



**Brexit and human rights project briefing No. 5:
Alternatives to free movement
April 2018**

Introduction

With just under one year to go until the UK's scheduled withdrawal from the EU on 29 March 2019, the UK Government has a lot of work left to do. Despite a series of announcements and a draft agreement on the rights of EU nationals currently in the UK, we are still in the dark as to the immigration system that will be implemented for EU nationals arriving in the UK post-Brexit.

The most up-to-date indication of the Government's intentions can be found in a draft Home Office paper, leaked in September 2017.¹ This leaked paper commits to ending freedom of movement and explores alternative immigration systems for EU nationals.

LCHR has previously explored the pros and cons of freedom of movement. We noted that whilst it is desirable in terms of facilitating economic and cultural exchange between member states, it is not without its pitfalls. In particular, it discriminates based on nationality between EU nationals who benefit from freedom of movement and non-EU nationals who are subject to the stringent requirements of domestic UK immigration law and policy.²

The design and implementation of the new immigration system for EU nationals can be used as an opportunity to address some of the key failings with the existing immigration system for non-EU nationals. In light of this, LCHR argues that the new post-Brexit immigration system should be based on the following key principles:

- Enabling those with the opportunity to work in the UK to do so, continuing to attract global talent whilst also including a broader definition of "highly-skilled".
- Introducing a route for "low-skilled" jobs based on the economic needs of the country and in recognition of existing migration patterns from EU member states.
- Prioritising rights to family reunion. Ideally, this would be done by "levelling-up" family reunion rights for non-EU nationals and creating a unified system of family reunion for nationals of EU and non-EU countries.
- Recognising the value that immigrants bring to the UK not only in economic terms, but in terms of culture, language, skills, wider contribution to society and fostering good relations between countries.
- Taking account of the special relationship between the UK and the remaining EU member states, having been part of the EU for 45 years and operated immigration systems based on freedom of movement alongside each other since 1992.

In this briefing, we analyse the Government's plans for the new immigration system for EU nationals in light of the above overarching principles, focusing on work and family migration. In doing so, we make some general recommendations for what such a system should avoid. LCHR's preference is for a post-Brexit immigration system based on free movement or a variation of free movement. However, if this proves impossible to attain, it will be vital for Labour to ensure the most damaging aspects of the current non-EU system are not foisted on EU nationals.

The UK's parallel immigration systems

Freedom of movement allows EU nationals (and their family members) to live and work in the UK visa-free and for an indefinite period of time, provided they are "exercising Treaty rights" (by working, studying, or as self-sufficient) and meet other requirements set out in the Free Movement Directive.

¹ Please see the following link for the full text of the leaked document: 'The draft Home Office post-Brexit immigration policy document in full' (The Guardian, 5 September 2017) (<https://www.theguardian.com/uk-news/2017/sep/05/the-draft-home-office-post-brexit-immigration-policy-document-in-full>).

² For LCHR's briefing analysing free movement, see 'Free Movement and Human Rights' (LCHR, December 2017) (<https://lchrblog.files.wordpress.com/2017/12/free-movement-briefing.pdf>).

The UK's domestic immigration system for non-EU nationals runs in parallel to this and can mostly be found in the Immigration Rules. The so-called "points-based system" is structured around "Tiers" for those coming to the UK to work or study. Other parts of the rules deal with visitors, family members and other types of migration.

The Government will no doubt be considering which elements of the current system for non-EU nationals can be applied to EU nationals, or at the very least influence the new system. With time running out to put plans in place, it seems more likely than ever that the Government will seek to apply key elements of the current Immigration Rules to EU nationals. This presents significant challenges, not least because the Exiting the EU Committee has found that three quarters of EU nationals currently in the UK would be ineligible to stay in the UK under the current rules for non-EU nationals.³

The end of freedom of movement

If the proposals in the leaked Home Office paper are implemented, EU nationals will no longer have the automatic right to move and reside in the UK freely. Like non-EU nationals, they will also be required to gain permission from the Home Office, which will assess applications on a case-by-case basis. The new system will be part of the Immigration Rules, but with separate provisions made for EU nationals. The new system will "not necessarily" be the same as the existing system for non-EU nationals.⁴

The paper states that the Government wants to strike the "right balance" – *making sure we attract the people we need to fill key labour market requirements, and ensuring that we continue to support UK businesses to prosper, while addressing concerns about the impact of uncontrolled migration on public services and community cohesion.*

The new system will be based on the following key considerations:⁵

1. Provision will be made at all skill levels to recognise that it will not always be possible to fill vacancies using UK resident labour, especially in shortage areas.
2. It will be desirable to bring in highly skilled EU citizens to enable the UK to remain a magnet for international talent and allow companies to continue to attract global talent.
3. The Youth Mobility Scheme could be broadened to include EU nationals so that young people can continue to gain work and cultural experience.
4. Intra-company transferees will be able to come to the UK (and vice versa) in a flexible manner.
5. EU students will be able to come and study in the UK.

A proposal by think-tank British Future suggests a three tiered immigration system based on preferential access to the UK labour market for EU nationals. This would involve a top tier attracting the brightest and best from any country around the world, a second tier based on freedom of movement for EU nationals meeting an income or skills threshold, and a third sector-based tier with quotas to fill low or semi-skilled jobs. There would be preferential access to this third tier for EU nationals.⁶

We consider below some of the key pros and cons of these proposals.

Work visas

The most commonly used immigration category for non-EU nationals applying for visas to work in the UK is Tier 2 (General). To be granted a visa in this category, migrants must have a job offer from an employer licenced by the Home Office to sponsor migrant workers. The job role must be "highly-skilled"

³ Joe Owen, 'Implementing Brexit: Immigration' (Institute for Government, May 2017) (https://www.instituteforgovernment.org.uk/sites/default/files/publications/Brexit_immigration_WEB.pdf), p15.

⁴ n3, p43.

⁵ n3, p42.

⁶ Sunder Katwala, Jill Rutter and Steve Ballinger, 'Britain's immigration offer to Europe: How could a new preferential system work?' (British Future, October 2016) (<http://www.britishfuture.org/wp-content/uploads/2016/10/Britains-immigration-offer-to-Europe.pdf>), p9.

and the salary must be at least £30,000 for “experienced workers” (or more depending on the job role). The employer must have carried out the Resident Labour Market Test (“RLMT”) to confirm that no suitable settled workers (British citizens, EU nationals or those with the permanent right to reside in the UK) could be recruited for the role.

The Government is considering how this same system could be extended to EU nationals in the future.⁷ There are a number of issues which make direct application of this system to EU nationals undesirable (and indeed LCHR would recommend these issues are also addressed in the system for non-EU nationals).

The hostile environment

The Home Office suggests implementing a work sponsorship system designed to tackle illegal working and labour market abuse by denying access to services needed by migrants to live in the UK. This refers to the UK’s “hostile environment” for immigration. LCHR has previously expressed concerns about EU nationals becoming subject to the hostile environment regime once the UK leaves the EU.⁸

The hostile environment includes measures to restrict migrants’ access to bank accounts, rented accommodation, healthcare and work. Not only is there little evidence that these measures assist the Home Office in combatting illegal immigration, but they cause discrimination, an environment of fear and place the burden of regulating immigration on landlords, employers and banks.⁹

- **LCHR recommends that Labour campaign for a reversal of the hostile environment and use the introduction of the new system for EU nationals as an opportunity to do so.**

Skill levels and salaries

The Government’s proposal suggests limiting the number of EU nationals who can come to the UK to work based on a salary threshold, an assessment of their skill level, and/or a direct numerical cap on numbers.¹⁰

The current points-based system (which includes Tier 2 (General)) has been criticised for failing to meet the needs of some employment sectors by over-emphasising “hard” education rather than “soft” skills and work experience.¹¹ The emphasis on high salaries also means that the ability to immigrate depends largely upon wealth and income rather than the migrant’s overall contribution to society. It also does not account for regional variations in salaries across the UK. A focus on salary levels may favour male applicants over female applicants, in light of gender pay differences and the focus on “hard” qualifications.¹²

Furthermore, one of the biggest challenges with basing the new system on skill level and/or salary level is how to decide (and who decides) how to categorise job roles. As Jonathan Portes highlights in his criticism of proposed restrictions to visas for “low-skilled” jobs, if the term low-skilled is used to refer to those who do not qualify for Tier 2 visas, this risks excluding physiotherapists, nurses, teachers, technicians, chemists, social workers and electricians, many of whom earn less than the current Tier 2 salary threshold.¹³

- **Any work visa system introduced for EU nationals should be based upon economic need and the wider value of the job in the UK, and it should not involve fixed salary levels. Account should be taken of a wider set of skills including the individual’s experience**

⁷ n3, p48.

⁸ For more on the hostile environment, see ‘Brexit and human rights project briefing No.4: Variations on free movement’ (LCHR, January 2018) (<https://lchrblog.files.wordpress.com/2018/01/variations-on-free-movement-briefing.pdf>).

⁹ See Conor James McKinney, ‘Immigration inspector: Right to Rent scheme not being properly evaluated or monitored’ (Free Movement Blog, 28 March 2018) (<https://www.freemovement.org.uk/inspector-right-to-right-scheme/>).

¹⁰ n3, p46.

¹¹ Melanie Gower, ‘The UK’s points-based system for immigration’ (House of Commons Library Briefing Paper Number 7662, 18 July 2016) (<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7662#fullreport>), p18.

¹² *ibid*, p19.

¹³ Professor Jonathan Portes, ‘Who are you calling low skilled?’ (The UK in a Changing Europe, 12 April 2017) (<http://ukandeu.ac.uk/who-are-you-calling-low-skilled/>).

and chances of career progression if granted permission to take up the job role in the UK.

One of the biggest concerns for the UK economy post-Brexit is that businesses will struggle to meet employment needs for so-called “low-skilled” jobs from the resident labour market.

In general, the term “highly-skilled” is used to refer to those with jobs requiring higher education (often at bachelor’s degree level or above). Conversely, the term “low-skilled” is generally used to refer to jobs in industries such as agriculture, hospitality and transport.

One of the solutions proposed to this problem is to extend the existing Youth Mobility Scheme to EU nationals. This scheme currently allows those aged between 18 and 30 years old from a list of eight countries (including Australia, New Zealand, Canada and Japan) to come to live and work in the UK for a maximum of two years. If a migrant on this scheme wants to continue to work for his or her employer in the UK at the expiry of the two-year visa, the employer must agree to sponsor them (under Tier 2) and the migrant must leave the UK and re-apply to return as a Tier 2 migrant.

Popularly known as the “barista visa”, the Home Office is considering extending this scheme to EU nationals. However, the current Youth Mobility Scheme receives a limited number of applicants, perhaps due to the lack of long-term opportunities it affords.¹⁴ It is not a particularly appealing offer to young people to allow them to move to another country, work there, contribute to the economy and build up a network of social and cultural capital only to be required to leave at the expiry of two years.

- **Any extension of the Youth Mobility Scheme should involve reform to make the scheme more permissive, allowing migrants to switch visa categories from within the UK to extend their stay.**

Quotas

There are currently quota systems in place for non-EU migrants in the Tier 1 (Exceptional Talent), Tier 1 (Graduate Entrepreneur) and Tier 2 (General) categories.¹⁵ These quota systems are subject to their own rules and restrictions. For example, there are 20,700 Certificates of Sponsorship (“CoS”) available per year in the Tier 2 (General) category (a CoS is required for a migrant to obtain a visa under Tier 2 (General)). These are split into unequal monthly allocations.

The cap on the number of CoS available was introduced in 2011 and until late 2017 had only been reached once (in 2015). However, the cap has now been reached every month since December 2017.¹⁶ As a result of this inflexible cap, UK businesses have been through the burdensome process of obtaining a sponsor licence and carrying out the RLMT only to be unable to recruit the highly-skilled migrants they have decided to offer job roles to.

British Future’s proposal involves sector-based quotas to fill low and semi-skilled jobs that cannot be filled by recruiting from the resident labour market.¹⁷ If the quotas could not be filled by EU nationals, they could be offered to nationals of other (non-EU) countries. The proposal suggests that industries such as agriculture, hospitality and food processing may be covered by this regime. This would allow the UK to continue filling “low-skilled” job roles whilst also meeting political aims by having fixed quotas under national control.

Right-wing think-tank Migration Watch UK proposes an “EU Skills Shortage Visa”.¹⁸ This would be sector-based and for a period of one year, extendable up to three years. There would be no opportunity to switch visa categories from within the UK or to settle in the UK. Such a system places no value on migrants’ wider contribution to society and is an unattractive offer to EU nationals who until January 2021 will have been subject to very few conditions on their activity and length of stay in the UK.

¹⁴ ‘Lack of labour’ (The Times, 18 April 2017) (<https://www.thetimes.co.uk/edition/comment/lack-of-labour-lmrg2jv32>).

¹⁵ n12, pp14-15.

¹⁶ Nichola Carter, ‘Unprecedented Tier 2 skilled worker visa drought continues’; (Free Movement Blog, 20 March 2018) (<https://www.freemovement.org.uk/unprecedented-tier-2-skilled-worker-visa-drought-continues/>).

¹⁷ n7, p10.

¹⁸ ‘EU Immigration, Post-Brexit – A Comprehensive Policy’ (Migration Watch UK, 11 May 2017) (<https://www.migrationwatchuk.org/briefing-paper/408>).

Such temporary schemes have been criticised for including a lack of integration measures and exposing migrant workers to the risks of exploitation in terms of working and living conditions. Temporary worker schemes have also been criticised for hindering integration due to their short-term nature which provides little incentive or opportunity for the local community or the temporary migrant workers to integrate with each other and build relationships conducive to community cohesion.

- **Immigration of “low-skilled” workers should be based on value and not numbers. If a quota system is implemented, this should be sector-based and flexible so that it can be adjusted in line with economic need and demand.**
- **Regimes should be introduced to assist with integration for both the migrant workers and the local community. Labour should continue to push for the reintroduction of the Migration Impact Fund to help to alleviate the economic concerns of those living in areas with high levels of temporary migration.**

Family reunion

The Government accepts in its White Paper that EU migration has had a positive economic impact on the UK.¹⁹ However, a progressive and principled approach to immigration must recognise that migration is not just about economics. Rights to family reunion should be prioritised in the new immigration system, without the existing burdens of income thresholds and extortionate application fees currently placed on non-EU migrant family members.²⁰

The proposals in the leaked paper suggest applying the current system of family migration for non-EU nationals to EU nationals. This means placing stringent requirements on those wishing to join family members here including the controversial income requirement for partners and the need to provide evidence of English language ability. The definition of “family member” will also change, and will very likely be brought into line with the definition currently applied by the Immigration Rules. The definition of family member under EU law is much more permissive and allows “extended” family members to join their relatives in the UK if they provide proof of their relationship. The Government intends to define family members as partners, dependent children, parents and durable (unmarried) partners only.

The Government’s proposals also suggest that the opportunity for workers to settle long-term in the UK and to bring their dependants here may be reduced, particularly at lower skill levels.²¹ This unfairly conflates family reunion rights with the “skill level” of the migrant and places undue importance on educational and financial background.

- **The new immigration system should prioritise rights to family reunion, avoiding the restrictive system currently in place for non-EU nationals by refusing to place emphasis on wealth and income.**
- **Brexit should be used as an opportunity to “level up” family rights for non-EU migrants.**
- **Migrants coming to work in the UK under any new route for “low-skilled” workers must enjoy the same rights to bring their dependants here as those in “highly-skilled” categories.**

Conclusion

As aforementioned, LCHR’s preference is for a post-Brexit immigration system based on free movement or a variation of free movement. However, if this proves impossible to attain, it will be vital for Labour to ensure the most damaging aspects of the current non-EU system are not foisted on EU nationals.

We would therefore suggest that the system implemented for EU nationals arriving in the UK from January 2021 does not mirror the existing system for non-EU nationals under the Immigration Rules, taking into consideration the criticisms and recommendations discussed above.

¹⁹ n3, p38.

²⁰ For further detail and criticism of the current family migration system for non-EU nationals, see LCHR’s briefing ‘Brexit and human rights project briefing No.4: Variations on free movement’ (LCHR, January 2018) (<https://lchrblog.files.wordpress.com/2018/01/variations-on-free-movement-briefing.pdf>), p6.

²¹ n3, p46.

Specifically, we recommend that Labour:

- Campaign for a reversal of the hostile environment and use the introduction of the new system for EU nationals as an opportunity to do so.
- Ensure any work visa system introduced for EU nationals is based upon economic need and the wider value of the job in the UK and is not based on fixed salary levels. Account should be taken of a wider set of skills including the individual's experience and chances of career progression if granted permission to take up the job role in the UK.
- Ensure any extension of the Youth Mobility Scheme involves reform to make the scheme more permissive, allowing migrants to switch visa categories from within the UK to extend their stay.
- Argue that the immigration of "low-skilled" workers should be based on value and not numbers. If a quota system is implemented, this should be sector-based and flexible so that it can be adjusted in line with economic need and demand.
- Push for regimes to be introduced to assist with integration for both the migrant workers and the local community. Labour should continue to push for the reintroduction of the Migration Impact Fund to help to alleviate the economic concerns of those living in areas with high levels of temporary migration.
- Prioritise rights to family reunion, avoiding the restrictive system currently in place for non-EU nationals by refusing to place emphasis on wealth and income.
- Use Brexit as an opportunity to "level up" family rights for non-EU migrants.
- Ensure migrants coming to work in the UK under any new route for "low-skilled" workers enjoy the same rights to bring their dependants here as those in "highly-skilled" categories.