

Brexit And The Great British Immigration Debate

The last 18 months have been momentous for UK immigration practitioners and multi-national employers as we try to determine what the impact of the EU referendum will mean for future UK immigration policy.

For lawyers and advisers the Brexit vote has been both a gift and a curse. Endless hours have been spent discussing the Article 50 process, the content of the negotiations that will follow and the potential outcome for Britain's new place in the world. Will we opt for a Norway type solution – EU light with access to the single market and the retention of free movement? Or is a hard Brexit the only way of "bringing back control" and assuaging popular concerns around excessive immigration? There is no doubt that concerns around immigration and its impact on public services and the labour market was one of the main drivers of the vote to leave. It is impossible therefore to see how EU freedom of movement provisions can survive in the post-Brexit legal landscape.

Furthermore, the Prime Minister has made it clear, both in her Lancaster House Speech (January 2017) and subsequent Brexit White Paper (February 2017), that cake cannot be both had and eaten – immigration control in respect of EU migrants has been mandated by the people and we will not therefore seek to remain in the single market. In March, forty years of hard work by successive British Prime Ministers, both Labour and Conservative, was dismissed in a single letter to the President of the European Council when Theresa May served notice of the UK's intention to leave the EU under the provisions of Article 50 of the Treaty of Lisbon.

How can the UK relinquish EU laws and what do we put in their place?

On Thursday 13th July 2017, the Secretary of State for Exiting the European Union, David Davis, published before Parliament the European Union (Withdrawal) Bill. Previously referred to as the "Great Repeal Bill", this legislation aims to repeal the European Communities Act 1972 and make other provisions in connection with the withdrawal of the United Kingdom from the EU. It represents the most significant change to the British constitutional settlement in nearly

50 years and is a key component of the government's Brexit strategy.

The first line of the Bill says the European Communities Act 1972, which took Britain into the European Union will be "repealed on exit day". This will end the supremacy of EU law and stop the flow of new regulations from Brussels. It is part of the process of regaining control of laws from Brussels and reinstating Parliamentary Sovereignty.

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All existing laws derived from the EU will continue to be enforced – thus providing for continuity and avoiding a "cliff-edge" scenario on Brexit day - but they can be changed or scrapped by further domestic legislation. The Bill does not detail policies line by line but transfers all EU regulations into domestic law. It gives the UK two years

after Brexit to correct any "deficiencies" arising from the transfer.

Parliament will commence the arduous process of debating the Bill this autumn and it will have to have gained Royal Assent by the time the UK leaves the EU - which is due to happen in March 2019. Given the precarious parliamentary arithmetic, and the fact that the Prime Minister leads a minority government following her disastrous election result in June, this will be a highly charged and complex process. The Bill amounts to an enormous exercise in taking the laws made in Brussels that currently apply in the UK, and turning them into UK laws.

Over the next two years the government will have to pass laws in areas that it will suddenly have sole control over, such as immigration. If the UK leaves the EU in an immediate "hard-Brexit" scenario in March 2019, a new immigration framework will have to be in place to regulate the entry and stay of EU nationals. This means that the new domestic immigration framework must be developed and legislated upon during the two year negotiation period.

The government must find a way of balancing the twin needs to reduce overall immigration figures whilst safeguarding the ability of businesses to secure the workers that they need.

Net Migration Target – will it ever be reached?

In their election manifesto, published in May 2017, the Conservative Party reiterated its overarching immigration policy of achieving "sustainable levels" of net migration over the course of each twelve month period. The Prime Minister has made clear that this means net migration of tens of thousands annually. This policy was introduced into government in 2010, but has never been achieved.

There are signs that the result of the Brexit referendum has already had an effect on numbers. Figures published in August 2017 showed net migration to the UK has fallen to its lowest level in three years, as significantly more EU citizens left the country in the wake of the Brexit vote.

The headline net migration figure of 246,000, which is the difference between immigration and emigration, was 81,000 lower than the 327,000 recorded in the March 2016 according to the Office for National Statistics (ONS).

Migration Advisory Committee – Commission 2017

In July 2017, the Home Secretary, Amber Rudd, wrote to the Migration Advisory Committee (MAC) to establish a commission to advise her on the impact on the United Kingdom labour market of the UK's exit from the EU and also how the UK's immigration system should be aligned with a modern industrial strategy.

In her letter to the MAC, the Home Secretary acknowledges that migration benefits the UK, economically, culturally and socially. She emphasises that businesses, agriculture, public services and universities all rely on migration for labour, skills and ideas. She confirms that in a post Brexit environment, the UK must remain a "hub for international talent".

The MAC's role will be to provide government with the detailed facts and evidence to inform the creation of a new regulatory architecture that will serve to reduce net migration whilst providing the country with the skilled workers required for it to compete as an autonomous state outside the EU single market.

After Brexit, "freedom of movement" will no longer apply to EEA nationals. Consequently this commission will be central to informing the thinking behind the creation of new rules and regulations governing the entry of EEA nationals to the UK labour market. All businesses will be affected by the new policies.

Scope of the MAC Commission

The government has commissioned the MAC to provide evidence based advice on the economic and social impacts of the UK's exit from the European Union as well as how the UK's immigration system should be aligned with a modern industrial strategy. This is a huge project which represents the MAC's most complex and far-reaching mandate since its inception in 2007. Employers may find the questions daunting and challenging to respond to in detail (not least because of time commitments), however, it is possible to be selective in terms of the questions answered and to rely solely on the most pertinent evidence relevant to the specific needs and experiences of the business entity.

The Call For Evidence – what does it contain?

The MAC seeks views and evidence from anyone with relevant knowledge, expertise or experience to help inform their response to government. Given that most employers, sectors and regions fall under this description - with significant concerns about access to skills, talent and labour prevailing generally – the committee may receive an avalanche of responses.

The MAC has set out a broad range of questions across three specific areas:

- EEA Migration Trends
- Recruitment Practices, Training & Skills
- Economic, Social and Fiscal Impacts.

The full set of questions can be found at the end of this article on the next page.

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Timeline – when do we have to respond?

The MAC has asked to receive responses by 27 October 2017. However they may also take late submissions from participants who are unable to respond in the timeframe. In turn, they have been asked to report to the government by September 2018, although they are also encouraged to issue interim reports if possible. There is plenty of time therefore to engage with the MAC. With the two year notice period provided by Article 50 of the Lisbon Treaty due to expire in March 2019, and the possibility of a "cliff-edge" departure from the EU as a worst

case scenario at that time, the government is leaving very little space to develop, implement and legislate for a new legal architecture for immigration control. They are likely therefore to implement a two year transitional period consisting of temporary arrangements prior to the launch of new immigration policies and procedures in 2021.

Why should we participate?

Brexit will constitute the most significant challenge to the British economy and resident labour market in a generation. It will also result in a comprehensive restructuring of the UK's immigration laws, systems and policies. For those with an interest in the outcome it is imperative to be involved in the discussion and to feed relevant evidence to the MAC in response to their Call for Evidence. This is an opportunity for employer's voices to be heard before a whole new immigration regime is created.

The Transition to a Post-Brexit Immigration Policy

In June 2017, the Prime Minister set out a "fair and serious offer" to safeguard the position of EU citizens living in the UK and UK citizens who are living in the EU.

The transition to new immigration arrangements is likely to take place in three phases.

- **Phase One** - The offer - the 3 million EU nationals currently living in Britain and exercising "treaty rights" will be permitted to remain and apply for settled status once they have been here for 5 years. EU nationals arriving in Britain after March 2017 (the date that notice was served on the European Union under Article 50) and prior to a "cut-off date" to be agreed in negotiations, will also be permitted to remain and apply for settled status after 5 years.
- **Phase Two** - The government proposes a temporary implementation period to ensure there is no "cliff-edge" on the UK's departure for employers or individuals. This will include a grace period during which those EU citizens who arrived before a cut-off date (to be decided) will have time to obtain their documentation from the Home Office.

During this time there will be a straightforward system for the registration and documentation of new arrivals. These transitional arrangements may last to 2021.

Within the transitional period there may also be scope to apply for permission to remain under the UK's new domestic immigration arrangements for EU nationals.

- **Phase Three** - The government will implement the new long-term arrangements covering the migration of EU citizens, designed according to the economic and social needs of the UK and reflecting the "special partnership" with the EU.

What are the main areas of potential conflict in the Brexit negotiations in relation to immigration and free movement?

There are a number of unanswered questions that will be subject to extensive negotiation. These include:

- **The cut-off date** - The Prime Minister did not clarify from when EU citizens will cease to automatically qualify for settled status in the UK. She set a range: March 29th 2017 (Article 50 day) to March 29th 2019 (the likely "Brexit day"). The date will be agreed as part of the Brexit negotiation process. The EU will push for the latest possible date – probably settling on March 2019.
- **European Court of Justice** - The EU's position is that the European Court of Justice should retain "full jurisdiction" over EU national rights. This will be a contentious issue in the Brexit negotiations as "bringing back control" of laws was a key tenet of the campaign to leave the EU. The government's position paper on Enforcement and Dispute Resolution (August 2017) suggests that this remains the plan however there is the implication that jurisdiction of the ECJ may continue for a transitional period beyond Brexit day. A transitional period may encounter hostility from hard line "Brexiters".
- **Spouses and families** - At present EU nationals can bring non-EU spouses and family members to the UK more easily than

British nationals because of the tough criteria contained within domestic immigration rules, including minimum earnings thresholds. It is unclear whether such preferential arrangements for family members of EU nationals will continue to apply. The EU is unlikely to accept that the requirements of the UK's immigration rules offer sufficient protections to family members of EU citizens.

- **Benefits and Welfare** - The Prime Minister's offer is to treat EU citizens living in the UK

equally with UK citizens but it is unknown if EU citizens will continue to be able to send benefits back to children not living in the UK.

- **Reciprocity** - The offer is dependent upon a similar agreement being reached regarding the status of British nationals living across the European Union. Mrs May says reciprocity is "vital" and the British government will not make a unilateral offer to EU citizens. This leaves open the question of what will happen if the Brexit talks break down.



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Ben is immigration counsel to many household-name multinational companies and he has extensive experience in strategic planning of global mobility programmes for large organisations, assisting global mobility departments and HR professionals in developing compliance and legal right to work policies and procedures. His team also advises individuals of all nationalities seeking entry to the UK as workers, investors, entrepreneurs, artists, performers or for family reunion. Ben works with the International Bar Association (IBA), the Immigration Law Practitioner's Association (ILPA), the American Immigration Lawyers Association (AILA), British American Business (BAB), the Investment Migration Council (IMC) and many other groups in disseminating information in respect of global immigration policy and legal developments. He is a technical partner of Expat-Academy. Ben advises and speaks to many organisations in respect of the immigration law implications of the British decision to leave the European Union. He is recognised by Who's Who Legal as a thought leader on Brexit.
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Migration Advisory Committee - Call For Evidence

The Questions

EEA Migration Trends

- Please provide evidence on the characteristics (e.g. types of jobs migrants perform; skill levels, etc.) of EEA migrants in your particular sector/local area/ region. How do these differ from UK workers? And from non-EEA workers?
- To what extent are EEA migrants seasonal; part-time; agency-workers; temporary; short-term assignments; intra-company transfers; self-employed? What information do you have on their skill levels? To what extent do these differ from UK workers and non-EEA workers?
- Are there any relevant sources of evidence, beyond the usual range of official statistics that would allow the MAC to get a more detailed view of the current patterns of EEA migration, especially over the last year?
- Have the patterns of EEA migration changed over time? What evidence do you have showing your employment of EEA migrants since 2000? And after the Brexit referendum? Are these trends different for UK workers and non-EEA workers?
- Have you conducted any analysis on the future trends of EEA migration, in particular in the absence of immigration controls?
- Have you made any assessment of the impact of a possible reduction in the availability of EEA migrants (whether occurring naturally or through policy) as part of your workforce? What impact would a reduction in EEA migration have on your sector/local area/region? How will your business/sector/area/region cope? Would the impacts be different if reductions in migration took place amongst non-EEA migrants? Have you made any contingency plans?

Recruitment Practices, Training & Skills

- Please provide evidence on the methods of recruitment used to employ EEA migrants. Do these methods differ from those used to employ UK and

non-EEA workers? What impact does this have on UK workers? Have these methods changed following the Brexit referendum?

- Do recruitment practices differ by skill-type and occupation?
- What are the advantages and disadvantages of employing EEA workers? Have these changed following the Brexit referendum result?
- To what extent has EEA and non-EEA migration affected the skills and training of the UK workers?
- How involved are universities and training providers in ensuring that the UK workforce has the skills needed to fill key roles/roles in high demand in your sector? Do you have plans to increase this involvement in the future?
- How well aware are you of current UK migration policies for non-EEA migrants? If new immigration policies restrict the numbers of low-skilled migrants who can come to work in the UK, which forms of migration into low-skilled work should be prioritised? For example, the current shortage occupation list2 applies to high skilled occupations; do you think this should be expanded to cover lower skill levels?

Economic, Social And Fiscal Impacts

- What are the economic, social and fiscal costs and benefits of EEA migration to the UK economy? What are the impacts of EEA migrants on the labour market, prices, public services, net fiscal impacts (e.g. taxes paid by migrants; benefits they receive), productivity, investment, innovation and general competitiveness of UK industry?
- Do these differ from the impact of non-EEA migrants?
- Do these impacts differ at national, regional or local level?
- Do these impacts vary by sector and occupation?
- Do these impacts vary by skill level (high-skilled, medium-skilled, and low-skilled workers)?