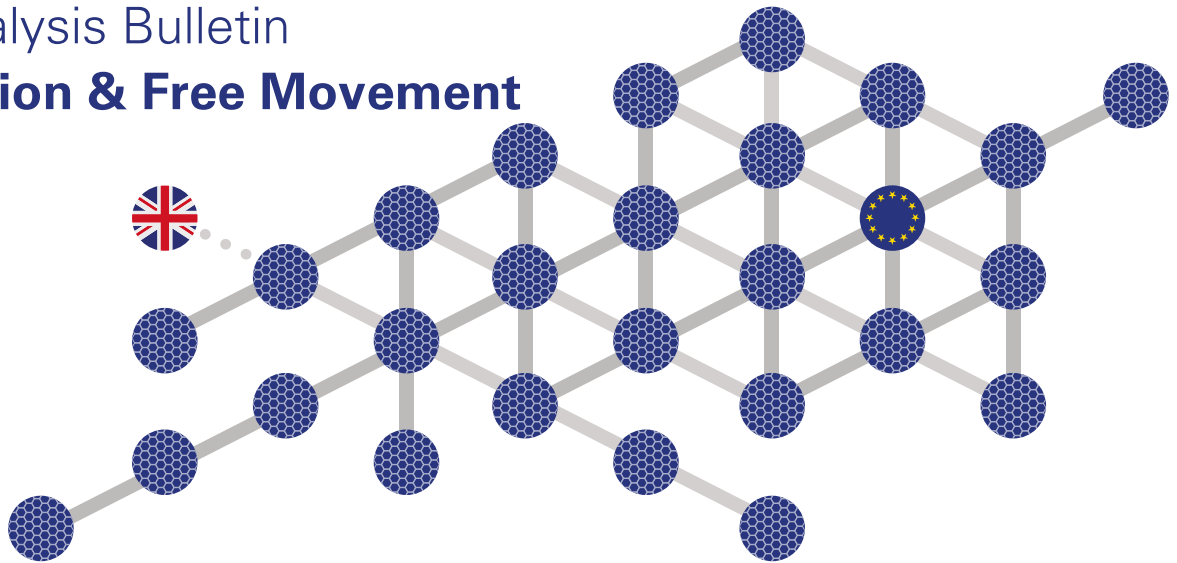


## Brexit Analysis Bulletin

# Immigration & Free Movement



The effect of Brexit on EU nationals living and working in the United Kingdom will undoubtedly be of interest to many employers as things develop over the coming months. In light of recent announcements by the Prime Minister, we consider the current visa arrangements in the UK, possible alternative models and the impact of Brexit on EU nationals living in the UK.

### Current Visa Arrangements

**EEA Nationals:** Currently, EEA nationals may travel freely in the UK for a period of up to three months, after which they must be working in order to stay (though there are other circumstances which may enable a prolonged stay e.g. self-sufficiency, study or job-seeking). After living in the UK for five years, EEA nationals automatically qualify for Permanent Residence. Individuals who have held Permanent Residence for a period of 12 months may be eligible to apply for British Citizenship.

**Non-EEA Nationals:** Non-EEA nationals may currently apply for work visas and permits to the UK in accordance with a points-based system. There are five tiers of entry to the UK under this system:

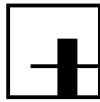
- Tier 1: high-value migrants (exceptional talent, entrepreneur, investor, graduate entrepreneur)
- Tier 2: highly-skilled worker (general, intra-company transfer, sportsperson, minister of religion)
- Tier 3: low-skilled workers (*this tier is not currently operational*)
- Tier 4: students
- Tier 5: youth mobility and temporary workers

Employers must obtain a sponsorship licence to be able to employ non-EEA nationals. Under Tier 2 of the points-based system, an employer may obtain permission to employ skilled workers who are non-EEA nationals provided the potential employee achieves a sufficient number of points and, in most cases, is only employed to do a job which cannot be filled by an employee from the UK or the EEA. The spouse, partner or dependant of someone who has been granted permission to work in the UK under the points-based system may also be able to work in the UK in certain circumstances.

### A New Immigration System?

UK Prime Minister Theresa May has recognised that restricting immigration was a key concern for many people who voted for Brexit, and has therefore announced that the government will look to secure a future for post-Brexit Britain outside the Single Market. This would allow immigration to be tightly controlled as the principle of free movement of persons would not apply.

On this basis, it is perhaps now unlikely that EEA membership will be pursued by the UK government, as this would require the continuation of the free movement of persons. It also now seems unlikely that



the government will be considering a system for EEA nationals similar to the current points-based system for non-EEA nationals.

Brexit may therefore be used as an opportunity to amend or completely overhaul the existing immigration system. It is likely that the agenda for a new set of immigration rules would seek to ensure that the UK remains an attractive place for desirable immigrants to choose to work, and that businesses are not unnecessarily restricted in who they employ, while still imposing sufficient restrictions on those entering the UK to keep immigration to a satisfactory level.

As matters currently stand, all possibilities are being considered by the government, including a possible alternative system whereby foreign nationals would be required to have a work permit before coming to the UK, with government ministers able to prioritise different sectors.

### **Impact On EU Nationals Living In The UK (and vice versa)**

Theresa May has confirmed that she anticipates it will be possible to guarantee the status of EU nationals who have already exercised their right of free movement and are currently living in the UK, as part of the formal Brexit negotiations. However, she has acknowledged that the UK could not make commitments on the rights of EU nationals to remain in the UK without a reciprocal arrangement being secured for any British citizens living abroad.

In any event, as we explore in further detail below, leaving the EU in itself may not be sufficient to extinguish Treaty rights that individuals have already acquired.

### **Separation of family members – breach of human rights?**

The separation of family members, including the deportation or removal of immigrants, can in certain circumstances be considered a breach of human rights.

In 2008 the House of Lords handed down a series of judgments on how claims under article 8 "*Right to respect for private and family life*" of the European Convention

on Human Rights (the ECHR) should be assessed and importantly, confirmed that the rights of other family members must be taken into account when decisions were being taken about the right to remain in the UK. The House of Lords specifically considered whether the fact that a person could return to their home country, and apply for entry to the UK from there, would justify removal from the UK. It held that this would rarely be enough to justify removal as a proportionate step, and in such circumstances article 8 rights could be relied upon to allow an individual to remain in the UK.

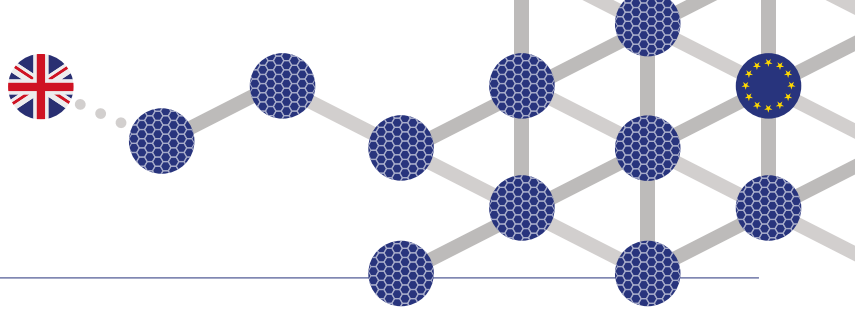
These cases are indicative of a general expansion of the protections that the ECHR affords individuals in the immigration context, and are likely to come into sharper focus as Brexit negotiations in this area continue.

The Human Rights Act 1998 incorporates the rights in the ECHR into UK law. The ECHR operates entirely separately to EU membership and so these rights would not be affected if the UK leaves the EU. The government has spoken of replacing the Human Rights Act with a UK Bill of Rights but this will still need to respect the UK's International Law obligations under the ECHR. Post-Brexit, human rights arguments are likely to become even more prevalent at the stage of immigration appeals if the UK seeks to restrict access for EEA nationals or their family members.

### **Practical Steps**

As Brexit talks progress it is likely that more detail will become available on these points. For now, businesses and individuals likely to be affected should continue to comply with the current immigration rules as the UK currently remains a member of the EU subject to all of its rights and obligations.

Employers may also wish to explore various options to safeguard their position in the future. This could involve carrying out an initial risk assessment and identifying whether any key employees are currently relying on free movement rights. Individuals who are in this position may wish to explore options beyond free movement rights which could allow them to continue living and working in their chosen member state.



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#### What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

#### For further information in the first instance, please contact:



Neil Maclean  
Partner  
T +44 (0)131 473 5181  
M +44 (0)782 541 3316  
E [neil.maclean@shepwedd.com](mailto:neil.maclean@shepwedd.com)



Katie Russell  
Partner  
T +44 (0)131 473 5266  
M +44 (0)787 269 9897  
E [katie.russell@shepwedd.com](mailto:katie.russell@shepwedd.com)



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