ABA Section of International Law
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Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

Editorial Note

Dear Members,

Here is the Spring Issue 2019 of the Immigration and Nationality Law News, published by ABA's Immigration and Naturalization Committee. This issue focuses on Brexit and its effects on immigration, economy and the future of Europe.

Specifically, this issue contains:

- *Chair's Note* by Margaret (Peggy) Kuehne Taylor;
- *Brexit's Impact on UK Immigration – Deal or No Deal* – By Jennifer Stevens;
- *BREXIT – The ECJ Conundrum for the UK* – By Riaan Eksteen PhD;
- *Orderly Brexit or "No Deal" Brexit – Implications on Immigration of UK Nationals to Switzerland* – By Sabine Taxer and Stefan Mueller, Esq.

Our sincere gratitude to the contributors - your time and effort are greatly appreciated.

Regards,

Stefan Mueller
Editor

Co-Chair's Note

Dear Immigration Committee Colleagues,

For better or worse, immigration/migration issues are currently in the forefront of domestic and international dialectic. It is the Salvadoran/Guatemalan/Honduran Triangle movement; the flight out of Venezuela; and the Central African exodus. It is the safeguarding of multinational families; the management of cross-border talent; and the insurance of domestic safety and security. We, the members of the Immigration Committee, possess the expertise and passion to tackle, or at least influence, the resolution of these complex issues.

This fiscal year alone, our committee members have addressed a myriad of immigration law topics. To name only a few, the committee has sponsored panels regarding – visa regimes in differing jurisdictions; migration issues arising from climate change; and rapidly evolving immigration-related jurisprudence in world courts.

We delivered these panels during the Section's annual meeting, during the speaker series associated with our monthly telephonic meetings, and during stand-alone non-CLE programs. The committee has also contributed to the formulation of ABA policy and ABA publications, such as the Year-In-Review and this newsletter. But the crowning achievements of our committee are the warm friendships we have formed. Through these friendships, we have energized each other and enhanced the service we render to our respective professional communities.

On a personal note, I want to convey to you how much I have enjoyed my three years serving as your committee co-chair. You, the members of the Immigration Committee, have educated and inspired me. I look forward to continuing my work with you in the future, albeit in a different capacity. Thank you.

Margaret (Peggy) Kuehne Taylor
Co-Chair

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

Call for Submissions

Members can submit articles, practice pointers, professional news and other items that they might think would interest our member base. If any member has just received an award, has been nominated for an award, moved firms, changed roles in the firm, or is speaking at an event, publishing an article, engaging in a volunteer project, or anything else noteworthy please let us know. Please note that all contributions on substantive law and practice pointers should focus on immigration law and practice.

Up until the leadership announces new roles in the committee, please continue to send your contributions to st.mueller@wengervieli.ch.

Brexit's Impact on UK Immigration – Deal or No Deal

By Jennifer Stevens

Following an eventful start to the year for Brexit negotiations, the can has been kicked until 31 October 2019. The UK is now set to leave the European Union (EU) on this date without a deal unless a deal is ratified before that date or a further extension is granted. Following three rejections of her deal by Parliament and failed talks with the leader of the opposition, Theresa May has resigned as Prime Minister causing even more uncertainty.

So what does this mean for EU nationals living in or wanting to live in the UK? What impact does this have on the UK's immigration system? Things remain unclear but I summarise below some of the key points we do know at this stage.

EU, European Economic Area (EEA) and Swiss nationals (for ease I will collective refer to them as EU nationals) are currently able to travel to, reside and work in the UK based on their free movement rights. Free movement will cease however, either at the end of any transitional period (in a deal scenario) or after Brexit (in a no deal scenario) – that is currently 31 December 2020 under the Withdrawal Agreement as currently drafted or 31 October 2019 if we leave with no deal.

Qualifying EU nationals who reside in the UK before the end of free movement (the 'cut off' date), shall be eligible for a grant of leave (known as immigration permission) under the EU Settlement Scheme (EUSS) which will protect their current rights after the cut-off date. Those who have resided in the UK for a continuous period of five years (subject to exceptions) will be granted settled status. Those who have resided in the UK for less than five years will be granted pre-settled status allowing them to accrue the relevant five-year period to be granted settled

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

status in the UK. The EUSS has now been fully rolled out with over 750,000 applications received so far.

Family members of EU nationals are also able to apply under the EUSS, which include:

- Spouses and civil partners;
- Unmarried partners (usually requiring two years' cohabitation with the EU national by the cut-off date);
- Children, grandchildren and great-grandchildren under 21 or dependent on the EU national (including those of spouse/civil partner); and
- Parents, grandparents and great-grandparents (including those of spouse/civil partner).

If the UK leaves the EU with a deal, which includes the transitional period negotiated and included in the Withdrawal Agreement, free movement will continue until 31 December 2020 and anyone entering the UK before that date can apply under the EUSS until 30 June 2021.

If the UK leaves the EU without a deal then free movement will end on the date of departure. Any EU nationals entering the UK following that date and up until 31 December 2020 can apply for European Temporary Leave, which will be for a maximum period of three years. Following that, EU nationals will be required to qualify and apply under the UK's immigration system.

Future immigration system

EU nationals arriving in the UK after Brexit or any transition period will be subject to a new immigration system. In a recent White Paper, the Government set out its intention that the future system will no longer differentiate between EU and non-EU migrants. Potential new employment routes are as follows:

- Skilled migration route (requiring sponsorship by an employer) – with the current cap and resident labour market test removed;
- Short-term and low-skilled migration route (limited to immigration permission of up to 12 months); and
- Youth mobility scheme for those aged between 18-30.

The new immigration system is set to be implemented from 1 January 2021. We did see recent changes to the Immigration Rules however, with the sudden removal of the popular Tier 1 (Entrepreneur) category and the introduction of the Innovator and Start Up categories at the end of March this year. These categories appear to be the beginning of a shift away from the UK's current points based system which has received criticism over the years.

So for EU nationals wanting to move to the UK, it would be advisable to do so as soon as possible in case the UK does leave the EU without a deal in October. EU nationals already in the UK should apply under the EUSS and consider applying for British citizenship if eligible.

With the Tory leadership up for grabs and the form of Brexit, if Brexit happens at all, uncertain, we need to continue to watch this space.

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ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

BREXIT – The ECJ Conundrum for the UK

By Riaan Eksteen PhD

Introduction

Ever since the United Kingdom (UK) planned the referendum on its future with the European Union (EU), the European Court of Justice (ECJ) has provided a rallying point for the proponents of Brexit. Accordingly, the Court has become and will remain an alienating factor in the UK's relationship with the EU. Prime Minister (PM) Theresa May (although she stood down as leader of her Party on 7 June 2019, she remains PM until her successor assumes office in late July 2019) declared it an indelible red line and made it a major Brexit negotiating demand of the UK from the beginning. The UK regards the Court as a threat to its sovereignty. The reasons for this fixation with the ECJ and the dogmatic rejection of any role for the Court are manifold. The resentment stems from particular decisions the Court has delivered in recent years affecting the UK. The antithesis of these demands is the EU's immovable position that the ECJ is an integral part of the whole EU establishment. The Court is there to oversee all the judicial aspects in which the EU is or may be involved. For the EU its Court is a non-negotiable issue.

Understanding the ECJ

Any discussion of the ECJ in the context of Brexit requires first of all an understanding of the Court and its place in the structure of the EU.

The EU is a political institution. Today it is far from what the European Founding Fathers envisaged it to be. The Union has become not just an economic but also a political global actor. This has come about because of multiple events it has pursued and still pursues in search of a better-integrated Union. Over the past 60 years, it took various actors to transform the Union by taking deliberate steps to achieve that ambition. From its inception, the ECJ has been an unusual Court within an effective legal system. The Court is a complex institution embedded in a political system that requires both a legal and a political understanding. Today no student of EU politics can afford to ignore the role of the judiciary, the impact of which can be crucial. In the grand scheme of Union affairs, the ECJ holds a prominent place in the intricate web of EU institutions. The Court has maintained its role as chief interpreter of EU law ever since its establishment in 1952. It has the power of judicial review. For the ECJ, the purpose of judicial review is not only to determine whether national laws are consistent with European law, but, most importantly, to declare illegal any EU or national law that violates any EU treaty. This resulted in the ECJ establishing the doctrine of EU law supremacy, which in turn created the doctrine of direct effect. The political impact of these two maxims has been considerable. Lately they have come to haunt the UK. Consequently, the Court has become a strategic actor that has been able to push forward its European integration agenda and be one of the driving forces of that process.

A supranational legal order has emerged with a Court that has changed little over time and has used its rulings to claim substantial authority over national courts, national law, and the interpretation of EU treaties. EU "judicial politics" has started to attract increasing attention. A consensus began to form on the pivotal role being played by the ECJ in politics. From case law, countless examples can be drawn to underscore the consciously political role of the ECJ, which has been nothing less than remarkable. The ECJ has become one of the most powerful supranational courts in world history with extensive authority clearly achieved. In that process the Court has advanced another aim of the Union, namely integration. In doing so it has demonstrated its independence and the authority necessary to push the parameters and depth of European integration. The ECJ shaped European integration from the beginning. It has played a central role in advancing that integration process. The Court became its main

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

proponent. It facilitated and advanced European unification by means of judicial interpretation. Its rulings were influential. The striking feature of the ECJ is not that it is a political court, but rather that it has until very recently been so successful in pursuing its political program of integrating Europe through law without attracting much public or even expert notice. Thus the power of the ECJ to promote European integration through law has been broadly acknowledged.

The intensification of European integration in the late 1990s has moved the Court increasingly into the limelight with its determination to bring and keep Member States in line with European law. The Court's mandate has evolved and has been secured through a series of treaties. The ECJ perceives itself as the custodian of all treaties adopted to give effect to the changing circumstances the EU faces. When the Court interprets a treaty it retains to a maximum degree judicial power to interpret those aspects of the treaty that applies to the Union. In doing this it plays a key role in developing the law of EU affairs. The latest is the Treaty of Lisbon, which has as its overall aim to ensure that the Union shall be perceived as one unit, speak with one voice, and implement consistent policies. This treaty has become a pivotal point in European integration and its foreign relations. It replaced all previous EU treaties. It introduced considerable changes and renamed the whole judicial system. The ECJ became the Court of Justice of the European Union (CJEU). This development has, however, not reduced the importance of the ECJ in any way. In fact, its role has expanded. The signing of the Lisbon Treaty, which seeks to ensure a more systematic account of overall foreign policy objectives, in fact saw an increase in the influence of the ECJ. It should be pointed out, though, that the ECJ does not define the Union's objectives. It accepts them as defined by the political institutions and the treaty.

Prelude to the Brexit Exercise

To understand the UK's inordinate fixation on the ECJ it is important to take several events into due consideration. The issue of the ECJ figured prominently in the build-up to the referendum of June 2016. Thereafter, while charting the unknown, the Court continued to be an issue in the general election of 8 June 2017. This issue became more and more the PM's bête noire. After the election that went so dreadfully wrong for her, the PM kept repeating her mantra that a no-deal was better than a bad one — the latter meaning one that would provide, inter alia, for a role for the ECJ. With her red line for the ECJ, she wanted all its control over UK affairs to end the moment the country left the EU. Only then would she be satisfied that she had been vindicated with her credo of "Brexit means Brexit".

Brexit is a foreign-policy issue for the rest of Europe. In London it revolves primarily around a battle for domestic power and the survival of the UK as a political unit. Seldom before has the impact of domestic affairs on foreign affairs been so vividly demonstrated as in the case of political divisions in the UK driving foreign-policy positions on Brexit and, in particular, PM May's red line on the ECJ. Because of this preoccupation with the ECJ the UK has viewed many of its position points through the ECJ-prism. An early ECJ thorn in the UK flesh came a few months before the Brexit-vote in June 2016. In February 2016, the Court ruled that the UK could not deport a Moroccan mother with a British-born son — even if she had a criminal record in Britain. The Court's decision was taken by Eurosceptic campaigners as evidence of unwarranted interference by the EU in the powers of the Home Secretary (Theresa May at that time), who has the ultimate power to decide on the deportation of individuals and thus also of convicted foreign criminals. It contained its own measure of shock and contributed in no small way to raising resentment towards the ECJ in the run-up to the referendum. After the vote the disbelief in the ruling continued to reverberate through government circles.

For hard-headed Brexiteers this created a dangerous precedent. That was why the referendum debate on Brexit focused so sharply on UK sovereignty — to remove the UK from the jurisdiction of the ECJ once and for all. The Court was perceived as detrimental to the UK's ability to control its own

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

affairs. This alone made it difficult for the government to keep arguing the benefits of staying in the EU. The UK's Secretary of State for Justice at the time of the referendum-campaign, Michael Gove, was a leading voice for Brexit. He was vehemently critical of and hostile towards the ECJ. He openly accused the Court of undermining the ability of the UK's intelligence service to monitor suspected terrorists, and of being harmful to UK interests.

In a landmark decision on 21 December 2016, the ECJ challenged the data-retention provisions of the UK's Investigatory Powers Act. The Court declared the general and indiscriminate retention of electronic communications to be unlawful. According to the ruling, Member States may not impose a general obligation to retain data on providers of electronic communications services. What horrified the UK leadership the most was the stinging remark with which the Court unceremoniously denounced the Act. In the Court's opinion, to exceed the limits of what is strictly necessary cannot be justified in a democratic society. PM May, who had been the UK's Home Secretary at the time of the Act's enactment, was now more adamant than ever that she did not want the ECJ to have any jurisdiction over the UK in its future relationship with the EU. Her antagonism to and resentment of the ECJ just grew deeper. She became embittered. The case furnished more grist to the mill of the Brexiteers. The headline for the article on the case in *The Telegraph* of 22 December 2016 said it all: "The European Court of Justice ruling on state surveillance is exactly why we are leaving the European Union". In early November 2017, in the midst of the UK-EU negotiations on Brexit, the ECJ rubbed added salt into UK wounds. The Court then ruled that a Somali national with 30 criminal convictions must stay in the UK. In addition, this prolific and violent offender was awarded £78,500 in compensation. This is because the Court ruled that the Home Secretary had unlawfully kept him in prison for 445 days while there were attempts to deport him.

The Onerous Road Travelled in Pursuit of Brexit

The siren call of the Brexit campaign was for the UK to "take back control". Yet, the full impact of Brexit upon the legal structure of the UK's relationship with the EU was hardly anticipated. PM May stubbornly determined to regain the UK's distinctive identity in the world, how it chooses to proceed in the world and to formulate a previously unthinkable policy. To achieve that she started out by adopting a hard-line approach to Brexit. In drawing red lines and endorsing previous ones, she acted more in an effort to appease the anti-EU wing of her party. Brexiteers mobilised around this slogan which then became a policy objective. Three years later nobody was in control. The failure to take back control was due to the PM failing to take and keep control. Given that her red lines were foolishly laid and contradictory, breaking them became inevitable.

A particular burdensome task was to disentangle the UK from the EU's multiple institutions and policies. Removing the UK from the purview of the ECJ is a delicate and sensitive issue, with questions being raised over whether the UK can totally sever all ties with the Court. The reasons why any future relationship with the EU will be nearly impossible without the Court are equally numerous. Whatever position the UK adopted it would not escape ECJ-related consequences. Given PM May's hard-line standpoint on the Court it was a fact that she could barely stomach. She ignored the four cornerstones of the EU (goods, people, capital and services) that had been meticulously constructed and fully endorsed by the ECJ over many decades. She wanted to focus only on keeping free movement of goods between the UK and the EU — but took no heed of the other three. It came as no surprise that her plan was unacceptable. Its proposals were incompatible with the needs and requirements of the EU. They caused a crucial point of friction. Being the major cornerstones of the Union they are enforced as indivisible, inviolable, and inalienable by the EU. Consequently, they are not only ingrained in the whole EU system but form the heart of the structure for the single market. This attempt to

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

split up the four freedoms never looked viable. All of this resulted in her plan being disliked and disavowed on all sides, both at home and in Europe. On top of that the UK proposed to apply EU customs rules without being part of the Union's legal order. Thus, the UK wanted its sovereignty back and control its own laws and by implication demanded that the EU lose control of its own laws.

The timing and content of her position taken on the ECJ were governed more by factions in the ruling Conservative Party than by reality. PM May converted slogans into policy. This strategy was doomed to fail. As the political squabbles about the Court intensified it became clear furthermore that the ECJ had brought its own set of consequences to the process of finding finality on Brexit regardless of the nature of the eventual relationship between the UK and the EU. For the EU these consequences were real and inescapable. For the UK it was a matter first to deny any role for the ECJ in the relationship to be negotiated. Then later, as the reality started to dawn on PM May that the UK would not be able to escape the involvement of the Court entirely, she tried to finesse that role so that its impact could be softened. At home she was accused of duplicity. In Europe the argument was won.

From the EU's side there was not much sympathy for the UK's efforts to remedy what amounted to a mess of its own making. The EU indicated from the beginning that there were limits to what it would agree with and accept from the UK. The EU was determined to preserve the value of membership for its members and to avoid any unpicking of all the compromises built up so painstakingly and meticulously over many decades. PM May was told in no uncertain terms that her approach of cherry-picking was unacceptable and counterproductive. On Brexit the EU has stood united as never before; the UK, on the other hand, has been a deeply divided entity and has remained so. It has become abundantly clear that the UK government consistently underestimated the EU's resolve to stay united. Moreover, for the EU surveillance and enforcement mechanisms are of paramount importance. That requires the involvement of the ECJ to ensure the uniform application of any agreement to be reached with the UK. What must be kept in mind is that such an agreement will represent an act of an institution of the EU. Consequently, it would fall within the jurisdiction of the ECJ to review its legality, interpret its provisions and ensure its uniform application. That was anathema to PM May. However, over time she discovered that the involvement of the ECJ was inevitable. Slowly but surely she began to acknowledge the fact that the UK would have to accept the ECJ — if not its rulings, then its involvement in one way or the other — when it comes to aviation, medicines, Europol, Euratom, or any other area where the UK wished to continue participating in EU agencies. Withdrawing from the ECJ meant that the UK would have to leave more or less every regulatory mechanism devised by the EU, from drug safety to aviation rules. European agencies, which she wanted the UK to continue participating in, are policed by the ECJ.

As the UK moved along the arduous path of constructing a substantive set of proposals to give full meaning to Brexit, its initial attempts to structure that future relationship with Europe and one without the ECJ were given the cold shoulder from its European interlocutors. In the first UK White Paper in February 2017 a section was included entitled: "Taking control of our own laws — We will take control of our own statute book and bring an end to the jurisdiction of the Court". One of the subsections was headed: "Ending the jurisdiction of the Court of Justice of the European Union in the UK". In it the government justified its determination to end once and for all the influence of the ECJ over the UK. In no uncertain terms it declared that the Court was amongst the most powerful of supranational courts due to the principles of "supremacy" and "direct effect" in EU law. The ECJ established these two principles in its rulings of Van Gend & Loos and of E.N.E.L respectively in 1963 and 1964, fully nine years before the UK joined the EU. So, when the UK joined in 1972 it must have known full well what these principles were and how they guided EU law. By joining the EU, the UK thus implicitly accepted them as part of it

membership agreement and adhered to them. Now 45 years later the UK found them objectionable and enough reason to reject the ECJ applying them and to continue abiding by them! The events of July 2018 with the publication of the second White Paper on the UK's future relationship with the EU brought the whole issue of the ECJ out into the open. In November 2018 PM May concluded the Withdrawal Agreement (WA) with the EU. It defines various roles for the Court in a future relationship with the UK.

Negotiations on how to structure the UK's exit became acrimonious. The EU dug in its heels. It refused to discuss trade-offs. It insisted that the withdrawal issue had to be finalized before anything else could even be considered. The pressure on PM May to define Brexit became immense. The complexity of Brexit grew beyond the slogans of the referendum that had caused Brexit. More Gordian knots appeared as the negotiations with the EU continued. Perpetuating the principles of "direct effect" and "supremacy" of EU law over UK law would mean that the UK would be required to annul Acts of Parliament if they were to be found inconsistent with EU laws or treaties. These two principles would apply equally to the provisions of the WA itself – even to any future relationship arrangement with the EU that might replace it. Incorporated in the WA are also equally unique and rigorous mechanisms for breaches by the UK. In such eventualities the UK would be subject to financial penalties or even discriminatory trade sanctions without any recourse for the UK to WTO disputes procedures. Article 128 (5,b) of the WA stipulates that if it were to enter into force, even if the UK would be nominally leaving the EU, it would continue not only to be subject to all EU laws, including newly enacted ones, but most important also to the jurisdiction of the ECJ and the decisions of EU institutions, such as the Commission and EU Parliament, while the UK would not be entitled to submit proposals, initiatives or requests for information to EU institutions. Because Article 184 of the WA requires both the UK and EU to use best endeavours to negotiate a long-term agreement which conforms to the principles set out in the Political Declaration, the UK would not be allowed to negotiate any future agreement that deviates from these principles. Such failure to agree to a long-term relationship in accordance with those principles would mean that the UK is caught up in the WA without any exit possibility or avenue for complaint. Neither PM May and her advisors nor Mr. Boris Johnson, the possible future PM, appeared to be fully aware of this constraint.

The inclusion of these numerous references to the ECJ caused more headaches for her. The WA suffered three fateful defeats in the House of Commons. It was not defeated because of its references to the ECJ, but they contributed to the disillusionment being felt about PM May's ineffective leadership and sustained incompetence to deliver what she had promised to do from the outset — deliver Brexit. Parliamentarians were at the end of their tethers and the process was growing more convoluted. The UK was plunged into deeper chaos and more confusion. Accusations of political dishonesty were levelled against PM May. Brexit was now on course for a lengthy delay and perhaps even self-destruction.

The EU has one common purpose. Never before has the EU been so strong and united. Having been galvanised into unity on Brexit does not mean that the EU does not experience divisiveness on several serious issues with their own real consequences for the Member States. First and foremost, it was determined to ensure that its Court continues to be the protector of all that has been created by the Union for the well-being of its Member States and their citizens, whether the negotiations with the UK succeed or fail. European integration has brought peace and prosperity to Europe and allowed for an unprecedented level of cooperation on matters of common interest in a rapidly changing world. The ECJ has been instrumental in creating and advancing that unity. Therefore, the Union's overall objective in its negotiations with the UK has been to preserve not only its own interests, but also those of its businesses, its Member States, and its citizens — all 3.7 million of them in the UK. And for this, the EU owes much gratitude to the ECJ for its role in influencing policies

and decisions. In its management of Brexit it demonstrated consummate professionalism.

Because the UK regards the ECJ as a threat to its sovereignty the Court has accordingly become an extremely divisive factor in UK politics. PM May and her party have staggered from one position on the ECJ to another. A scenario that will ensure the UK an ECJ-free future will leave the UK very much high and dry, with incalculable consequences for the country in every sphere of human activity. While she promoted her suggestions that there could be ways to respect the ECJ's involvement, without direct ECJ jurisdiction, there was little appetite in the EU for creating new mechanisms to help her finesse her red line on the Court. At home this standpoint has not endeared her to all members of her party. The die-hard Brexiteers demanded a clean break with the EU. Accordingly, these hard-liners have accused her of betraying her own red line on the ECJ and what Brexit is all about. The pro-EU members of her party wanted to mitigate the impact of leaving. PM May eventually found herself torn between appeasing the hardcore Brexiteers and the EU negotiators, who yielded very little to her demands. The UK's position has all along been aggravated by her decision that Brexit meant not just Brexit but also several red lines — foremost among them leaving the single market, ending free movement and ending the jurisdiction of the ECJ.

Conclusion

In the span of a few weeks the whole Brexit-process unraveled. Events have ruined PM May. Her legacy is in tatters. She and her government will not be remembered for any decisive events or moments, but rather for a series of failures that led to the most catastrophic non-event in the recent history of the UK — Brexit. Her poor political judgments aggravated the UK's precarious position. From June 2016 up to May 2019 the whole Brexit exercise and negotiating process provided valuable lessons. One that was ever so difficult for PM May to swallow was the high premium the EU placed on protecting the integrity of its legal order, with the ECJ being inextricably part of that regime, and the accompanying solidarity of its members. The other one was that for foreign affairs to be successful it requires a policy that depends on important conditioning factors and circumstances domestically that are conducive to unity. After all these years the UK has not advanced to the end of Brexit. It has not even completed the beginning. What it has to show for all its efforts is that faith in the democracy is at a low point and contempt for Parliament is growing.

Three years after the referendum the future of the UK and its relationship with the EU are as unclear as ever. For three years the UK and the Conservative Party in particular have been in a prolonged existential crisis. More than two years have been squandered by the government and its obdurate PM, who, lacking the imagination, flexibility, flair, or clubbability failed to find a solution acceptable to Parliament that would implement the plebiscite's outcome. Finally PM Theresa May succumbed to the inevitability and resigned ignominiously. She was in government but her party was ungovernable. Her cabinet was discontented and unruly. It neither obeyed her nor sacked her. During her tenure as PM she had to accept the resignations of nearly 30 members of her Cabinet and senior staff involved with Brexit. The spate of parliamentary votes contributed nothing to a solution. It brought no clarity. It only added to what was already a madhouse of confusion. It held her in contempt — a first in UK parliamentary history. In her worst nightmares PM May surely could not have foreseen the tumultuous political storm that broke over her and her efforts to achieve what Brexit and the referendum of 2016 were all about. Confidence in her was at an all-time low. In the process she became mortally wounded politically. She panicked. She misread the mood in Europe and in her Parliament. She was outmatched. She succumbed to EU demands. In the end she was tolerated more than accepted. When she eventually capitulated in humiliating fashion she left no legacy.

How, when, and even if the UK leaves the EU has been unclear for months. That uncertain state of play will continue well into the premiership of her successor. When the new PM assumes office he will

ABA Section of International Law
Your Gateway to International Practice

Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Spring Issue 2019

be assured of one unmistakable fact: the WA his predecessor negotiated is not open for renegotiation. On that the EU remains adamant. If the UK does want to leave the EU in an orderly manner it can only be by way of the WA which will be transformed into a treaty. That is all that the EU's legal constraints will allow.

The new PM will have to face the unenviable situation that the EU had extracted a formal commitment from PM May which is now encased in the WA not to attempt reopening the WA as it was the condition of the EU Council's decision when it granted the extension period until the end of October 2019. As the EU will not entertain any amendments to the WA and its current version will not be approved by the UK Parliament, the new PM would be well advised to focus on the longer-term relationship between the UK and the EU. If he were to endorse the WA it could spell political disaster for him and his party. What seems not to be fully appreciated by the UK negotiators is the fact that the WA will become an international treaty between the EU and the UK once the UK Parliament on the one side approves it and enacts implementing legislation and the European Parliament on the other side ratifies it as well. Thus when it enters into force it becomes legally binding in international law. Moreover, the ECJ is then entitled to review it as a treaty of the EU from which consequences for the Union flow.

When the EU's uncompromising stand on the ECJ is analysed the bottom line that emerges is that the Court has become an influential force not only in the EU establishment as a whole, but also in the Union's legal and foreign affairs in particular. Over decades the ECJ has grown into a powerful force, so much so that it has not endeared itself to the UK. For the UK the Court became a contentious issue. In the ensuing Brexit negotiations the ECJ remained a major bone of contention. The ECJ linkage to a solution was a given and the Court emerged as an issue on which the EU was not prepared to compromise for the simple reason that for the Union its Court has been and must continue to be involved in overseeing its treaty and other international obligations.

When Brexit does eventually happen the nature of the UK's departure will shape its future relations with the EU and vice versa. Inevitably, they will be tied together for years to come. The protracted and contentious negotiations of the past 30 months have severely diminished trust between the EU and the UK. The latter's reputation throughout Europe has been damaged. The antipathy of the Brexiteers has been fueled. The economic consequences of Brexit and the lessons of Brexit for the future of European and global integration are subjects that will dominate media space and scholarly discussion, and cause political headaches for the foreseeable future.

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Orderly Brexit or"No Deal" Brexit - Implications on Immigration of UK Nationals to Switzerland

By Sabine Taxer and Stefan Mueller, Esq.

Background

On 23 June 2016, the United Kingdom made history in being the first member state of the European Union (EU) to vote to exit the EU. Of the approximately 30 million people voting on the referendum (representing more than 70% of the British population), 51.9% voted for the United

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Kingdom to leave the EU. Subsequently, on 29 March 2017, the British government officially notified the EU of the United Kingdom's intention to leave the EU.

While the United Kingdom was set to leave the EU on 29 March 2019, the deadline was initially extended to 12 April 2019. Having granted this initial extension, the EU has now backed another six-month extension until 31 October 2019 as no deal could have been closed by the previous deadline. However, the United Kingdom will leave the EU before this date if the withdrawal agreement is ratified by the United Kingdom and the EU before then.

Should the United Kingdom and the EU ratify the withdrawal agreement on or before 31 October 2019, it will result in an orderly Brexit. Should no agreement be ratified by no later than 31 October 2018, it will result in a so-called "no deal" Brexit.

Since the main legal foundations for the relations between the United Kingdom and Switzerland are currently the bilateral agreements between Switzerland and the EU, Brexit will also have consequences for Switzerland and its relationship with the United Kingdom. This article will focus on the relationship between the United Kingdom and Switzerland following an orderly or a "no deal" Brexit. Following the United Kingdom's exit from the EU, the bilateral agreements between Switzerland and the EU have to be replaced by bilateral agreements between the United Kingdom and Switzerland with an objective to ensure that the existing mutual rights and obligations granted under the current legal framework continue to apply after the United Kingdom has left the EU – irrespective of whether it is an orderly Brexit or not.

The Swiss Strategy

According to statistics, there were a total of 43,000 UK nationals living in Switzerland and about 34,500 Swiss nationals living in the United Kingdom in 2017. Furthermore, while the United Kingdom is the sixth largest export market for Swiss-produced goods, Switzerland is also a major partner for the United Kingdom with being its third largest export market outside the EU – only after the United States of America and the People's Republic of China. Due to the importance of a continued beneficial trade partnership, Switzerland and the United Kingdom have entered into negotiations to conclude bilateral agreements that shall provide for the same, and to some extent, also further rights and obligations as exist under the current legal framework between Switzerland and the EU. These negotiations have been initiated by the Swiss Federal Council on 19 October 2016.

In the context of these negotiations, Switzerland and the United Kingdom have signed five bilateral agreements providing for a smooth continuation of their bilateral rights after Brexit. These five bilateral agreements relate to the areas such as trade, immigration, road and air transport, insurance and data protection. In terms of immigration, the Swiss Federal Council has approved an agreement with the United Kingdom on 19 December 2018 concerning citizens' rights after Brexit – the Agreement on Citizens' Rights Following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement.

The Agreement Citizen's Rights Following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement

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Persons Agreement aims to protect the rights of Swiss and British nationals obtained in either the United Kingdom and Switzerland under the Agreement on the Free Movement of People (AFMP) concluded between Switzerland and the EU.

The AFMP was signed by Switzerland and the EU on 21 June 1999 and came into effect on 1 June 2002 after having been approved by the Swiss voters. It aimed at gradually introducing the free movement of persons between Switzerland and the EU and to partially liberalize the cross-border provision of services. Currently, the AFMP affords full freedom of movement to citizens of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom. Moreover, citizens of Bulgaria and Romania are entitled to the free movement of persons under the AFMP as of 1 June 2019. Finally, citizens of the newest EU member state, Croatia, will enjoy full freedom of movement only as of 1 January 2027.

With the United Kingdom leaving the EU following Brexit, Swiss and UK nationals cannot refer to the AFMP with regard to the freedom of movement between Switzerland and the United Kingdom. As a result, on 25 February 2019, Switzerland and the United Kingdom have entered into the Agreement on Citizens' Rights Following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement, which grants Swiss and UK nationals with the same rights as they had under the AFMP among others. This agreement will become effective either on 1 January 2021 in case of an orderly Brexit or, provisionally, on 1 November 2019 in case of a "no deal" Brexit and will mainly protect the rights acquired by Swiss and UK nationals under the AFMP after the same ceases to apply between Switzerland and the United Kingdom. While the rights granted under this agreement will apply without any timely limitations for those citizens already living in the respective foreign jurisdictions, the benefits of this agreement do not apply to Swiss and UK nationals who move to the respective foreign country after the AFMP has ceased to apply to the United Kingdom, which will either be 1 January 2021 or 1 November 2019.

Orderly Brexit

In case of an orderly Brexit, the United Kingdom and the EU will have ratified a withdrawal agreement on or before 31 October 2019. Such withdrawal agreement will envisage a transition period, which is set to run until 31 December 2020.

In case of an orderly Brexit, the AFMP and its existing provisions will continue to apply for relations between Switzerland and the United Kingdom during the transition period until 31 December 2020. Therefore, during the transition period, both UK nationals in Switzerland and Swiss nationals in the United Kingdom may claim the rights under the AFMP. As a result, both Swiss and UK nationals are afforded with the full freedom of movement as applicable to them since 1 June 2002.

The Agreement on Citizens' Rights Following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement will not come into effect until after the end of the transition period on 31 December 2020. Therefore, all Swiss nationals moving to the United Kingdom and all UK nationals moving to Switzerland before and on 31 December 2020 will be protected in their status acquired under the rights applicable to them in accordance with the AFMP.

Moreover, while the EU is expected and has also confirmed that UK nationals shall be exempt from

the requirements to obtain a visa to enter the Schengen Area after the United Kingdom has left the EU, such exemption must also be resolved between Switzerland and the United Kingdom. As a result, the Swiss Federal Council has also decided to exempt UK nationals from the requirement to obtain a visa to enter Switzerland after the AFMP ceases to apply to the UK after its exit from the EU. In return, the United Kingdom has resolved that Swiss nationals will also be exempt from the requirement to obtain a visa to enter the United Kingdom once the United Kingdom has left the EU. Both exemptions resolved by Switzerland and the United Kingdom apply to short and long stay in Switzerland and the United Kingdom respectively.

"No Deal" Brexit

In case the United Kingdom and the EU will not ratify a withdrawal agreement by 31 October 2019, the United Kingdom will leave the EU without an agreement, which will result in a "no deal" Brexit. In case of a "no deal" Brexit, the Agreement on Citizens' Rights Following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement concluded between Switzerland and the United Kingdom will provisionally apply as of 1 November 2019. Therefore, all Swiss nationals moving to the United Kingdom and all UK nationals moving to Switzerland before and on 31 October 2019 will be protected in their status acquired under the rights applicable to them in accordance with the AFMP.

Furthermore, Switzerland has also approved a temporary agreement with the United Kingdom concerning the access to the Swiss labor market, which will apply in case the United Kingdom leaves the EU as part of a "no deal" Brexit. This agreement will introduce simplified requirements for working in either country for a limited transition period in order to safeguard the interest of the Swiss economy in recruiting British workers and the ability of Swiss nationals to access the labor market of the United Kingdom. While UK nationals would be qualified as third country nationals in Switzerland and thus lose all the benefits provided to them under the AFMP, the new agreement aims to introduce simplified access for UK nationals and provide them with similar rights as awarded to EU nationals under the AFMP. This means that the general restrictions applicable to third country nationals such as (a) checks in professional qualifications, (b) preference of domestic workforce and (c) consideration given to the interests of the Swiss economy as a whole, would not yet apply to UK nationals willing to enter the Swiss labor market. Additionally, such facilitations would also result in a temporary waiver of the need for the Federal Migration Office to approve the cantonal permits. The aim of this temporary agreement is to cushion the impact of the abrupt change from the benefits and facilitations under the AFMP to the extensive restrictions applicable to third country nationals in order to safeguard the Swiss economy. Furthermore, Swiss nationals shall also be able to stay in the United Kingdom for up to three months without requiring a residence permit; thereafter, they need to register for a residence permit, which will be valid for three years. The agreement will come in force earliest on 1 June 2019 and shall be in place only until 31 December 2020 (which reflects the intended transition period).

Finally, the Swiss Federal Council has also decided that Swiss businesses should remain to be able to hire staff from the United Kingdom in case of a "no deal" Brexit. In order to ensure that this can be facilitated, the Swiss Federal Council has resolved on 13 February 2019 on the creation of a special annual quota of 3,500 permits (2,100 long-term permits and 1,400 short-term permits) for 2019 for UK nationals following a "no deal" Brexit on 31 October 2019.

Conclusion

Whether there will be an orderly Brexit or a "no deal" Brexit, Switzerland and the United Kingdom have ensured by entering bilateral agreements that the rights of their respective nationals in the foreign jurisdictions will be upheld in order to guarantee a certain continuity and thus reducing a risk of an adverse impact on their respective economies.

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