

## **ILPA EVIDENCE TO THE ALL PARTY PARLIAMENTARY GROUP ON MIGRATION FOR ITS ENQUIRY INTO BREXIT AND IMMIGRATION**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by courts, Government departments, and non-governmental organisations.

ILPA has provided considerable evidence to parliamentary committees on Brexit and has briefed parliament on amendments to the European Union (Notification of Withdrawal) Bill pertaining to migration, as well as responding to consultations by other organisations and commissioning a range of papers on the subject of Brexit. A list of these is annexed below.

Given the nature of the organisation and its work ILPA has indicated under the relevant headings set out by the enquiry where in the papers below discussions pertinent to the questions raised by the all-party parliamentary group can be found and has drawn out some of the main themes in the text of this submission.

### **Roles filled by EEA nationals who would not qualify for a skilled visa**

The current cohort of EEA nationals in the UK labour market results not only from those who come to work, but from those who join spouses, partners and children in the UK and those who work while studying. For example the then Minister, Minister, the Rt Hon James Brokenshire MP said in the 6 July 2016 debate<sup>1</sup> “Almost 125,000 EU students study at UK universities.”<sup>2</sup> He said

*“This issue is not simply about the immigration status of an individual. Under free movement law, EU citizens’ rights are far broader than just the right to reside in the UK. There are employment rights, entitlements to benefits and pensions, rights of access to public services, and rights to run a business, which is so closely aligned with the right to provide cross-border services, as well as the ability to be joined by family members and extended family members, in some cases from countries outside the EU. Of course, under current arrangements these rights extend to European economic area and Swiss nationals, who are not in the EU. They all need to be considered, and we must remember that people do not have to register with the UK authorities*

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<sup>1</sup> HC Report, Vol 612, 6 July 2016, col 937ff.

<sup>2</sup> Ibid. Col 946.

*to enjoy basic EU rights to reside. We will need to work out how we identify fairly and properly the people who are affected.*<sup>3</sup>

Not all the persons who come to join family would qualify under the family immigration routes applying to third country nationals joining family members. Not all the EEA students who come to the UK will be able to do so when they no longer qualify for home student fees. The effect on the UK labour market will be greater than the loss of those coming to work.

In our 25 February 2017 briefing<sup>4</sup> for the debates on proposed amendments to the European Union (Notification of Withdrawal Bill) on the rights of EEA and Swiss nationals, we stated

*The Office for National Statistics data from January 2017 identifies difficulties in recruit to vacancies in retail and wholesale, manufacturing, health and accommodation and food services.*<sup>5</sup>

*EU nationals can fill vacancies quickly because there is no pre-registration of the employer as a sponsor, or visa system for the individual worker and circular migration is an option: the ability to come and go from the UK, knowing that leaving does not reduce the likelihood of being of being able to return. Current approaches to migration of third country nationals do not encourage or support circular migration, the advantages of which are that it is a way to a way to build understanding and goodwill and to facilitate trade and relationships between different countries. Another advantage, although one for other countries, not the UK, is that counter it can help to the brain drain from countries from which the UK takes students or borrows skilled workers. Circular migration also functions to limit permanent migration.*

*There is much in the current debate that is reminiscent of the 1960s and the passage of two Commonwealth Immigrant Acts to put an end to circular migration, in that case of British citizens, then called ‘Citizens of the UK and Colonies’, who were born outside the UK.<sup>6</sup> It is arguable that those who would reduce immigration are repeating the decisions of their counterparts in the 1960s. Like a Citizen of the UK and Colonies before the 1960s, an EEA national can come to the UK and then leave, safe in the knowledge, until the referendum in the case of the latter, that they could return at any time. This produces ‘migrants’ rather than ‘immigrants’; people who can come, and then can go rather than people who come and then stay.*

*Propinquity is also relevant to the speed with which EEA nationals can take up jobs: it is possible to start work in the UK and wrap up affairs at home, or keep a home going elsewhere in the EU, at the same time.*

We wrote at more length on the question of circular migration in our 17 January 2017<sup>7</sup> evidence to the Home Affairs’ Select Committee for its enquiry into immigration policy and in our 20 February 2017 evidence to the House of Lords’ Select Committee on Economic Affairs.<sup>8</sup>

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<sup>3</sup> Col 951.

<sup>4</sup> Available at <http://www.ilpa.org.uk/resources.php/33026/ilpa-briefing-for-house-of-lords-committee-stage-of-the-european-union-notification-of-withdrawal-bi>

<sup>5</sup> <https://www.cipd.co.uk/about/media/press/100217-eu-labour-supply-shortages>

<sup>6</sup> Commonwealth Immigrants Act 1962, Commonwealth Immigrants Act 1968.

<sup>7</sup> <http://www.ilpa.org.uk/resources.php/32891/ilpa-submission-to-the-home-affairs-select-committee-enquiry-on-immigration-policy-20-january-2017>

<sup>8</sup> Available at <http://www.ilpa.org.uk/resource/33009/ilpa-submission-to-the-house-of-lords-select-committee-on-economic-affairs-enquiry-into-brexit-and-t>

Protection for low-skilled workers who are victims of exploitation and abuse may be reduced post Brexit when the UK is no longer bound by the EU Directive 2001/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. ILPA said in its 17 October 2016 paper for the Joint Committee on Human rights on the Human Rights implications of Brexit<sup>9</sup>

*Initially, when the UK exercised its opt-out from the Directive, the Home Office argued<sup>10</sup> that the provisions of the Directive did not add to the protection of trafficked persons in the UK. The Home Office stated that opting in would require the UK to make mandatory provisions at the time discretionary in UK law and that these steps would reduce the scope for professional discretion and flexibility and might divert already limited resources.*

Announcing the decision to opt in, the then Minister, Damian Green MP said

*The new text still does not contain any measures that would significantly change the way the UK fights trafficking. However, the UK has always been a world leader in fighting trafficking and has a strong international reputation in this field. Applying to opt in to the directive would continue to send a powerful message to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle this crime.<sup>11</sup>*

When the UK decided to opt in, the Commission identified that it would need to amend existing trafficking offences to confer extra-territorial jurisdiction over UK nationals who commit trafficking offences anywhere in the world; to make mandatory appointing special representatives to support child witnesses during police investigations and criminal trials and to set out the rights of trafficked persons to assistance and support. At the time, the UK was party to the European Convention on Human Rights and to the Council of Europe Convention on Action against Trafficking in Human Beings, but the measures identified by the Commission had not been made mandatory in UK law, suggesting that without the Directive they are again vulnerable to repeal.

The Directive emphasises the importance of protecting trafficked persons and puts this on an equal footing with the implementation of criminal measures. It sets out criteria for issuing a residence permit to trafficked persons. The residence permit envisaged falls somewhere between the reflection periods and residence permits for which provision is made in the Council of Europe Convention. The Directive provides that the permit is to be issued for at least six months. It provides that trafficked persons should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. Article 12.2 of the Directive requires member States to ensure that trafficked persons have access 'without delay' to legal counselling, and, to legal representation, including for the purpose of claiming compensation. It requires that legal counselling and legal representation be free of charge where the victim does not have sufficient financial resources.

Under the Directive, Member States must provide trafficked persons with subsistence, access to emergency medical treatment and attend to the special needs of those most 'vulnerable' during a

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<sup>9</sup> Available at <http://www.ilpa.org.uk/resources.php/32575/ilpa-submission-to-the-joint-committee-on-human-rights-on-the-human-rights-implications-of-brex-it-17>

<sup>10</sup> 19 June 2012.

<sup>11</sup> Hansard HC 12 Mar 2011: column 53WS.

*reflection period. Those holding a residence permit should be authorised to access the labour market, vocational training and education according to rules set out by national governments.*

It will be necessary to ensure that the equivalent of the specific protection afforded trafficked persons by the Directive is retained. Legislation protecting employment rights is also relevant to the protection of low-skilled workers, whether British or foreign.

The UK's ability to identify and punish traffickers and to protect trafficked persons risks being compromised in that it may no longer enjoy direct access to the Europol database, Eurodac data or to the same intelligence sharing. This is discussed in ILPA's 11 November 2016 paper on implications of Brexit for the Justice system and in Professor Valsamis Mitsilegas' paper for the ILPA EU referendum series.<sup>12</sup> ILPA considers that a thematic study as to the way in which Brexit will affect the UK's ability to pursue traffickers and to protect their victims should be undertaken.

### **Impact of loss of access to these workers and how the government should accommodate the need to fill these roles**

The question is about the loss of workers who work below the skills thresholds accommodated by the points-based system, rather than about the loss of EEA national workers in particular. Post Brexit, such workers could be drawn from the EEA or outside the EEA.

ILPA said in its 7 September 2016 paper for the NGO British Future:

*...the Prime Minister has indicated that she does not intend to abandon the net migration target or to lift the cap on Tier 2 (skilled migration) of the Points-Based System post Brexit, that currently there is no provision in the immigration rules for low skilled migration (Tier 3 of the Points Based System, which has never been used). If she maintains these positions then we can anticipate acute labour shortages in both skilled and low skilled positions post Brexit*<sup>13</sup>

The impact of Brexit, **both on highly skilled and low skilled occupations** is starting to be felt now. In ILPA's July 2016 briefing for the 6 July 2016 debate on a 10 minute rule Bill,<sup>14</sup> we cited the then Minister, Minister, the Rt Hon James Brokenshire MP saying that there are nearly 250,000 EU workers in the public sector, that September 2015, 9.4% of NHS doctors and 6.3% of NHS nurses in England were from an EU country as well as citing the figures on students quoted above.<sup>15</sup> We observed that certainty and uncertainty about their future could have direct impact on the decisions taken by current students and those who have accepted places on courses, and businesses. Recent newspaper reports indicate that this comment was prescient.<sup>16</sup>

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<sup>12</sup> EU Referendum position paper 7: Criminality Free Movement and Criminal Law, 19 May 2016.

<sup>13</sup> Available at <http://www.ilpa.org.uk/resources.php/32463/ilpa-evidence-for-british-futures-inquiry-into-the-status-of-eu-nationals-in-the-uk-7-september-2016>

<sup>14</sup> HC Report, Vol 612, 6 July 2016, col 937ff. ILPA briefing at <http://www.ilpa.org.uk/resources.php/32287/ilpa-briefing-for-a-10-minute-rule-bill-on-persons-exercising-rights-under-eu-law-and-their-position>

<sup>15</sup> Ibid. Col 946.

<sup>16</sup> *Record numbers of EU nurses quit NHS*, The Observer 18 March 2017, <https://www.theguardian.com/society/2017/mar/18/nhs-eu-nurses-quit-record-numbers>

In our 20 January 2017 evidence to the Home Affairs Select Committee for its (ongoing) enquiry into immigration policy<sup>17</sup> we wrote

*The changes wrought by ending EU migration in its current form could include (depending upon the settlement reached):*

- *A great reduction in circular migration, with the only means to guarantee the possibility of circular migration being taking British citizenship.*
- *A greater number of persons unable to be reunited with close family members. These would include elderly parents in families at all income levels, and spouses, partners and children for families on low incomes. The change will affect British citizens and the settled in relationships with EEA nationals and EEA nationals settled in the UK and their family members. Other British nationals and settled persons will be no better, and no worse, off.*
- *Employers and those entering into contracts for services having a smaller pool of persons from which to make their initial choice of worker, at all skills levels. So called “low skilled” migration will end: outside EU migration there are currently no immigration routes to enter for the purpose of doing work below certain qualification and salary levels, but there are jobs in, for example the care, agricultural and food processing sectors for which it has to date not proven possible to recruit in sufficient numbers from British citizens and the settled. As to skilled migration, EEA nationals and their family members represent a flexible, rapidly deployed workforce enjoying the benefits of circular migration. We have seen no evidence the Tier 2 skilled migration cap of 21,000 per annum can be maintained post Brexit.*

We went on to say, **again dealing with both skilled and ‘low skilled’ immigration:**

*There is currently evidence of skills gaps: see the work that goes into drawing up the shortage occupation lists and the employers satisfying the resident labour market test. ILPA takes the view that these gaps will increase post Brexit and that it is not possible or desirable to fill gaps entirely from the resident labour market, whether in the immediate, medium or long term. Beyond skills gaps there is the question of the UK’s being able to recruit and retain leaders in their field. In immigration debates this is often described as attracting ‘the brightest and the best’ with no clarity on the meaning of ‘best’. The hackneyed phrase nonetheless points to a deeper concern: that there are circumstances in which what is needed is not someone who can do a job, but the best person for the job.*

*The need for skilled and unskilled labour will not disappear post Brexit. If it reduces, this is likely to be because of recession rather than positive factors. Where controls on migration create gaps in the labour force, whether at highly skilled or low skilled levels, this has consequential economic effects, as does limiting the ability rapidly to fill these gaps.*

*As to low-skilled labour, we draw attention to the report of the Migration Advisory Committee on this topic.<sup>18</sup>*

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<sup>17</sup> Available at <http://www.ilpa.org.uk/resources.php/32891/ilpa-submission-to-the-home-affairs-select-committee-enquiry-on-immigration-policy-20-january-2017>

<sup>18</sup> *Migrants in low-skilled work: the growth of EU and non-EU labour in low-skilled jobs and its impact on the UK*, Migration Advisory Committee 2014, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/333083/MAC-Migrants\\_in\\_low-skilled\\_work\\_Full\\_report\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333083/MAC-Migrants_in_low-skilled_work_Full_report_2014.pdf)



We stated in our 20 February 2017 evidence to the House of Lords' Committee on Economic Affairs<sup>19</sup>

*The Migration Advisory Committee has identified reliance [on migrant labour] at all skills levels and highlighted factors contributing to this. For example, in its July 2014 report Migration for low-skilled work<sup>20</sup> it identified that migrants are more geographically mobile than the domestic workforce.*

*Despite the free movement of workers from within the EU there are a significant number of skilled jobs that cannot be filled from within the resident labour market: not only the 20,700 jobs for which provision is made in Tier 2 general, but the Tier 2 jobs that do not fall within that cap (jobs paying over £155,300 per annum, intra-company transfers and jobs filled by those on Tier 5 or Tier 1 visas). The shortage occupation lists attest to systemic shortages in jobs requiring specialist education and training: vacancies that will thus take time to fill from within the resident labour market.*

*In terms of those exercising rights of free movement, reliance cannot be measured solely in terms of EEA and Swiss citizens and their qualifying non-EEA family members exercising rights under Directive 2004/38/EC, including persons exercising derived rights. Account must be taken of Articles 21, 45 (workers) and 49 (establishment) and 56 (services) (and predecessor provisions) of the Treaty on the Functioning of the European Union to cover all free movement of persons. Articles 49 and 56 include legal persons as well as natural persons, e.g. companies providing cross-border services.*

*Data from March 2016 showed that the number of EU migrants working in Britain had risen by 224,000 to 2.15 million over the preceding year.<sup>21</sup> Fiscal data provide an assessment of EU nationals' contributions in taxes.<sup>22</sup>*

...

*As to 'low-skilled work', there is reliance on migrant labour in skilled trade occupations in the construction industry and in lower paid work in social care, hospitality and agriculture.*

...

*It is difficult to isolate the effects of a reduced ability to source workers from the other effects of Brexit, in particular Britain's being outside the single market and outside the EU's trade deals. The need for skilled and unskilled labour will not disappear post Brexit. If it reduces, this is likely to be because of recession rather than positive factors. Where controls on migration create gaps in the labour force, whether at highly skilled or low skilled levels, this has consequential economic effects, as does limiting the ability rapidly to fill these gaps.*

*...in jobs such as agricultural work, population is sparse in rural areas and the shortage of low cost housing in rural areas means that jobs cannot be filled from the local labour market.*

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<sup>19</sup> Available at <http://www.ilpa.org.uk/resource/33009/ilpa-submission-to-the-house-of-lords-select-committee-on-economic-affairs-enquiry-into-brex-it-and-t>

<sup>20</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/333083/MAC-Migrants\\_in\\_low-skilled\\_work\\_Full\\_report\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333083/MAC-Migrants_in_low-skilled_work_Full_report_2014.pdf)

<sup>21</sup> <https://www.theguardian.com/world/2016/may/18/number-of-eu-migrants-working-in-uk-rises-to-record-level>

<sup>22</sup> [http://www.cream-migration.org/publ\\_uploads/CDP\\_22\\_13.pdf#page=41](http://www.cream-migration.org/publ_uploads/CDP_22_13.pdf#page=41)

*Workers from elsewhere within the UK may struggle on the wages offered to maintain a permanent home elsewhere while living apart from their families in rudimentary conditions.*

Increasingly, immigration officers, employers, landlords etc., have to know who has a right to reside and who does not, and evidence is needed to prove this. We are acutely aware, however, of the logistical problems entailed by having to provide such documents both to EEA and Swiss nationals currently in the UK who are allowed to remain and workers, whether EEA or Swiss nationals or third country nationals, who come post Brexit to fill gaps currently filled by EEA and Swiss workers and their family members. For the scale of the task simply of dealing with those already present see the Migration Observatory's 3 August 2016 post *Here today, gone tomorrow? The status of EU citizens already living in the UK.*<sup>23</sup>

EU nationals are in very many respects treated in the same way as British citizens and the settled. Their entitlements are relatively uncomplicated although with the growth of the hostile environment, proof of entitlement is becoming an increasing problem; particularly for their third country national family members. Increasingly, immigration officers, employers, landlords etc., require proof of immigration status. Third country national workers are likely to need more support from their employers as they negotiate their exclusion than are EEA nationals.

### **Restrictions on the rights of EEA national workers post Brexit and restrictions on the rights of third country nationals post Brexit**

See above re the range of EEA and Swiss national workers and their family members working in the UK labour market.

The numbers of EEA and Swiss nationals, and their family members working in the UK labour market greatly exceeds the number of third country national skilled workers (for example the cap on Tier 2 (General workers is 20,700 per annum while the post study Tier 1 Graduate Entrepreneur route is limited to 2000 places per annum, the Tier 1 Exceptional Talent visa to 1000 and the temporary Tier 5 Youth mobility visa to 59,000 (calculated on the basis of reciprocity with places for British citizens in the countries involved) per annum. If it is accepted that the loss of EU nationals will result in shortages in the UK labour market then to cope with these we are potentially looking at an immigration system of a different order of magnitude. We suggest that it is not possible to scale up the current, intensely bureaucratic, system to deal with large additional numbers.

If a group are to enjoy privileged access to the UK labour market, it is not self-evident that that group should be comprised of EEA and Swiss nationals and their family members. There are other contenders: for example Commonwealth citizens, or making it easier for family members of British citizens and the settled, and persons with international protection needs, to come to the UK and letting them take what jobs they can. However, there may be good reasons to give preferential treatment to EEA nationals: established patterns of migration, propinquity and ease of access, as set out in ILPA's February 2017 evidence to the House of Lords Committee on Economic Affairs cited above. Further, there is the probability that so to do will increase the

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<sup>23</sup> <http://www.migrationobservatory.ox.ac.uk/commentary/here-today-gone-tomorrow-status-eu-citizens-already-living-uk>

chances of British nationals being given opportunities to work in the EU. But it would be wrong to assume without more that EEA nationals are at the front of any queue.

As discussed in ILPA's 11 November 2016 paper for the House of Commons' Justice Select Committee<sup>24</sup> on the implications of Brexit for the Justice system, at the moment immigration law firms are seeing an increase in enquiries as a result of Brexit. Some of these come from EEA nationals and their family members. Others come from companies seeking to understand the implications of Brexit for their business and for their workforce. Decisions companies take on their location post Brexit may affect those companies' demand for legal services, in fields far beyond immigration law. It is far from certain that companies based elsewhere in the EU would wish to continue to make their disputes subject to UK law and to continue to choose the UK courts as the forum for the resolution of such disputes although it is less likely that the law governing agreements already made would be changed.

ILPA members include firms with lawyers based in a large number of different countries, advising on immigration to and from a range of such countries. Like other businesses they will need to decide whether to keep the same volume of their operations in the UK post Brexit. This affects both the location of established practitioners and the location of their training programmes. Mutual accreditation of qualifications is valued by those advising companies on immigration law across several jurisdictions and by those specialising a particular complex area of immigration laws across several jurisdictions.

Academia will be hit, by the potential effect on student numbers and in a restriction on the choice of leading academics if, for example, the Tier 2 cap is hit, but also by the likely loss of schemes such as Erasmus and decreasingly willingness, already identified, of other European academic institutions to partner with UK universities in EU funded schemes.

Farming will be hit by the UK's being outside the Common Agricultural Policy and the loss of tariff free access to the single market, as well as potentially by the signing of free trade agreements giving new competitors, including those with lower standards of animal welfare and therefore lower overheads, access to the UK food market, as well as by the loss of seasonal agricultural workers.

These examples can be multiplied across other sectors.

### ***Transitional Provision***

It is not simply a question of thinking about what should be the restrictions on the rights of EEA and Swiss national and third country national workers post Brexit. It is necessary to think about transitional provision. The extension of the hostile environment by the Immigration Acts of 2014 and 2016 means that to live in the UK it is necessary that a person be able to evidence their immigration status: to employers; to landlords and landladies; to banks; when driving; to the health service and to benefits agencies. There are, at a conservative estimate, three million EEA and Swiss nationals in the UK. All of them will need to have documents evidencing their new status on the day on which their rights and entitlements change. It may be some time before the government has devised, and announced the final form of arrangements for all EEA and Swiss nationals and their family members living in the UK before Brexit. Whatever the

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<sup>24</sup> Available at <http://www.ilpa.org.uk/resources.php/32687/ilpa-submission-to-the-house-of-commons-justice-committee-inquiry-on-implications-of-brexit-for-the->



form of these arrangements, it may be simple for some persons to prove that they fall within them and more complicated for others. The Home Office cannot tidy up every case before the date of Brexit. It already has a backlog. Job advertisements appeared in March 2017 for 240 new Executive Officers in its Liverpool offices to deal with applications from EEA nationals for documents evidencing their current status, but the numbers of such applications continue to rise and these documents may or may not be determinative of the new status.

ILPA suggests that a realistic settlement is to put in place transitional arrangements that will last at least seven years from the date of Brexit. Seven years is the period for which States are allowed to impose transitional arrangements on access to the labour market for those nationals of a State joining the EU. It would give those present as qualified persons in the UK prior to the date of Brexit time to qualify for permanent residence, including making provision for a permitted absence of less than two years.

We suggest that during this period it should suffice that an EEA national be able to present their passport or national identity card to satisfy checks as to their immigration status, and that third country national family members be able to present the passport or national identity card of the principal and proof of the relationship. Those third country national family members with documents issued pre Brexit evidencing their exercise of rights of free movement should also be able to present those and similarly for persons with retained or derivative rights. It would be necessary to permit other means of evidencing status for those in the latter two categories, or to make them the priority group for being issued residence documentation.

Under this arrangement is it correct that EEA and Swiss nationals and their family members would benefit from a privileged status during the transitional period. We consider this a strength rather than a weakness of the proposal as it would provide time to manage the impact on the labour market and on universities of the loss of EEA and Swiss nationals and their family members.

The transitional period could be used to make pragmatic arrangements for those EEA and Swiss national and their family members whose rights had not been clearly defined in any statements as the minimum guarantees for EEA and Swiss nationals and their family members post Brexit. These are likely to include:

- *Children not born pre Brexit of EEA and Swiss nationals present in the UK pre Brexit*
- *Long-term residents*  
Persons with a certain number of year's residence, without looking in detail within that period at matters such as whether they had had comprehensive sickness insurance throughout. Such persons are likely to have powerful Article 8 claims, and it is pragmatic to deal with them in a way which avoids litigation
- *Third country national family members of British citizens exercising EU rights*  
British citizens returning from periods of residence as a qualified person in other EU members may be treated as exercising EU rights on return. One effect of this is that they have been able to bring to the UK third country national family members in situations where those family members would not meet the requirements of the immigration rules. Those family members may have been resident for considerable periods, and children born in the UK etc. and again will have powerful Article 8 claims.

- *Persons with periods of residence in the Channel Islands/Isle of Man*  
Residence in these areas is counted in calculating whether a person has acquired permanent residence.

## **Developing the skills of the settled workforce and those with the right to work in the UK**

There are a range of shortages in the UK labour market. As to skilled work, these are most acutely felt in occupations placed on the shortage occupation lists that apply for the purposes of identifying who can be employed to fill Tier 2 general jobs paying under £155,300 per annum without the need for the employer to demonstrate by advertising that no member of the resident labour market (which currently includes EEA and Swiss nationals). Whatever the settlement for EEA and Swiss nationals and their family members already present in the UK, restrictions on the filing of vacancies by EEA and Swiss nationals in the future are likely to exacerbate existing shortages and create new ones.

Discussions of migrant workers often make reference to their covering ‘the jobs British citizens’ will not do: but this notion is rarely explored. It is suggested that in many cases British and settled workers eschew these jobs for cultural reasons: they do not fit with their aspirations, even where the worker in question is long term unemployed and has few prospects.

In other cases a settled worker may not consider it viable to do a job unless the pay for it is increased beyond what the employer considers feasible. Earnings do not go as far in the EU as when sent, for example, as remittances to another EU country. Without addressing the affordability of housing it seems likely that it will remain difficult to fill jobs previously done by EEA nationals with workers from the settled workforce.

The European Economic Area has offered work opportunities to the settled workforce to gain opportunities overseas and English language skills have made, for example, young UK graduates, attractive on the job market in the UK, giving them opportunities to secure that vital first job that can then lead to subsequent employment. These opportunities may be lost post Brexit.

Skills have been brought into the UK from the EEA and Switzerland, for example in the health profession and construction industry and some employers have invested to facilitate skills transfers from EEA workers to the settled workforce. Opportunities for such transfers may be lost post Brexit.

## **Implications of a regional and geographic immigration policy.**

ILPA has discussed the situation in all the devolved administrations in its 3 March 2017 evidence to the House of Lords Committee on the European Union for its enquiry into Brexit and devolution and the particular situation in Northern Ireland in its 30 September 2016 paper for the House of Lords Select Committee on the European Union for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union.

As we stated in the former:

*Even before the referendum vote was known, debates and correspondence on the Bills that became the Immigration Acts 2014 and 2016 had highlighted the complexities of the devolution settlement in ways that have implications for the debates on free movement and the rights of EEA and Swiss nationals and their family members post Brexit. The Acts make immigration status relevant to a wide range of entitlements, including to housing and social care and touch devolved matters such as the criminal law and licensing regimes. The Government takes the view that because immigration is a reserved matter, any modifications to housing law etc. are also reserved. This was contested, in particular by the Scots administration. As Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper,<sup>25</sup> this is not new and these tensions are longstanding.*

While immigration is a reserved matter, many subjects touched by immigration legislation are devolved. Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper for ILPA<sup>26</sup> that while immigration is a reserved matter, for example, welfare entitlements are devolved in Scotland and thus EEA nationals' access to services in Scotland could be protected by clarifying which matters are within the competence of the Scottish parliament or require the legislative consent of the Scottish Parliament prior to enactment. Ongoing political and inter-governmental cooperation between Holyrood and Westminster would be needed to achieve this.

Devolved matters on which there is immigration legislation in Northern Ireland include<sup>27</sup>:

- health and social services;
- education;
- employment and skills;
- social security;
- housing.

Health, social welfare, education, housing and economic development are matters devolved to the Welsh Assembly.

The Scotland Act 2016 enables Scotland to set income tax rates and this has implications for the taxation of EEA and Swiss nationals and their family members as well as of third country nationals.

In ILPA's view there is potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations.

Distinctive Scottish approaches to the EU and to immigration have emerged in the fields of both immigration and asylum. For example, Scotland strives to integrate persons seeking asylum from the time of arrival, rather than wait until they have been given leave to remain. There are different approaches to punitive provisions to persons whose claims have failed. For example, a provision which enables asylum-seeking families with children to remain supported under s 95 of the Immigration and Asylum Act 1999 until they leave the UK<sup>28</sup> is removed by the 2016 Act.<sup>29</sup> Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' Rights wrote

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<sup>25</sup> Op.cit.

<sup>26</sup> ILPA EU Referendum position paper 12: The implications for Scotland of a vote in the EU referendum for the UK to leave the EU, 1 June 2016, at <http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the>

<sup>27</sup> Cabinet Office and Northern Ireland Office, *Devolution settlement: Northern Ireland*, 20 February 2013.

<sup>28</sup> Section 94(5) of the Immigration and Asylum Act 1999.

<sup>29</sup> By paragraph 7(5), Schedule 10 to the Immigration Act 2016.

to the Rt Hon James Brokenshire MP on 8 December 2015 to express the Scottish Government's concern about these provisions. He also wrote to the Rt Hon James Brokenshire MP on 8 December 2015 to express the Scottish Government's concern about removing local authority leaving care support from young people who have exhausted their appeal rights<sup>30</sup> saying:

*...to cut off their support at a time, when they are at their most vulnerable is both morally wrong and also places them at serious risk of harm.*

At different times in the past, efforts have been made to address skills shortages in Scotland. The Scottish Executive negotiated of the 'Fresh Talent Initiative' under which certain third country national graduates to remain in Scotland and it is the policy of the Scottish National Party to call for the reintroduction of the post study work scheme whereby graduates could remain in the UK to work for up to two years on completion of their studies. Scotland continues to struggle to attract the workers it needs, whether from elsewhere in the UK, from the EEA and Switzerland, or from third countries.

The fishing industry in Scotland is an example of an area where leaving the EU could result in skills shortages. Many jobs in the industry are treated by the government as low skilled, because they do not require academic qualifications/high salaries and thus do not fall within Tier 2 of the Points-Based System, but this is nonetheless skilled work that requires specialists.

Labour shortages in Northern Ireland may increase post Brexit. Factors that may influence this include:

- If those from Northern Ireland their family members who are entitled to passports from the Republic chose to use these to work in the EU, whether in the Republic of Ireland or elsewhere;
- if parts of the city of London opt for Dublin as their EU base post Brexit (insurance company that has already done so?) and the Republic booms
- if there is recession in Northern Ireland, already a depressed area, post Brexit.

ILPA discussed this in detail in its 30 September 2016 paper for the House of Lords Select Committee on the European Union for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union. Our work was informed by discussions with lawyers and officials at the North South Immigration Forum and by Professor Bernard Ryan's May 2016 paper in our EU referendum series.<sup>31</sup> We wrote

*ILPA members include lawyers practising in Irish as well as UK immigration law and members act for clients who are based both in Ireland and the UK. We are aware that, as always, questions of immigration law sit within a wider framework, including that of the relative prosperity of Northern Ireland and the Republic. Whether the UK remains with the customs union and whether the free movement of services is preserved have implications for this. The UK and Ireland are important markets for each other<sup>32</sup>. If the UK leaves the customs union, and if free movement of persons and*

<sup>30</sup> Immigration Act 2016, Schedule 12.

<sup>31</sup> Available at <http://www.ilpa.org.uk/resource/32154/eu-referendum-position-paper-8-the-implications-of-uk-withdrawal-for-immigration-policy-and-national>

<sup>32</sup> See the Department of Trade: *Doing Business in Ireland: Ireland Trade and Export Guide* updated 18 January 2016

services is not preserved, particularly if it takes many years to negotiate full independent UK membership of the World Trade Organization, we anticipate that a number of companies will relocate staff and operations out of the UK, reducing the numbers of their staff there. The Republic of Ireland is one place to which to relocate, in particular because of language but also because of culture<sup>33</sup>. Some moves, for example of financial services and tech, would have considerable implications for the prosperity of the Republic. This in its turn could have implications for where dual Irish/British nationals, and indeed third country nationals, chose to live and work and for the immigration law policies of both States. This could in turn affect decisions on the common travel area, whether at national or EU level.

In July 2015 the Northern Strategic Migration Partnership responded to the Migration Advisory Committee's call for evidence on the minimum salary thresholds for Tier 2 of the Points-based system. Its detailed consultation response provides valuable information about skills shortages in Northern Ireland.

At leader's questions on 27 September 2016, the Taoiseach said<sup>34</sup>

*...Our intention is to protect this country's vital national interest in these Brexit talks.*

*I have asked all Ministers to engage with their counterparts in Northern Ireland in respect of the forthcoming North-South Ministerial Council. This morning, for instance, the Cabinet noted the 2015 report of InterTradelreland, which deals with cross-Border activities for research and expansion of opportunity for exports and creation of jobs and so on. The reports for 2016, 2017 and 2018 may be very different.*

*...Ireland will argue vehemently for the continued recognition of the peace process and the support that has brought but also in respect of the critical juncture this country faces in terms of maintaining our links with the United Kingdom, but speaking as a country that will remain a central part of the European Union.*

Discussions with Irish business immigration lawyers and others subsequently suggest that Ireland has particular aspirations to attract insurance companies to Dublin.

The Northern Strategic Migration Partnership in its July 2015 response the Migration Advisory Committee's call for evidence on the minimum salary thresholds for Tier 2 of the Points-based system, mentioned above, said

*The proposal to increase the minimum salary thresholds for Tier 2 will, we believe, have a disproportionate impact on employers in Northern Ireland vis-à-vis employers in other parts of the UK, due to the lower salary levels offered here and the acute shortage of appropriately skilled labour in the region.*

For the reasons set out in our evidence to the Committee for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave

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<sup>33</sup> See *What will Brexit mean for the City of London*, 24 June 2016, <https://www.ft.com/content/23d576b0-386a-11e6-a780-b48ed7b6126f> ; *Irish Times Dublin's Financial Services expected to benefit from Brexit*, 18 August 2016 <http://www.irishtimes.com/business/financial-services/dublin-s-financial-services-expected-to-benefit-from-brexit-1.2760538>

<sup>34</sup> Dáil Éireann Debate 27 September 2016, Vol. 922 No. 1.

the European Union,<sup>35</sup> given that Ireland and the UK joined the EU on the same date<sup>36</sup> the question of the land border between the two States being an external border of the EU has never arisen and we consider that it would be sanguine, therefore, to assume that the Protocol on the Common Travel Area, Protocol 20 to the Treaty of Lisbon<sup>37</sup>, will not become the subject of Brexit negotiations.<sup>38</sup>

One individual can be both a customs official and an immigration officer and customs functions performed at the border by Her Majesty's Revenue and Customs may be performed currently by the Secretary of State and officials designated by him or her. The Borders, Citizenship and Immigration Act 2009 Act created a unified border force<sup>39</sup> and subsequent legislation has built on this. While it is not the case that customs checks at the border must imply immigration control, this sharing of functions would make it easier for such control to be exercised, whether in a systematic or selective manner.

Frontier workers may be Irish or UK or third country nationals and others in the border area may cross the border frequently for leisure or to see family and friends. Customs controls, as described above, could affect such journeys, whether or not immigration controls are imposed, and whether immigration controls are imposed systematically or selectively. If customs and/or immigration controls are re-introduced on the land border dividing the island of Ireland some frontier workers may wish to relocate to the side of the frontier on which they work to avoid having to negotiate controls, with any attendant risk of delays.

A sizeable number of persons living in Northern Ireland will have been born there, or have a parent born there, and will thus be able to acquire citizenship of the Republic of Ireland. It would be helpful to have figures on whether those who will not have dual nationality will be a minority in Northern Ireland. A settlement premised on the notion that most persons will have dual nationality could put them at a considerable disadvantage.

The report *Implications for Wales of Leaving the European Union*, report of the External Affairs and Additional Legislation Committee of the National Assembly for Wales, January 2017 canvases the implications of Brexit for Wales in considerable detail. The relative prominence of manufacturing and agricultural sectors in Wales means that being outside the single market and /or customs union poses particular threats for Wales while Wales has also benefited from considerable EU funding.<sup>40</sup> EU migration has fuelled a rise in the foreign born population of Wales. The External Affairs and Additional Legislation Committee of the Welsh Assembly said in its January 2017 report:

*47. We recognise that perceptions of EU migration were a factor in determining the outcome of the EU referendum. Restricting the ability of EU citizens to work in the UK after Brexit will have adverse consequences for many public services, some businesses and future infrastructure*

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<sup>35</sup> *Opacity*.

<sup>36</sup> 1 January 1973.

<sup>37</sup> Protocol (No 20) to the Treaty on the Functioning of the European Union on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

<sup>38</sup> See HM Government *Alternatives to membership: possible models for the UK outside the EU*, March 2016.

<sup>39</sup> On 21 July 2009, the day on which the Act was passed, see s 58(1) therein.

<sup>40</sup> *Implications for Wales of Leaving the European Union*, report of the External Affairs and Additional Legislation Committee of the National Assembly for Wales, January 2017.



*projects in Wales. Careful consideration must be given to mitigating these consequences as a future immigration policy for the UK is developed.*<sup>41</sup>

It also identified that Welsh universities would be likely to lose EU students.

See further ILPA's 20 February 2017 evidence to the House of Lords' Select Committee on Economic Affairs.<sup>42</sup>

## **ANNEX: ILPA MATERIALS AND MATERIALS COMMISSIONED BY ILPA ON THE SUBJECT OF BREXIT**

### **2017**

**European Union (Notification of Withdrawal) Bill 2017, House of Lords' Committee Stage, [ILPA Briefing on free movement and related matters, 25 February 2017](#)**

Evidence to the House of Lords Committee on the European Union for its enquiry into Brexit and devolution 3 March 2017

[ILPA submission to the House of Lords Select Committee on Economic Affairs enquiry into Brexit and the Labour market \(20 February 2017\)](#)

[ILPA submission to the Home Affairs Select Committee enquiry on immigration policy \(20 January 2017\)](#)

### **2016**

[ILPA Submission to the House of Commons Justice Committee Inquiry on Implications of Brexit for the Justice System, 16 November 2016](#)

[ILPA briefing prior to giving oral evidence on 16 November 2016 for Preparing legislation for introduction in Parliament. Part one of the House of Lords' Select Committee on the Constitution enquiry into the legislative process \(14 November 2016\)](#)

[ILPA submission to the Joint Committee on Human Rights on the human rights implications of Brexit, 17 October 2016](#)

[ILPA Evidence for the House of Lords' Select Committee on the European Union for its enquiry into the possible consequences of Brexit on EU rights, 1 October 2016](#)

[ILPA Evidence for the House of Lords' Select Committee on the European Union for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union, 30 September 2016](#)

[ILPA briefing for a 10 minute rule bill on persons exercising rights under EU law and their position in the event of the UK leaving the EU, 8 July 2016](#)

[ILPA evidence for British Future's inquiry into the status of EU nationals in the UK, 7 September 2016](#)

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<sup>41</sup> Op.cit.

<sup>42</sup> Available at <http://www.ilpa.org.uk/resource/33009/ilpa-submission-to-the-house-of-lords-select-committee-on-economic-affairs-enquiry-into-brexit-and-t>

Prior the referendum ILPA commissioned a series of papers from academics and experts working in the field examining different aspects of Brexit. These do not purport to represent the views of ILPA but to provide a platform for a range of voices discussing issues raised by Brexit. The documents can be found at <http://www.ilpa.org.uk/pages/brexit-briefings-may-2016.html> and we summarise them below.

**1. Sovereignty and legitimacy**, Adrian Berry, Garden Court Chambers and Rowena Moffatt, Doughty Street Chambers: issues raised by the relationship between the UK and the EU in terms of the UK as a sovereign power, and as to the legitimacy of the EU and its institutions.

**2. Free movement of persons and the single market**, Dr \*\*\*Catherine Barnard, University of Cambridge, considers the centrality of migration to the EU's single market. The relevant Treaty provisions and the rights they confer on individuals wishing to work in another Member State and companies wishing to establish themselves or provide services in another Member State.

**3. Rights of entry and residence**, Professor Steve Peers, University of Essex: what rights EU citizens have to enter and reside in other Member States, and how they can be limited. Addresses how EU citizenship ties in with the nationality laws of Member States.

**4. EU free movement/citizenship in practice: at home and abroad**, Matthew Evans, Director of the AIRE Centre: what it means to be an EU citizen, and what are the rights and wider benefits which derive from this status.

**5. EU Citizens' access to welfare benefits – past, present and future**, Desmond Rutledge, Garden Court Chambers: what welfare benefits EU citizens can claim in the UK and when they can claim them.

**6. The relationship between the European Court of Human Rights and the EU**, Nuala Mole, Senior Lawyer at the AIRE Centre: the relationship between the European Court of Human Rights and the EU, focusing on the protection gap that exists as regards acts and omissions of the EU which may breach human rights and the halted accession process. The impact of the relationship between the EU and the European Court of Human Rights on a post-Brexit UK.

**7. Free Movement and Criminal Law**, Professor Valsamis Mitsilegas, Queen Mary University of London: when Member States can exclude and expel nationals of other Member States on the grounds of criminal conduct, and how they share relevant information. The European Arrest Warrant system, which enables Member States to bring to justice individuals who have entered other Member States to evade prosecution or custody.

**8. The implications of UK withdrawal from the EU for immigration policy and nationality law: Irish aspects**, Professor Bernard Ryan, University of Leicester: how Brexit could affect the common travel area with the Republic of Ireland and the position of Irish nationals in the UK.

**9. The impact of Brexit**, Professor Steve Peers, University of Essex: the UK's options on Brexit as regards free movement of persons, and the withdrawal process under Article 50 TEU. Considers what would be the implications for EU citizens in the UK and UK citizens in the remaining EU (including a discussion on the issue of 'acquired rights' under international law and in particular under Article 70 of the Vienna Convention).

**10. The Common European Asylum System**, Elspeth Guild, Partner, Kingsley Napley, the Common European Asylum System and how it works for the UK. Sets out data on the arrival of asylum seekers in the EU in 2015, and discusses the possible implications of Brexit.

**11. The EU's Borders: Schengen, Frontex and the UK**, Bernard Ryan, University of Leicester: the legal framework behind the EU's internal and external borders. The position of the UK within the current regime, and the possible implications of Brexit.

**12. The implications for Scotland of a vote in the EU referendum for the UK to leave the EU**, Maria Fletcher, Nina Miller Westoby and Sarah Craig, University of Glasgow: the possible implications for Scotland of both a vote for Leave and for Remain, including a summary of the UK devolution settlement and how it has evolved in practice.

Since the referendum ILPA has commissioned papers from practitioners and academics giving their views of what a post-Brexit immigration system might look like. These are available at <http://www.ilpa.org.uk/pages/brexit-briefings-may-2016.html>. Again, these do not represent the views of ILPA and the recommendations are not endorsed by ILPA. Rather, they are designed to allow a plurality of voices to be heard in the debate.

**Securing EEA Nationals' Residence Rights**, Matthew Evans, Director of the AIRE Centre: aimed at policy-makers and EEA nationals living in the UK. Gives guidance to policy-makers on improvements to the residency application process and to EEA nationals on applying.

**Rights to Remain after Brexit**, Bernard Ryan, Professor of Migration Law at Leicester University: r discusses potential solutions for the three million EEA nationals living in the UK under EU Free Movement law.

**After a hard Brexit – British citizens and residence in the EU**, Professor Elspeth Guild, Kingsley Napley, Professor Steve Peers, University of Essex and Jonathan Kingham, LexisNexis: outlines what a so-called hard BREXIT will mean for British citizens seeking to visit, live and work in the EU, explaining the Common European Immigration System.