

# BALANCE SHEET BLUES AND RED FACES

UK GOVERNMENT DITHERING  
ON IMMIGRATION LAWS  
PILES THE PRESSURE  
ON BUSINESS



**Julia Jackson** Wedlake Bell LLP

For the past two years, BREXIT – British withdrawal from the European Union (EU) – has dominated political debate in the United Kingdom (UK). At the heart of the discussion has been the issue of inward immigration to the United Kingdom, divided into two basic questions: (1) Who is allowed to enter, live and work in the UK?; and (2) what will be the status of more than three million EU citizens already living and working inside the country?

Easy to pose but, apparently, impossibly difficult to answer. With less than a year to go until the country exits the European Union, the British government continues to delay publishing the white paper that will

set out its policy vision for immigration in a post-Brexit Britain.

The political uncertainty has been corrosive for businesses – both big and small. Managers have been left unable to make effective long-term recruitment and retention plans, while overseas nationals have been left in limbo, unsure whether to commit careers and family to a potentially unwelcoming Britain.

#### THE VOTE

Summer 2016 saw the UK population decide, by a narrow majority in a referendum, to end its European Union membership after 43 years. Like all European

Union member states, the UK's membership obliges it to accept freedom of movement - the right to live and work in the UK without being subject to immigration control - for all citizens of the European Union and their family members. It is a right that attracts furious criticism from those seeking withdrawal, who see it as an undermining of national sovereignty.

By contrast, overseas nationals wishing to come to the United Kingdom from countries outside the European Union, including American citizens and even the non-British family members of British citizens, must comply with the detailed and often demanding requirements of UK do-

mestic immigration law. These criteria include the need to show sufficient funds for living expenses; restrictions on employment; and prohibition from claiming any public funds.

### DRAFT WITHDRAWAL AGREEMENT

Out of the fog of political debate some details have emerged. Under the terms of the Draft Withdrawal Agreement published in February 2018, the UK and the remaining 27 EU states have agreed that the freedom of movement rights will continue not only until the UK formally leaves the EU on March 29, 2019, but, to ensure that there is no "cliff-edge," for the duration of a transition period that follows, ending on December 31, 2020.

For the estimated 3.6 million EU nationals already living in the UK or those taking up residence before the end of the transition period in December 2020, there will be a protection of existing rights with the ability to claim "settled status" (similar to U.S. green card status) after a period of residence of five years and limited leave (permission to stay in the UK for a specified period) for those who have been here for a shorter period followed by settled status once they have reached the five-year residence criterion.

### WHAT HAPPENS AFTER BREXIT?

What is not yet clear is the position of EU nationals wanting to move to the UK after December 2020.

The UK Government initially declared that it would publish a white paper to set out its policy vision in Summer 2017. By October of that year the paper was being promised "before the end of the year," with draft legislation at the beginning of 2018. But in November 2017 the Immigration Minister could only promise that the white paper would be available "soon" and by February 2018, amid red faces and vocal criticism from all political parties, the only commitment was that the paper would be available "in the coming months when the time is right." The current popular view is that we are unlikely to see the document before October 2018.

In part, this rolling delay has been caused by uncertainty in other areas of the negotiation, most notably over access to the EU single market and customs union. But there's also deep public mistrust in the ability of politicians to effectively manage immigration; carefully balancing the needs of the economy and business, shaping the pace and pattern of immigration for the benefit of society as a whole, while ensuring integration and a humanitarian approach.

### DIRECT IMPACT ON BUSINESS

Vocal anxieties from EU nationals living in the UK and UK nationals living elsewhere in the EU have done little to calm fears on this, while news is emerging that employers are already facing recruitment difficulties for low-skilled roles, particularly in agriculture and hotel and catering commonly filled by EU nationals.

In the meantime, employers have been hit by another aspect of government immigration policy. Since April 2011 the Government has imposed a cap on the number of skilled workers that employers may bring to the United Kingdom from outside the EU, setting an annual limit of 20,700 to be allocated in tranches on a monthly basis.

Apart from a couple of glitches in 2015, the system appeared to work smoothly – until December of last year, when the number of valid requests for certificates exceeded supply. Employers are allowed to re-submit valid applications but the shortage persisted – month after month – as the number of applications and re-applications snowballed.

Perhaps hardest hit was the healthcare sector where hundreds of doctors and medical specialists were refused visas despite the massive recruitment problems currently being experienced by the National Health Service (NHS).

While data isn't yet available to explain why a system that has worked effectively for more than seven years should suddenly become so unworkable, it seems likely that the decreasing number of EU nationals coming to the UK, the increasing number of EU nationals actually leaving the UK and generally high levels of employment have all had a bearing.

While few would argue for uncontrolled access to the UK labor market by overseas nationals, there can be little merit in a system that denies visas to precisely the skilled workers that the UK needs. Indeed it has generated further accusations of mishandling, as UK Home Office policy is intended to attract the "brightest and the best" to the UK.

For the health sector, a temporary fix was put in place, effective from July 2018, that removed all doctors and nurses from the immigration cap. It is hoped that – in time – this will reduce the pressure and increase the availability of visas for other much needed skilled workers particularly in engineering and IT.

The issues demonstrate the difficulty of designing an immigration system which works for industry and employers, is humane and responsible and allays populist

concerns about immigration.

Meanwhile, while we wait for the white paper to be published, rumors have begun to circulate that the UK government may propose a system allowing EU nationals unrestricted rights to live and work in the UK after Brexit – a freedom of movement system in all but name. While this will be welcomed by many employers and EU nationals alike, it will inevitably lead to cries of betrayal from some of those who voted to leave and their populist cheerleaders. Other nationalities – including U.S. citizens – could also ask why EU citizens remain privileged when the UK is no longer in the EU.

Further, a white paper that only seeks to address the position of EU nationals post-Brexit, will face accusations that it fails to deal with the wider question of how the UK should address immigration from elsewhere, while the need for skilled overseas workers continues.

There are now calls for a root and branch review of the whole domestic immigration system, one that differentiates between different types of migration (family, humanitarian and economic) and seeks to move away from quick fixes for immediate concerns.

The Holy Grail of immigration policy will be to create a means of allowing access to high-skilled and high-value migrants in a reasonably friction-free manner, while measuring low-skilled worker applications (seasonal fruit-picking, for example) against the filter of economic necessity.

Furthermore, any system that continues to tackle unregulated immigration should be balanced, it is argued, by the need for the UK to take a fair share of humanitarian migrants, those unwillingly displaced by war, famine or natural disaster.

Economic necessity, skill shortages, populist expectations, EU negotiating positions - only one thing is certain - by the time we all see the long-awaited legislation, the drafters of the white paper will have had a long, hot acrimonious summer.



*Julia Jackson is a solicitor and partner at Wedlake Bell in London. Julia specializes in immigration and nationality law and has extensive experience of assisting employees, entrepreneurs and HNW individuals in obtaining rights of residence in the United Kingdom and also advises on EU residence rights in UK.*