



Labour Campaign for Human Rights

Free Movement and Human Rights

December 2017

Introduction

As the prime minister has made clear, if the current government remains in power, free movement will most likely end as a result of Britain exiting the EU. This has been a contentious issue within the Labour Party, with MPs and members considering how to square the circle of respecting the referendum outcome whilst maintaining the undoubted benefits of the existing system.

Many progressives see free movement as the gold standard for managing immigration. However, it is not without its flaws. This briefing offers an honest analysis of the system's impact on human rights in order to aid our understanding of its alignment with progressive values and how it could fit into Labour's approach to Brexit.

After considering the undoubted human rights benefits enjoyed by those under the jurisdiction of free movement, we explore the scope for human rights violations within the existing system. Attention is then turned to those who are excluded from free movement.¹

LCHR is not seeking to argue for or against free movement. However, we do make some general recommendations that follow from our analysis. We recommend that:

- Labour maximises any opportunity to limit the extent of nationality based discrimination between our dual immigration systems for EU and non-EU migrants.
- Labour prioritises its' proposed Migration Impact Fund, and ensures that the policy is developed to include and reassure communities that feel left behind by rapid immigration.
- Labour listens to and recognises the concerns of its constituents regarding free movement. Yet Labour must also combat any attempts at scapegoating, and redirect the legitimate anger felt at economic insecurity towards their true sources.

A Rights-Based System

Deciding who can and cannot enter or reside in a state is invariably an exercise in exclusion. Yet free movement stands out amongst immigration systems as, rather than simply outlining limits and penalties, it guarantees positive rights for those under its jurisdiction. Free movement has its roots in the 1957 Treaty of Rome, which established the principle of non-discrimination on the grounds of nationality, as well as the 1993 Maastricht Treaty which introduced the notion of EU Citizenship.² The 2004 Free Movement Directive (Directive 2004/38/EC6) enshrined the following treaty rights for EU citizens arriving to the UK:

- The initial right of residence for up to three months.
- The right to remain as a job-seeker.
- The right of extended residence through economic activity as a worker (including self-employed).
- The right of extended residence for 'self-sufficient' persons, including students.
- The right of permanent residence (after five years' continuous residence).
- The right for direct family members of EU citizens to have parallel rights of residence.³

Although there is some variation between how member states enact EU treaty rights, these rights generally extend to British citizens arriving to countries in the EU. It is without doubt that the privileges which constitute free movement are uncommonly positive for immigration law, and that they have bolstered the rights of millions of Europeans whilst facilitating an unprecedented economic and cultural exchange between member states.⁴ As a report by Another Europe is Possible made clear,

¹ In this briefing, references to the EU include the EEA area and Switzerland.

² House of Lords European Union Committee, 14th Report of Session 2016-17, Brexit: UK-EU movement of people, March 2017. Available at: <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/121/121.pdf>

³ House of Commons Exiting the European Union Committee, The Government's negotiating objectives: the rights of UK and EU citizens, Second Report of Session 2016-17, March 2017. Available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

⁴ Morris M., Free movement and the EU referendum, IPPR, March 2016. Available at: <http://www.ippr.org/publications/free-movement-and-the-eu-referendum>

there are also genuine concerns that without free movement, more migrants would be vulnerable to 'super-exploitation' by unscrupulous employers.⁵

Yet despite these undoubted benefits, free movement is not so robust a system that it acts as a bulwark against all human rights infringements, or against the hostility with which the current government has treated migrants.

EU citizens can have their residency rights removed on the grounds of public security, public policy or public health, or if they are not economically 'self-sufficient'.⁶ As decreed in The Immigration (European Economic Area) Regulations 2016, in order to reside in the UK for more than three months, an EU citizen must have both "comprehensive sickness insurance" and "sufficient resources [...] not to become a burden on the social assistance system."⁷ The Conservative government's interpretation of the comprehensive sickness insurance requirement has raised considerable problems, leading the European Commission to launch an unresolved infringement procedure against the UK government.⁸ This is because migrants are permitted to use NHS services and therefore understandably do not realise the need for additional insurance, which in some cases has led to unwarranted threats of deportation upon failure to produce proof.⁹

There have also been numerous examples of the UK government demanding unnecessary information from EU citizens wishing to apply for permanent residence. As shown by a report from the3million, the average European cost and length of applications for permanent residence is £28.26 and four pages respectively. The UK form is 85 pages long and costs £65 to complete, placing an unnecessary strain on low income applicants.¹⁰ There is very limited legal aid available to help EU citizens navigate what the Exiting the European Union Committee labelled as a "disproportionately burdensome" process. Recent figures show that nearly 30 per cent of applications for permanent residence are rejected, meaning EU citizens are six times as likely as non-EU citizens to have their application turned down.¹¹

Whilst these faults are not inextricably linked to free movement and could conceivably be rectified under a different administration, they serve as a reminder that the current system is neither perfect nor immune to detrimental interpretation by the government of the day.

The other side of free movement

Although much of the post-Brexit debate has understandably focused on maintaining, modifying or removing free movement, the UK in fact has two distinct immigration systems; one that applies for EU citizens and one that applies, with some variations, for citizens from the rest of the world.

Partly because free movement does not offer the government many opportunities to achieve its much-derided aim of reducing immigration to the 'tens of thousands', the system for non-EU migrants bears the brunt of its efforts to deter migration flows.¹² Since 2016 skilled non-EU workers with Tier 2 visas are only eligible to stay in the UK permanently if they are earning at least £35,000 per year, which has

⁵ Zoe Gardner and Luke Cooper, 'Brexit and Immigration: Prioritising the rights of all workers', Another Europe is Possible, September 2017. Available at: <http://www.anothereurope.org/wp-content/uploads/2017/09/aeip-free-movement-final-web.pdf>.

⁶ Marley Morris, 'Beyond Free Movement: Six Possible Futures for the UK's EU Migration Policy.', IPPR, 2016. Available at: https://www.ippr.org/files/publications/pdf/beyond-free-movement_Jul2016.pdf.

⁷ http://www.eearegulations.co.uk/Regs2016/ByPage/regulation_04.

⁸ Aleksandra Herbec, 'The scandal of CSI, the little-known loophole used to deny EU citizens permanent residency', LSE: <http://blogs.lse.ac.uk/brexit/2017/03/17/disheartened-and-disappointed-the-government-and-universities-have-failed-eu-citizens-over-comprehensive-sickness-insurance/>

⁹ Lisa O'Carroll, 'Dutch woman resident in UK for 30 years may have to leave after Brexit', The Guardian, January 14th, 2017: <https://www.theguardian.com/politics/2017/jan/14/dutchwoman-resident-in-uk-for-30-years-may-have-to-leave-after-brexit>.

Zosia Wasik, 'EU citizens seeking UK residency face health insurance hurdle', The Financial Times, April 18, 2017: <https://www.ft.com/content/b1c556d6-2048-11e7-a454-ab04428977f9>.

¹⁰ Anne-Laure Donskoy, 'I want to be the one to decide my future' How EU Citizens experience the process of applying for the 'permanent residence certificate', the3million, June 2017. Available at: https://docs.wixstatic.com/ugd/0d3854_c620324f11204d4aa1b3f2440c688867.pdf.

¹¹ HM Government, Identifying and Registering Qualifying EU Nationals, 2017. Available at: www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/107107.htm#_idTextAnchor030.

¹² Laura Kuenssberg, 'Immigration: Tories to keep 'tens of thousands' target', BBC News, May 8th, 2017. Available at: <http://www.bbc.co.uk/news/uk-politics-39840503>.

been widely criticised for hinging immigration on an individual's income and wealth.¹³ Over 100,000 people signed a parliamentary petition calling on the threshold to be scrapped because it “unfairly discriminates against charity workers, nurses, students and others”.¹⁴ Non-EU migrants are also subject to extortionate spousal visa fees of £1,465 (an increase from £885 in 2014).¹⁵ Combined with a £600 health surcharge per applicant, these costs exclude many Britons on low incomes from exercising their right to a family life.

Non-EU citizens are also subjected to Theresa May's notoriously harsh minimum income requirement policy, which mandates that any British citizen with a spouse from outside the EU must earn an annual income of £18,600 or above (or £22,400 when including a child) before their partner can come to live with them.¹⁶ This threshold contributes to Britain being ranked as the worst of 38 developed countries for family migration, and places another financial barrier on the right to a family life, excluding 41% of the British working population whilst disproportionately penalising women and children.¹⁷

This constitutes a remarkable difference in immigration status that is determined solely by an individuals' country of origin. A particularly revealing example put forth by Professor Jonathan Portes showed that if the £35,000 annual salary requirement for non-EU migrants were applied to those arriving from the EU, 50 per cent of the UK's physiotherapists, midwives, lab technicians, farmers, butchers, mechanics, plumbers and carpenters would not be allowed in.¹⁸ For every EU citizen whose liberties are expanded by free movement, there are countless citizens the world over who are denied the same opportunities on the basis of their nationality.

Despite the non-discriminatory intentions of The Treaty of Rome, the UK's immigration system inherently discriminates on the basis of nationality. The undoubted benefits of free movement are reserved only for the citizens of 27 European countries, whilst the rest are subjected to one of the strictest systems in the developed world. This discrepancy isn't an argument for abandoning free movement, but it should remind us that we cannot see it in isolation from the UK's immigration system as a whole, and that – within that system – there is a clear inequality.

- LCHR recommends that Labour maximises any opportunity to limit the extent of nationality based discrimination between our dual immigration systems, particularly by 'levelling up' rights for non-EU migrants.

Popular Criticisms of Free Movement

The desire for some form of immigration control played a key role in the vote for Brexit, with one poll showing that, for 33 per cent of leave voters, the primary reason for wanting to leave the EU was “to regain control over immigration and its own borders.”¹⁹ The explanation for this anti-immigration sentiment has been linked to the exponential increase in migration from the EU over the last few years. The number of EU nationals in the UK increased by roughly 150,000 between 1993 and 2003, yet between 2004 and 2017 the numbers increased by approximately 2.2 million.²⁰ This increase can

¹³ Melanie Gower & Ben Politowski, 'The £35,000 salary requirement to settle in the UK', Commons Briefing papers CBP-7264, March, 2016. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7264>.

¹⁴ 'Scrap the £35k threshold for non-EU citizens settling in the UK'. Available at: <https://petition.parliament.uk/archived/petitions/118060>.

¹⁵ <http://britcits.blogspot.co.uk/2016/07/british-citizens-forced-to-pay-719829.html>; <http://britcits.blogspot.co.uk/2014/05/british-citizens-forced-to-pay-338110.html>.

¹⁶ Cassie Werber and Christopher Groskopf, 'Which countries make it hardest for citizens to live with foreign spouses', February 24th, 2017. Available at: <https://qz.com/917688/countries-are-cracking-down-on-immigration-by-making-it-hard-for-citizens-to-live-with-foreign-spouses/>.

¹⁷ Migrant Integration Policy Index 2015, Family Reunion. Available at: <http://www.mipex.eu/family-reunion>; Madeline Sumption, Carlos Vargas-Silva, The Minimum Income Requirement for Non-EEA Family Members in the UK, January 2016. Available at: http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Report-Minimum_Family_Income.pdf.

¹⁸ Professor Jonathan Portes, 'Who are you calling low skilled?', UK in a Changing Europe, April 2017. Available at: <http://ukandeu.ac.uk/who-are-you-calling-low-skilled/>.

¹⁹ Lord Ashcroft, 'How the United Kingdom voted on Thursday... and why', June 24, 2016. Available at: <http://lordashcrofthpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>

²⁰ Dr Carlos Vargas-Silva, 'EU Migration to and from the UK', The Migration Observatory, August 2017. Available at: <http://www.migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>

largely be attributed to the growth of the EU, as eight eastern European countries joined the union in 2004, including Poland which is now the largest source of foreign born nationals in the UK.²¹

Research from IPPR prior to the referendum demonstrated how the extension of the EU to southern Europe meant that for the first time, the UK experienced a sustained positive net migration from the EU. Coupled with domestic austerity and the global financial crisis manifesting itself particularly acutely in the Eurozone, this contributed to many in the UK losing the “feeling of parity” towards Europe.²²

How Labour Can Respond

It is important that Labour recognises that there exists a widespread perception that high migration equates to detrimental pressure on jobs, wages, and public services, especially as the majority of Labour MPs represent constituencies that voted to leave the EU.²³ This is particularly true in areas that have witnessed a particularly rapid change in their communities.²⁴ Research from British Future has shown that migrants have tended to settle in areas where there is a supply of affordable private rented housing, and that most calls for reduced migration are directed against the category of low-skilled labour.²⁵ There are limited examples in which free movement may be said to precipitate a squeeze on resources, such as ‘derogation contracts’ that allow European agency workers to be hired as temporary employees on lower rates of pay than full-time staff.²⁶

A specific policy that could enable Labour to visibly respond to the concerns of its constituents is The Migration Impact Fund. Established by the last Labour government to help local authorities and services that are experiencing unexpected or high levels of immigration, the fund provided £50 million per year financed by a surcharge on visa applications.²⁷ The current government established the re-branded Controlling Migration Fund in 2016, which provides £25 million each year. British Future argued this reduced funding “risks becoming a small and tokenistic pot of money put forward to deal with the latest neighbourhood ills” and not the feedback driven, community-led initiative that is required. Labour has already committed to a new Migration Impact Fund, with additional funding from contributions from High Net Worth Individual Visas.²⁸ Ensuring that this policy adequately considers economic concerns that are often conflated with the presence of migration, such as the poor condition of privately rented accommodation, would send a clear message that Labour is listening to the concerns of those who voted to regulate free movement.

- LCHR recommends that Labour prioritises its proposed Migration Impact Fund, and ensures that the policy is developed to include and reassure communities that feel left behind by rapid immigration.

However, whilst free movement is equated with a squeeze on public services, suppression of wages and pressure on housing and benefits, the root causes for these concerns are not to be found in the immigration system but in structural deficiencies within the UK economy. This government’s rhetoric and policies sustain and combine with the anti-immigration narrative in sections of the media to create the politically useful misperception that economic hardship is the result, not of years of austerity, but

²¹ Dr Carlos Vargas-Silva and Dr Cinzia Rienzo, ‘Migrants in the UK: An Overview’, The Migrant Observatory, February 2017. Available at: <http://www.migrationobservatory.ox.ac.uk/resources/briefings/migrants-in-the-uk-an-overview/>.

²² Alex Glennie and Jenny Pennington, ‘Europe, Free Movement and the UK: Charting a new course’, IPPR, April 2014. Available at: http://www.ippr.org/files/publications/pdf/free-movement-EU-UK_April2014.pdf.

²³ Professor Chris Hanretty, ‘Most Labour MPs represent a constituency that voted Leave’, June 2017. Available at: <https://medium.com/@chrishanretty/most-labour-mps-represent-a-constituency-that-voted-leave-36f13210f5c6>

²⁴ Mark Easton, BBC ‘The speed of cultural change’, November 27, 2013. Available at: <http://www.bbc.co.uk/news/uk-25128110>.

²⁵ Sunder Katwala, Jill Rutter and Steve Ballinger, British Future, ‘Time to get it right: Finding consensus on Britain’s future immigration policy’ <http://www.britishfuture.org/wp-content/uploads/2017/09/Time-to-get-it-right-.pdf>.

²⁶ Alex Glennie and Jenny Pennington, IPPR, ‘Europe, Free Movement and the UK: Charting a new course’, April 2014. Available at: http://www.ippr.org/files/publications/pdf/free-movement-EU-UK_April2014.pdf.

²⁷ Patrick Wintour, ‘Fund to ease impact of immigration scrapped by stealth’, The Guardian, August 6th, 2010. Available at: <https://www.theguardian.com/uk/2010/aug/06/fund-impact-immigration-scrapped>.

²⁸ ‘For the Many Not The Few’, Labour Manifesto 2017. Available at: <http://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf>.

of the presence of those who appear to be different.²⁹ Yet European migrants made a net contribution of £20 billion to UK public finances between 2000 and 2011, and are less likely to report claiming unemployment, sickness or disability benefits than UK nationals.³⁰ The Labour Campaign for Free Movement was correct in its assertion that "migrants are not to blame for falling wages, insecurity, bad housing and overstretched public services. These are the product of decades of underinvestment, deregulation, privatisation, and the harshest anti-union laws in Europe."³¹ Labour has a duty to address legitimate concerns at their source whilst rejecting division, especially as the unprecedented spike in hate crimes after the referendum demonstrates how community cohesion is incompatible with divisive discourses.³²

- LCHR recommends that Labour listens to and recognises the concerns of its constituents regarding free movement. Yet Labour must also combat any attempts at scapegoating, and redirect the legitimate anger felt at economic insecurity towards their true sources.

A key part of this effort may be to advocate for further reform and to make clear where the boundaries of consequence for immigration lie, regardless of what system is in place. Many of the economic arguments in defence of free of movement are based on how it plugs gap in essential yet underpaid or undesirable jobs, such as fruit picking or domiciliary care.³³ The median gross hourly pay of central and eastern European migrants who tend to fill these low-skilled, low-pay positions is £3 less than it is for UK nationals.³⁴ Labour may wish to question if maintaining this self-sustaining intersection between immigration and insecure work is desirable. Yet it is also clear that a comprehensive solution to this issue would be far beyond the remit of any immigration system, and may include policy levers ranging from an increase in the minimum wage to sector-specific incentives and labour protections.³⁵ This holistic consideration of policy led the Institute for Government to recommend a vastly improved enforcement of wider labour market regulations and the National Living Wage as part of its proposals for implementing a post-Brexit immigration system.³⁶ Being clear about what immigration systems can and cannot do could help Labour untangle the damaging misconception that the presence of migrants equates to economic insecurity.

²⁹ For example: Simon Walters, 'Secret Report warns of Migration Meltdown in Britain', Daily Mail, October 31st, 2017. Available at: <http://www.dailymail.co.uk/news/article-398232/Secret-report-warns-migration-meltdown-Britain.html>.

³⁰ Christian Dustmann and Tommaso Frattini, 'The Fiscal Effects of Immigration to the UK', The Economic Journal, 2014. Available at: <http://www.cream-migration.org/files/FiscalEJ.pdf>.

³¹ Julia Rampen, 'Clive Lewis and David Lammy back call for Labour to defend free movement', The New Statesman, August 4th 2017. Available at: <https://www.newstatesman.com/politics/brexit/2017/08/clive-lewis-and-david-lammy-back-call-labour-defend-free-movement>.

³² May Bulman, 'Brexit vote sees highest spike in religious and racial hate crimes ever recorded', The Independent, July 7th, 2017. Available at: <http://www.independent.co.uk/news/uk/home-news/racist-hate-crimes-surge-to-record-high-after-brexit-vote-new-figures-reveal-a7829551.html>.

³³ Stephen Clarke, 'A Brave New World: How reduced migration could affect earnings, employment and the labour market', Resolution Foundation, 2016. Available at: www.resolutionfoundation.org/app/uploads/2016/08/A-brave-new-world.pdf

³⁴ Morris M., Free movement and the EU referendum, IPPR, March 2016. Available at: <http://www.ippr.org/publications/free-movement-and-the-eu-referendum>.

³⁵ Madeline Sumption, 'Labour Immigration after Brexit: Trade-offs and Questions about Policy Design', The Migrant Observatory, January 2017. Available at: <http://www.migrationobservatory.ox.ac.uk/resources/reports/labour-immigration-brexit-trade-offs-questions-policy-design/>.

³⁶ Joe Owen, Implementing Brexit: Migration, Institute for Government, May 2017. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/Brexit_immigration_WEB.pdf.