

## STRANGER DANGER: THE POST-BREXIT SCENARIO FOR EU MIGRATION TO THE UK

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In 1973, just as the UK was entering the EEC, public service broadcasting produced a short film to warn children of the danger of going off with strangers. The theme was “Stranger Danger”. It is said that this film had a profound effect on how those children acted when they themselves became parents. The theme of migration was very salient in the 2016 Brexit referendum with a similar theme of “Stranger Danger” – of the need to control our migration. In October 2018, it was reported, “The PM insists her new post-Brexit immigration plan will be revolutionary because ‘it will be the UK Government that decides who comes here’” (The Sun 2 October 2018). The theme of this paper is that the new attitude represents a constitutional shift in the way EU nationals will be treated that will have important personal consequences.

Brexit constitutes a significant moment in the re-designation of those coming to reside in the UK. It is a moment of constitutional choice. Rather than treating EU citizens in future as privileged members of society, they are going to be lumped together with other foreigners into a category of “friendly aliens”. This is a choice that narrows the range of specially privileged residents in the UK. It also really returns the position to 1971 in significant ways. But it also reinforces a growing insistence on economic contribution as the test for permitting non-citizens into the country.

Nearly 40 years ago, Ann Dummett published a book on UK immigration law where she showed that the UK then divided people into Citizens, Aliens and Others.

Originally, the UK was medieval in its structure of citizenship – people either owed loyalty to the Queen and were her subjects or they were aliens. Aliens were divided into friendly aliens and enemy aliens.

In 1948, the UK created British citizenship in the wake of the loss of India and its place in the Commonwealth, but without the Emperor as the head of state. That Act defined the status, but not the rights of a British citizen. The assumed right to move within the Empire was curtailed in respect of Commonwealth citizens in 1962 and 1968. That right has gradually narrowed because the category of British citizen was redefined in the British Nationality Act 1981. That removed the *ius soli* and left citizenship dependent on the *ius sanguinis* combined with a *ius soli* element, thus limiting rights where citizens were born abroad. British citizens born outside the UK have typically become underprivileged citizens – British Overseas Territories Citizens or British Overseas Citizens. The loyalty to the Crown, with which we started 70 years ago, has become limited to attachment to the territory of the United Kingdom.

Rights of European Union citizens to reside in the UK do not depend on the Immigration Act 1971, but merely on European Union legislation made effective by the European Communities Act 1972, which will be repealed on Brexit day. That means that the rights of EU citizens will lapse on Brexit day, unless provision is made to continue them.

European citizenship is a status which has grown since the Birmingham Declaration of 1991<sup>1</sup> and the Treaty of Maastricht. It was intended as a complement to national citizenship. Whereas previous rights

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<sup>1</sup> Bull. EC 10-1992 I 8.9. The Amsterdam Treaty added the statement that ‘Union citizenship shall complement national citizenship’ to Article 8(1) EC

under the Rome Treaty gave citizens of other Member States a special status in receiving Member States based around free movement rights, the Maastricht Treaty added political rights – the right to vote and stand in local elections and European elections<sup>2</sup>. According to the ECJ:

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.<sup>3</sup>

Whereas the original treaties conferred a kind of *economic citizenship* on EU nationals, based around the rights of workers to work and reside freely in other member states, the Maastricht Treaty tried to create a kind of *affective citizenship*, a sense of belonging. The Directives of 1990 on pensioners, people of independent means, and students reinforced the idea that mobility rights were not to be conceived as linked simply to economic utility. But, as long as mobile citizens were not a demonstrable burden on their host state, they are entitled to move freely.

In terms of formalities, there is currently no prior scrutiny of EU migrants by way of visas. Member States can require registration within three months (Directive 2004/38, art. 8 (1) and must issue a residence card as proof of residence for non-EU national family members within 6 months of a request (art. 10) and the application must be made within 3 months (art. 9). Particularly after the introduction of Schengen, there is an expectation of being able to move freely around the EU, subject to some supplementary administrative procedures which are not seen as particularly burdensome.

In the advance of Brexit, the Government commissioned the Migration Advisory Committee (MAC) to investigate the rules which should apply to EEA nationals after Brexit. MAC report in September 2018.<sup>4</sup> It takes a very different starting point from the affective conception of European Union citizenship, a view which both the Government and the Labour Party have endorsed. It was instructed to examine migration from the economic and social perspective and to link it to the Government's industrial strategy.<sup>5</sup> It commissioned research on fiscal, recruitment, training and productivity effects of EEA migration and one study on the impacts on social cohesion. It concluded that there was no robust evidence on the impact of migration on social cohesion<sup>6</sup>: "There is no evidence that migration has reduced the average level of subjective well-being in the UK."<sup>7</sup> The report also notes that there is no adequate evidence on self-employment and its impacts, so it does not make any recommendation about the rules that should govern self-employment.<sup>8</sup> (This is significant because at least 14% of EU residents in employment are self-employed (25% for Romania and Bulgaria).) So the report is predominantly focused on those in permanent paid employment.

The MAC report on migration was thus firmly focused on the economic contribution of migration. There was a very clear attempt to produce a cost-benefit analysis. Two categories of worker provided that

<sup>2</sup> See J. Shaw in N. Walker, J. Shaw and S. Tierney, *Europe's Constitutional Mosaic* (Oxford 2011), pp. 142-9.

<sup>3</sup> Case C-85/96 *Martinez Sala v Freistadt Bayern* [1998] ECR I-2691.

<sup>4</sup> Migration Advisory Committee, *EEA Migration in the UK: Final Report*: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/741926/Final\\_EEA\\_report.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF)

<sup>5</sup> Report, para. 2.

<sup>6</sup> Reports, para. 6.3

<sup>7</sup> *Ibid*, para. 6.22.

<sup>8</sup> *Ibid*, para. 7.82 to 7.83.

benefit: workers who filled skill shortages in the UK, and high-skilled workers whose contribution to national productivity exceeds their overall cost. The result is that the affective aspects of citizenship are ignored in any analysis of the contribution of EU citizens in the future:

We do not see compelling reasons to offer a different set of rules to EEA and non-EEA citizens, unless the UK wishes to use migration in negotiations. As this report has explained, a migrant's economic impact depends on factors such as their skills, employment, age and use of public services, and not fundamentally on their nationality.<sup>9</sup>

Let me summarise the differences between UK rules that currently apply to EU migrants and those applying to non-EEA migrants, which demonstrates the impact of the changes which MAC recommends and which the UK Government has accepted to apply after the end of the Transition Period (if there is one).

Category	EEA	Non-EEA
Prior Scrutiny	<ul style="list-style-type: none"> <li>No visa</li> <li>No need for sponsor</li> <li>No charge levied on employers of EU migrants</li> </ul>	<ul style="list-style-type: none"> <li>Visa issued before arrival</li> <li>Employers charged for sponsoring individuals (including Tier 2 Immigration Skills Charge)</li> </ul>
Tier 1: self-employed (entrepreneur)	<ul style="list-style-type: none"> <li>Must be planning to have a business activity in the UK</li> <li>No minimum resources requirement</li> <li>No language requirement</li> <li>No health insurance requirement</li> </ul>	<ul style="list-style-type: none"> <li>Must be running a business in UK</li> <li>At least £200,000 of funds or £50,000 in UK Government grants</li> <li>Adequate maintenance funding so no recourse to public funds</li> <li>Minimum language requirement</li> <li>Health surcharge</li> </ul>
Tier 1: self-funding	<ul style="list-style-type: none"> <li>Sufficient funds not to be burden on public funds</li> <li>Comprehensive sickness insurance</li> </ul>	As above
Tier 1: exceptional talent	As self-employed	<ul style="list-style-type: none"> <li>Endorsed by specified bodies</li> <li>Adequate resources; no recourse to public funds</li> <li>Language requirement</li> <li>Health surcharge</li> </ul>

<sup>9</sup> Ibid, para, 7.14

Tier 2: long-term workers	<ul style="list-style-type: none"> <li>• Can come as work seekers for 3 months</li> <li>• No minimum salary</li> <li>• No language requirement</li> <li>• No health insurance requirement</li> </ul>	<ul style="list-style-type: none"> <li>• Must be sponsored by an employer</li> <li>• Employer must show could not recruit local workers to job</li> <li>• Must meet minimum salary (currently £30,000 increased for each dependent)</li> <li>• Minimum language requirement met by passing specified tests</li> <li>• Tuberculosis and Police checks</li> <li>• Must pay health service surcharge (currently £200 per person per year)</li> <li>• Renewable for a total period of 6 years</li> </ul>
Tier 3: non-skilled workers	Same as Tier 2	Does not exist
Tier 4: students	<ul style="list-style-type: none"> <li>• Need to be financially self-sufficient not to be a burden on public funds (free to work as much as like)</li> <li>• Have health insurance</li> </ul>	<ul style="list-style-type: none"> <li>• Need to be sponsored by university</li> <li>• Need to be financially self-sufficient (though can work up to 20 hours a week)</li> <li>• Must pay health service surcharge (currently £150 per person per year)</li> <li>• Must satisfy language test</li> <li>• No recourse to public funds</li> <li>• No more than 8 years in your lifetime</li> </ul>
Tier 5: temporary workers	Same as Tier 2	<ul style="list-style-type: none"> <li>• Up to 2 years on same conditions as Tier 2, except minimum wage level is lower</li> <li>• No language test</li> <li>• Non-renewable</li> </ul>
Tier 5: Youth workers (18-30)	Same as Tier 2	<ul style="list-style-type: none"> <li>• Up to 2 years, non-renewable</li> <li>• Are from Australia, Canada, Japan, Monaco, New</li> </ul>

		<p>Zealand, Hong Kong, South Korea, Taiwan or British Overseas Citizens</p> <ul style="list-style-type: none"> <li>• Can work in any job (except sportsman or doctor)</li> <li>• Must have £1890 savings</li> <li>• Must pay health service surcharge (currently £200 per person per year)</li> <li>• No recourse to public funds</li> <li>• No children</li> </ul>
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So, in brief, in most cases the Alien has (1) to have a pre-entry visa, (2) to be sponsored (except for youth workers), (3) to meet minimum income thresholds, (4) to have passed a recognized English language test, (5) to pay a health surcharge, and (6) not to have recourse to public funds to supplement maintenance. In addition, the permission to stay is time limited, unless the person acquired indefinite leave to remain. At most the EU citizen needs to have comprehensive health insurance and have sufficient to live on without recourse to public funds. So the move of the EU citizen from the category of "Other" with distinct privileged to the category of unprivileged friendly Alien is a significant change.

That is an analysis of a rather technical kind about the changes that are planned. I believe that constitutional principle is worked out not in grand declarations of principle or value, but in the detail through which values are implemented. The absence of formalities such as visas and sponsorship matters a lot. Not only do they create work and significant cost (at least £1200 to the Tier 2 employer and £1300 to the employee for a 3-year visa), they create an atmosphere in which the migrant perceives themselves not as "one of us", but "one of them", an outsider, albeit a useful outsider. The *affective* concept of citizenship has disappeared and the *acquis* of Union law also disappear. It may be that the current immigration rules (which occupy 1096 pages), with their privileged position for EU citizens, will continue for some time after Brexit, but they can be changed quite quickly (and are normally changed every six months).

#### MIGRATION, DEVOLUTION AND IRELAND

Citizenship and migration are not devolved matters. The MAC committee specifically investigated whether different minimum salary thresholds in different parts of the UK would be desirable or different quotas for different parts of the UK. But they rejected this as not economically significant. The MAC Committee is facing the devolved institutions with policies.

Much more significant in this context is the **Common Travel Area (CTA)** with the Republic of Ireland. This has particular importance for the Northern Ireland border, but it also affects movement to other parts of the UK. Irish citizens are governed by the Immigration Act 1971 and reciprocally, British citizens in the Irish Immigration Act 2004. The Common Travel Area allows free movement for British and Irish citizens (only) between the two states. The rights conferred are significant in that Irish citizens can assert a range of rights without prior permission and without the need to assert British citizenship. These rights include the right to work, to reside, to study, to access social welfare payments (much more than is possible under

EU law), to health care and the right to vote in both local and parliamentary elections and referendum. Reflecting the affective ties and common heritage of the two countries, “British and Irish citizens’ rights in the two countries are almost indistinguishable”.<sup>10</sup> These rights do not extend to other EU nationals or to nationals of third states. So they can be stopped (if there are enough alert border police to check their status).

The maintenance of the Common Travel Area is specifically identified in the Protocol on Ireland in the Annex to the Withdrawal Treaty (art. 2) and in relation to non-discrimination (art. 34 of the Withdrawal Treaty). This would allow Ireland to maintain the rights of British people beyond the usual three months in Ireland. It would also allow the British to offer favourable status. The picture is unclear, but it is estimated that 40% of Irish cross-border workers work in Derry, and cross-border employment is particularly important in health and education.<sup>11</sup> The suggestion is that crossing borders to work is patchy across the country and there are sectors of the economy where cross-border movement is very significant. Movement of British people to and from Ireland is not going to be the largest problem. According to Eurostat data, taken from January 1st, 2014, 11.8% of the Irish population are foreign born. Poles made up the largest grouping of non-nationals in Ireland at 22 per cent (or 118,042), followed by British 21 per cent (115,658); Lithuanians 7 per cent (35, 617) and Latvians (20, 086) and Nigerians (19, 727) 4 per cent each. So movement of non-Irish citizens is a significant issue within the CTA.

The British hope that the tight migration controls can be maintained despite no border police. If migration requirements are going to be so strict in the UK after Brexit, then the Poles, lawfully working in the Republic, who come over to Belfast to be employed (or worse to be self-employed) will find themselves subjected to substantial controls. It is unlikely that the British will be able to impose border visa checks, but migrants will be subject to a range of controls by private sector bodies. Employers, landlords, banks, the driving licence authority and the health service are all obliged to check the immigration status of those who come to work, to rent property, open a bank account, get a driving licence or receive health treatment (except in emergencies).<sup>12</sup> In other words, privatised and decentralised immigration enforcement will ensure that the immigration requirements are enforced. The effect of this policy is to r=create an atmosphere of suspicion of foreigners – the idea of Stranger Danger!

### Conclusion

By a number of proposed administrative reforms as well as possible legislative reforms, the status of EU citizens within the UK is about to change. Their move from privileged “Others” to “friendly aliens” treats them no longer as part of the affective community of the UK, but merely as instrumental means to improve the British economy, *Gastarbeiter* in the 1960s German term. This is not the position in Norway. This is a retreat to the 1950s in relation to workers from EU countries, when the expansion of the British economy was assisted by cheap labour, especially from Italy and Ireland. But the economy has changed and now the UK only wants high-skilled workers. That is a constitutional change about the status of people

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<sup>10</sup> Imelda Maher, *The Common Travel Area: More than Just Travel* (Royal Irish Academy – British Academy Brexit Briefing, 2018), p. 1

<sup>11</sup> Irish Times, 2 March 2013.

<sup>12</sup> See Immigration, Asylum and Nationality Act 2006, Immigration Act 2014.

in the UK, about a sense of belonging, which is not really being properly debated as a constitutional matter.

The days of French students coming to the UK, getting a job for a few weeks and then spending the earnings travelling round the UK may well be coming to an end, at least without satisfying significant formalities.