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THE POST-BREXIT LEGAL FRAMEWORK FOR INTERNATIONAL MIGRATION IN THE UK: DIFFERENTIATED DEPORTABILITY OF POOR EUROPEANS?

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Abstract

Politicians often mention immigration enforcement, and deportation in particular, as a means to assert state sovereignty. The scholarship on deportation in philosophy and political anthropology also names exclusion as a founding act of sovereignty. This paper looks at deportation through an event that is interpreted as regaining sovereignty by a State, that is exiting a supra-national political organization, namely the European Union. New immigration regulations in the UK are meant to end the EU Freedom of Movement and equalise the statuses of EU- and non-EU migrants in the UK. The research question this working paper addresses is the following: how will the new immigration regulations and policies affect the possibility of deportations of EU citizens in the UK? With the lens of Interpretive Policy Analysis, the working paper analyses primary sources, such as regulations, policy papers and policy implementation guidelines as well as expert interviews with immigration advisors. It concludes that the deportability of EU citizens will increase. Deportability of EU citizens will be differentiated, as rough sleepers, former convicts and irregular migrants may be first to be targeted with deportation and form a new deportspora.

Keywords: Brexit, EU citizens, EU Settlement Scheme, deportation, deportability, sovereignty, legal analysis, differentiated deportability, exclusion

Contents

Introduction

Brexit, or United Kingdom exit from the European Union has been planned as a powerful performance of the national sovereign power. It has been framed by its supporters as the regaining of UK sovereignty from the supra-national political organisation. Brexit was framed as an opportunity for establishing UK's own laws and being able to execute them, which gained 51.9% of votes in the Referendum of 23 June 2016. At the end of March 2017, the UK Government started the exit process, developing a host of new policies and legislation to enable the 'disentangling' of UK's ties with the EU. Following the end of the Brexit transition period, at beginning of 2021, EU citizens living in the United Kingdom were moved under the plethora of highly complex national immigration laws. More than 3 million people are now required to comply with immigration laws previously not applicable to them.

UK's politicians and press supporting Brexit were eager to link the EU problem of limiting the country's sovereignty with the freedom of movement (FOM), which gives residence and work rights to EU citizens in other Member States. They falsely explained that Britain was unable to select immigrants from the continent and to deport EU citizens (Radziwinowiczówna & Galasińska, 2021). 'Controlling [the UK] borders by ending free movement once and for all' (UK Government, 2018) has also become the Home Office's (Ministry of Internal Affairs) watchword in the time following the Referendum. Attributing importance to deportation in the Brexit debates was not surprising, as the act of making non-citizens deportable and expulsing them is one of the means to assert sovereignty in the contemporary nation-states (De Genova, 2010; Walters, 2002). By linking the two sovereignty-establishing factors: Brexit and deportation, in this working paper we set out to study whether EU citizens[1] who have lost their privileges related to EU citizenship in the post-Brexit United Kingdom, have indeed become more deportable.

The share of EU citizens among the people deported from the United Kingdom has been on the increase before Brexit, when the EU FOM was still in force. 2016, the year of the Brexit referendum, saw a 26% increase in the number of EU citizens deported from the UK in comparison to 2015 (Home Office, 2019a, p. 20). The growth in the number of deportations has been attributed to the increasingly hostile environment targeting EU citizens in the UK (Radziwinowiczówna, 2020b), especially rough sleepers (Demars, 2017). Despite pro-Brexiteers untrue argument that Britain was unable to deport EU citizens, between July 2019 and June 2020, half of those deported from the UK were EU nationals. The UK, even before Brexit, was negotiating its sovereignty from the European Union by excluding its citizens and selecting the most vulnerable, such as the people with low or no income and no access to housing (Radziwinowiczówna & Morgan, in preparation). EU citizens continued to be deported even during the Covid-19 national lockdowns in the UK. Deportations that happened during the pandemic were also selective, with an overrepresentation of citizens of poorer EU member states. Between April and June 2020 when Britain was hard-hit by the first Covid-19 wave, the only chartered deportation flights headed for Europe, removing 188 EU citizens to Romania, Poland and Lithuania, as well as 97 Albanians (No Deportations, 2021). The timing of these deportations was fundamental and demonstrated that 'hostile environment' policy was undeterred by a serious global health crisis limiting travel. Before Brexit, the inequalities in the deportability of EU citizens were visible and they reproduced the divide between the 'old'

(EU14 that together with UK formed the EU before the 2004 enlargement) and 'new' (EU8 and EU2) EU member states. In 2020, EU citizens from the 'new member countries' made 40% of all the deported from the UK (Home Office, 2021c). It therefore remains important to verify if the post-Brexit deportability will also be selective, making the economically and socially excluded EU citizens more vulnerable to deportations.

We define 'deportation' as any expulsion from a territory of a state that is non-voluntary and organized by the authorities of this state. This understanding of deportation is what the Home Office (HO), the government department responsible for expulsions, calls 'enforced return'. The technical term 'enforced return' names expulsion with the use of coercive measures (e.g., on a chartered flight), different than the so-called 'voluntary return' of the people who are ordered to leave by the authorities but do it under their own arrangements. There is no complete concordance between our understanding of deportation and the HO's definition of deportation, reserved solely to what is perceived as 'conducive to the public good', for instance for convicts (Walsh, 2019, p. 2). Another category of expulsions distinguished by the HO are administrative removals for immigrants identified as having no legal right to live in the country. The way we understand deportation encompasses what the UK Home Office defines as deportation and administrative removals.

The question this working paper sets out to answer is if the immigration regulations EU citizens are now subject to in the UK will increase their deportability. The future protection of EU citizens' rights in the UK have been previously studied (Smismans, 2018) and potential risks related to the EU Settlement Scheme have been identified (Sumption & Kone, 2018; Radziwinowiczówna, 2020a). Stijn Smismans (2019) has even warned that it may lead to the repetition of the Windrush scandal that led to a sudden deprivation of entitlements of people of Caribbean origin living in the UK legally and sometimes to their deportation (de Noronha, 2020). However, the new post-Brexit legal grounds for tentative deportations have not been systematically analysed. Here we present the results of the analysis of immigration laws and policies valid as of August 2021 and explain under which conditions EU citizens may now become deportable, and compare it with the provisions for deportation under the FOM. On the basis of the analysis we will also explain which EU citizens will be most likely to become deportable and deported under the new immigration system.

The argument evolves over four sections. In the next section we present the theoretical framework that links the EU deportations with UK sovereignty and is informed by the inequalities in deportability. In the following section we explain the methods of data collection and analysis. In the section 'Legal grounds for EU deportations' we analyse the conditions under which EU citizens could be deported under the FOM and the present, post-Brexit regulations on deportations and lawful immigration to the UK. In the last section we hypothesise which characteristics will increase the possibility of being targeted with deportation. We argue that class and criminal convictions will define the future deportability of EU citizens in the UK. The poorest Europeans are likely to form the new deportspora – a deportable population. We refer to Peter Nyers' observation about deportspora – an 'abject diaspora' created by the border control policies (Nyers, 2003, p. 1070). While Nyers writes about non-EU citizens attempting to enter the European Union, in this working paper we propose to speak about the people who share the privilege of the red EU passport. We argue

that the new regulations will differentiate the deportability of the EU citizens, making poorer people and people with criminal convictions more prone to be deported.

Theoretical framework

Certain actors, including supra-national political organisations, international corporations and migrants challenge the idea of states as omnipotent sovereigns controlling their territories (Comaroff & Comaroff, 2001; Sassen, 1996). Powerful destination countries, unable to disentangle from the globalized capitalist economy (Chalfin, 2010; Ong, 1999), choose to negotiate their sovereignty by regulating the flow of migrants (De Genova, 2004; Golash-Boza, 2015). Deportation theorists link deportation and deportability to the creation of sovereignty, referring to Schmitt's (1985) assumption about the expulsion as the founding act of sovereignty (see also in Agamben, 1998). Nicholas De Genova (2010) argues that the 'technology of citizenship' – or the distinction between citizens and non-citizens and the right to expel the latter – has become one of the premises of nation-state sovereignty (see also Walters, 2002). If we accept that sovereignty is based on exclusion and that Brexit is meant for the purported re-establishing of UK's sovereignty, it is necessary to ask whether the expulsions of EU citizens will increase after the United Kingdom's exit from the European Union.

Rather than building an all-encompassing deportation-sovereignty theory, the relation between deportation and sovereignty needs to be analysed for specific country-cases, sensitive of time and deported groups. The Brexit debate in the United Kingdom involved a circular reasoning involving deportation and sovereignty. Pro-Brexiteers advertised the EU Exit as a necessary step to deport more EU citizens and Brexit was planned to change the rules and decide over UK's ability to exclude people (Radziwinowiczówna & Galasińska, 2021). In other words, sovereignty from the supra-national European Union was necessary to expand the legal grounds for deportation and these deportations, as well, were planned to reaffirm UK's sovereignty. The Figure 1 below illustrates this sovereignty problem in the Brexit-era Britain:

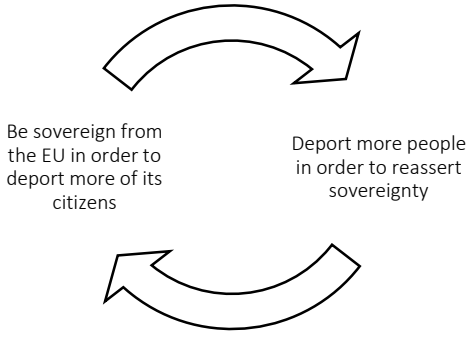

Figure 1. Deportation-sovereignty problem in the Brexit-era UK

Sovereignty is reinstated not by the deportability and deportation of all, but only of some non-citizens. While the performances of sovereignty, such as exiting the EU on the 31th of January 2020 have symbolic power, sovereignty is executed over the bodies of individuals (Hansen & Stepputat, 2005). Reinforcing UK's sovereignty by expanding the grounds for deportation is underpinned by unequal neoliberal state project, as certain groups of non-citizens are becoming more deportable than others. Just like not all the EU citizens were equally deported before

Brexit (Radziwinowiczówna, 2020b), we propose to study the differentiated deportability post-Brexit. We define the differentiated deportability as the unequal socio-legal likelihood of being deported among the citizens of the EU member states. This discretionary choosing of who may lose their immigrant status or be targeted with deportation is a part of a post-colonial state project, with a biopolitical vision of immigrants and their contribution to society (Radziwinowiczówna & Morgan, in preparation). The characteristics that make the deportable mark the boundary between the migrants deserving and undeserving the privilege of residence within the polis.

Methodology

This working paper presents the findings of two research projects: 'Brexit and Deportations: Towards a comprehensive and transnational understanding of a new system targeting EU citizens' (BRAD)[2] and 'New bordering of the UK: Post-Brexit deportability and governance of EU mobility' (UK2deport) [3]. The findings presented below come from work packages that integrated the analysis of primary (interviews) and secondary data (available statistics, legal acts and policy papers). The data were analysed within the framework of the Interpretive Policy Analysis (IPA). IPA, by integrating analysis of variety of types of primary and secondary data (Yanow, 2000) allowed for studying the law on the books and law in action relating to EU deportations in the UK and the meaning the involved parties give to them.

The analysis of the law on the books included legal acts, policy papers and secondary research valid as of August 2021. Our analysis of the law in action has been informed by semi-structured interviews with nineteen experts in the North of England, London and in Poland, country of origin of the biggest group of EU citizens in the UK and one of the two countries that receive the biggest numbers of EU deportees from the UK. The interviewed experts supported vulnerable EU migrants either as immigration advisors or lawyers, local Council Officers or workers and volunteers of charities or non-profit organizations. Five of them were trained and certified as Office of the Immigration Service Commissioner Level 1 Immigration advisors (they were people who can offer advice and services related to EUSS applications). Four worked for non-governmental organizations that were supported by the HO to reach out to vulnerable EU citizens at risk of being left out (Home Office, 2019b). Table 1 at the end of this working paper offers anonymized data of the interviewed experts. Agnieszka interviewed eleven of the experts in English and eight in Polish, their mother tongue. All the interviews were transcribed and analysed with the use of NVivo. Whenever we refer to the information the experts provided, we indicate the source using their anonymized code (see Table 1).

Legal grounds for EU deportations

EU deportations before the EU exit

The UK officially left the European Union on 31 January 2020, but the right to move and reside freely for EU citizens ended together with the transition period on 31 December 2020. With the EU treaties in force, EU mobility to UK was regulated by Article 7 of the Citizen's

Directive[4] ('The Directive'). It applies to citizens of EU Member States and their direct family members (spouse, civil partner, dependent children and grandchildren, of either partner, up to age 21, as well as dependent parents and grandparents of either partner) regardless of their citizenship. EU citizens can travel freely to other member states and remain there for up to three months. Economic conditionality underpins the EU FOM (Barbulescu & Favell, 2020; Juverdeanu, 2019), as the lawful right of residence for more than three months in another member state is not absolute but applies to EU citizens who exercise 'Treaty' rights as (1) job seekers , (2) workers (also as self-employed), (3) students , (4) self-supporting, or (5) family members of categories 1–4.

Lawfully resident EU citizens were subject to deportation from the UK if they committed a crime and were sentenced to a term of imprisonment. However, they enjoyed some level of protection but depending on the length of residence in the UK. Firstly, under Article 27 of The Directive, deportation of EU citizens exercising 'Treaty' rights is limited to 3 grounds: public policy, public security, and public health. Secondly, under Article 28 (2) of The Directive, deportation of EU citizens and family members with permanent residence, can only be on serious grounds of public policy and public security. For instance, in *Roszkowski v SSHD* (*Roszkowski v Secretary of State for the Home Department*, 2017) involving a Polish national with permanent residence sentenced to a four-year imprisonment term for robbery, the court decided that there was no serious grounds of public policy or public security to justify his deportation. Lastly, deportation of EU citizens who have lived in the UK for 10 years or are a minor, can only be done on imperative grounds of public security or in the best interest of the child (Article 28 (3) (a) and (b)). In the UK, these grounds were contained in the Immigration (European Economic Area) Regulations 2016 and offered protections to EU citizens, safeguards which are now doubtful following the UK exit from the EU.

EU deportations after the EU exit

As a result of Brexit, FOM-related protections against expulsion no longer apply to EU citizens, who are now subject to existing provisions contained under a range of UK legislative acts. Bases for removal or deportation of an EU national now expand beyond the previous grounds to include a range of other reasons like: when deportation is conducive to the public good (Immigration Act, 1971, s. 3 (5)); where a person has been convicted and sentenced to a period of imprisonment of at least 12 months (UK Borders Act, 2007, s. 32); or deportation of a serious foreign criminal is in the public interest (Nationality, Immigration and Asylum Act, 2002, s117C). Although s.3 (5) of the Immigration Act 1971 excludes current holders of pre-settled and settled status, the 2007 and 2002 Acts apply to them. Potentially, the UK can deport those with permanent residence for criminal conduct after Brexit. An examination of the Immigration Rules finds that a person (including all EU citizens in the UK) is liable for deportation for three reasons: where deportation is conducive for the public good; where a person is the spouse, civil partner or child under 18, of a person ordered to be deported; or where deportation is recommended by the court in the case of an adult who has been convicted of an offence punishable with imprisonment (Immigration Rules, n.d. Part 13: Deportation, para. 363 (i) – (iii)).

The application of these provisions and the expanded grounds, have several implications for EU citizens. Firstly, previous protections enjoyed by EU citizens under Art. 27 and 28 of the Citizens' Directive no longer apply as EU citizens are now subject to UK immigration provisions that apply to all non-UK citizens. Secondly, all EU citizens must navigate the constant UK immigration changes that the system is known for. For instance, major changes to the Immigration Rules introduced in October 2020 (Statement of changes to the Immigration Rules: HC 813, 22 October, 2020) and contained in Part 9 of the Immigration Rules, address grounds for refusal of visa applications which may potentially lead to deportations. Although these changes do not apply to EU citizens who have lived in the UK as of 31 December 2020 (Immigration Rules, n.d. Appendix EU), it applies to new EU arrivals. Appendix EU contains provisions EU citizens must satisfy to remain in the UK after 31 December 2020.

A key change to the Immigration Rules relates to the removal of rough sleepers who arrived to the UK after 31 December 2020. Where such new entrant has been rough sleeping in the UK, any application to remain in the UK may be cancelled, the change also allows for any current visa held by that person, to be cancelled (Immigration Rules, n.d. Part 9: Grounds for Refusal, para 9.21.1). The change has been described by Amnesty International (2020) as 'cruel and inhumane' and needs to be interpreted as a continuation of the 'abuse of rights' policy that applied to EU rough sleepers between 2016 and 2017 (Demars, 2017). After media and legal campaign, the rough sleeping rule has been amended and currently it can apply to rough sleepers who 'repeatedly refused suitable offers of support' and 'engaged in persistent Anti-Social Behaviour (ASB)' (Public Interest Law Centre, 2021).

European Union Settlement Scheme

The European Union Settlement Scheme (EUSS) aims to establish the immigration status of EU citizens legally residing in the UK as of 31 December 2020 and grants eligible individuals rights of legal residence depending on their length of residency in the UK (gov.uk, 2021). All EU, EEA and Swiss citizens and their family members living in the UK by 31 December 2020, had their rights guaranteed until 30 June 2021. After this date, only holders of certain status have the legal right to remain in the UK. Appendix EU to the immigration rules provide the legal framework for making applications by EU citizens resident in the UK as of 31 December 2020 and states the requirements that eligible EEA residents and their family members must satisfy if they wished to continue living in the UK after 30 June 2021. These covered: proof of identity, proof of continuous residence, evidence of previous criminal convictions and pending prosecutions (Home Office, 2021d). National Insurance Number is treated as the by-default proof of continuous residence. Where the HO cannot verify the length of residence on this basis, it may require additional documents. The type of status granted depends on the length of continuous residence in the UK and is either indefinite leave to enter or remain; or limited leave to enter or remain (Immigration Rules, n.d. Appendix EU, para EU1). These are also referred to as settled and pre-settled status respectively.

Settled status is available to individuals who are able to demonstrate at least five years of continuous residence (Immigration Rules, n.d. Appendix EU, EU11) and pre-settled status

to individuals who have not lived in the UK for up to 5 years (Immigration Rules, n.d. Appendix EU, EU14). The 5 years is counted from the day they first arrived in the UK. This is understood as at least six months in every 12-month period in the span of five years. The possible exceptions to the continuity of stay is a break of up to one year 'for an important reason', such as childbirth, serious illness, study, vocational training, overseas work posting, compulsory military service abroad (gov.uk, 2021). Travel disruptions due to natural disaster, military conflict or pandemic were added as additional exceptions to the continuous residence rule on 1 December 2020 (Immigration Rules, n.d. Appendix Continuous Residence, CR 2.3 (b)).

Those who got the new status can continue to live and work in the UK. The settled status gives permanent right of residence and permits a five-year period that can be spent overseas before an individual loses it. The pre-settled status holders are able to live outside of the UK without losing it for two years, however, should they plan to apply for settled status, they have to maintain a five-year continuity, which will permit maximum 6-month absence from the UK in a year. For both statuses, the only evidence is an entry on an electronic database and not a physical document.

As the exact number of EU citizens currently living in the UK is not known, it is difficult to estimate how many people have not applied to EUSS. As of 30 June 2021, there were 6,015,400 applications made to the EUSS (Home Office, 2021b). With over 5,355,400 applications, the majority were made from England. About 291,200 applications were made from Scotland, while applications from Wales and Northern Ireland were 98,600 and 98,400 respectively. 5,446,300 cases concluded: 52% with settled status, 43% with pre-settled status, 2% refused applications, 1% withdrawn or void applications and 1% invalid applications.

According to the HO, as of 31 March 2021, 6% of applications were re-applications, as the applicants who are asked for additional evidence to prove five-year residence often provide it after the deadline and therefore must start a new application. This means 4,963,560 people applied to EUSS by the end of March (Home Office, 2021b). This high number of applicants involves third-country family members of EU citizens eligible to apply, as well as EU citizens who moved abroad or returned to their country of origin, but applied to EUSS in case they ever decide to move back to the UK (Sumption, 2020).

Despite the high number of applications, there are EU nationals who have still not applied to EUSS. In June 2021 the government officials estimated that 130,000 of 820,000 EU citizens eligible to claim benefits had not applied to the EUSS (Zeffman, 2021). With these examples we want to stress that it will be impossible to give the exact number of people who will not have applied for the new status and will stay in the UK. It is possible that their number will go into tens or even hundreds of thousands.

The future will show if the lack of the new status will lead to deportation. In October 2019, Brandon Lewis, Minister of State for Security and Deputy for EU Exit and No Deal Preparation, said that Immigration Rules will be applied to those who do not apply to the EUSS (BBC News, 2019). Three months later Lewis withdrew from this declaration (BBC News, 2020). There is scope for an eligible applicant to make a late application to the Scheme if there are reasonable grounds for failing to meet the deadline. Late applications by children, persons lacking mental capacity or having serious mental conditions, victims of modern slavery or

persons in abusive relationships or other compelling circumstances, are some examples that constitute reasonable grounds (Home Office, 2021a).

In the following sections, we analyse three groups whose immigration status will be particularly vulnerable under the new immigration regulations: people who do not apply under the EUSS, those who will lose their status or for whom it will expire, and people who had their applications rejected. We provide the reasons that may lead to the three outcomes and hypothesise what socio-economic groups may find themselves in such situation to understand the differentiated deportability of EU nationals in the UK.

People who do not apply to the EUSS

EU citizens abstained from applying to the EU Settlement Scheme for several reasons: those who plan to return to their country of origin or migrating elsewhere within the European Union, lack of identity documents, lack of knowledge that they need to apply or lack of ability to do it as well as inability to find support to apply and – finally – past criminal convictions that they would not like to reveal to the UK authorities upon applying.

There are practical reasons that impede application under the EUSS. Lacking identity or travel documents are a serious obstacle, as EU citizens unable tomeet the requirements , faced serious challenges to apply to EUSS. Getting a new passport is a challenge for financially and digitally excluded people because of having to apply on-line for a consular appointment and high passport fees and travel expenses (Morgan & Radziwinowiczówna, 2020).

Children born in the UK but not British, or children who relocated to the UK from an EU country, must also apply under the EUSS. Children in single parent households who hold no valid EU passport face difficulties should the other parent have parental responsibility and refuse to give consent for the child's passport application. Even more at risk are children in care, who rely on legal guardians or carers to make the application on their behalf. The key barriers to making an application by children in care were identified as no lead being taken to identify eligible young EU citizens and/or no application made by local authorities. Other vulnerable children may lack sufficient identity documents, or their guardians or (foster) parents do not know about the EUSS or their responsibility for application (Lagrue et al., 2020). Legislations safeguard applications made by children in the UK (Borders, Citizenship and Immigration Act, 2009, s 55, Children Act, Part V Protection of Children) and the Home Office must consider the need to safeguard and promote the welfare of children when determining any application affecting them. The best interests of the child must always be paramount. However, these legal protections only cover persons under the age of 18, therefore the consequences resulting from a lack of application will not manifest until these children become adults. They are likely to become a new 'Windrush generation' with no right to work, rent a home or claim public funds and even endangered with deportation.

Criminal record is an important factor contributing to abstaining from applying under the EUSS. For the individuals with a European Arrest Warrant, sought after either for enforcing a custodial sentence or for the purpose of an ongoing criminal trial, application could result in a quick detention, as they would reveal their personal data to the authorities. Similarly, arrest warrant or unspent convictions in the UK or overseas could be another reason not to apply, as every EUSS application is checked against the UK Police National Computer. Applications to

EUSS provide the HO with a database of information about criminal convictions, personal details, face scans and current pictures (IA5, RSP6), which can be prejudicial for any individual with convictions in the UK or overseas who may be lawfully targeted with deportation as 'conducive for the public good'.

Rejected applications

Incorrect applications in the EUSS could lead to refusal of status. In theory, the applicants who submit fraudulent or abusive applications could be removed (*Withdrawal Agreement*, 2019 Article 20). Individuals who deliberately provided false or misleading information or documents or on behalf of whom such documents were provided may be refused the new status. For instance, using false documents to demonstrate continuous five years residence in the UK could be classified as misleading information (Home Office, 2021d, pp. 21–23).

All adult applicants are required to provide information about criminal convictions in the UK and overseas (Home Office, 2021d, p. 9). It may be an important change to the current situation of EU citizens with an overseas criminal record, of which the HO is often unaware. Additionally, the applications made by people with pending prosecution in the UK may be paused by the UK Visas and Immigration until the outcome of the prosecution is known. HO caseworkers are instructed that in case they believe that an applicant can be deported after conviction, the decision on deportation must be made prior to the EUSS decision (Home Office, 2021d, p. 28).

People with a deportation order, a decision to make a deportation order, an exclusion order or exclusion decision are refused the new status. In case the deportation order was made two years before, Immigration Enforcement evaluates if there has been a material change of circumstances since the deportation order was made (Home Office, 2021d, p. 15). Should there be no change, the application will be refused.

Applicants convicted of major crimes stand the risk of refusal and their application may lead to deportation. The EUSS manual for Home Office caseworkers (Home Office, 2021d, p. 14) explains that the cases of the following applicants should be directed to Immigration Enforcement (IE): convicts imprisoned in the last five years, regardless of the length of the sentence; convicts at any time imprisoned for at least 12 months as a result of a single offence; individuals who have lived in the UK for less than five years have, 'in the last 3 years, received 3 or more convictions (including non-custodial sentences)'; individuals in prison whose cases are awaiting deportation consideration; individuals who entered or helped somebody else to enter into a sham marriage; individuals who have fraudulently obtained or attempted to obtain or helped somebody else to obtain a right to reside in the UK; individuals whose UK citizenship was revoked. If IE decides that an individual should be deported, the application under the scheme will be refused (Home Office, 2021d, p. 10).

For individuals with previous prosecutions that have not been considered for deportation, application in the EUSS may result in deportation. HO guidelines say, 'where the applicant has … other convictions not previously considered for deportation which … meet the criteria for referral to IE, the application must be referred to IE to consider deportation' (Home Office, 2021d, p. 28). Therefore, even during the transition and grace period that ended on 30 June 2021, the EUSS created a group of newly-deportable EU citizens.

The HO uses a range for eligibility and suitability criteria for applications. The eligibility criteria cover: evidence of identity, proof of continuous residence and lack of serious or repeated offences (Immigration Rules, n.d. Appendix EU, EU11-EU14A), while the suitability requirements relate to applicants that have been issued with either a deportation order, exclusion order or an exclusion decision, or where false representations have been made or false documents have been submitted or misleading information was submitted or the applicant is subject to a removal decision and a range of other grounds (Immigration Rules, n.d. Appendix EU, EU15-E16).

The suitability grounds were expanded to closely align with the provisions of Part 9 of the Immigration Rules (Grounds for Refusal). These suitability grounds did not exist at the start of the EUSS as all an applicant needed to prove was identity, residence and a lack of serious criminal offences. The introduction of these suitability grounds in 2020 (Immigration Rules, n.d. Appendix EU, EU15-EU16) demonstrates the rapid rate of changes within the UK immigration system and increases the chances of applicants being rejected or refused. Despite the current refusals accounting for a low percentage of overall applications, the scope of these changes make it inevitable that the number of refusals on suitability grounds are likely to increase after the EUSS officially ended, but late applications are still possible and this may have an impact on the number of possible deportations of EU citizens.

People who will lose their status

Pre-settled status will expire after two years away from the UK and settled status after five years and holders of an expired status will need to apply under a different visa category to be able to legally return to UK. Given that EU citizens' mobility often has the form of 'liquid migration' (Engbersen & Snel, 2011), as they enjoy the FOM in their family and professional life, some may be not even aware of the immobilisation their new status entails (Radziwinowiczówna et al., 2020).

Another vulnerable group will be the people unable to update from the temporary pre-settled to the indefinite settled. It is the applicant who must demonstrate the continuous residence should the information automatically retrieved by the Home Office from the HM Revenue & Customs not correctly reflect the length of their stay. The interviewed immigration advisors have repetitively stated that their service users often failed to prove a five-year residence (IA4, IA5). As Smismans (2019) observes, '(t)hese people are likely to face similar problems when applying for settled status later on. There is a risk that all the more difficult cases will resurface within five years'. This can be especially impactful on children and carers who joined family members but never planned to work, or those who worked in the shadow economy or were unemployed for longer periods.

We anticipate that certain groups will likely be excluded from the EUSS upon the expiry of their pre-settled status. This may be the case for people who forget to re-apply or cannot do it because of the lack of documentation or inability to do it. When the pre-settled statuses granted now expire, the HO will no longer finance assistance provided to most vulnerable EU citizens. As the NGO workers who support rough sleepers in London noted, their clients often changed telephone numbers and oftentimes did not have e-mail accounts (IA5, RSP9), both of which are necessary to access on-line profile under EUSS, also for the

purpose of upgrading pre-settled to settled status. Lastly, pre-settled status holders who update to the settled status are evaluated differently since the Brexit transition ended, especially where the holder has a conviction or does not meet the suitability criteria.

Post-Brexit framework for international migration in the UK

The status of the EU citizens who migrate after the transition and those who moved to the UK by the end of the transition period differs. The latter could apply to the EUSS to guarantee continuation of their residence rights post-Brexit but the former do not qualify for EUSS.

With the end of FOM on 31 December 2020, new EU migrants looking to relocate to the UK for work or study, are subject to UK rules on working and studying in the UK. The distinction between EU citizens arriving after 31 December 2020 (save for citizens of the Republic of Ireland) and non-EU citizens has disappeared, as the mobility of all foreigners and the basis for their deportation are stipulated by new provisions in the Immigration Rules and subjected to conditions contained in other immigration legislations (Immigration Act, 1971; Immigration Act, 2014; Immigration Act, 2016). EU nationals who intend to work or study in the UK must satisfy strict requirements and score points for a successful application.

Working in the UK requires the accumulation of points under the points-based system and is anchored on two routes: self-sponsorship and sponsorship. The latter involves being employed by a 'licensed sponsor'; working at an appropriate skill level, appropriate salary and having knowledge of English language (Immigration Rules: Appendix Skilled Worker); while the former involves categories that do not require sponsorship by organisations, with applicants assessed on a range of criteria: talent, access to investment funds and business development. On the other hand, the requirements for study involve being accepted on a course run by a registered educational institution; having available funds for a specified period to cover tuition fees and living expenses; and the knowledge of English language (Immigration Rules, n.d. Appendix Student).

The application of these Rules to EU citizens has several implications. Firstly, the financial cost covering application fees, biometric enrolment, and health surcharge is high and varies between £200 and £400 per annum. Some costs are not refunded where an application is unsuccessful thereby making it available to applicants from well off backgrounds. Secondly, very little free legal support is available to applicants who have to operate in a rapidly changing immigration system, which increases the risk of refusals. Thirdly, strict limits are imposed on visa holders. For instance, new EU arrivals may have limitations in terms of the type of work they can do if they are sponsored, or number of hours they can work for if they are students. If they are studying, they will also have limitations in relation to their ability to bring family members to join them in the UK. New entrants with criminal records stand the risk of refusals, as the current provisions of the Immigration Rules (Part 9: Grounds for Refusal) will be applicable to them. Finally, for new entrants who intend to make the UK their permanent home, the huge visa costs and visa restrictions may deter them from living in the UK permanently. Whilst these implications are not new to existing non-EU visa holders, it will have serious implications on new EU arrivals who previously enjoyed the right of FOM.

It is to be expected that migration of EU citizens to the UK will continue despite restrictive immigration system. EU migration may continue because of transnational networks (including networks of care (Radziwinowiczówna et al., 2018, 2020)) and migration culture (Grabowska et al., 2017) developed in countries which have seen intensive post-accession migration to UK. Under strict, expensive, changing and difficult to navigate immigration system, some new entrants may opt to remain in the UK as irregular migrants (Myslinska, 2020). It is possible that they will come as tourists and overstay the six-month period of visa-free stay or overstay their visa. They will be irregularised; as the UK government's policy paper explains, 'leaving the UK after leave has expired, or not leaving at all when required to, will impact a migrant's immigration status and will affect future interactions with UK immigration' (UK Government, 2020). This autonomy of migration (De Genova, 2017) will likely involve work in shadow economy, just like was happening before EU accession of EU member states with biggest diaspora in the UK, such as Poland (Garapich, 2016) or Romania. It is possible that the EU citizens who will work with no permit may be criminalised, as it happens now under the Immigration Act 2016 that introduced a criminal offence of illegal working, punishable with custodial sentence and/or a fine.

Conclusions

The UK Government and media celebrated the ending of the FOM and the ability to deport EU citizens based on national law as a sovereignty-recuperating achievement. The UK has moved millions of EU citizens under the immigration regulations, extending to them a policy exhibited by a range of legislations on immigration and nationality and aimed at limiting the eligibility of certain groups from entering and living in the UK. Consequently, the grounds for deportation of EU nationals have been broadened. In accordance with circular reasoning involving EU deportations and UK sovereignty, sovereignty from the European Union was indeed necessary to be able to create new opportunities for illegalisation and deportation of numerous EU migrants. As soon as the EU FOM ended for the UK, existing regulations applied to new EU migrants. A new version of the guidelines for EUSS suitability amplified the grounds for rejections for EUSS applicants.

The European Union Settlement Scheme, although involves a simple application process, can result in some EU citizens slipping through the cracks of the system. 43% of the people who applied under EUSS must re-apply to stay in the UK for more than five years. They will be reapplying under economic and political circumstances that will be significantly different than when the EUSS opened. Moreover, the EUSS can potentially serve to create a database of future deportees, as it gives the UK authorities access to personal details, biometric data, history of contribution to the fiscal system and criminal record of millions of non-UK citizens. Should their deportation serve political agenda of the government either as re-creating sovereignty or relieving a struggling economy, the HO could refer to it.

We also conclude that certain characteristics, such as income, access to housing or criminal record will make EU deportations selective, which has led us to speak about the differentiated deportability of EU citizens in the UK. EU citizens on low income or none at all, especially rough sleepers as well as convicts and children in care may become the new EU

deportspora in the UK, as there is an overlap between the economic and immigration status. The poorest EU citizens will most likely become irregularised migrants, who will continue to migrate to Britain despite not qualifying for work visa. As ethnic background determines the probability of getting criminal convictions and incarceration (Stacey, 2019), ethnicity may also differentiate deportability, given that criminal convictions will play an important role in sentencing to deportations. Class, again, will come into play for the convicts, given the lack of legal aid in the UK and high costs of immigration lawyers. The rough sleeping rule will likely target the Central and Eastern Europeans (including the Roma), who are overrepresented among the EU street homeless. We therefore anticipate that the CEEU citizens, as they come from the poorest EU member states as well as non-white Western Europeans will be most likely to become the new deportspora in the UK.

Endnotes

1 Other EEA and Swiss citizens as well as the family members of EU citizens are out of the scope of this working paper.

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4 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Table 1. Summary of the interviewed experts

	Role	Organization	Place	When interviewed	Anonymized code	Language of the interview
1	Office of the Immigration Service Commissioner (OISC) Level 1 Immigration advisors	Community volunteer	Bradford, UK	October 2020	IA1	PL
2	OISC Level 1 Immigration advisor	Non-profit organization	Birmingham, UK	October 2019	IA2	PL
3	OISC Level 1 Immigration advisor	Non-profit organization	Birmingham, UK	November 2019	IA3	EN
4	OISC Level 1 Immigration advisor	Charity organization	Smethwick, UK	February 2020	IA4	EN
5	OISC Level 1 Immigration advisor	Non-profit organization	London, UK	March 2020	IA5	PL
6	OISC Level 3 Immigration advisor	Charity organization	Smethwick, UK	February 2020	IA6	EN
7	Council worker	Local Council	Bradford, UK	October 2019	CW1	EN
8	Council worker	Local Council	Bradford, UK	October 2019	CW2	EN
9	Council worker	Local Council	Bradford, UK	October 2019	CW3	EN
10	Rough sleepers project coordinator or worker	Charity	Poznan, Poland	February 2020	RSP1	PL
11	Rough sleepers project coordinator or worker	Charity	Poznan, Poland	February 2020	RSP2	PL
12	Rough sleepers project coordinator or worker	Charity	Poznan, Poland	February 2020	RSP3	PL
13	Rough sleepers project coordinator or worker	Charity	London, UK	February 2020	RSP4	PL
14	Rough sleepers project coordinator or worker	Charity	London, UK	February 2020	RSP5	EN
15	Rough sleepers project coordinator or worker	Non-profit organization	London, UK	March 2020	RSP6	EN
16	Rough sleepers project coordinator or worker	Charity	London, UK	March 2020	RSP7	EN
17	Rough sleepers project coordinator or worker	Charity	London, UK	March 2020	RSP8	EN
18	Rough sleepers project coordinator or worker	Charity	London, UK	March 2020	RSP9	EN
19	Immigration lawyer	Private legal practice	London, UK	March 2020	IL	PL

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