council document 6673/16, 3 March 2016.
[xviii] Schengen Borders Code, Article 6. These rules apply to entry for up to 90 days in any 180-day period. For longer periods, the law of the member state in question will apply.
[xix] Schengen Borders Code, Article 13.
[xx] [2004] OJ L 349/1, as amended. A consolidated version is available at http://ec.europa.eu/dgs/home-affairs/pdf/fr_reg_consolidated_en.pdf.
[xxi] EU Regulation No 656/2014, [2014] OJ L 189/93.

[i] Information from European Commission, *Back to Schengen: A Roadmap* (COM (2016) 120, 4 March 2016), Annex I and European Commission document *Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq* (consulted on 11 May 2016).
[ii] France has also had border controls for security reasons since the terrorist attacks in Paris of 13 November 2015.
[iii] Commission Opinion C (2015) 7100 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, 23 October 2015.
[iv] COM (2016) 275, 4 May 2016, and Council document 8835/16, 12 May 2016. The decision permits controls by Austria, Denmark, Germany, Norway and Sweden at the land and sea borders directly affected by migration via Greece and the Balkan states.
[v] The Commission's evaluation was adopted on 2 February 2016. It led to a Council recommendation on 12 February 2016.
[vi] 'EU-Turkey statement', 18 March 2016, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.
[vii] See European Commission, *First Report on the Implementation of the EU-Turkey Statement*, COM (2016) 231, 20 April 2016.
[viii] COM (2015) 671, 15 December 2015.
[ix] Council document 7649/16, 8 April 2016.
[x] European Parliament document PE578.803 (Committee on Civil Liberties, Justice and Home Affairs), 23 March 2016.
[xi] The same arrangements apply to the Republic of Ireland, because of its common travel area with the UK. See the separate ILPA briefing paper on that subject.
[xii] This is distinct from Protocol 21, which permits the UK to decide unilaterally to opt in to immigration or asylum legislation other than Schengen rules, or to discussion of proposals relating to such legislation.
[xiii] Case C-77/05 *UK v. Council* [2007] ECR I-11501.
[xiv] See Council Decision 2000/365.
[xv] In relation to UK participation in SIS II, see Council Decision 2015/ 215 [2015] L 36/8.
[xvi] See the letter from Immigration Minister James Brokenshire MP to Sir William Cash MP, chair of the European Scrutiny Committee, 10 February 2016, available at http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/02/Mydocument_(55).pdf.
[xvii] Case C-77/05 *UK v. Council* [2007] ECR I-11501.
[xviii] The same provisions apply to the Republic of Ireland.
[xix] EU Regulation 2007/ 2004, Article 12.
[xx] EU Regulation 2007/ 2004, Article 20(5).
[xxi] EU Regulation 2007/ 2004, Article 23(4).
[xxii] Frontex, *General Report 2014*, Annex D.
[xxiii] HM Government, *The Best of Both Worlds: The UK's Special Status in a Reformed EU* (February 2016), para 1.22.

The Impact of Brexit

Steve Peers, University of Essex, 17 May 2016

Introduction

What would happen if the UK left the EU? In each case, that would depend on what the UK and EU negotiated afterward. But it is possible to give some general indication of the consequences.

The UK's main options

As regards the free movement of EU citizens, it is possible that the UK might still wish to accept free movement, as a condition of participation in the European Economic Area (EEA) treaty, which extends the bulk of the rules on access to the EU internal market to non-EU countries (Norway, Iceland and Liechtenstein).

The UK is currently a party to the EEA Treaty, but according to Articles 2 and 128 of that Treaty, the parties to it are the EU and its Member States as well as those members of the European Free Trade Association (EFTA) that wish to join (Switzerland, an EFTA member, voted against joining). There is no express provision on what happens if a Member State leaves the EU. So it is arguable that in order for the UK to (re)join the EEA if it left the EU and ceased to be a Member State, it would have to join EFTA and then apply to (re)join the EEA. In that case, the same Article 128 makes clear that the terms of new states joining have to be agreed by all the existing members. Within the EU, the EEA Treaty is an association agreement, which means that all Member States have a veto and (in practice) the UK's participation would have to be ratified by national parliaments. The European Parliament would also have a veto.

However, it is not clear if the UK would seek to join (remain in) the EEA, or if the EU would agree

to this. The most prominent members of the 'Leave' side have ruled out EEA membership, on the grounds that the free movement of people, along with contributions to EU programmes or to EU Member States (which are legally required by the EEA treaty and its protocols) as well as the acceptance of many EU laws with less say make EEA participation undesirable. On the other hand, some 'rank and file' supporters of the Leave side support EEA membership in some form, or assume that it would be the inevitable result if there is a Leave vote.

It would be possible for the UK to seek to (re)join the EEA while requesting special terms, such as an exemption from or a limitation of the rules on free movement of people or other exemptions (financial contributions or the acceptance of EU laws, for example). Of course, the EU and other EEA parties would have to agree to any such requests. There is an extra safeguard in the EEA treaty if there is a large impact of migration (or any other EEA rule) in a Member State. It is up to each EEA member to decide whether to invoke this safeguard, but the EEA provides for retaliation (ie suspension of some aspect of preferential trade) if an EEA member seeks to invoke it.

Alternatively, the UK could seek to negotiate a 'stand-alone' treaty on free movement of people with the EU, as Switzerland has done, or a more limited agreement on migration between the UK and EU. This might form part of a broader trade agreement, or be linked politically with other agreements (ie the Swiss case), so it could not be denounced without triggering the possible retaliatory denunciation of other treaties.

The UK could alternatively seek to negotiate bilateral treaties on migration with individual Member States, although it is not clear as a matter of EU law exactly what external competence the EU (as distinct from its Member States) may have as regards treaties with non-EU citizens. In any event, any treaty which impacts upon the number of UK citizens coming to work in the EU will likely be a 'mixed' agreement that requires ratification by all Member States and a national veto, since EU law reserves competence on the volumes of admission of non-EU economic migrants to Member States.

Process of withdrawal

In principle EU law will fully apply until the UK ceased to be a Member State. The withdrawal process is set out in Article 50 Treaty on European Union ('TEU'), although some have argued that the EU and UK might ignore Article 50 and reach some *ad hoc* arrangements instead. As a matter of law, it seems clear that Article 50 is the only legal route to withdrawal under the current Treaties, although it would be legally possible alternatively either to amend Article 50 by way of Treaty amendment or to arrange for the UK's withdrawal by means of Treaty amendment (as in the case of Greenland). However, making the UK's withdrawal conditional on either of those forms of Treaty amendment would not appear to offer any advantages for the UK, since in that case the arrangements would be subject to national vetoes and ratification in each national parliament.

If the UK votes to leave the EU, the withdrawal process would be triggered once the UK officially notified its intention to withdraw. The Treaty does not require the UK to notify this intention if there is a Leave vote, or specify when the notification would have to be made. Although David Cameron has said that he would immediately notify a Leave vote, some on the Leave side have suggested that they might delay a notification, or not make a notification at all, hoping that the EU would be willing to renegotiate the UK's membership again. Then the results of that further renegotiation

would be put to the British public in another referendum. However, this plan would depend on the EU's willingness to renegotiate again; and the sort of fundamental changes to the UK/EU relationship that Leave supporters would like to see (such as the abolition or significant restriction of the free movement of people) would very likely entail Treaty amendments, with the difficulties described above. Furthermore, some Leave supporters are unequivocally in favour of notifying withdrawal from the EU as soon as possible in the event of a Leave vote.

If a withdrawal is notified, then negotiations on a withdrawal treaty will formally begin, although it may be possible to have informal negotiations beforehand if both sides agree. In principle the UK would leave the EU two years after notification, unless the withdrawal treaty sets a different date or the UK and the EU agree unanimously to extend that date. It is not clear if a notification can be withdrawn after it is made, or if the withdrawal date could be extended indefinitely as a means to the same end. It is also not clear if the withdrawal treaty will deal with the post-Brexit relationship between the UK and the EU; Article 50 talks only about taking account of the future framework for relations. Presumably it would be possible to negotiate the post-Brexit treaty informally if necessary, alongside the withdrawal treaty.

Article 50 says that the UK will not be part of the negotiations on the withdrawal treaty or the future UK/EU relationship on the EU side, although of course it will be negotiating on its own behalf. To this end, the UK will not be able to participate in voting or meeting in the Council or European Council concerning these negotiations, although it will still be able to participate in those bodies otherwise. While some on the Leave side have threatened to veto EU measures during the withdrawal period as a pressure tactic to obtain better terms of withdrawal, this will only work to the extent that the measures are subject to unanimous voting, or cannot be adopted by means of 'enhanced cooperation' or (in the case of foreign policy) 'constructive abstention' instead. The UK will retain its participation in all other bodies (European Parliament, Commission, CJEU) during the withdrawal period.

Impact on UK citizens in the remaining EU and EU citizens in the UK

The withdrawal agreement ought to detail the position of UK citizens in the remaining EU and EU citizens in the UK at the time of Brexit. The key issues are retaining residence rights and the status that goes along with it (status of family members, access to employment and benefits, equal treatment, grounds for expulsion). There will also be a question of how to regulate the future position of those already resident, for instance if they marry a non-EU citizen in future, they retire from work or otherwise change their status, they enter university in future or they are not yet a permanent resident under EU law.

While Article 70 of the Vienna Convention on the law of treaties refers to guaranteeing 'acquired rights' of individuals in the event of termination of a treaty, it has never been applied in the context of a withdrawal from the EU pursuant to Article 50 of the TEU, since that TEU clause has never been used before. It is therefore open to question what 'acquired rights' means. Some literature argues that it applies only to property rights, not to public law issues like immigration status. There may be a better argument that it protects people who have *already* acquired permanent residence status as of the Brexit date, but it is not clear if it can logically apply to rights in the *process* of acquisition or which the person concerned would wish to invoke in future, such as those described above. Moreover, Article 70 does not apply if the treaty concerned sets out special rules for withdrawal, and it could be argued that the process referred to in Article 50 TEU does just that. It is also not clear whether Article 70 (or the rule of customary international law which it

embodies) would in any event constitute a rule which could be invoked by individuals before a national court, in order to set aside a national or EU law rule which conflicted with it.

To the extent that they did not have acquired rights or were not covered by a treaty between the UK and the EU or its Member States, national law or (in the remaining EU) to some extent EU law would apply. It would be up to the UK what rules it wished to adopt as regards EU citizens in the UK. On the EU side, national immigration law on the immigration of non-EU citizens would apply. Moreover, this area of law has been partly harmonised by EU law (except in Ireland and Denmark, which like the UK have an opt out from these laws), which would set at least minimum or parallel standards applying to UK citizens as regards family reunion, long-term residence, the admission of students, researchers and trainees, equal treatment for workers in general, and admission of highly-skilled workers, seasonal workers and intra-corporate transferees.

The EU waives short-term visa requirements for wealthy countries, except in principle it will retaliate if a wealthy country imposes visa requirements for one of its Member States. One of the senior figures on the Leave side has contemplated imposing tourist visas on EU citizens, with UK citizens equally being subject to visas for visits to the EU. In any event, in the absence of a deal on free movement of people, UK citizens will no longer be fast-tracked when they cross the EU's external borders—and EU citizens will not be fast-tracked when they visit the UK in return.

The implications for Scotland of a vote in the EU referendum for the UK to leave the EU

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Introduction

One view of the relevant EU and UK law suggests that the implications for Scotland of the UK leaving the EU are negligible. According to this view, such implications sit squarely within the implications affecting the UK as a whole. This view suggests that distinctive Scottish implications would flow only were Scotland to be an independent country.

This paper suggests that this view is overly strict and certainly not the only 'game in town'. The view we offer is based upon a reality that is more nuanced and messy. Within the terms of the devolution settlement, or perhaps, in spite of it, distinctive Scottish approaches to the EU and to immigration have emerged. As devolution of power to Scotland increases, so too does the intertwining of competences between Holyrood and Westminster. The outcome of the referendum ought to be considered in light of this messier reality. We show that, whether the result is for 'leave' or for 'remain', the outcome creates the potential for constitutional unease between administrations North and South of the border.

We begin by outlining the current legal position vis-à-vis the referendum and withdrawal from the EU. Thereafter we outline the relevant parts of the UK devolution settlement. After that, we

consider the reality of how that legal landscape has evolved in practice, and how it is developing. Our account of the lived experience of the devolution settlement sets the scene for us to consider the implications of both a leave and of a remain vote.

The current legal position

The referendum and withdrawal: legal arrangements

A UK Act of Parliament—the EU Referendum Act 2015—makes provision for a referendum on whether the UK should remain a member of the EU. Legally, the UK Government is not required to implement the result of the referendum. However it has promised the UK electorate that it will do so. A decision to withdraw from the EU would take effect for the whole of the territory of the UK, even if the majority of the electorate in Scotland voted to remain. This is so as there is no provision in the EU Referendum Act for a 'double lock' threshold requiring each constituent part of the UK to vote to leave before the UK can withdraw from the EU. The SNP tabled an amendment to require such a double lock threshold during the passage of the Bill through Parliament, but were unsuccessful. In short, there is nothing to protect the Scottish electorate from an EU exit against its will.

As a matter of EU law, withdrawal from the EU by a Member State takes place through the operation of Article 50 of the Treaty on European Union (TEU). This provision has never been activated and therefore we would enter new legal territory should the UK seek to do so.

Article 50 lays down the procedural steps for a Member State to leave the EU. It begins by stating simply that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.' In other words, the UK must come to that decision according to its own domestic laws and procedures: EU law makes no mention of so-called 'sub-state entities' in this withdrawal provision. So, Scotland cannot look to EU law to argue for a greater or specific role to play in the process of withdrawal.

Such a process will entail negotiations between the UK and EU institutions: mostly the European Council, that is, heads of government of the Member States and the European Commission. The process is likely to take years rather than months and—according to Article 50 TEU—should take 'account of the framework for its future relationship with the Union.'

As for that future relationship between the UK and the EU, EU law provides no procedure. It is thought likely that an agreement on this will be negotiated between the UK and the EU and its Member States in tandem with the withdrawal agreement. Such an outcome was highlighted by a recently published House of Lords EU Committee Report, although as so often when the status of Scotland poses tricky political and legal questions, this report was silent on the role of devolved institutions in these processes.

UK devolution arrangements

The Scotland Act 1998 (SA 1998), which created the institutions, powers and administrative responsibilities that make up the devolution arrangements for Scotland within the UK, is described by the Supreme Court as being 'on any view a monumental piece of constitutional legislation' (*Martin v HM Advocate* [2010] UKSC 10, at [44]). The main law-making powers of the Scottish Parliament are set out in sections 28-30 of SA 1998 and, unlike the Westminster Parliament, the Scottish Parliament's legislative powers are limited. Acts of the Scottish Parliament are competent

only if they legislate upon devolved matters, are compatible with EU law and the European Convention of Human Rights, and comply with the other limitations in section 29.

The arrangement adopted in SA 1998 is not to specify devolved areas but instead to list the powers reserved to Westminster (section 30 and Schedule 5); the remaining matters are then considered to be devolved matters. Schedule 5, Part 2 Head B6 states that immigration and nationality, including asylum and the status and capacity of persons in the UK who are not British citizens; free movement of persons within the European Economic Area and the issue of travel documents, are 'reserved matters.' In addition, 'Foreign affairs' (Schedule 5 Part 1 para 7(1)) is a reserved matter, specifically including relations with the EU and its institutions. However the function of implementing EU obligations is exercisable in devolved areas by Scottish Ministers under section 53 of SA 1998.

Notwithstanding this allocation of powers, section 28(7) of SA 1998 is noteworthy because it restates Westminster's unlimited power to legislate in all areas—reserved and devolved—and illustrates why the Sewel Convention (which recognises that Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament) is an essential feature of the devolution settlement. The Sewel Convention, which has now been given statutory form in SA 1998 section 28(8), is considered further below.

At face value, the legal provisions in relation to the EU referendum and withdrawal and the devolution settlement suggest that the distinctive Scottish implications of a UK exit from the EU are limited. However, the reality is more nuanced and complex than that.

The messier reality

We need to consider the lived experience of EU membership for Scotland, of immigration more broadly, and of devolution in practice. That lived experience indicates that the outcome of the EU referendum may have consequences unique to Scotland.

Scotland and the EU—a distinctive relationship?

Scotland is said to be pro-EU and to be 'firmly in the "remain" camp'. This is certainly true of the official position of the Scottish government. The Scottish First Minister has spoken in Brussels and London about making a positive case for the UK to remain in the EU and has published the case for continued Scottish EU membership. She has also claimed that the Scottish public is more pro-EU than the rest of the UK, although polls have revealed that Scottish public opinion is not that different on questions concerning transfer of power to the EU. Similarly, public attitudes to *migration* in Scotland while less negative than south of the border (partly explained by the smaller impact migration has on the Scottish labour market), are not much less negative.

However, there *is* a remarkable difference in Scottish public opinion on the referendum question: an analysis of key voter intention surveys suggest that in Scotland those wanting to remain substantially outnumber those who wish to leave. This might be explained by the enduring dominance of the SNP in Scotland and its strong narrative and vision of 'independence in Europe'. Professor Curtice also describes a 'profoundly different pattern of party politics' in Scotland. He says '"standing up for Scotland" is an objective with which above all the SNP are associated. And nowadays at least the SNP both dominates the electoral scene and is strongly pro-European. South of the border, in contrast, nationalist sentiment is expressed most strongly by the anti-European UKIP.' It is worth noting that in Scotland all the other major political parties,

including the Scottish Conservatives, also have strong pro-EU membership rhetoric.

More devolved powers for Scotland, more intertwined responsibilities, more constitutional unease?

Devolution of power to Scotland has not remained static since the 1998 settlement. The latest amendment, the Scotland Act 2016 (SA 2016), is said to 'transform the Parliament at Holyrood into one of the most powerful devolved parliaments in the world.' During the 2014 Scottish independence referendum campaign the three main UK political parties made a 'vow' to the people of Scotland that substantial further powers would be devolved to Scotland in the event of a 'No' vote. The Smith Commission was convened and ultimately reported on how that vow might be delivered. Some, but not all, of the recommendations in that report have found their way into the law books through SA 2016. This Act extends the competence of the Scottish Parliament substantially.

For instance it enables Scotland to set income tax rates and thresholds, gives it control over a significant part of the welfare system, and puts the Sewel Convention on a statutory footing.

So, while SA 2016 does not change the fact that immigration and EU matters remain reserved to Westminster, many of these newly devolved powers are intertwined with reserved ones and implementing them will require very careful and detailed inter-governmental cooperation. Such cooperation through the Sewel Convention will in itself bring possible complexity because its new statutory footing may affect how and by whom it is interpreted and in turn how it operates, as we consider below.

Scotland and migration—divergence and tension within the devolution settlement?

The trend for immigration legislation to reach into areas of life beyond those associated with immigration control as traditionally envisaged has intensified in the Immigration Acts of 2014 and 2016. But it is nothing new. Under the provisions of a UK-wide statute, the Immigration and Asylum Act 1999, the early years of devolution coincided with Glasgow becoming a major provider of housing for asylum seekers. The Dungavel Immigration Removal Centre also opened during that time.[iii] That period also saw the emergence of Scotland's divergence in practice and policy, even where there was collaboration and agreement with Westminster. One example is the Scottish Government's response to asylum seekers and refugees on matters of integration, health, housing and education. Another is the earlier Scottish Executive negotiation of the 'Fresh Talent Initiative' encouraging certain third country national graduates to remain in Scotland. Alongside this however, one saw the beginnings of institutional unease in Scotland about the reach of immigration legislation into devolved areas such as housing and social care, a feature that has intensified as that reach has also expanded. Most recently, Immigration Act 2016 provisions that touch upon devolved functions—for instance the landlord and tenant relationship—have highlighted the possibilities for constitutional unease over the Sewel Convention's operation, prompting arguments for and against its reform. A UK exit from the EU might similarly raise challenging questions about the future operation of the Sewel Convention, as we consider below.

After the referendum

We need to consider the constitutional unease that may develop between Holyrood and Westminster after the referendum: in the event of a UK withdrawal from the EU and in the case of

the UK remaining in the EU.

Vote Leave

As we have seen, neither EU law (Article 50 TEU) nor UK law (SA 1998) guarantees Scotland a specific role in negotiations leading to a withdrawal agreement or the parallel negotiations leading to an agreement between the UK and EU on the post-exit relationship. In relation to both aspects of withdrawal, Scotland will be able at best to feed into UK negotiations. However, the extent to which that will happen, and the extent to which its position will be taken seriously, is dependent on agreement and goodwill between Westminster and Holyrood, in a situation where the former holds the balance of power.

While a Concordat on the Coordination of EU Policy Issues states that Scottish Ministers and officials should be fully involved in discussions within the UK Government about the formulation of the UK's policy on all issues which touch on matters falling within devolved responsibilities, this does not have the force of law, nor does it commit the UK Government to actually taking on board views expressed in the course of discussions. Nevertheless, under its auspices, Scotland has experienced some degree of success in feeding into and shaping the UK line on EU policy, and Scottish ministers do attend, with the agreement of the UK lead minister, the Council of Ministers when devolved matters are under discussion.

While regarding this *indirect* route to influence the EU as important, if too uncertain and *ad hoc* to command confidence, the Scottish Government has worked hard to develop *direct* lines of communication and influence with EU institutions and bodies. Indeed, building on these direct lines of engagement, it has been suggested that, if the UK exits the EU, Scotland (from within the UK) might wish to negotiate a distinct and differentiated settlement with the EU. Such a sought-settlement would be one that reflected Scotland's more pro-EU, pro-immigration stance—although we acknowledge that this would be politically and legally difficult, not least because the European Commission would probably wish to remain neutral as regards to domestic constitutional struggles.

While there may be grounds for hope that Westminster would enable a co-operative relationship with Holyrood in respect of the negotiated withdrawal and future relationship with the EU—if only to avoid increasing support for the independence cause, and the likelihood of a second independence referendum—only time will tell if that will be the case.

More certain is the involvement of the Scottish Government and the Scottish Parliament in the domestic disentanglement of UK law from EU law, a task that would be necessitated by withdrawal from the EU. As part of this task—and since EU laws that relate to devolved matters are implemented in Scots law by Scottish ministers (SA 1998, section 53)—there would be countless pieces of Scottish legislation to review with a view to repealing, reforming or retaining them.

Of potentially even greater significance and concern would be the required amendment to SA 1998: this may raise the more complex question of the operation of the Sewel Convention. Amending the Scotland Act would have the effect of amending the competences of the Scottish Parliament and here the argument that a Legislative Consent Motion (LCM) from the Scottish Parliament would be necessary becomes forceful. Some commentators argue that the legal necessity of an LCM is not a foregone conclusion, particularly in light of the Sewel Convention

having been put on a statutory footing. However, what emerges is a situation where to proceed to amend the competences of the Scottish Parliament without seeking an LCM would seem politically unthinkable, even without going as far as to take into account the possibility of the Scottish Parliament withholding consent. As a whole it appears that the situation is destined for constitutional unease.

Vote Remain—under terms already negotiated by David Cameron

In the event that the UK chooses to remain in the EU, it is not simply the case that the status quo survives without alteration. Rather, a Remain vote would trigger the reform package or 'renegotiation deal' that David Cameron agreed with the EU in February 2016. That deal was one which the Scottish Government thought was unnecessary and, ultimately, a 'dangerous sideshow'. Prominent parts of the deal are squarely aimed at restricting EU immigration to the UK, something that reflects what many lawyers view as a long-standing tendency on the part of UK governments to incorrectly implement the law on EU free movement, despite that law being one of the cornerstone principles of the EU. It is not certain that the changes to existing EU free movement law that are entailed would pass muster with the European Parliament, which must consent to them for them to pass into law, or with the Court of Justice of the EU, if they are challenged. Only time will tell.

Just as the road ahead for Cameron's 'deal' is not legally certain at the EU level, it might also be bumpy at home. Here, there is the possibility of tension emerging between the 'deal' (which includes restrictions on in–work benefits for migrants for up to four years) and devolved social welfare powers under SA 2016. Such tensions may be slow to emerge, since the devolved social welfare powers mostly affect older and disabled people rather than the broader categories of workers and families. But tensions there may be. If, in the future, the Scottish Parliament was to respond to political pressure to use its powers to top-up certain benefits for families and children, tensions with the UK Government's approach of restricting EU citizens' access to social welfare could arise. This might happen if the Scottish Parliament used its powers in a different way to that of the rest of the UK, so as to augment benefits for families and children, including EU citizens. Again, only time will tell.

Conclusion

Complexity and uncertainty are the watchwords of the post-referendum legal landscape, particularly, but not exclusively, in the event of a Leave vote. This statement is as true from a UK perspective as it is from the Scottish perspective. That said, whether the outcome is 'vote Leave' or 'vote Remain', legislative changes will result in post-referendum effects being felt in Scotland. In both scenarios, the intertwined natures of the responsibilities held at different institutional levels could lead to tensions emerging within the constitutional settlement. This will be particularly the case if, in an era of greater devolution of power to Scotland, Scottish institutions are not involved in settling the post-referendum landscape.

In the event of a (close) Remain vote, the causes and arguments of the Leave 'losers' will undoubtedly cast a shadow, just as the desire for greater autonomy for Scotland, including the independence cause, continues to influence calls for further constitutional change notwithstanding the 'no' vote to independence. As this tricky political and legal landscape is traversed, opportunities for divergence as well as further institutional tensions between Holyrood and Westminster may be revealed.

The relationship between the ECHR and the EU

Nuala Mole, Senior Lawyer, The AIRE Centre, 9 June 2016

Introduction

The European Union (EU) is a Union of 28 states. The Council of Europe is an intergovernmental organisation with 47 Member States, 28 of whom are also Member States of the EU and a further four Council of Europe states are members of another intergovernmental organisation the European Free Trade Association (EFTA). The relationship between the EU and EFTA is particularly important, as the EFTA states have opted into many of the EU measures that the UK has not joined.

The European Convention on Human Rights (ECHR) is a Council of Europe treaty. The European Court of Human Rights is a Council of Europe court which sits in Strasbourg and exists to ensure the observance by states of their obligations under the ECHR by considering complaints by individuals that their rights have been breached. The Court of Justice of the EU, which sits in Luxembourg, provides definitive rulings on EU law. It is not normally possible for individuals to take complaints to the Court of Justice. The EU and the Council of Europe, their treaties, their two courts, and their functions, are entirely separate from one another.

The Council of Europe and the EU had agreed that the EU should be bound by the ECHR and, that by acceding to the ECHR, it would also be subject to the same supervision of its acts and omissions by the European Court of Human Rights. The term 'accede' in relation to a treaty means to agree to be bound by its terms. Accession would give the EU the same status as a country in the eyes of the European Court of Human Rights. This would enable the European Court of Human Rights to deliver judgments in relation to any alleged breaches of the ECHR by the EU. A long series of negotiations between the EU and the Council of Europe took place (EFTA was not consulted). Finally a draft accession agreement was agreed in April 2013, but it required the endorsement of the Court of Justice.

On 18 December 2014, the Court of Justice concluded in Opinion 2/13 that the draft accession agreement was incompatible with the EU treaties. The Court stated that the approach adopted in the agreement envisaged, which is to treat the EU as a Member State and to give it a role like that of any other contracting party, 'disregarded the intrinsic nature of the EU' (although the agreement had in fact contained many complex provisions to accommodate the unique nature of the EU). The agreement was rejected and the accession process could not proceed to the next stage.

This paper looks at the 'protection gap' and the halted accession process, and concludes with some thoughts on the impact of the relationship between the EU and the ECHR on a post-Brexit UK.

Accession of the EU to the ECHR

In 1994 the firm suggestion was made that the EU should accede to the ECHR in part because of the perception that if the Union acted in a manner which was incompatible with human rights,

there was no mechanism whereby this could be challenged.

In 2000 the Charter of Fundamental Rights was adopted, and in 2008 in the Lisbon Treaty it was given the same status as the EU treaties themselves. This meant that it became legally binding and had to be applied in any action implementing EU law, and could be relied upon in any court applying EU law. The Charter basically combines the provisions of the ECHR and the Council of Europe's Social Charter but also includes some additional provisions—such as the right to asylum and the right to good administration. The Lisbon Treaty provided for accession to the ECHR.

The amendment in the Lisbon Treaty went further than necessary. The text says that the Union *shall* accede and not that the Union *may* accede. Protocol 8 to the Lisbon Treaty states that accession to the ECHR must make provision for preserving the specific characteristics of the Union and Union law. This mandatory language has placed the Union in a very difficult position as it would appear to be under a *treaty obligation* to negotiate an accession solution which is acceptable both to the Member States of the Council of Europe and to the Court of Justice.

To facilitate this accession, treaty amendments to the ECHR approved by the 47 Member States of the Council of Europe were also necessary. The ECHR had to be amended (by Protocol 14) to allow the EU, which is not a state, to accede to the ECHR.

The draft accession agreement, concluded after years of negotiation, was sent to the Court of Justice to give its Opinion on its compatibility with EU law. On 18 December 2014, in what has been described as the Christmas bombshell, the Opinion was delivered. The Court of Justice found that the draft agreement that it had been asked to consider was incompatible with EU law.

One reason the Court gave for this was that for the European Court of Human Rights to deliver judgment on a matter of EU law, it would first have to decide on the interpretation or application of the treaties, a matter solely for the Court of Justice. If the European Court of Human Rights was to give an interpretation of EU law, there might be a risk of two competing interpretations by the two separate courts. This was unacceptable in the eyes of the Court of Justice. The Court appears to have lost sight of the object and purpose of accession, as mandated by the Lisbon Treaty. This purpose was precisely to bring the acts and omissions of the Union under the judicial scrutiny of the European Court of Human Rights and thereby fill the gap in judicial accountability that exists within the EU legal order. This gap is an irony, given that effective judicial protection is a fundamental tenet of EU law.

The prospects of any renegotiated agreement being reached in the near future are slim. This is firstly because the non-EU Member States of the Council of Europe had bent over backwards to accommodate the EU's concerns in the negotiation process and, with great difficulty, reached the final draft and secondly because what appetite there was in the Council of Europe for the accession of the EU has now largely gone. Those entrusted with the negotiation process are justifiably unlikely to spend months on a renegotiation only to have the fruits of their labours rejected again.

The eventual accession of the EU to the ECHR will enable individuals who were victims of violations of the ECHR caused by acts or omissions of the EU to seek redress from Strasbourg. Strasbourg will, for the time being, continue to be able only to offer redress to individuals for violations by national authorities who were acting in accordance with their EU law obligations,

rather than from the EU itself.

The EU from the perspective of the European Court of Human Rights: the protection gap

Can the European Court of Human Rights presume that the EU guarantees fundamental rights to the same extent as the ECHR, and what should happen when it does not do this? The approach of the Court of Justice in Opinion 2.13 was dogmatic:

'...the principle of mutual trust between the Member States is of fundamental importance in EU law,... and requires, ... each of those States, save in exceptional circumstances, ***to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.***

When implementing EU law, Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, ***they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'***

This statement is inherently at odds with the protection of human rights guaranteed by the ECHR. The Strasbourg Court considers that where evidence is adduced indicating the existence of a failure to comply with both EU law and the Convention, the national authorities are *required* to verify the actual situation. They must satisfy themselves that the individual will not be exposed to a risk in another Member State or to take the necessary steps to prevent it. Where there is a real risk that a judicial decision in one Member State is unsafe because the safeguards of a fair trial set out in Article 6 ECHR are not (or are plausibly alleged not to have been) respected, the state party to the ECHR is required to verify the allegation.

The approach of the European Court of Human Rights is different. States who have signed up to the ECHR remain responsible for their human rights breaches even if they were required to act the way they did by their membership of an international organisation such as the EU. However, the European Court of Human Rights held in its *Bosphorus Airways* judgment that if state action is taken to comply with other international legal obligations, it may be justified if the organisation in question protects fundamental rights to at least the same level as the ECHR. This judgment was re-visited by the European Court of Human Rights Grand Chamber in May 2016 in *Avotins v Latvia*, after the Court of Justice's Opinion on accession. The European Court of Human Rights found that in mutual trust cases the Court of Justice (in its Opinion) had said that the power of the state to review the observance of fundamental rights by the state of origin of the judgment must be limited to exceptional cases. The European Court of Human Rights found that 'exceptionality' standard unacceptable. The court being asked to trust the acts of another state must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the state of origin, in order to ensure that the protection of those rights is not manifestly deficient. EU law as set out in the Opinion on the other hand would require that state to turn a blind eye. The two sets of legal obligations are mutually exclusive.

Determining the content of EU law is the prerogative of the Court of Justice. It does this, for example, when it answers questions of EU law referred to it by national courts which are posed in

order to avoid an incorrect interpretation of EU law. Where a national court decides not to make a reference, when asked, it must give reasons for its decision. If it does not give reasons, it will be in breach of Article 6 ECHR.

In an Irish case[iii], the Irish High Court refused execution of a European Arrest Warrant from Romania because there were substantial grounds for believing the trial at which a woman had been convicted 16 years ago amounted to a flagrant denial of justice. The Court held there was a wide practice of discrimination against Roma in Romania; there were reasonable grounds for believing that the respondent, who was Roma and illiterate, had suffered discrimination in her trial such that her return and subsequent imprisonment would constitute a breach of the ECHR. EU law could not only have required her return but also prevented the Irish court from making enquiries as to whether there might have been (or be) a breach of her fundamental human rights in Romania. The ECHR as interpreted by the European Court of Human Rights demands that these enquiries are made.

The impact of the relationship between the EU and the ECHR on a post-Brexit UK

If Brexit occurs it will be decades before the UK can disentangle national measures derived from EU law from non-EU derived national law. Furthermore, the reach of EU law now goes far beyond the confines of EU membership. The UK will still be a member of the Council of Europe. In addition, sometimes non-EU Member States will have opted in to EU measures. Many Council of Europe countries which are candidates for accession to the EU are in the process of expressly harmonising their national laws with EU law, increasing its reach even further. The European Court of Human Rights regularly takes into account EU measures which have been widely adopted across Europe, but not by the state in question, to inform its jurisprudence on particular provisions of the ECHR. EU law is now a significant factor in the judgments of the European Court of Human Rights even in cases against states which are not EU Member States. So were the UK to leave the EU, it would still be affected by EU law when it comes before the European Court of Human Rights.

You can read the full paper by Nuala Mole on ILPA's website. This will be of particular interest to lawyers interested in the precise legal interrelation between the EU and the ECHR, and the relevant case law.