

COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

5: Immigration and Brexit



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Synopsis

- *Argues that it cannot be known what the immigration position would be post-Brexit. It all depends on what is in the withdrawal agreement.*
- *Looks at the relative strength of the negotiating positions following a victory for “Leave” in the 23 June Referendum, and the impact of this from an immigration perspective.*
- *Suggests that it is most likely that in the immediate aftermath of a Brexit vote, the UK would face a stark choice: the same free movement arrangements as now (probably politically unacceptable following a public vote for Brexit), versus all EU migrants in Britain suddenly becoming subject to UK immigration law, which would produce very significant administrative upheaval.*

1. This article is designed to examine what a Brexit might look like from an immigration perspective. This is of course arguably the biggest issue in the EU Referendum debate: is it likely to make any difference to migrant numbers? Unfortunately, however, this is also the issue where the answer is least clear. My own view, and the view of many, is that Brexit would make almost no difference to overall immigration to the UK, save that the UK would no longer have any influence on EU immigration policy. Fundamentally, though, anything could happen.

The immediate aftermath of Brexit

2. The first thing to happen following a “Leave” vote would of course be nothing. Paul Jenkins QC has addressed this in greater detail in his article, [*The post-23 June process*](#), but in summary, following such a vote, the UK would have to give notice of withdrawal. It would then have two years to negotiate a withdrawal agreement. It is the content of that agreement that matters.
3. A number of points may immediately be made. First, it seems inevitable that the EU would have the strongest hand in the withdrawal negotiation. That is in part because in principle, the EU could simply sit out the two years. That would leave the UK with nothing at all – no trade agreement; nothing – which would obviously not be in the UK’s interests. The UK therefore risks being left having to reach a deal, any deal, simply to have anything at all. That provides negotiators with a rather weak opening position.
4. Secondly, there is the economic position. Yes of course the UK is an important country, with a bigger economy than, say, Norway or Switzerland. Equally, however, UK exports represent only 8% of the total EU exports. By contrast, 44% of the UK’s exports are to the EU. The relationship is therefore worth more to us than it is to them.
5. Lastly, the only alternative to a withdrawal agreement would be the UK attempting to enter into bilateral agreements with all 27 remaining Member States. That would almost certainly be prohibitively complex. Each negotiation – each set of terms – would have to be assessed by reference to the impact on all the other negotiations being undertaken. It might also be that individual states would see this as a divisive tactic, and so be unwilling to engage.
6. It therefore seems a safe assumption that the UK would be negotiating with the EU as a whole, and that the EU would have the upper hand. That in turn has important consequences, certainly in immigration terms:
 - a. The UK would not be able to adjust its immigration arrangements by state. It would not, for example, be able to be kinder to the French than it is to the Lithuanians. That alone would represent a very significant constraint on the ability to reduce migrant numbers.

- b. It is difficult to see what incentive the EU would have to permit any variation from the existing level of migration. Why would the EU wish to give a new outsider a better deal than it gives to its current insiders? This must be particularly true where the UK has just been responsible for a significant level of disruption. The obvious incentive would seem to be for the EU to take a strong line and use its negotiating strength to avoid any future disruption.

So, what would happen?

7. Nevertheless, following an “Leave” vote, the clear domestic political pressure would be for a significant cut in EU migration. If the EU would not provide that, what then would be the alternative?
8. The short answer is that UK negotiators would be left with simply withdrawing from the EU altogether, and having all EU migrants now subject, directly, to UK domestic immigration law. The UK would of course try for more than that – for some middle ground – but fundamentally, that would have to be its bottom line. Consider, however, what having no special arrangement for EU migrants would look like:
 - a. There are currently around 3 million EU migrants in the UK. The vast majority of them, including those with permanent resident rights, would now have to regularise their position. Many of them will not currently have papers, because they do not need them. They would now. No doubt there would be transitional arrangements, but on any view, that is an enormous number of immigration applications to process (even 10% of that would represent an enormous number). It is easy to be sceptical about the ability of the Home Office to cope.
 - b. That would in turn lead to mistakes, challenges, and onwards appeals. There would be many consequences: individuals being stopped and detained at port on return from holiday; employers and landlords facing illegal working and illegal renting proceedings; immigration sponsor licences (for businesses; and also for universities and colleges) being wrongly suspended; and time and money being spent to resolve the mistakes.
 - c. Most importantly of all, if the UK were to hope to achieve any change to its overall migration numbers, then a number of people currently in or wishing to come to the UK would not now be able to do so. The cut would have to come somewhere. It could not be around asylum. It would have to be around those who are currently, for the most part, EU workers and their families. That would have a massive impact on a number of

levels. EU migrants are found in large numbers in accommodation and food services; in manufacturing; in administrative and support services, and in construction¹. Those industries would be hit very hard.

- d. Finally, if the UK were no longer a member of the EU, and was no longer part of a free movement arrangement, then its citizens abroad also now have to regularise their position. The British bankers in Paris and Brussels, the retired on the Costa Del Sol, those with property in Tuscany, would all now need transitional arrangements and/or local immigration applications. It cannot be known how receptive the host states would be. These are of course the UK citizens with the most at stake on 23 June. However a large number of them will not now have a vote: see *Shindler v Chancellor of the Duchy of Lancaster & the Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 469 (where a challenge to EU Referendum Act 2015, s 2, which excludes from the franchise UK citizens who have been resident outside the UK for more than 15 years, failed.).

Conclusion

9. Subjecting all EU migrants to the full force of UK immigration law would therefore represent an enormous amount of uncertainty and upheaval. This would also, of course, be happening alongside the UK having to negotiate other international agreements (because it would no longer be a party to EU agreements); having to resolve the rest of its legislative agenda; and dealing with whatever were happening in Scotland. On any view we would be looking at years of very little else happening in Parliament.
10. Faced with this, it seems likely that the most likely *immigration* outcome of a Brexit would be: no substantive change. It is difficult to see why even after a “Leave” vote, the UK Government would choose the level of upheaval outlined above. But we shall see...

Nick Armstrong

June 2016

Further information

Find out more about our EU law team at Matrix at matrixlaw.co.uk/practice-areas/eu-law/.

¹ See The Migration Observatory at the University of Oxford, [Commentary: Project Unclear: Uncertainty, Brexit and Migration](#) (10 March 2016).