Citizenship, Migration and Free Movement in Brexit Britain

Jo Shaw
University of Edinburgh
[*jo.shaw@ed.ac.uk*]

Regardless of what happens in the next few months and years in the post-referendum UK, much of the harm has been done. The uncertainty, in particular, is killing. It will have a significant impact on many of the UK's most productive economic sectors including universities and financial services. It will cast a shadow over inward investment and over the willingness to take risks of those responsible, for example, for building new infrastructure. There will be a brain drain. Already in some respects the EU is acting as if the UK were no longer a Member State. It has no Commissioner since Jonathan Hill's resignation. After the EUCO summit on 29 June which took pace without the UK's presence, EU27 conclusions were issued.

Many and various are the suggestions for how the UK's relationship with the EU and the 27 EU Member States might be shaped in the future. The obvious next step is that Article 50 TEU should be invoked and a notification of a decision to withdraw should be made. But whose is the decision: that of the people in the referendum, of the government of the day, or of Parliament? Is the notification once made revocable? Would two years be long enough to negotiate a withdrawal agreement and to regularise the legal situation of all affected parties in the UK and elsewhere. And will such an agreement or agreements, likely to be one or more mixed agreement involving the Member States as well, be the subject of an advisory opinion before the Court of Justice, slowing further the pace of withdrawal?

Some have turned to thinking about how to overcome the effects of the referendum. These ideas range from a second referendum to overturn the previous referendum (which is democratically dubious, even if a General Election may be held to clear the political sinuses sufficiently to make it conceivable), via a parliamentary vote to block the invocation of Article 50 TEU (treating the referendum result as purely advisory and asserting that parliamentary sovereignty demands a measure of Parliament), towards territorially differentiated statuses which preserve the integrity of the UK as a state but allow Scotland, Northern Ireland and Gibraltar somehow still to be part of the EU (which would constitute a sort of 'reverse Greenland', but is tough to envisage). If the latter initiatives fail, it is not hard to envisage that the UK may break up.

Many have speculated about the various 'associate' statuses which the UK may negotiate, including an option labelled 'Norway+', leading eventually to a Canada-type FTA (even though such does not exist at the moment). Under the latter heading, we discover that some people think that it is possible to maintain access to the single market, including passporting options for financial services firms, without having the free movement of workers. Good luck with that. Distinguishing between labour, enterprise and services is always a fun task quite apart from what might be acceptable to the EU27. A small number, finally, simply refuse to believe that Brexit will happen. To his credit, Andrew Moravcsik said this before the vote, and continues to maintain the argument. Since Michael Gove and Theresa May emerged as the frontrunners for the leadership of the Conservative Party on 30 June 2016, the chances are that Brexit means Brexit, with all the consequences that may flow from this.

Under one scheme, to promote territorial differentiation, which has been offered for our consideration, we read that 'Citizenship and migration-law, would have to be reconsidered, but the ensuing difficulties could be negotiated.' Someone who writes such a statement has obviously never had any dealings with the UK Home Office, both at the meta-level of drafting impenetrable legislation and at the micro-level of decision-making and enforcement. In fact, a more realistic reading of what is happening below the surface (where EU institutional officials and Member State politicians urging – more or less gently – that the UK should get on and invoke Article 50 TEU) is that the deal to be offered to the UK on exit is more likely to be 'EEA-' than 'EEA+', as this series of tweets from Ben Judah shows. The political failures that got the UK to that point could not be more serious, as Rafael Behr highlights, and include a media (paper and broadcast) that is largely incapable of holding politicians to account for what they say. The outlook for the UK heading towards Brexit is bad.

Of course any glib statements to the effect that somehow we can expect business as usual in the UK will be subjected to careful and rigorous analysis over the months to come, by academics and others. What characterises such statements is a deep commitment to the enduring principle of having your cake and eating it, as well as in some quarters a commitment to preserving the territorial integrity of the UK as a state by imaginative institutional means. The former principle was well in evidence during the referendum campaign. Fears that the UK might break up in the event of a Brexit vote should, of course, have been fed more effectively into the decision-making process about how to design the referendum and the referendum process. The notion of a 'double lock' for the different regions of the UK was put forward by the Scottish National Party, but rejected during the passage of the European Union Referendum Act 2015. Oh, how useful that would have been now, had it been adopted, although no one should discount how difficult these types of mechanisms would have been to design.

As predicted, and indeed for reasons I outlined earlier, immigration issues certainly played a substantial role in the campaign, especially in England and Wales, alongside concerns about sovereignty ('taking back control'). However, thus far what we know about referendum voting choices largely stems from a survey that is rather simplistic in its approach to unpicking arguments and motivations. Perhaps it would be best to describe what appears to have been a key factor as 'fear of immigration', rather than immigration itself. As it stands, the UK's large urban centres, which are the most diverse and multicultural places, on the whole voted to remain, although this was less true in the North of England, where there seems to be a strong sense amongst many voters that they have simply been left behind by globalisation, both economically and culturally. Moreover, there seems to be widespread horror and revulsion in the UK at the wave of xenophobic and racist attacks on people and property since the referendum by a minority belonging to the radical right. The reality, however, is that the genie of a populist radical right in the UK is now out of the bottle, and the landscape of political parties will probably never be the same.

But the underlying trends pointing inexorably in this direction are longer rather than shorter term. The truth is that UK political discourse about migration has for some time elided any 'moral' differential between free movement and immigration from third countries (and between labour migration and asylum seeking). As I have argued before, politicians in the UK have long been uncomfortable navigating the space between the political truth of popular hostility to immigration and the legal commitments of the UK to the EU Treaties. On that account, EU citizens exercising free movement rights are simply 'lucky immigrants', and since – as things stand – the UK cannot impose controls on the numbers or types of migrants from those countries, they have become the butt of particular hostility, not only from what might be described as older white working class communities, but also amongst settled migrant communities, especially those from South Asia, who are bitter about increasing restrictions upon family visits (never mind family reunification which is now subject to very substantial income-based controls) which have been delivered in the name of being tough on immigration. If the UK electorate has indeed delivered a message on immigration then it does need to be respected, even if this is likely to mean very substantial costs elsewhere across the UK as a whole, e.g. in relation to a predicted economic downturn hitting lower income households more heavily than those on higher incomes. Indeed, Cameron told the European Council meeting on 28 June that freedom of movement was at the heart of the UK electorate's decision to vote to leave the EU.

David Cameron's earlier 'renegotiation' of the terms of UK membership of the EU in February 2016 contained substantial sections on free movement, including a proposed emergency brake in respect of so-called 'in work' benefits paid to newly arrived migrants, an indexation of child benefit where it is payable to children resident outside the host state, apparent attempts to roll back the case law of the Court of Justice in *Metock* concerning third country national family members of EU citizens and steps to open up further the possibility of

deporting EU citizens who commit serious criminal offences. Since the UK did not vote to remain in the EU in the referendum held on 23 June, however, that 'deal' has now officially ceased to exist and will never come into force. Political leaders in Brussels and in the Member States have rushed to remind the UK that it cannot simply be resuscitated. In any event, it seems these concessions were not enough for the UK electorate, and this is hardly surprising given the consistently confused messages on European integration that Cameron has given throughout his premiership.

The UK now appears to have entered a phase of modest 'Bregret', as it becomes increasingly clear that there are no concrete plans as to what should happen next after the Leave vote. It probably hasn't (yet?) entered a full blown phase of buyers' remorse, although bad economic figures as well as the increasing evidence that pledges made during the campaign cannot be delivered upon might push voters in that direction. In fact, it has been academics who have led the way both before and after the referendum, setting out in plain terms the various options around the EEA, EFTA and other association statuses. In contrast, politicians have often come out with highly contradictory statements, seemingly indicating that what they want for the UK is all the advantages of EU membership and none of the 'burdens' (as they see them).

It has, therefore, become a consistent trope that somehow the UK wants to preserve the single market, but without free movement, as if the free movement of labour were somehow easily severable from the free movement of services and enterprise. To achieve this, some have already mooted income or activity restrictions to try and preserve the core of free movement whilst cutting away at the edges. Let's have a quick look to see if this is possible without wholesale regulation of free movement and access to labour markets. Remember, this is not the type of proposal that Martin Ruhs has come up with, whereby free movement and the integrity of national welfare states could be balanced against each other by means of greater restrictions on access to welfare states (equivalent to those imposed on third country nationals with 'no recourse to public funds' or similar stamped in their passports) which in itself is already an abrogation of the principle of non-discrimination on grounds of nationality. This would bring lower income or temporarily unemployed EU migrant workers closer to the situation of those who are completely outside the labour market, whose situation has been clarified in recent years by the Court of Justice as lying, in effect, outside the protective scope of EU citizenship. Ruhs' proposal is a reasonable one, bearing in mind that across a diverse European Union income disparities may place particular pressures upon specific Member States, which have their own internal redistributive policies and labour market regulatory issues to contend with. It recognises the point that the overwhelming majority of economists make, which is that immigration is a net fiscal gain for the host state, but equally allows solutions to be tailored to local circumstances. Moreover, these types of disparities in income and GDP should be self-correcting over a period of time and free movement – with its lower barriers to entry and

transaction costs – is precisely a flexible rational solution to the problems that disparities within the Union raise. On that account, much free movement is likely to be temporary. Perhaps some sort of arrangement relating to equal treatment and access to the welfare state might be possible post-Brexit under the oft-cited safeguard clauses in the EEA Agreement (Articles 112-113), but again this would need to be negotiated, and there seems little appetite for this amongst the Member States.

On the contrary, the proposal for a migration cap – even an emergency one – takes us into new territory, and is not a step that seems easily compatible with either EU law or the EEA Agreement, even by way of a safeguard clause or a separate protocol. We would need to question whether we are entering a world in EU law where we seek to distinguish students and professionals from fruit pickers? Between nurses and retirees? Where there may be a distinction between stocks and flows of EU citizens and workers. Where bright line restrictions on third country national family members will also come into consideration. Surely there comes a point where free movement ineluctably slides into immigration control, with all the consequences in terms of restrictions and enforcement that flow from this, both for those who are already residing in another Member State, and for those who might move in the future.

And in the short term, there are pitfalls aplenty, as Migrants Rights has pointed out. A week after the vote, the assurances of fair and humane treatment of EU citizen residents have been few and far between (and certainly lacking in detail), especially on the part of those who would have legal and political authority to deliver on such statements. For example, the new frontrunner for the leadership of the Conservative Party, Theresa May, and thus the favourite to lead the negotiations, has said that those statuses are indeed 'subject to negotiation'. Already now, uncertainties abound. What of those who now face a period of unemployment lasting more than six months and who have not reached five years residence? Will the UK pursue an energetic expulsion policy? What will happen to permanent residents once Brexit is a reality, if free movement is not part of the package (as May has declared it should not be)? Should they be offered citizenship or just indefinite leave to remain? At what cost, as the fees currently are very high and rising? What will happen to those who have not reached five years residence at the date of Brexit? How will their situation, those of their (sometimes third country national) family members be regulated given the manifest inability of the Home Office and the various associated agencies even to deal effectively with their existing workload without putting several million more people under immigration control? The transition from freedom to restriction will be painful for many. There will be many cases that fall through the cracks, and vast amounts of insecurity and pain.

In contrast, on the other side of the Channel, Member State governments can see particular reasons to encourage the brain drain amongst the young and the talented that (according

to the predictions) the UK is going to face. Let's think about giving EU citizenship (i.e. national citizenship) to students who spend some years studying in our universities, says Prime Minister Renzi of Italy. So far, just a vague proposal, even a glib one. But it is a sign of the times.

Indeed, there are many who are seeking a solution to immigration uncertainties – and other pitfalls of potentially losing EU citizenship – through citizenship. EU citizens are naturalising in the UK (or at least seeking permanent residence documentation as the first step to naturalisation). The Irish government has pleaded with UK citizens not to overwhelm their passport services with work and is said to have taken on additional staff already. Anecdotal evidence from Belgian highlights large numbers of UK citizens resident there making applications for citizenship. Dual citizenship may be the answer for many (especially in Northern Ireland, which already has more than 0.5m Irish passport holders), further undermining, of course, the case that Brexit is all about asserting sovereignty understood as a zero sum game. The renewed arguments for Scottish independence have a strong kernel of concern for the fate of EU citizenship – both for Scots themselves and for those resident in Scotland who fear for their rights.

Welcome to Brexit Britain. An archipelago of contradictions.