The Irony of Brexit for Immigration Control

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Immigration was a hot topic throughout the Brexit debate. 'To take back control' was a prominent slogan. In her Lancaster speech of January this year, Theresa May was adamant that control of immigration is a central objective of the ongoing Brexit negotiations: 'The message from the public before and during the referendum campaign was clear: Brexit must mean control of the number of people who come to Britain from Europe. And that is what we will deliver.'

Many readers of this post will remember the 'breaking point' poster used by UKIP before the referendum with a picture of migrants and asylum seekers trotting across the Western Balkans. That poster was a tipping point in the debate. The EU was associated with chaos and open borders – both for EU citizens and third country nationals.

From a legal perspective, there is a certain irony in the 'breaking point' poster. My argument will be that while Brexit can facilitate legal control over the entry and stay of EU citizens, it need not necessarily make it easier for the UK to control the immigration of third-country nationals, including asylum seekers. It might even, paradoxically, render control of immigration by non-Europeans more difficult to some extent.

Status Quo: Extended Opt-out

The legal background of the irony is easy to explain: from a legal perspective, the UK has always retained widespread control of its external borders insofar as the entry and stay of third-country nationals is concerned, since the UK rejected to participate in the border-free Schengen area. It did not sign up to the Schengen Implementing Convention of 1990 and it secured an opt out when the letter was integrated into the framework of the European Union on the occasion of the Treaty of Amsterdam.

Moreover, successive British governments decided not to participate in most legislative initiatives on immigration, visas and border controls in the so-called area of freedom, security and justice, which have been adopted during the past 15 years and which have substantially reshaped the immigration law systems of countries in continental Europe. The UK does not participate, for instance, in the Family Reunion Directive, the Long-Term Residents Directive, the Blue Card scheme for highly qualified migrants or any other instrument facilitating the entry or stay of third-country nationals. The UK can decide autonomously the nationals of which country are subject to visa requirements, are allowed to take up employment or have to leave the UK. There is little primary or secondary law limiting UK sovereignty in this respect.

The situation is different for the ECHR and corresponding limits to state discretion, on the basis of Articles 3 and 8 ECHR, on the expulsion of those staying illegally, including suspects of terrorism. That is why Theresa May was promoting a departure from the ECHR (or at least a repeal of the Human Rights Act) when she was Home Secretary. Leaving the ECHR (or repealing the Human Rights Act) might have extended UK sovereignty over third-country national somewhat (albeit with a considerable constitutional price-tag attached). By contrast, leaving the EU won't change much regarding immigration control.

Brexit: Loss of the Opt-in Option

What is more, the UK might even lose regulatory leverage post-Brexit insofar as immigration controls vis-à-vis third-country nationals are concerned. The underlying reason is simple: at the time of the Treaty of Amsterdam, the British government of Tony Blair secured not only an opt out from the Schengen regime. It also won an opt in option for all immigration, visa, asylum and border control measures, which are not inseparably linked to the abolition of border controls. This opt in option of was reinforced by the Treaty of

Lisbon which established an hitherto unprecedented option of 'cherry picking' in the field of justice and home affairs legislation. The UK has used this opt in option quite extensively – and selectively – over the years, including during the time when Theresa May was Home Secretary.

This selective opt in practice focused on those measures enhancing the control powers of states, such as the Schengen Information System (SIS), in which the UK participates although it never signed up to order-free travel. The UK also subscribed to many EU measures against illegal immigration, while not being bound by the rules on legal migration. Most importantly, the UK participates in the Dublin regulation without, however, contributing to the solidarity measures, such as the relocation decisions on resettling 160,000 asylum seekers from Greece and Italy to other Member States. To be sure, the Dublin system was originally based upon a convention outside the EU framework, but it ceased to exist as an instrument of public international law when it was supplanted by EU legislation in which the UK participated.

In short, British participation in justice and home affairs was highly selective and lopsided: it enhanced state control without promoting the rights of migrants and refugees. As a member of the EU, the UK could use the justice and home affairs Protocols to enhance control of its external borders towards other Member States through à la carte participation. The irony is that Brexit will reverse these dynamics.

The Future: Reversed Dynamics

In the post-Brexit legal environment, the UK will not be able to decide any longer to participate in Dublin and the SIS by means of a simple declaration notifying the Council that it wants to exercise the opt-in option. Instead, the UK will have to negotiate with the EU post-Brexit whether it will be allowed to participate – and these negotiation will be defined, like any negotiation, by a *quid pro quo*, by reciprocal give-and-take.

Thus, the UK might have to pay a price for being allowed to participate in the Dublin IV Regulation or the Schengen Information System in the future – something it got for free in the past. The EU could demand, for instance, that the UK contributes to the relocation of asylum seekers from Greece or Italy. If that happened, Brexit would entail into the opposite of what UKIP had hoped for when it put up the 'breaking point' poster.

That need not happen, of course. The UK could decide, alternatively, to stay out of Dublin or it could negotiate a cross-sectoral package deal. The price the EU may wish to extract from the UK for continued Dublin participation may relate to any other policy field.

One thing, however, seems certain: the UK will not get Dublin for free any longer – like Switzerland, which was allowed to join Dublin under the condition that it subscribed to border free travel within the Schengen area at the same time. Ever since, border controls have been abolished between Germany and Switzerland. That, to me, is the irony of Brexit for immigration law *sensu stricto*: it might become more difficult for the UK to control the entry and stay of third-country nationals.

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