Title: The trafficked and the new undocumented post Brexit
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Abstract: This presentation will consider those third country nationals currently exercising rights under EU law who currently look most likely to find themselves on the wrong side of any Brexit settlement and to swell the ranks of the undocumented. It will consider what would need to be put in place to protect them against the worst forms of labour exploitation, including trafficking and forced labour, were the UK to leave the EU. In so doing it will examine the protection EU law and procedures afford over and above that provided by domestic law and the European Convention on Human Rights against the worst forms of labour exploitation of third country nationals.

Alison Harvey, No5 Chambers speaking notes to accompany presentation

Introduction

I am going to consider those persons currently exercising Treaty rights who are most vulnerable to exploitation now, during the transitional period and after Brexit, and then the protection against the worst forms of exploitation, including human trafficking, that will exist post-Brexit for everyone: EEA nationals and others currently exercising Treaty rights, and third country nationals with no rights under treaties.

Problems do not crystalise on Brexit, the threat of it puts a person at risk because their precarious status can be known and can be exploited.

A lot of attention has focused on which persons exercising Treaty rights currently in the UK will be allowed to stay post Brexit, and less, but some, on who will be allowed to travel post-Brexit. The first thing to do is to turn that on its head and identify who will not be allowed to stay.

Character

We know that the government intends to apply a 'character' filter to grants of a new 'settled status' for EEA nationals and their family members currently present. Tuesday's document on settled status confirmed this.

Public policy

EU law has always permitted the expulsion of individuals on 'public policy' (public security, public health public policy) grounds but these are being interpreted increasingly widely. In the Immigration (European Economic Area) Regulations 2016, (SI 2016/1052) which came into effect in February 2017, this test has been interpreted very broadly, in a way that appears to be incompatible with EU law, *inter alia* lowering the threshold at which removal/exclusion may be permitted by, for example, allowing this on preventative grounds, in the absence of a past criminal conviction; by restricting the factors relating to the individual's integration in the UK that may be taken into account and by detailing vague and controversial 'fundamental interests of society' weighing in favour of removal. The burden of proof is also placed on the applicant rather than the Home Office.

No right to reside

The Government has moved from an approach that permitted the expulsion of EEA nationals only on 'public policy' grounds to an approach that permits their detention and removal, with restrictions on return, where they do not have a 'right to reside' but are not held to present a 'public policy' threat. They may be accused, not of the EU law concept of 'abuse of rights', but of 'misuse of rights' which includes, contrary to EU Law, taking account of the motive for which rights are exercised. For example, a British citizen who goes to live and work overseas so that on return they can bring their third country national spouse back with them without having to meet the requirements of the Immigration Rules may fall foul of this requirement. Rough sleeping is characterised under the current UK regulations on free movement as a 'misuse of rights.'

The Home Office has provided in the regulations that the return, with 12 months, of a person whom it has removed for having no right of residence is a 'misuse of rights' and that it may be proportionate to refuse to allow such a person back into the UK unless they can provide evidence of being a qualified person (worker, student etc.)

Detention

The broader the powers of removal, the greater the chance that person will be detained against removal. Of course, if detained they cannot exercise their rights to work and study, or to look for work and cannot live as a qualified person.

Figures on slide.

The percentage of EU nationals in detention is going up all the time. And in the third quarter of 2016, EU citizens made up a quarter of all enforced removals: some 1,000 persons.

Those whom the Home Office has detained are often persons sleeping rough, often from the A8 and A2 but also others unable to prove that they are exercising Treaty rights, for example because they do not have documents. Romanian and Bulgarian nationals are over-represented in the detention statistics. In the first quarter of 2017, of 1,515 EU detainees, 594 were from Romania and Bulgaria, while 746 were from the A8.

The High Court held, in the expulsion case of *R(Kondrak) v The Secretary of State for the Home Department* [2015] EWHC 639 (Admin), that while it may be proportionate to detain a person being expelled to effect removal, that should only be when removal was imminent. In that case a week was suggested, rather than the five months for which Mr Kondrak had been locked up. In that case, when Mr Kondrak was bailed, the Home Office had purported to make it a condition of release that he did not work. It conceded in his case that the imposition of this condition had been unlawful.

EU nationals who originate from outside the EU and third country nationals exercising treaty rights

The above is not the full story. Very often those affected are naturalised EU nationals, who originate from outside the EU or third country national family members exercising treaty

rights. One of the most notorious detention cases of recent years is that of *Muuse,* a Dutch national of Somali origin. As a Dutch national and an EU citizen Mr Muuse could not, in the circumstances of the case, be deported. But immigration officers made no attempt to check out this claims to be an EU citizen. JLW QC, sitting as a High Court judge, said:

> *'This imprisonment was worse for the Claimant than simple imprisonment because it was in circumstances where he was wrongly put at real risk of deportation, with the fears and anxiety that such brought.*
>
> *73. The junior officials acted in an unconstitutional and arbitrary manner that resulted in the imprisonment of Mr Muuse for over three months. The outrageous nature of the conduct is exhibited partly by the way in which they treated Mr Muuse and ignored his protests that he was Dutch, partly by the manifest incompetence in which they acted throughout and partly by their failure to take the most elementary steps to check his documents which they held [...].*
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> The case is known to lawyers as one where aggravated and exemplary damages were awarded.
>
> *74. However, though it is more than sufficient to uphold the decision of the judge to award exemplary damages on the basis of this high handed and outrageous arbitrary conduct of the junior officials, it would not be fair to those officials to say nothing of the system that allowed this to happen. That system was the responsibility of the Home Secretary and his senior officials [...]. 75. The decision to make an award of exemplary damages was moreover a good example of the type of case referred to by Lord Devlin in Rookes v Barnard at page 1223 where its effect will serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power". There has been no Parliamentary or other enquiry into Mr Muuse's case. No Minister or senior official has been held accountable. We were not told of any internal or other enquiry conducted by the Permanent Secretary or Head of the Immigration Directorate (or as it now is the UK Border Agency). The only way in which the misconduct of the Home Office has been exposed to public view and his rights vindicated is by the action in the High Court. [...] 77. Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages. The making of such an award, as Lord Hutton observed in Kuddus, also serves to vindicate the strength of the law. It further demonstrates that the award of punitive damages under the common law has a real role in restraining the arbitrary use of executive power and buttressing*

Another such case is *R(Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin) Mr Santos was a Brazilian national with a right to reside under EU law Mrs Justice Lang DBE awarded aggravated damages for unlawful detention to Mr Santos, who had a right to reside under EU law. She held

> *'In my judgment, the treatment of the Claimant by the Defendant does merit an award of aggravated damages in the sum of £10,000. I consider that the way in which the officers disregarded his repeated attempts to explain his legitimate status in the UK under EEA law, dismissing him as an immigration offender, was offensive and intensely humiliating … I also*

consider that his treatment at Colnbrook ..was so degrading that it offended his personal dignity.' [paragraph 152]

Character – transitional period

Those whom the Home Office does not remove or detain pre Brexit will make applications for settled status during the transitional period, at which point not only are they at risk of refusal of settled status but of removal on the grounds of their criminal record, conduct during the transitional period or alleged misuse of rights. The result is likely to be a reluctance to come forward at all before the deadline.

Those moved for their exploitation may be part of this cohort because they have been involved in unlawful work and a conviction for this may leave them on the wrong side of the filter.

Third country national family members

Those likely to be shut out after Brexit will be not only nationals of EU member State, of whatever origin, but third country nationals, people from outside the EEA exercising rights as family members under the treaties. The Government indicated in the document on its proposals for a post-Brexit immigration system, leaked to *The Guardian* newspaper that it did not intend to make provision over and above that which currently exists in the Immigration Rules for those exercising what it calls 'derivative' rights: those who enjoy rights because of a link with an EEA national. Who will be affected by this?

Zambrano parents

Third country national parents of British national children, who, but for the care of that parent, would have to leave the EU. These parents may be overstayers with no lawful leave. They may have had a relationship with a British citizen, but this has broken down. What with their immigration history and childcare responsibilities they are likely to be in some of the more precarious forms of employment.

'Chen' parents

Caring for a self-sufficient EEA national child who elects to reside in the UK. Provided the child was self-sufficient before the parent started work, the parent can work.

Third country national family members of British citizens

Who cannot meet the requirements of the Immigration Rules but have been able to come to the UK via the '*Surinder Singh* route', which allows returning British citizens who have exercised Treaty rights in other member States to be treated as exercising Treaty rights on return. While some will have acquired these rights as a result of pan-European careers, others will have gone abroad because they knew that because of their low income, they would not be able to meet the £18,600 requirement of the Immigration Rules.

This creates a pool of workers at considerable risk of exploitation.

Failure to apply for right to reside during the transitional period

EEA nationals and Swiss nationals and those exercising will have to apply for 'permission to reside', conceived of as a form of leave under the Immigration Rules, during the post-Brexit two years (or more) transition period. Those who fail to do so will receive no special protection at the end of the transition. Those who, for a range of reasons that might include mental health problems or relationship breakdown, fail to make the application may find their ability to stay depends on meeting requirements of the Immigration Rules under which they cannot qualify.

Arriving after Brexit

As to EEA nationals arriving after Brexit we know that there will be shortages across the labour market, including in low-skilled work. The document leaked to The Guardian newspaper envisages a form of temporary worker', for two years, with provision for skilled workers to have longer periods of leave putting EEA nationals in the same position as third country nationals coming as 'temporary workers' under Tier 5 of the points-based system.

Migrant workers

While the UK has not participated in the Common European Immigration System, third country national migrant workers do benefit from the protection of workers' rights under EU instruments such as the EU Equal Treatment Directive 2000/78/EC which are justiciable before the Court of Justice. They also benefit from specific provisions on trafficked persons.

Trafficking in persons

The UK will remain a party to the Council of Europe Convention on Action against Trafficking in Human Beings[1] post Brexit, but EU Directive 20011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA will no longer be applicable. This has implications in the spheres of civil and criminal law.

The Anti Trafficking Monitoring Group has produced a comprehensive report *Brexit and the UK's fight against Modern Slavery*.[2] It says in that report:

> *The UK Government's stated intention to leave the jurisdiction of the Court of Justice of the European Union (CJEU) seems to pose an existential threat to continued participation by the UK in European security and criminal justice mechanisms, including those that enable us to combat modern slavery*

It cites the House of Lords Select Committee on the European Union,[3] which has identified practical limits on the extent that the UK and remaining EU Member States can collaborate

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[1] ETS 197.

[2] *Brexit and the UK's fight against Modern Slavery: a briefing by the Anti-Trafficking Monitoring Group,* July 2017, at https://www.antislavery.org/wp-content/uploads/2017/07/ATMG-Brexit-paper.pdf Citing House of Lords, Select Committee on the European Union, 2016, Brexit: future UK-EU security and police cooperation. Available at: https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf ***

[3] House of Lords, Select Committee on the European Union *Brexit: future UK-EU security and police cooperation,* Seventh report of session 2016-17, HL Paper 77, Available at: https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf

on police and security matters if they are no longer accountable to, and subject to oversight and adjudication by the Court of Justice, among other supranational institutions. Trafficking is a business whose profits run into millions.

Fighting against traffickers and prosecuting traffickers

The UK's ability to identify and punish traffickers and to protect trafficked persons risks being compromised in that it may longer enjoy direct access to the Europol database, Eurodac data or to the same intelligence sharing.

EU law has developed an extensive mechanism of exchange of information on criminal records of EU citizens, which should enable national authorities to have a full picture of the criminal record status of EU citizens who enter their territory:

- Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States;
- Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

To this must be added the Schengen Information System ('SIS II'.) This is this is an inter-state database containing information about persons and property of interest to State authorities. The reasons for entering information relate primarily to policing and criminal justice matters, including extradition, missing persons, surveillance and the seizure of property.

The UK Government said that the EU system:

> *'…has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of the previous offending of EU nationals being prosecuted. The previous conviction information can be used for bail, bad character and sentencing, as well as by the prison and probation service when dealing with the offender once sentenced.*'[4]

If Brexit means that the UK ceases to participate, or that restrictions are placed on its participation, in these information sharing systems then its ability to fight organized crime may be affected. This has particular implications for its ability to fight trafficking in persons

The European Arrest Warrant permit warrants issued in one member State to be enforced in another, thus facilitating the UK in requiring other EU member States to cooperate with it in pursuing wanted persons, and facilitating its cooperating with other States.

One particular difficulty with staying involved in these systems post Brexit will be if the Court of Justice is not permitted to exercise jurisdiction. These systems depend on cooperation between States and on information sharing and this requires regulatory oversight.

Trafficking persons prosecuted

[4] Command Paper (8671).

Meanwhile where trafficked persons and other workers have committed crimes in the course of their exploitation a Directive on the right to interpretation and translation;[5] a Directive on the right to information;[6] a Directive on the right to access to a lawyer;[7] a Directive on Legal Aid all provide protection and increase the chances of their being able to plead defences related to their trafficking. The Directive on procedural safeguards for children[8] provides them with particular protection.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Initially, at a time (in 2012) when the UK was opting out of EU instruments seemingly on principle, the UK opted out of that one. The Home Office argued[9] it did not add to the protection of trafficked persons in the UK and tried to argue that its making mandatory provisions at the time discretionary in UK law would somehow leave trafficked persons worse off. The Home Office stated that opting in would require the UK to make mandatory provisions at the time discretionary in UK law and that these steps would reduce the scope for professional discretion and flexibility and might divert already limited resources.

The decision to opt in was portrayed by Government as largely presentational with the Minister then in charge, Damian Green MP, saying:

> *The new text still does not contain any measures that would significantly change the way the UK fights trafficking. However, the UK has always been a world leader in fighting trafficking and has a strong international reputation in this field. Applying to opt in to the directive would continue to send a powerful message to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle this crime.*[10]

Nonetheless when the UK did decide to opt in, the European Commission identified that it would need to amend existing trafficking offences to:

- confer extra-territorial jurisdiction over UK nationals who commit trafficking offences anywhere in the world;
- to make mandatory appointing special representatives to support child witnesses during police investigations and criminal trials; and
- to set out the rights of trafficked persons to assistance and support.

This was despite the UK already being signed up to Article 4 of the European Convention on Human Rights and to the Council of Europe Directive on Trafficking.

Rights of trafficked persons

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[5] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.
[6] Directive 2012/13/EU on the right to information in criminal proceedings.
[7] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
[8] Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings.
[9] 19 June 2012.
[10] *Hansard* HC 12 Mar 2011: column 53WS.

The terms of the Directive emphasise the importance of protecting trafficked persons and put this on an equal footing with the implementation of criminal measures. It sets out criteria for issuing a residence permit to trafficked persons. Article 12.2 of the Directive requires member States to ensure that trafficked persons have access 'without delay' to legal counselling, and, to legal representation, including for the purpose of claiming compensation. It requires that legal counselling and legal representation be free of charge where the victim does not have sufficient financial resources. Article 4 of the European Convention on Human Rights will continue to provide protection to trafficked and enslaved persons and has, in particular, been recognized as a source of positive obligations toward them.[11]

Under the Directive, Member States must provide trafficked persons with subsistence, access to emergency medical treatment and attend to the special needs of those most 'vulnerable' during a reflection period. Those holding a residence permit should be authorised to access the labour market, vocational training and education according to rules set out by national governments.

[11] *Siliadin v France* European Court of Human Rights 73316/01; *Rantsev v Cyprus and Russia,* European Court of Human Rights, 25965/04.