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Migration Related Issues Regarding Brexit: From Free Movement to Asylum and Illegal Migration

The campaign preceding the referendum on the withdrawal of the United Kingdom from the European Union focused, among other issues, on the UK taking back control over immigration. Nevertheless, the incorrect use of terminology regarding immigration, instead of free movement of persons, could result in confusion as regards the extent to which the UK is bound by EU migration *acquis*. This article therefore intends to clearly distinguish the debate, on the one hand, on the retention of rights related to free movement and, on the other hand, the issues related to migration and asylum.

A unique aspect of this article is that it not only discusses the legal implications, but also focuses on the practical implementations and the related concerns, as the complications of the Brexit negotiations could even be exceeded by the challenges of the practical implementation of the required actions, both by the UK and the 27 EU Member States. The article therefore also draws attention to the risks posed by inadequate actions. Nevertheless, the future relationship between the EU and the UK is also discussed, both as regards the future legal migration of the citizens of the two parties, as well as possible close cooperation regarding asylum and illegal migration.

I Introduction

Taking back control, including on migration, was one of the driving mantras leading to the majority voting for Brexit in the referendum in 2016. Nevertheless, academics state that 'the perception that the UK has little control over immigration because of its EU membership is erroneous.'[1] This study intends to examine different areas of asylum and migration, partly

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1 Natascha Zaun, 'Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers' <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/> accessed 6 June 2019.

in order to see which perception is closer to reality; furthermore it also wishes to identify questions that could be negotiated and settled as part of the future relationship in the discussed policy areas.

The starting point should definitely be Protocol No. 21 of TFEU that clearly states that 'the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union'. Only three Member States, i.e. the UK, Ireland and Denmark, enjoy such an opt-out situation as regards harmonisation in the Area of Freedom, Security and Justice, yet the UK and Ireland have the right to opt in, either at the early phase of negotiations, resulting in the fact that their vote counts at the time of adoption and can therefore influence the outcome of a vote. Even if they do not opt in pre-adoption, the UK and Ireland still can decide to opt in any time after the adoption of a specific legal act in the Area of Freedom, Security and Justice.

The Area of Freedom, Security and Justice covers a number of policy areas in justice and home affairs. Even the list of migration-related issues could extend from border management, visa policy, legal migration and illegal migration to asylum issues. Although such policy areas were not among those most debated during the Brexit negotiations, it is worth examining the relevant EU *acquis* from a Brexit perspective, as a semantic shift from EU citizens to immigrants could be observed in the UK, resulting in the terminology of free movement of persons and that of immigration of third-country nationals being muddled. This article intends to focus on the issues of asylum and illegal migration as those policy areas have recently been the main focus of the EU.[2]

However, it would be a mistake not to deal with citizens' rights, as the Brexit negotiations have definitely put this policy area in the centre of tensions, as the protection of the acquired rights of both EU citizens in the UK and UK citizens in the EU27 turned out to be a key concern for both parties.[3] It actually also touches upon the policy area of legal migration, as British citizens become third-country nationals as a result of withdrawal and therefore their long-term stay will fall under the regulatory area of legal migration.

All in all, the article ends up pointing out, through the examination of migration related issues, why the following statement of MEP Ellie Chowns is a very vivid description of Brexit: 'It's a complex dish that's never been cooked before, has no recipe, two chefs in different kitchens, it'll cost us a fortune and it risks giving us all indigestion for many years to come.'[4]

[2] See especially European Council Conclusions in June 2018 and December 2018, as well as the Statement on the situation at the EU's external borders adopted by the EU Ministers of Home Affairs on 4 March 2020.

[3] See for in-depth background Éva Gellér-Lukács, 'Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons' (2016) (1) ELTE Law Journal 141–162; <http://eltelawjournal.hu/brexit-point-departure-future-field-free-movement-persons/> accessed 6 June 2019.

[4] European Parliament, plenary debate on Implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement, 14 January 2020 <https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003_EN.html> accessed 19 January 2020.

II Residence Rights: Immigration-Related Questions of Free Movement Issues

1 Retention of Residence Rights according to the Withdrawal Agreement

The UK's decision to withdraw from the European Union has generated many questions on the legal status of UK nationals living in an EU27 Member State and EU citizens living in the UK. Brexit has raised a number of concerns and resulted in diverging suggestions by politicians and NGOs as well as academics for ensuring that all EU citizens who have exercised their free movement rights will be able to retain their residence and equal treatment rights.[5]

On 8 December 2017 a joint report stated that an agreement has been reached in principle across, among others, the area of protecting the rights of Union citizens in the UK and UK citizens in the Union and declared the following: 'The overall objective of the Withdrawal Agreement with respect to citizens' rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date.'[6] In November 2018, the European Union and the United Kingdom endorsed, at leaders' level, the Withdrawal Agreement that would ensure an orderly UK withdrawal from the EU on 30 March 2019, as well as a political declaration[7] setting out the main parameters of the future EU–UK relationship.[8]

Once the discussions aimed at bridging the gap between the UK and the EU positions had been stepped up, a revised Withdrawal Agreement was reached and immediately endorsed by the European Council on 17 October 2019, and in the meanwhile the Political Declaration on the framework for the future relationship was also revised. Nevertheless, the new agreement did not affect the provisions regarding citizens' rights and the revised political declaration did not modify Section IX on Mobility. On 13 December 2019, the European Council in its Conclusions reiterated its commitment to an orderly withdrawal on the basis of the Withdrawal Agreement, which was then signed by the two parties on 24 January and entered into force upon the UK's exit from the EU, on 31 January 2020 at midnight (CET).

The WA is an extensive legal document aiming, among other things, to preserve the rights of UK nationals living in the EU27 and EU citizens living in the UK. Importantly, the

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[5] See Anne van der Mei, 'Brexit and citizenship I: retention of EU citizenship' <https://www.maastrichtuniversity.nl/blog/2018/10/brexit-and-citizenship-i-retention-eu-citizenship> accessed 6 June 2019.

[6] Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, Para 6, <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> accessed 6 June 2019.

[7] See<https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf> accessed 9 January 2020.

[8] Whereas the withdrawal agreement, if ratified, would be a legally binding treaty, the political declaration is a legally non-binding document; however, despite their different legal nature, they are considered as a package for the purpose of the approval process in both the EU and the UK.

agreement establishes a transition period until the end of 2020, extendable once with a maximum of two years, to help businesses and citizens to adapt to the new circumstances, and the EU and UK to negotiate their future partnership agreements. During this time, the UK applies the acquis and is treated as a Member State, but is not be able to participate in EU decision-making or be represented in EU institutions. It also means that the Free Movement Directive (2004/38/EC)[9] continues to apply in this extended period.

Part Two of the agreement sets out in legal terms provisions safeguarding most of the essential guarantees of EU free movement law for those who made use of it, both UK citizens in the EU27 and EU27 citizens in the UK. A stated priority for the EU and the UK, this part was completely agreed by negotiators in March 2018. In particular, the WA defines the categories of persons within its scope and contains provisions on residence and related rights, coordination of social security, equal treatment and non-discrimination. Undoubtedly, the most important result of the provisions is that the persons covered enjoy the rights set out in Part Two for their lifetime, unless they cease to meet the conditions therein.

Article 13(1) of the WA expressly states that 'Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.' It therefore provides the enforcement of the principle of acquired rights in this policy area, yet it does not deny that conditions and limitations can also be applied; nevertheless, the agreement also gives a closed list of them in order to avoid arbitrary application in this regard.

The personal scope of the agreement set out in Article 10 enumerates the categories of persons who are covered by the WA and enjoy this continued preferential residence right. Such categories are: (a)–(b) Union citizens or UK citizens who exercised their right to reside in the territory of the other party in accordance with Union law before the end of the transition period and continue to reside there thereafter; and (c)–(d) Union citizens or UK citizens who exercised their right as frontier workers in the territory of the other party in accordance with Union law before the end of the transition period and continue to do so thereafter.

Apart from the citizens of the EU and the UK covered by points (a)–(d), points (e) and (f) also recognise the acquired rights of certain family members, regardless of their citizenship. Family members, nevertheless, have to fulfil one of many conditions, yet the lengthy legal list of conditions leads to the conclusion that family members also have residence rights if they were already granted rights under EU law before the transition period (e.g. spouses, parents, children, grandchildren and grandparents) or who will be able to join the EU/UK national in the host state if they are living in a different country, but are already considered a family member by the end of the transition period.

[9] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

The WA also covers future children, wherever they are born or legally adopted. The right to join the EU or UK citizen after the transition period for already existing family members and future children is a declaration of the principle consistently confirmed by the CJEU that the residence right of family members is derived from, and is dependent upon, but also implied in the residence right, of the EU national practicing their free movement right. However, citizens' groups and the European Parliament[10] have underlined the WA failed to protect certain family reunification rights, especially those recognised by EU case law.

Based on the *Surinder Singh* case[11] a non-EU family member of an EU citizen moving to another Member State then returning to that citizen's home Member State must enjoy at least the same rights as would be granted to him or her under EU law if his or her spouse entered and resided in the territory of another Member State. The CJEU clarified that

> when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.[12]

Although such cases of returning mobile EU citizens are not regulated by the Free Movement Directive, the family reunification rights ensured in the Directive should still be applied to the returners according to the present EU acquis; this principle has been stipulated by the CJEU in the *O and B* case,[13] as well.[14]

Similarly, the agreement seems to fail to recognise the outcome of the *Zambrano* judgement[15] declaring the residence right of non-EU carers for minors who have not left their Member State of birth.[16] In this case it was not Directive 2004/38/EC, but Article 20 of TFEU that was interpreted by the CJEU as meaning that it precludes a Member State from refusing a third country national, upon whom his minor children who are European Union citizens are dependent, a right of residence in the Member State of residence and nationality of those

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[10] European Parliamentary Research Service, 'Brexit: Understanding the withdrawal agreement and political declaration' European Parliament Brief, March 2019. <http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635595/EPRS_BRI(2019)635595_EN.pdf> accessed 6 June 2019, 3.

[11] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-04265. See for more, Gellérné Lukács Éva, *Munkavállalás az Európai Unióban, (Employment in the EU)* (KJK Kerszöv 2004, Budapest).

[12] *Surinder Singh case,* Judgment of the Court, para 23.

[13] Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v B.,* [2014], ECLI:EU:C:2014:135.

[14] See Laura Gyeney, 'Same sex couples' right to free movement in light of Member States' national identities, The legal analysis of the Coman case' Iustum Aequum Salutare XIV. 2018. 2. <http://ias.jak.ppke.hu/hir/ias/20182sz/11_GyeneyL_IAS_2018_2.pdf> accessed 6 June 2019.

[15] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177.

[16] See Ágnes Töttős, 'Az Európai Bíróság legújabb ítélkezési gyakorlatának hatása az idegenrendészeti jogalkalmazásra (The impact of recent case law of the European Court of Justice on the application of alien law)' in Pécsi Határőr Tudományos Közlemények XII. (2011, Pécs) 307–321.

children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of a European Union citizen.

As for family members who are not yet in the life of mobile EU nationals or UK citizens, but will be, only children born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period are covered by the agreement. It therefore does not extend the preferential rules to future spouses and their relatives. It is however not surprising, given the fact that, on the one hand, the letter David Cameron wrote to the President of the European Council on 10 November 2015,[17] describing the UK's concerns regarding EU membership, specifically contained reference to marriages of convenience,[18] and on the other hand, the British legal provisions on family reunification with a third-country national follows a restrictive approach.[19]

As regards administrative measures, the UK and the EU Member States can choose between two systems, either requiring that Union citizens or UK nationals, their respective family members and other persons who reside in their territory to apply for a new residence status which confers the rights [Article 18(1)], or allowing that those eligible for residence rights receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document that includes a statement that it has been issued in accordance with this Agreement [Article 18(4)]. According to the European Parliamentary Research Service it means that

> the UK and the EU Member States can choose between a constitutive system (persons will be required to apply for a new residence status to attest to their rights under the withdrawal agreement) and declaratory system (those complying with the conditions automatically become beneficiaries of the withdrawal agreement).[20]

Nevertheless, since creating a new residence status in line with Article 18(1) does not necessarily constitute residence and treatment rights equal to those that have already been granted by the free movement *acquis*, it could be closer to the spirit of the agreement to distinguish the two solutions based on whether they provide direct effect to the WA or not.

In any case, persons entitled to the rights under the citizens' chapter have the right to request from the host state a document, which may be digital, attesting that the person is

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[17] Letter by David Cameron on a new settlement for the United Kingdom in a reformed European Union, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf> accessed 6 June 2019.

[18] See Éva Gellér-Lukács, Ágnes Töttös, and Sándor Illés, 'Free movement of people and the Brexit' in Hungarian Geographical Bulletin (2017) <https://doi.org/10.15201/hungeobull.65.4.9> accessed 6 June 2019. Gellérné Lukács Éva, 'Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons' (2016) (1) ELTE Law Journal 141–162.

[19] See report of the UK National Contact Point of the European Migration Network on 'Family reunification of Third Country Nationals in the European Union National' Contribution from the United Kingdom, Home Office Science, March 2017 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/28a_uk_family_reunification_final_en.pdf> accessed 6 June 2019.

[20] European Parliamentary Research Service Brief, 3–4.

covered by the WA. EU law safeguards apply to any host state decision against the restriction of the residence rights of the persons covered. The host State may therefore not impose any limitations and conditions other than set out in the WA; furthermore, there shall be no discretion in applying the limitations and conditions, other than in favour of the person concerned.

According to Article 18(1) Member States may require to apply for a new residence status to attest to their rights under the withdrawal agreement. The WA also sets out the legal conditions of such national regimes in order to avoid them becoming restrictive. The Agreement specifically states that the sole purpose of such a procedure should be that of verification. The administrative procedures should be smooth, transparent and simple.

2 Retention of Residence Rights in the UK

The Home Office published the details of the EU Settlement Scheme (EUSS) in a Statement of Intent on 21 June 2018,[21] and has opened the scheme on a live trial basis, with the following guiding principle: 'A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens.'[22] The public beta test phase of the EUSS was launched on 21 January 2019 and the scheme was fully launched on 30 March 2019. As of 29 February 2020, overall, the total number of applications received up to 29 February 2020 was more than 3.3 million (3,343,700), while the total number of applications was almost 3 million (2,998,300). Of these, 58% were granted settled status and 41% were granted pre-settled status. Of the remaining applications, 19,100 received a withdrawn or void outcome, 6,800 were invalid and 300 were refused.[23]

As a result of a successful application[24] in the EUSS,[25] one is given either settled status or pre-settled status. Applicants are not asked to choose which they are applying for; the granted status depends on how long the applicant has been living in the UK when they apply. Settled status is granted if the applicant who started living in the UK by 31 December 2020 has lived in the UK for a continuous 5-year period.[26] If the applicant does not have 5 years' continuous residence when applying, they will usually get pre-settled status. Even though the WA would allow the extension of the transition period for a maximum of two years, the European Union

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[21] UK Home Office, 'EU Settlement Scheme: Statement of Intent' 21 June 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 6 June 2019.

[22] Statement of Intent on the EU Settlement Scheme, para 1.15.

[23] EU Settlement Scheme Statistics February 2020 Experimental Statistics, 19 March 2020. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873588/eu-settlement-scheme-statistics-february-2020.pdf> accessed 26 March 2020.

[24] Exceptions include those who have indefinite leave to remain, which is usually verified by a stamp in the passport or a letter from the Home Office stating this, as well as frontier workers.

[25] See <https://www.gov.uk/settled-status-eu-citizens-families> accessed 26 March 2020.

[26] Five years' continuous residence means that for 5 years in a row the applicant has been in the UK for at least 6 months in any 12-month period. The rules also include a number of justified exceptions.

(Withdrawal Agreement) Act 2020[27] [Section 33] rules out extending the transition period, even if a free trade deal with the EU has not been agreed.

Both pre-settled and settled status provide the right to work in the UK, use the National Health Service (NHS), enrol in education or continue studying, access public funds such as benefits and pensions if they are eligible for them, and travel in and out of the UK. However, pre-settled status only provides a right to stay in the UK for a further 5 years from the date it is granted, but they can apply to change this to settled status once they have 5 years' continuous residence. Once the applicant received settled status, they can stay in the UK for an indefinite period and will also be able to apply for British citizenship.

Apart from concerns regarding the proper technical function of the newly created EUSS or the possible bureaucratic burden it may mean for applicants to prove the length of their stay in the territory of the UK, one of the major concerns is related to the solely digital nature of certifying the new status as the UK does not issue a physical document under the system, and so the status is only registered and certified digitally. Some of the citizens concerned are afraid that, in the case of a solely digital registration, they will be at a disadvantage compared to third-country nationals with documentary status (e.g. when it comes to renting a flat, opening a bank account or getting access to health care);[28] furthermore, online systems can be temporarily offline or can be hacked.[29] Nevertheless, requesting the UK to issue a residence document would have required reopening this part of the Withdrawal Agreement, the scenario of which was continuously rejected by the Commission as it may have generated further requests for modification from the British side.

The second major concern of EU citizens living in the UK is whether they will be given the right status, so whether the British authorities will properly assess the duration of their stay in the UK. The media reported stories of people who were given pre-settled status when they had been living in the UK for far longer than 5 years as well as of a sharp rise in the proportion of EU citizens not considered eligible for settled status, which has caused alarm among campaign groups.[30] The organisation 'the3million' also expressed its concerns about EU citizens possibly being granted the wrong status, that is pre-settled instead of a settled status, as all holders of pre-settled status face an individual hard deadline when their status expires: if they do not apply for settled status before that expiry date, they lose all their rights in the UK.[31]

[27] See <http://www.legislation.gov.uk/ukpga/2020/1/contents/enacted> accessed 26 March 2020.

[28] Access of third-country nationals to health care is a core issue not only in the UK. See for more Éva Gellér-Lukács, Laura Gyeney, Gábor Kovács, and Sándor Illés, 'Third-country nationals in the Hungarian public health care sector' (2015) (1) New Medicine 29–36.

[29] See <http://static.wixstatic.com/ugd/0d3854_c5075db192444f74a6543588134a2731.pdf> accessed 8 January 2020.

[30] Rise in EU citizens not getting UK settled status causes alarm, The Guardian, 30 August 2019. <https://www.theguardian.com/politics/2019/aug/30/eu-citizens-uk-settled-status-alarm> accessed 8 January 2020.

[31] The3million: European Union (Withdrawal Agreement) Bill, A briefing on Pre-Settled Status under the EU Settlement Scheme, January 2020 <http://0d385427-9722-4ee6-86fe-3905bdbf5e6e.usrfiles.com/ugd/0d3854_be6c47d83faa483a841dae953e2bede6.pdf> accessed 8 January 2020.

A third concern is whether the news on the required procedure of application will reach all the EU citizens and their family members in time so that they will not miss the application deadline of 30 June 2021. Some assume that hundreds of thousands of EU citizens who are currently living lawfully in the UK – many of them vulnerable and long-term residents – will not be able to apply on time, with serious consequences.[32] A study[33] has also examined which EU citizens are at risk of failing to secure their rights after Brexit, which also pointed out that one challenge facing any large-scale government programme is coverage. The study identifies four groups of characteristics that may decrease the chance of people applying in due time: people who may not be aware that they can and need to apply; people who are already vulnerable or have reduced autonomy for some reason; people with difficulties accessing or using the application; and people who could have difficulty demonstrating that they have been living in the UK.

> If a significant number of eligible people do not apply, enforcing a strict deadline would increase the illegally resident EU-national population in the UK. As a result, perhaps one of the most important unresolved policy questions affecting the completeness of the settled status process is what contingency plans will be in place for people who do not apply by the deadline.[34]

Even though the proposed amendments to the European Union (Withdrawal Agreement) Bill 2020 for an automatic guarantee, a registration scheme and the provision of a physical documented proof of that status were unsuccessful,[35] the Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) was established [Section 15] as required by the WA and a schedule to the act contains provisions relating to its constitution and functions. Complaints can be submitted to this body by EU27 citizens about their treatment, and it can launch inquiries or court proceedings as a follow-up. Nevertheless, according to Steve Peers it might be questioned whether the body is really independent, given the influence which the act gives the Home Secretary over appointments to it.[36]

On 15 January 2020, the European Parliament also adopted a resolution on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement[37] noting all the concerns that have so far been identified and reiterating its commitment to monitoring closely how the EU27 and the UK implement Part Two of the Withdrawal Agreement. When

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32 See <https://us13.campaign-archive.com/?u=9c20dec826b5110f3a7f5e9bc&id=f4c85ae13e> accessed 8 January 2020.

33 'Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?' The Migration Observatory, 12 April 2018, <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/> accessed 8 January 2020.

34 Ibid.

35 Amendments 5, 6 and NC5 to the European Union (Withdrawal Agreement) Bill.

36 Steve Peers, 'The Withdrawal Agreement Implementation Bill' EU Law Analysis blog post, 22 October 2019. <http://eulawanalysis.blogspot.com/2019/10/the-withdrawal-agreement-implementation.html> accessed 9 January 2020.

37 See <https://www.europarl.europa.eu/doceo/document/B-9-2020-0031_EN.html> accessed 19 January 2020.

debating this subject, certain members of the EP practically blackmailed the UK that unless the citizens' rights will be properly ensured in line with the WA, they would not agree to the trade deal that is to be negotiated by the end of the transition period.[38]

3 Retention of Residence Rights in the EU27

The Brexit preparedness website of the European Commission contains specific information on measures by the 27 EU Member States ensuring the residence rights of UK nationals who are legally residing in a Member State.[39] Strangely, as of late March 2020 it still does not contain information on the Member States' choice on whether they apply Article 18(1) or Article 18(4) of the WA, but only on what happens in the event of a no deal scenario. Nevertheless, the website also contains an overview table[40] regarding the residence rights of UK nationals in EU27 Member States in a no deal scenario that – contrary to its introductory notes – also states plans and provisions applicable in case of Brexit with an agreement, and the website also lists all the links to the national websites that also contain information as regards the implementation of the WA. Planned preparatory measures in the Member States, especially as regards the national approach chosen for offering a continued right to stay, the administrative measures foreseen and the planned communication methods, as well as the timing of actions, can therefore be found from these sources, yet the pieces of information are scattered and can be misleading as they do not properly distinguish between a no deal scenario and Brexit based on the WA.

It can be nevertheless be concluded that many of the Member States plan to exchange the existing free movement documents to residence permits in line with Article 18(1) of the WA, yet even Article 18(4) provides that those eligible for residence rights have the right to receive a residence document that includes a statement that it has been issued in accordance with the Agreement. Furthermore, Article 26 of the WA provides that the state of work may require UK national frontier workers to apply for a document certifying their rights. In order to follow a common approach, a Commission implementing decision[41] set out provisions on documents to be issued by Member States pursuant to the WA. Council Regulation (EC) No 1030/2002[42] lays down a uniform format for residence permits for third-country nationals containing all

[38] See <https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-14-ITM-003_EN.html> accessed 19 January 2020.

[39] See <https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en> accessed 26 March 2020.

[40] See <https://ec.europa.eu/info/files/overview-table-residence-rights-uk-nationals-eu27-member-states_en> accessed 26 March 2020.

[41] Commission Implementing Decision of 21.2.2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, C(2020) 1114 final.

[42] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157/1.

the necessary information and meeting very high technical standards, therefore, that format should also be used for residence documents to be issued in line with the WA.

This implies that a certain transitory or grace period is foreseen by Member States to carry out the required administrative procedures. While certain Member States (Luxembourg, Croatia, France, Slovenia, Sweden and the Netherlands) aim at a relatively shorter transition period depending on the final date of withdrawal, Hungary, on the other hand, decided to set the end three years after the withdrawal date. The main justification behind the Hungarian decision is not necessarily the increased workflow, but instead a substantive one, as Hungary aims to directly exchange the free movement documents to national long-term residence permits once the length of stay of a UK citizen or family member in Hungary reaches a continuous three years.

This Hungarian approach also leads us to another major question, as Regulation 1030/2002 only sets out provisions regarding the format of the document, but Member States simply stating that they aim to issue this type of document does not give a hint of what conditions will be required or what rights will be provided for those exchanging their status for the specific national one. Based on the WA, Member States shall ensure that UK citizens and their family members will continue to enjoy, among others, residence and employment rights.

One condition that Member States are expected to check with regard to all applications is whether the applicant is a threat to public policy, public security or national security.[43] Second, there is usually a requirement of a certain length of continuous residence set out not only by the EU Long-Term Residence Directive,[44] but also by national schemes that could be applied parallel to the EU long-term regime. Member States may lift the national requirement (this is not an option in the case of the EU Long-Term Residence Directive) as UK citizens and their family members already enjoy the rights that such permanent residence permits usually grant for third-country nationals. On the other hand, when exchanging the previous document to a permit issued in the common format of Regulation 1030/2002, Member States might still insist on verifying the required length of residence in order to avoid temporarily staying UK citizens, such as students, acquiring a life-long residence right without the actual intention to stay in the particular Member State permanently. This would be a similar option to the one chosen by the UK by distinguishing between pre-settled and settled status.

As for administrative issues, with respect to lengthy transition periods, it needs to be ensured that, apart from the issuing Member State, all other Member States recognise those documents that serve as temporary residence documents during the transition period also as residence permits verifying residence rights in the Schengen area when crossing external borders. These documents could be those issued previously in line with Directive 2004/38/EC but still declared valid during the transition, or new documents, even if they do not hold many

[43] See Töttős Ágnes, 'A közrendre, közbiztonságra veszélyesség uniós szabályozása a legális migráció területén (EU law on threats to public order and public security in the area of legal migration)' in Pécsi Határőr Tudományos Közlemények XIII. (2012, Pécs) 285–297.

[44] The EU Long-Term Residence Directive requires five years of continuous residence.

security elements. Regardless of the wide ranging variations Member States may choose, such documents need to be notified in line with Article 39(1)(a) of the Schengen Borders Code.[45]

4 Future Relationship

Free movement ends at the end of the transition period; therefore, unless the transition period is extended or the UK and EU decide to sign a separate treaty as part of the future relationship extending free movement in the future, much stricter immigration rules will apply to those intending to gain new residence rights in the territory of the other party. Therefore, national and EU rules need to be examined in order to see what happens when a national from the other party intends to gain a new entry and residence right after the withdrawal.

Based on primary law [Article 79 (1)–(2) of TFEU] several sectoral Directives have been adopted so far to harmonise the rules of entry and stay of third-country nationals aiming to reside for purposes such as family reunification,[46] long-term residence,[47] studies, research,[48] traineeship,[49] seasonal work,[50] highly-skilled work[51] or being intra-corporate transferees.[52] Nevertheless, on the one hand, Member States are provided with a degree of flexibility as a result of the several optional clauses in the Directive, and on the other hand, Member States' national competence is preserved where the purposes of stay are not harmonised at EU level. Furthermore, a major national competence is guaranteed by primary law, as TFEU 79(5) sets out the following: 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory

[45] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016.

[46] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[47] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44, amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

[48] Researchers' status has been dealt with under EU legislation since 2005. Illés, Sándor, Gellérné, Lukács Éva, 'Towards researcher mobility' (2007) (Special issue) Európai Tükör 139–155.

[49] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132/21.

[50] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/37. See Ágnes Töttős, 'The Past, the Present and the Future of the Seasonal Workers Directive' (2014) (1) Pécs Journal of International and European Law 45–60.

[51] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

[52] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1. See Ágnes Töttős, 'Negotiations in the Council' in Paul E. Minderhoud, Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive. Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers 2018, Oisterwijk) 5–17.

in order to seek work, whether employed or self-employed.' Consequently, the actual management, especially that of labour migration, is primarily in the hands of individual Member States, and therefore UK citizens will have to face 27 diverging systems when trying to figure out the future rules should no preferential immigration system be set up between the UK and the EU for newly arriving citizens of the other party.[53]

As regards the British plans, the UK already made it clear in July 2018 that it would design a system that works for all parts of the UK and that UK would welcome workers because 'This will be crucial to supporting its public services, as well as enhancing the UK's attractiveness for research, development and innovation.'[54] In its paper in December 2018[55] the UK confirmed its intention to base its future immigration system on skills. In December 2019, Prime Minister Boris Johnson told Sky[56] that the UK intends to use an Australian style points based system in which there would be three categories of visas in the future – one for highly skilled that is 'exceptional talents'; one for skilled workers with job offers in sectors including the NHS; and a time-limited visa for lower-skilled migrants who will 'come to do particular jobs and stay for a while.'

Presently non-EEA citizens wanting to move to the UK to work or study need to apply for one of a number of visas that range from Tier 1, preserved for investors and 'exceptional talent', to Tier 5 visas for short-term voluntary and educational programmes. The two most common are the Tier 2 skilled worker visas and Tier 4 student visas. Some of these visas allow people to apply to bring dependants, such as children and partners. Visas work on a points-based system, in which people get more points for higher salaries or if their job is on the list of shortage occupations, and most visas come with other conditions, including knowledge of English, the need for a sponsor and agreeing not to claim benefits for a period of time. The criteria have become tougher in recent years: for example, for a Tier 2 'experienced skilled worker' visa, people now need to be paid at least £30,000 to apply, up almost £10,000 from 2011.[57]

The Migration Advisory Committee (MAC) published its report on salary thresholds and points-based systems on 28 January 2020,[58] then a policy paper on the UK's points-based

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[53] On 29 March 2019 the outcome of the Fitness Check on the EU Legislation on Legal Migration was adopted, the relevant documents are available here: <https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/fitness-check_en> accessed 9 January 2020.

[54] UK Government, 'Political declaration on the future relationship between the United Kingdom and the European Union' July 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf> accessed 6 June 2019, para 74–75.

[55] UK Government, 'The UK's future skills-based immigration system' December 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf> accessed 6 June 2019.

[56] Sophy Ridge on Sunday, interview with Boris Johnson, 8 December 2019, <https://www.skygroup.sky/corporate/media-centre/articles/en-gb/Sophy-Ridge-on-Sunday-Boris-Johnson> accessed 8 January 2020.

[57] 'UK immigration: No preference for EU workers after Brexit, cabinet agrees' 25 September 2018, <https://www.bbc.com/news/uk-politics-45634901> accessed 6 June 2019.

[58] See <https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-points-based-system-and-salary-thresholds> accessed 26 March 2020.

immigration system[59] was presented on 19 February 2020. A number of MAC's recommendations were accepted, including to lower the general salary threshold to £25,600, while under the points-based system for skilled workers, applicants will be able to 'trade' characteristics such as their specific job offer and qualifications against a lower salary. There will continue to be different arrangements for a small number of occupations where the salary threshold will be based on published pay scales, and the UK intends to set the requirements for new entrants 30% lower than the rate for experienced workers in any occupation. On 5 March 2020 the UK Government presented the Immigration and Social Security Co-ordination (EU Withdrawal) Bill[60] paving the way for ending free movement system with the EU, strengthening border security, and laying the foundation for a new UK points-based immigration system.

In an Annex to Council decision authorising the opening of negotiations with the UK for a new partnership agreement the EU dedicates a complete chapter to mobility (Chapter 9), although the aim of setting out a close relationship as regards legal migration between the departed parties cannot be found in the document. Instead, the EU's negotiation mandate only talks about envisaged partnership that should aim at setting out conditions for entry and stay for purposes such as research, study, training and youth exchanges.[61] Nevertheless, the UK's approach to negotiations contains no foreseen partnership regarding legal migration.[62]

III Issues of Illegal Migration and Asylum

1 The Return of Illegally Staying Migrants

At the end of 2010, the common rules on return were set out by the so-called Return Directive (Directive 2009/52/EC),[63] which provides for clear, transparent and fair common rules for the return and removal of irregularly staying migrants, the use of coercive measures, detention and re-entry, while fully respecting the human rights and fundamental freedoms of the persons concerned. On 12 September 2018 the Commission proposed the recast[64] of this Directive as a part of a package of measures following up the European Council of 28 June 2018 that underlined the need to step up the effective return of irregular migrants significantly,

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[59] See <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement> accessed 26 March 2020.

[60] See <https://www.gov.uk/government/publications/immigration-bill-2020-overarching-documents> accessed 26 March 2020.

[61] Ibid, para 57.

[62] See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf> accessed 26 March 2020.

[63] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24.

[64] Commission, 'Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018' COM (2018) 634 final.

and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

Nevertheless, the UK is not bound by the present Return Directive either, as a result of its opt-out. The United Kingdom did not opt into the previous version of the Directive, adopted in 2008, on the basis that it did not deliver the strong returns regime required by the UK and made the process overly bureaucratic according to its official position.[65] The UK believes this continues to be the case though it recognises that the recast seeks to establish clearer returns procedures and includes a number of additional provisions to those set out in the previous version of the Directive. Nevertheless, in its justification not to opt in, it is stated that UK return procedures have continued to be a success in comparison to those of other EU Member States, with strong relationships with third countries and new initiatives such as biometric returns.

One of the reasons for the low rate of effective return among migrants who have been ordered to leave the EU is the lack of cooperation from some third countries in identifying and readmitting their nationals. This is why the EU cooperates very actively with the home countries of irregular migrants, in particular through so-called readmission agreements. The 4 December 2018 Communication of the Commission on the 'Progress under the European Agenda on Migration'[66] acknowledged that the EU's return policy would not be effective without operational cooperation with third countries and 'although readmission is a sensitive political topic in many countries of origin, a cooperative approach has helped operationalise third countries' obligations on readmission.'[67] In line with this cooperative approach, the EU has been negotiating formal readmission agreements as well as less formal operational arrangements with the more reluctant third countries. As a result of these efforts, the EU presently has 17 readmission agreements[68] and 6 operational arrangements.[69]

The LIBE Committee of the European Parliament had a brief study prepared on 'The implications of the UK's withdrawal from the EU on readmission cooperation'[70] that examines the consequences of the UK's decision to withdraw from the European Union (EU) on the EU's readmission policy, as well as the framework for relevant future cooperation between the UK and the EU in this area. The study concludes that while the UK's withdrawal will have a limited effect on the EU as regards readmission, the implications for the UK of its withdrawal from

[65] Caroline Nokes (UK Minister of State for Immigration), 'Written statement on the European Union JHA Opt-In Decision: Proposal to Recast the Returns Directive' HCWS1290, 31 January 2019, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-31/HCWS1290> accessed 6 June 2019.

[66] Commission, 'Communication to the European Parliament, the European Council and the Council, Managing migration in all aspect: Progress under the European Agenda on Migration' COM(2018) 798 final.

[67] Ibid, 9.

[68] Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde.

[69] Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, Côte d'Ivoire.

[70] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 'Briefing on the implications of the UK's withdrawal from the EU on readmission cooperation' <http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI(2018)596843_EN.pdf> accessed 6 June 2019.

the EU are far greater, as EU readmission agreements and mixed agreements containing readmission clauses will cease to apply to the UK following its withdrawal.

This implies that the UK not only needs to negotiate its own readmission agreements with the relevant third countries, but the geographical proximity and migration patterns will necessitate continuing cooperation between the EU and UK on readmission. It also suggests that a readmission clause pertaining to the readmission of their own nationals should be included in the future EU–UK relationship agreement alongside an EU–UK readmission agreement covering third country nationals and stateless persons.

2 Asylum Policy

UK is signatory to the 1951 Geneva Convention on the Status of Refugees[71] and the 1967 Protocol,[72] and has ratified both. The Maastricht Treaty had made asylum an EU matter, albeit within the framework of intergovernmental cooperation, yet under the Treaty of Amsterdam, asylum became an area of supranational EU competence, thereby establishing the foundations for a Common European Asylum System (hereinafter also referred to as CEAS).

> The CEAS is a legislative framework established by the EU. Based on "accordance" with the Convention relating to the Status of Refugees (Refugee Convention) as amended by its 1967 Protocol, the CEAS regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States.[73]

The first phase of the CEAS included secondary legislation enacted between 2000 and 2005 based on defining common minimum standards to which Member States were to adhere in connection with the reception of asylum-seekers (Reception Conditions Directive);[74] qualification for international protection and the content of the protection granted (Qualifications Directive);[75] and procedures for granting and withdrawing refugee status (Asylum Procedures Directive).[76]

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[71] Convention relating to the Status of Refugees, opened for signature on 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

[72] Protocol relating to the Status of Refugees, opened for signature on 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[73] European Asylum Support Office, 'An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis' August 2016, <https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF> accessed 6 June 2019, 13.

[74] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

[75] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

[76] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

> The issue of secondary movement was first addressed in legislative form by the 1990 Dublin Convention, which set criteria for determining the State responsible for examining asylum applications lodged in one of the Member States of the European Communities. The Dublin system presupposed a similar treatment of asylum applicants and refugees in Member States. Such harmonisation of Member States' asylum law was first pursued through intergovernmental cooperation under the 1992 Maastricht Treaty (Title VI on cooperation in the field of Justice and Home Affairs).[77]

Nevertheless, the first phase of CEAS also reformed the Dublin Convention, resulting in the so-called Dublin II Regulation;[78] furthermore, legislation was also adopted that established the Eurodac database for storing and comparing fingerprint data in order to provide a successful implementation of the Dublin system.[79]

However, the Hague Programme[80] in 2004 already declared that the first phase of the CEAS should be quickly followed by a second phase of development, with a change of emphasis from minimum standards to a common asylum procedure on the basis of a uniform protection status. Consequently, the recast of all the elements of the CEAS was negotiated and adopted by 2013. Nevertheless, when it comes to EU asylum policies, the UK currently combines the best of both worlds. On the one hand, it has not opted into most of the second phase reforms. While the UK had opted into the first round of legislation (2000-2005), it decided to not opt into the recast of these directives (2008–2013),[81] in order to maintain its national rules the UK chose not to participate in the corresponding second phase CEAS instruments due to concerns over the limits they would place on its national system. As a result, the UK remained bound by the directives adopted as part of the first phase of the CEAS, as these directives established minimum standards and allowed Member States a large degree of flexibility in implementation. EU asylum harmonisation had indeed entailed liberalisations against the will of some Member States, and the UK made use of its right to opt out, in part to protect restrictive practices, such as 'detained fast track', which would not have been in line with the EU's policies.

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[77] European Asylum Support Office, 'An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis' August 2016, <https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF> accessed 6 June 2019, 13.

[78] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

[79] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

[80] European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' 13 December 2004 [2005] OJ C 53/1.

[81] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

On the other hand, the UK opted into the recast Dublin Regulation (Dublin III).[82] It was an essential interest of the UK to cooperate with the Member States regarding the fight against illegal secondary movements and the phenomenon of asylum shopping. The UK has therefore participated in the Dublin system since it was inaugurated as a Convention in 1990. The most recent iteration of the agreement, Dublin III, decides which nation is responsible for processing asylum claims, which is usually the first country of entry in the EU. With asylum-seekers usually coming from the Middle East and Africa, being geographically located in the North-West of the EU entailed a very favourable position for the UK under the Dublin Regulation. Unless an asylum-seeker has close family in the UK or a visa from the UK, the UK is not in charge of processing an application.

It is, of course, difficult to predict what the exact implications of leaving the Common European Asylum System will be for the UK. Even when the UK has left the EU, it will still 'benefit' from restrictive border policies, such as the EU–Turkey deal,[83] the closure of the Balkan route and Frontex operations aimed at deterring irregular migrants and asylum-seekers. However, leaving the Dublin Regulation might imply that the UK is less able to control the immigration of third-country nationals, particularly asylum-seekers; therefore leaving Dublin leaves the UK in a position of weakness vis-à-vis its European partners.

> While the role of the Dublin Regulation as an effective instrument for controlling the immigration of third country nationals has often been questioned, given the wave-throughs from border countries, policy-makers from North-Western EU Member States, including the UK, have always wanted to keep it. They usually highlight two reasons for doing so. First, they felt that Dublin sent a signal to asylum-seekers that they would not be able to choose where to apply for asylum. Second, policy-makers argued that Dublin would also send a signal to voters that governments are in control of migration.[84]

3 Implications of the UK Leaving the Common European Asylum System

'Overall, the international asylum law rules are fragmented in various ways: the UN Refugee Convention only applies to certain issues, and has no enforcement mechanism; the ECHR case law is ad hoc and indirect; and while the EU asylum laws are potentially more coherent

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Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.
Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

[82] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

[83] EU–Turkey statement, 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 6 June 2019.

[84] Zaun (n 1).

than the other two sources, only some of those EU laws apply to the UK.'[85] Even if the UK has a selective relationship regarding CEAS, leaving the EU could still have significant implications for British asylum policy, as was also extensively examined by the European Union Committee of the House of Lords.[86] The Committee's report identified two main areas where concerns arise: one related to the UK's departure from the Dublin system, the other one is the potential impact of Brexit on the UK's bilateral relationships, especially as regards effective cooperation with French and Belgian border agencies.

As regards the UK's participation in the Dublin system, the figures[87] show that a larger number of Dublin transfers to the UK were under Articles 8 and 9 of the Regulation: under certain conditions, the applications of some of those in EU countries, whose relatives are already in the UK, should be dealt with by the UK. In contrast, a larger number of transfers out were under Article 13, which mandates that asylum seekers who move on after being registered in a country of first arrival can be returned to that country. The Committee's report points out the negative consequences regarding both directions of Dublin transfers:

> UK withdrawal from the Dublin System after Brexit would result in the loss of a safe, legal route for the reunification of separated refugee families in Europe. Vulnerable unaccompanied children would find their family reunion rights curtailed, as Dublin offers them the chance to be reunited with a broader range of family members than under current UK Immigration Rules. [...] After Brexit, the UK is also likely to find it more difficult to enforce the principle that people in need of protection should claim asylum in the first safe country that they reach. Without access to the Eurodac database, it is unclear how the UK would be able to identify asylum applicants who have already been registered in another European country. And a new returns agreement (or agreements) would be needed for the UK to be able to send asylum seekers back to their first point of entry to the EU.[88]

In a reference for preliminary ruling,[89] even the potential impact of Brexit on the present implementation of the provisions of the Dublin III Regulation before the withdrawal was examined. S.A. and M.A. challenged the transfer decision before the International Protection Appeals Tribunal of Ireland, primarily on the basis of Article 17 of the Dublin III Regulation and on grounds relating to the withdrawal of the UK from the EU. By way of derogation from Article 3(1), Article 17(1) of that regulation provides that each Member State may decide to

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[85] Steve Peers, 'Manufacturing Discontent: Q and A on the legal issues of asylum-seekers crossing the Channel' 3 January 2019, <https://eulawanalysis.blogspot.com/2019/01/manufacturing-discontent-q-and-on-legal.html?fbclid=IwAR2l5ryxUE7GI5RrbZRFERqqEXotSY_FQ—m5mZrmL1KyyJFrkzkDoOAUso> accessed 6 June 2019.

[86] 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee, 48th Report of Session 2017–19, 11 October 2019, <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/428/428.pdf> accessed 19 January 2020.

[87] Transfers in to the UK: 131 in 2015, 558 in 2016, and 461 in 2017. Transfers out of the UK: 510 in 2015, 362 in 2016, and 314 in 2017, <https://www.migrationwatchuk.org/briefing-paper/444> accessed 6 June 2019.

[88] 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 3.

[89] Case C-661/17 *M.A. and Others v The International Protection Appeals Tribunal and Others* [2019] ECLI:EU:C:2019:53.

examine an application for international protection lodged with it by a third-country national or a stateless person, even if that examination is not its responsibility under the so-called Dublin criteria. In its judgement,[90] the CJEU finds it clear from the wording of Article 17(1) of the Dublin III Regulation that that provision is optional in so far it leaves it to the discretion of each Member State to decide to examine an application for international protection. It therefore implies that, regardless of a fear that might exist in certain applicants that their rights may be in danger because of being transferred to the UK that is in the process of withdrawal from the EU, no Member State could be forced to apply the discretionary clause as it is the exclusive right of the Member State. We could also add to the reasoning of the Court that such fears are not necessarily justified by the withdrawal of the UK, as we could see that the UK is already bound by a lower level of guarantees under EU law.

4 Future Relationship

'Irregular migrants and asylum-seekers will encounter a lot of practical and legal barriers when trying to enter the UK. Some of the practical obstacles – such as geographic location – will obviously remain, but some of the legal obstacles, especially those resulting from the Dublin Regulation, will disappear, and potentially make the UK less able to control the migration of third-country nationals.'[91] Nevertheless, at least in the short term, Brexit has an impact on illegal movements, as border officials had noticed a clear trend during interviews with recently-arrived asylum seekers and migrants, who said smugglers had warned them that the window of opportunity to cross into Britain would close after Brexit.[92] In the future, the UK will not only have to put much diplomatic effort into negotiating readmission agreements with third countries, but it may also wish to include the issue of return and readmission in the area of its future relationship with the EU. The European Parliament also recommended[93] that it would be beneficial for the EU to include a readmission clause in the future relationship agreement alongside the negotiation of an EU-UK readmission agreement, which would extend not only to own nationals, but to third-country nationals as well.

In its paper on several areas of the future relationship[94] the UK dedicated a separate sub-section to issues of asylum and illegal migration (2.5.1), while stating that 'it is vital that the UK and the EU establish a new, strategic relationship to address the global challenges of asylum and illegal migration.' The UK also proposed a 'comprehensive, "whole of route" approach that includes interventions at every stage of the migrant journey and to ensure that no new incentives are created to make dangerous journeys to Europe.' According to the British

[90] M.A. Judgement, paras 53–61.
[91] Zaun (n 1).
[92] 'Brexit fears are driving migrants to make dangerous journeys to Britain before its borders 'close" Newsweek, 2 January 2020, <https://www.newsweek.com/brexit-fears-driving-surge-migration-britain-english-channel-1480061> accessed 9 January 2020.
[93] European Parliamentary Research Service Brief, 3.
[94] UK Government (n 54) paras 74–75.

paper, it should, *inter alia*, cover ongoing operational cooperation, for example working with Frontex to strengthen the EU's external border, and Europol to combat organised immigration crime; a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through or have a connection with, based on a clear legal structure, facilitated by access to Eurodac or an equivalent system; new arrangements that enable unaccompanied asylum-seeking children in the EU to join close family members in the UK, where it is in their best interests and vice versa; a continued strategic partnership to address the drivers of illegal migration by investing and building cooperation in source and transit countries; and continued UK participation in international dialogues with European and African partners.

It therefore seems that the UK wishes to maintain active cooperation with the EU, and even more so wishes to somehow be a part of the implementation of certain elements of the EU acquis. This was also confirmed in July 2018 by the Political Declaration on the future relationship, which states that

> The Parties will cooperate to tackle illegal migration, including its drivers and its consequences, whilst recognising the need to protect the most vulnerable. This cooperation will cover: *a)* operational cooperation with Europol to combat organised immigration crime; *b)* working with the European Border and Coastguard Agency to strengthen the Union's external border; and *c)* dialogue on shared objectives and cooperation, including in third countries and international fora, to tackle illegal migration upstream.[95]

The House of Lords European Union Committee in its report in November 2019 was also of the opinion that 'it is vital that refugees and asylum seekers are considered in any agreement on the future UK–EU relationship' and highlighted that this 'asylum cooperation should take the Dublin System as its starting point and would ideally be based on continued UK access to the Eurodac database.'[96] However, as regards the involvement of the UK in the implementation of the Dublin system and Eurodac, I see two major obstacles. First of all, the Dublin system and access to Eurodac is only provided to non-EU states that are Schengen associate states, but not to other third countries. Second, the modification of the Dublin system,[97] as one of the key elements of a wider asylum reform package, is presently being negotiated, although unsuccessfully.[98]

The UK Government, exactly because of the most debated element, the relocation system, has decided not to opt in to the EU proposal for the Dublin IV Regulation as 'the proposed Dublin IV Regulation binds Member States to participate in a quota-based distribution

[95] UK Government (n 54) para 114.

[96] 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 4.

[97] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM (2016) 0270 final.

[98] See Ágnes Töttős, 'How to Interpret the European Migration Crisis Response with the Help of Science' in Zoltán Hautzinger (ed), *Dynamics and Social Impact of Migration* (Dialóg Campus 2019, Budapest) 69–81.

scheme.'[99] The House of Lord European Union Committee nevertheless suggests that the UK Government should reconsider participating in a responsibility sharing mechanism for asylum seekers, yet even this recommendation makes it conditional on the system operating on a voluntary basis.[100]

However, there is one particular issue in which the UK aims to negotiate with the EU as part of the future relationship. Section 17 (Family unity for those seeking asylum or other protection in Europe) of the European Union (Withdrawal) Act adopted in 2018 set out the obligation for the minister to negotiate an agreement with the EU under which, after Brexit, an unaccompanied child who has made an application for international protection to a member State may, if it is in the child's best interests, come to the UK to join a relative who is a lawful resident of the UK, or has made a protection claim which has not been decided, and an unaccompanied child in the UK, who has made a protection claim, may go to a Member State to join a relative there, in equivalent circumstances.[101] Nevertheless, the new European Union (Withdrawal Agreement) Act 2020 removes the obligation to agree a deal and only requires a government minister to make a statement setting out policy on the subject within two months.[102]

In line with the UK's situation described above, the negotiation mandate of the UK sets out its interest regarding two issues related to future relationship with the EU in the area of asylum and illegal Migration. First, the UK makes a specific commitment to seek to negotiate a reciprocal agreement for family reunion of unaccompanied children seeking asylum in either the EU or the UK, with specified family members in the UK or the EU, where this is in the child's best interests [Section 54]. Second, the UK indicates its openness to an agreement regulating asylum and migrant returns between the UK and the EU, or alternatively with individual Member States, underpinned by data sharing, to help counter illegal migration and deter misuse of our asylum systems [Section 55].

99 Robert Goodwill (UK Minister of State for Immigration), 'Written statement on European Union opt in decision: Dublin IV Regulation' HCWS370, 16 December 2016, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-16/HCWS370/> accessed 6 June 2019.

100 'Brexit: refugee protection and asylum policy' House of Lords European Union Committee Report, 4.

101 European Union (Withdrawal) Act 2018, Section 17 <http://www.legislation.gov.uk/ukpga/2018/16/section/17/ enacted> accessed 9 January 2020.

102 European Union (Withdrawal Agreement) Bill, Part 4 Section 37, <https://publications.parliament.uk/pa/bills/cbill/58-01/0001/20001.pdf> accessed 9 January 2020.

IV Conclusions

After a detailed examination of the extent to which EU *acquis* on asylum and migration applies to the UK, it is easy to agree with the following statement of Professor Peers:

> While some in the 2016 referendum campaign falsely claimed or implied that the UK has no control over its borders as an EU Member State, in fact the UK has an opt out from the EU's Schengen system of (in principle) open internal borders, as well as an opt out on EU law on asylum, immigration and criminal law. In practice, the UK only opted in to some EU asylum laws: all of the first phase laws, but only some of the second phase laws (Dublin, Eurodac and the asylum agency).[103]

On the other hand, as the mobility of EU citizens does not belong to the EU policy on Justice and Home Affairs, but instead is a key component of the internal market, where the UK does not presently enjoy opt-out rights, the control the UK actually wished to take back was not in the realm of immigration. It was in the field of free movement of persons, a cornerstone of the EU, and as a result the UK is even in the process of giving up on its membership. Nevertheless, only 'new immigration' could be covered by a more restrictive policy by the EU, while EU citizens already in the territory of the UK and their family members have acquired extensive residence and equal treatment rights that need to be preserved.

Consequently, extensive tasks arise on both sides of the English Channel as regards protection of citizens' rights: designing, legislating, administering communicating and enforcing. A number of concerns regarding the UK's Settlement Scheme have already arisen, such as the lack of physical document attesting the status, the ambiguity of proper assessment of the length of stay, and whether the procedure is properly available for all EU citizens and family members, especially the most vulnerable ones, and consequently, how harsh consequences would those not applying in due time need to face.

While it is true that about half of the EU27 Member States also opted for requiring the change of status to a national one similarly to the UK, their aim is supposedly to be able to issue a document with biometric data used for third-country nationals in the EU, thus safeguarding the effective retention of rights in line with the WA.

Apart from ensuring the future enjoyment of acquired rights and designing and implementing its national system accordingly, the UK and the EU27 should also start envisioning the elements of a future relationship in the area of migration and asylum. The UK and the EU will not stop facing common challenges in this regard, and the lack of European solutions will inevitably affect the situation of the UK. Therefore, the area of fighting illegal migration and the abuse of asylum systems while protecting the most vulnerable ones could be a policy area where close cooperation would have major significance for both the EU and the UK.

[103] Peers (n 85).

Nevertheless, a divorce is a major change in any partnership, regardless of the parties' good intentions, as Commission President Ursula von der Leyen also expressed it:

> The bonds between us will still be unbreakable. We will still contribute to each other's societies, like so many Brits have done in the EU, and as so many EU citizens do here every day in the UK. […] But the truth is that our partnership cannot and will not be the same as before. And it cannot and will not be as close as before – because with every choice comes a consequence. With every decision comes a trade-off.[104]

[104] Speech by President von der Leyen at the London School of Economics on 'Old friends, new beginnings: building another future for the EU-UK partnership' 8 January 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_3> accessed 8 January 2020.