



# **Post-Brexit immigration policy: the opportunity for wider reform**

Position Paper

Joint Council for the Welfare of Immigrants (JCWI)

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### **About the Joint Council for the Welfare of Immigrants (JCWI)**

JCWI is an independent national charity established in 1967. We work to ensure justice and fairness in immigration, nationality and asylum law and policy and we provide direct legal advice and assistance to those affected by UK immigration control. Our solicitors provide representation in the Immigration and Asylum Tribunals. We have built up expertise over decades fighting for justice for those who are vulnerable and have particular experience of dealing with complex immigration issues. This expertise informs our policy and campaigns work.

This briefing draws upon JCWI’s history of legal casework and campaigning, often on behalf of the most disadvantaged migrant communities in the UK. It aims to present a migrant-centred perspective on the shape of a fair and equitable post-Brexit immigration policy.



## 1. Introduction and summary

The UK's imminent exit from the European Union (EU) has seismic implications for immigration policy. Hundreds of thousands of European workers, students and family members currently migrate to the UK every year.<sup>1</sup> For over forty years, EU free movement law has protected the ability of EEA migrants and their family members to live, study and work in the UK.<sup>2</sup>

But after the UK ceases to be a member of the EU, European nationals coming here will be brought under domestic immigration control. Beyond this, the UK will embark on a series of new trade partnerships with countries around the world, with significant further implications for our immigration policy.

**Managing these changes will be highly complicated. In fact, immigration is already presenting the Government with one of its biggest predicaments in the Brexit process.**

On 23<sup>rd</sup> June 2016, the UK voted to leave the European Union by a margin of 52% to 48%. The issue of immigration played a significant role in the Brexit debate. Many placed their vote for Brexit in order to 'take back control' of immigration from the European Union. There is now widespread public expectation in the UK that, after leaving the EU, we will be able to reduce numbers of migrants and introduce a selective approach about who can come here. The Government has responded by doubling down on its commitment to reduce net migration levels, and promising new rules which will filter only the 'brightest and the best' for future migration.

However, in the period since the EU referendum it has also become clear that continued immigration will be vital for the UK's economic and political stability into the future. Almost three quarters of the EEA nationals who come to the UK every year do so in order to work,

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<sup>1</sup> ONS immigration statistics issued in February 2017 show that 268,000 nationals of EU member states immigrated to the UK in the year to September 2016, comprising 45% of the total in-flow of migrants for that year. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/feb2017>

<sup>2</sup> We use the term 'EEA nationals' in this briefing to include nationals of a member state of the European Union (EU) other than the UK, or nationals of Iceland, Liechtenstein, Norway or Switzerland. We recognize that, dependent on the future of the Common Travel Area between the UK, Ireland, Isle of Man and the Channel Islands, the rights afforded to Irish nationals may differ from other EEA nationals coming to the UK.



with a further fifth coming here to study<sup>3</sup>. UK businesses, universities and public services have been appalled at the prospect of a 'cliff edge' in just two years' time, and argued that there will be grave consequences. The Government has now confirmed that free movement rules may be phased out after a post-Brexit transition period<sup>4</sup>. It has also sought to reassure business that it will invite its views on the shape of future EEA immigration rules via a consultation in the summer of 2017<sup>5</sup>.

Meanwhile, the UK is already seeking to lay the initial foundations for future free trade deals with countries including Australia, India and the USA. Prime Minister Theresa May called in January 2017 for the UK to emerge from Brexit '*more outward-looking than ever before*' as a '*truly Global Britain – the best friend and neighbor to our European partners, but a country that reaches beyond the borders of Europe too*'.<sup>6</sup> But immigration will be at the heart of these discussions too – potential trade partners have already made clear their desire to see some UK immigration restrictions eased within future deals<sup>7</sup>.

It seems unlikely that the Government will be able to reconcile these agendas with its tough immigration promises to the British public. The danger is that, unless it acts to reframe the debate, the current public mood over immigration will further sour. During the coming period of uncertainty, a sense of public disillusionment over the issue of immigration is likely to grow. The consequences of any tough new policies on migrants will begin to be felt, causing further concern among migrant communities. This turbulence will offer a path for populist political factions to gain momentum, capitalizing on a growing mistrust of the Government.

**In our view, the only way to resolve these issues is for the Government to take the lead now, ahead of Brexit, by mapping out and implementing reforms that will enable immigration to work properly for the UK.**

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<sup>3</sup> EU Migration to and from the UK, Migration Observatory, 31 October 2016. Available at: <http://www.migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>

<sup>4</sup> Brexit: Theresa May suggests free movement extension, in BBC News, 5 April 2017. Available at: <http://www.bbc.co.uk/news/uk-politics-39498647>

<sup>5</sup> Government will launch a consultation on future EEA migration rules in summer 2017. "We will be ending freedom of movement as we know it", Home Secretary Amber Rudd on ITV's Peston on Sunday, 26 February 2017

<sup>6</sup> Theresa May's Brexit speech: 'A Global Britain', 17<sup>th</sup> Jan 2017, in The Spectator, <https://blogs.spectator.co.uk/2017/01/theresa-mays-brexit-speech-global-britain/>

<sup>7</sup> Two countries have already told the UK they must relax immigration rules if they want free trade, The Independent, 22 January 2017. Available at: <http://www.independent.co.uk/news/uk/politics/brexit-latest-australia-india-tell-uk-relax-immigration-rules-free-trade-deal-eu-visa-restrictions-a7540036.html>



The most immediate task – that of bringing EEA nationals under immigration control after Brexit – should be viewed as a vital, and urgent, opportunity to make wider improvements to the existing system. The truth is that, whilst EEA nationals have quietly provided flexible, often underpaid labour, the system for non-EEA migration has become increasingly rigid and punitive. Frequent legislative changes generate uncertainty and confusion among migrants and their UK sponsors. Tough rules reserve entry, settlement and family migration for those on professional salaries. Despite rising costs, there is minimal accountability for applicants. These issues will all be further exposed when EEA nationals are brought into the immigration system, vastly increasing the Home Office’s workload<sup>8</sup>.

More widely, and with an eye to the long-term future of the UK, the Government must adopt a greater level of candor with the public about the vital role played by migrants across the UK economy. The truth is that we will need foreign workers, students and their families to continue coming here in the future. The Government should step back from policy-making which aims by hook or by crook to slash net migration levels. Instead it should introduce a balanced, even-handed approach which has an eye to the wide range of interests in this area, and aims to send a positive message about the UK’s regard for migrants to domestic and international audiences.

**We argue that introducing a post-Brexit immigration policy that works for the UK’s economy, public services and communities will ultimately require ambitious reforms.**

These changes do not have to take place overnight – they can, and probably should, be approached as a phased process of review and reform which is rolled out alongside Brexit negotiations, as the UK’s future becomes clearer. This paper offers a number of key recommendations which we believe would lead the UK in the right direction, towards a post-Brexit immigration policy fit for the new era that lies ahead.

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<sup>8</sup> If immigration patterns from the year to September 2016 were reproduced after Brexit, 45% of the UK’s total annual immigration inflow would comprise EEA nationals who would be newly subject to domestic immigration controls.



## Summary of recommendations

### 1. Reframe the UK's immigration policy objectives

At this critical moment in which the UK must reposition itself on the global stage, we need an immigration policy guided by a pragmatic, positive stance towards immigration. The unachievable net migration target should be replaced by objectives which will enable us to retain the UK's attractiveness to international talent, and embed a welcoming and humane approach within all policies dealing with foreign nationals coming here.

### 2. Ensure that the immigration rules as a whole are equitable, proportionate and serve the UK's long-term interests

The current immigration rules for non-EEA nationals have embedded inequality and hostility within the system. This will be further exposed after Brexit, when EEA nationals are brought under immigration control. We propose that, in order to avoid further inequity, new rules for *both* EEA *and* non-EEA nationals to work, study and be reunited with family should be introduced. These rules should be fair and effective, and be able to deliver positive outcomes for the UK as well as for those who come here.

### 3. Address inefficiencies in current immigration law and processes

The UK tangled immigration laws and overstretched system currently offers a poor service to many non-EEA applicants and business/education sponsors attempting to navigate through it. After Brexit, a substantial new cohort of EEA nationals will be brought into this system, generating significant problems unless reforms are made. We propose that the Government should frontload investment now with the aim of increasing the capacity and skills of Home Office and border control staff, in order to ensure that a decent service is available for all who use it.

### 4. Increase the accountability of Home Office decision-making

Immigration decisions have been uniquely targeted by cuts to independent appeal rights in recent years, enabling poor decision-making to go unchecked and placing new and unwelcome pressures on the UK courts via the judicial review process. After Brexit, the demand for independent review of decisions is likely to increase, with a new wave of legal claims against the Home Office. As such, we urge the Government to restore the right of appeal in the independent immigration tribunals which were established for this purpose. We also urge the Government to facilitate reasonable access to legal advice for both EEA and non-EEA nationals, in order to ensure widespread understanding of new rules and improve the quality of applications.



**5. Rethink the ‘hostile environment’ strategy**

Immigration enforcement is increasingly dependent on community-level controls, with the cost and responsibility for immigration document checks passed onto doctors, landlords, teachers and employers. We argue that this approach invites discrimination, whilst undermining wider integration strategies aimed at building cohesive communities. In the context of a new post-Brexit immigration policy, the Government should move away from the hostile environment approach. Enforcement should occur at properly managed borders and by immigration officials, not communities. Community involvement should be in the form of a local integration strategy which aims to reach out to, rather than intimidate, migrant communities.

**6. Tackle the causes of irregular migration**

In embarking upon Brexit, the UK will need to take a fair and pragmatic approach in order to avoid a significant increase in the irregular migrant population. If it introduces rules with retrospective effect – for example in relation to the 3.6 million EEA nationals already resident in the UK – or which are particularly demanding for future applicants, a greater number of people will inadvertently fall outside the system. Systems put in place to allow EEA nationals to prove their entitlement to be in the UK will have to be simple, cheap, and fair. All new post-Brexit immigration rules should be proportionate and clearly communicated to the public, in order to avoid a further increase in undocumented migrants. Government could also take this opportunity to consider how the status of the UK’s existing 650,000 plus undocumented migrants could be resolved, and thereby reduce the need for in-country enforcement.



## 2. The route to a new immigration policy

The coming period, following the triggering of Article 50 on 29th March 2017, will be one of great political and economic uncertainty. The UK Government is now embarking on an unprecedented series of complex negotiations, in which immigration promises to emerge as the subject of competing objectives.

This section outlines the key areas in which UK immigration policy faces changes in the period ahead. It considers the particular implications for EEA nationals of being brought under domestic immigration control, after the UK ceases to be a member of the European Union. We argue that these challenges should be met within a wider set of reforms across the immigration system.

### The challenges ahead

During the next two years, the UK will navigate towards Brexit through withdrawal negotiations with the European Union. It is likely that, from March 2019, a transitional period will begin, whilst a future UK/EU free trade arrangement is negotiated. In addition, after Brexit a series of formal negotiations will take place between the UK and other key partners regarding free trade arrangements, including Australia, India, and the USA. Immigration will play a crucial role within all these negotiations.

There are three key areas in which UK immigration policy will be subject to change in the coming years:

- **The position of the 3.6 million EU treaty rights holders currently residing in the UK**, as well as that of the estimated 1.2 million UK nationals living elsewhere in the EU, must be resolved<sup>9</sup>. This is likely to form an early part of Brexit withdrawal negotiations and resolution will take the form of a reciprocal agreement between the UK Government and EU member states. Dependent on the cut-off date for any such agreement, it could include transitional arrangements for some EEA nationals arriving in the UK as well as for UK citizens travelling elsewhere in the EU, after Article 50 is triggered but prior to Brexit. JCWI's views on the position of EU treaty rights holders currently living in the UK have been outlined in a separate briefing

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<sup>9</sup> Figures from Article 50: Shades of grey, or black and white? 21 March 2017, Migration Observatory, University of Oxford, [http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2017/03/Commentary-Article\\_50-1.pdf](http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2017/03/Commentary-Article_50-1.pdf)



paper, in which we argue for the Government to secure the status of EEA citizens and other treaty rights holders currently living in the UK as soon as possible<sup>10</sup>.

- **A new, post-Brexit immigration system for EEA nationals.** After Brexit, EU free movement law will cease to apply here unless transitional provisions for its continuation are agreed. This will mean that new rules replacing EU free movement rights will be replaced, and that all future EEA nationals will be brought under immigration control<sup>11</sup>. Although future EEA immigration rules will be shaped by the UK's domestic agenda, they will also be influenced by the position of EU member states within Brexit negotiations. It is likely that EU member states will seek some degree of preferential treatment for EEA nationals in the UK (possibly reciprocated by preferential treatment of UK nationals in the EU). A new post-Brexit immigration system could also include transitional arrangements for EEA nationals arriving in the UK prior to full implementation of new rules.
- **Future immigration rules for non-EEA nationals.** After Brexit, the UK will seek to agree a series of bilateral free trade deals with key economic partners, including Australia, India and the USA. It is likely that access to the UK immigration system, including routes for economic, student and family migration, will be an issue for discussion within future trade negotiations, with some countries also seeking preferential treatment for their nationals under new trade and immigration rules.

### The implications for EEA nationals

The most immediate change to immigration policy after Brexit will concern future EEA nationals coming to the UK, who could be brought under domestic immigration controls as soon as March 2019. In our view, the scale of the changes ahead in relation to EEA nationals has not yet been fully considered in the public debate.

For decades, EEA nationals and their family members have been able to live, study and work in the UK under EU free movement law<sup>12</sup>. It is not yet clear exactly which immigration

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<sup>10</sup> We have called for the UK Government to unilaterally introduce a policy which would grant permanent residence (and/or the opportunity to gain permanent residence) to all those residing here under EU treaties, to enable them to move as easily as possible to security in the UK. See A Future Settlement for EU Treaty Rights Holders in the UK, Joint Council for the Welfare of Immigrants, 31 January 2017. Available at: <https://www.jcwi.org.uk/news-and-policy/jcwi-briefing-a-future-settlement-for-eu-treaty-rights-holders-uk>

<sup>11</sup> "We will be ending freedom of movement as we know it", Home Secretary Amber Rudd on ITV's Peston on Sunday, 26 February 2017

<sup>12</sup> EEA nationals may enter and reside in the UK under free movement and residence rights provided for in Directive 2004/38/EC (the 'Citizens Directive'). The Citizens Directive was initially given effect in the UK by the



rules will apply to EEA nationals coming to the UK post-Brexit. However, they are likely to be affected by at least some of the immigration rules which currently apply to non-EEA nationals. This could impose new costs for employers, universities and migrants, requiring them to navigate the UK's complex immigration system whilst being subject to many of its restrictions.

Changes could include:

- **Limited access to UK labour markets.** Some EEA nationals may benefit from preferential access to employment here, or may be able to enter for low-skilled work via new seasonal and/or sector-specific work routes<sup>13</sup>. However it is still likely that some or all EEA nationals will be subject to earning, language and skills requirements, and limited to jobs which cannot be filled from the domestic labour force. Any such changes will place significant new burdens and costs on UK employers wishing to recruit EEA nationals in the future<sup>14</sup>.
- **Limited access to UK higher education**, including higher fees and limited access to loans. Universities and colleges would need to manage the increased bureaucracy and costs of bringing EEA nationals under sponsorship requirements. They would also have to manage the financial implications of any decline in the EEA student population as a result of new rules<sup>15</sup>.
- **New family migration rules.** It is likely that the rights of EEA nationals to bring their family members here would be significantly curtailed<sup>16</sup>. British citizens with an EEA spouse, elderly parent or adult dependent child would find it significantly more difficult (if not impossible) to bring them to the UK to join them<sup>17</sup>.
- **Restricted access to justice.** EEA nationals in future will have extremely limited appeal rights with regards to immigration decisions. Their application fees are likely

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Immigration (European Economic Area) Regulations 2006 (SI 2006 No. 1003), which were subsequently revoked and replaced by the Immigration (European Economic Area) Regulations 2016 (SI 2016 No. 1052).

<sup>13</sup> As confirmed by Home Secretary Amber Rudd on ITV's Peston on Sunday, 26 February 2017

<sup>14</sup> E.g. as reported in Personnel Today, 5 July 2016 <http://www.personneltoday.com/hr/will-brexit-affect-employers-eea-workers/> How will Brexit affect employers with EEA workers?

<sup>15</sup> E.g. as reported in Real Business: Brexit could be biggest disaster to strike higher education in years, 7 March 2017. Available at: <http://realbusiness.co.uk/current-affairs/2017/03/07/brexit-disaster-higher-education/>

<sup>16</sup> Currently, all EEA nationals exercising treaty rights here may bring their family members to live with them. Family members also have the right to work. Non-EEA nationals in some immigration categories have limited rights – including some students and lower-earning/temporary workers.

<sup>17</sup> Currently, EEA nationals may come and join a British spouse here, under the 'self-sufficient' category in EU law. By contrast, British citizens or permanent residents wishing to bring a non-EEA spouse here need to earn at least £18,600 per annum. The rules affecting migration of an adult dependent relative are very prohibitive



to rise substantially<sup>18</sup> and they will find it extremely difficult to resolve their status if they fall outside the rules<sup>19</sup>.

- **Subject to complex immigration rules and bureaucratic processes.** After Brexit, EEA nationals will have to navigate the UK's immigration system, with its overlapping rules and regulations. Brexit could nearly double the number of migrants for whom the Home Office has oversight, placing potentially unmanageable pressures on a system already under strain<sup>20</sup>. As with non-EEA nationals, leave to remain granted to EEA migrants is likely to be for limited periods of time, requiring them to reapply in order to remain here. There could be an increase in the UK's irregular migrant population, as EEA nationals fall outside new, more restrictive rules.
- **Restrictions on welfare benefits and NHS care.** EEA nationals coming here in future are unlikely to have no recourse to public funds until they attain settled status. They may (unless exempted through, for example, continuation of the European Health Insurance Card scheme with EU member states) be required to pay the Immigration Health Surcharge currently levied on non-EEA nationals as a contribution towards anticipated costs of NHS treatment in the UK.

This panoply of rules and restrictions will constitute a particularly sharp contrast with the flexibility currently enjoyed by EEA nationals. Bringing EEA nationals under domestic immigration control will have implications for businesses, higher education, public services, communities and migrants themselves. In the short-term, this will create challenges which the Government has not yet demonstrated how it intends to meet. In the longer-term, these impacts are likely to deter some talented migrants from coming here, as well as having impacts on our economy and society. In our view, steps to resolve these issues should lie at the centre of a broad package of reforms to support the UK in moving forwards positively in the post-Brexit era.

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<sup>18</sup> Currently, EEA nationals applying for residence documents benefit from low fees which are currently capped at £65. By contrast, non-EEA nationals moving from pre-entry to British citizenship can expect to pay over £7,000 in fees and Home Office costs, with fees pitched at well above administration costs

<sup>19</sup> In future, EEA nationals who cease to have permission to be here are likely to be required to apply to regularise their status under UK long residence or private life requirements in domestic law. Only a small number of such applications made by non-EEA nationals are successful every year.

<sup>20</sup> ONS statistics for February 2017 show that EEA nationals comprise 45% of annual migrant inflow to the UK – if this remains the same then it will nearly double the UK Home Office's workload. See <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/feb2017>



### 3. Priorities for post-Brexit immigration reform

In our view, Brexit creates an urgent need to reorient immigration policy and processes so that they are fit for the future. The shape and implementation of immigration laws and processes will have wide-reaching implications for UK institutions, businesses, communities and migrants. It is vitally important to get them right from the outset.

This section outlines six key areas for reform to immigration policy and its implementation, which we believe would re-establish confidence in the Government and meet the UK's interests into the future.

#### 1. Reform UK immigration policy objectives

Since 2010, the UK government has designed immigration policy with the overarching objective of reducing net migration levels, ideally to the tens of thousands every year. This policy objective, which appeared in the 2010 and 2015 Conservative party manifestos, has informed a wide series of restrictive policies affecting non-EEA nationals in recent years.

However, the net migration target has sat at odds with the reality of rising migration levels to the UK in recent years. Net migration reached a near-record high in 2015/16<sup>21</sup>, with greater numbers of both EEA and non-EEA nationals coming here for work and study. The advent of Brexit has generated new calls for the net migration target to be dropped<sup>22</sup>. Secretary of State for Exiting the European Union David Davis acknowledged in March 2017 that migrant numbers may need to 'rise and fall' after Brexit<sup>23</sup>.

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<sup>21</sup> In the year to June 2016, net migration reached 335,000 – exceeding by over three times the net migration target of the 'tens of thousands'. Migration Statistics Quarterly Report, December 2016, Office of National Statistics. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/dec2016>

<sup>22</sup> Most recently, on 4th May 2017, Open Britain, in partnership with the Independent, launched a new campaign to drop the net migration target. Available at:

<http://www.independent.co.uk/news/uk/politics/drop-the-target-campaign-net-migration-immigration-cap-tens-of-thousands-petition-eu-brexit-a7664156.html>

<sup>23</sup> Immigration should rise and fall after Brexit, David Davis says, BBC News, 27 March 2017:

<http://www.bbc.co.uk/news/uk-politics-39407039>



But, despite acknowledging that it will not be met in the foreseeable future<sup>24</sup>, ministers have stuck by this aspiration. In the Brexit white paper in February 2017, the Government pledged that:

*'We will create an immigration system that allows us to control numbers and encourage the brightest and the best to come to this country, as part of a stable and prosperous future with the EU and our European partners'*<sup>25</sup>

We understand that the Government wishes to send a strong message to the public that it will 'take control' of immigration, in response to the EU referendum. But in our view the reality of Brexit, and the uncertainties it generates, will require a different policy approach if the best outcomes for the UK are to be achieved.

During the current period, the Government will be seeking to re-establish the UK's position on the global stage. Immigration will form a central plank of negotiations with future trade partners, and the UK will be exposed to a new set of pressures to increase its intake of migrants from both within and outside the European Union.

In this context, the net migration target is limiting. It will lock the UK into a restrictive position which measures policy success on immigration solely in terms of absolute numbers. It will increase the pressure on the Government to introduce policies which do not meet the best interests of the UK economy, employers, or migrant communities. And it will ultimately undermine public faith in the system, because immigration flows are likely to remain persistently and considerably higher than the Government's target.

Instead, we propose that the net migration target is replaced by a more pragmatic approach which is broadly positive about immigration. It is clear that we will continue to need migrants from across the world to contribute their skills and ideas to our economy and public services. The immigration system should be informed by objectives which have the flexibility to respond to the UK's needs at a time of great turbulence and uncertainty, and which embed a welcoming and positive approach towards immigration.

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<sup>24</sup> Amber Rudd: Government committed to 'tens of thousands' migration target, ITV News, 11 September 2016. Available at: <http://www.itv.com/news/2016-09-11/amber-rudd-government-committed-to-tens-of-thousands-migration-target/>

<sup>25</sup> In 'The United Kingdom's exit from, and new partnership with, the European Union'. Department for Exiting the European Union White Paper. 2 February 2017. Available at: <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper's>



If the UK does not send a positive message about the value of migrants' contributions, or their experience of the UK is hostile or negative, then we will deter the international talent that we need. Our policy objectives should leave others around the world in no doubt that UK will be taking an evidence-based, fair and proportionate stance towards immigration that is in the interests both of the UK and its diverse partners.

## **2. Ensure that the immigration rules as a whole are equitable, proportionate and serve the UK's long-term interests**

The UK's immigration rules will need to accommodate hundreds of thousands of EEA nationals coming to the UK every year after Brexit. In future, they may also need to accommodate new groups of non-EEA nationals whose entry is facilitated by the UK's post-Brexit trade deals.

It seems likely that the UK could build preferential immigration arrangements into a range of new free trade agreements, both with the EU and with non-EU countries. In our view, this would result in a piecemeal approach, with access to the UK's immigration system offered to the highest bidders, and different rights and entitlements co-existing for different national groups. This would generate an unmanageable level of complexity in the immigration system, generating confusion among UK sponsors and migrants alike. And it would foster resentment among those communities who are particularly disadvantaged by rule changes.

We are also concerned about the Government's emphasis on attracting only 'the brightest and the best' to the UK after Brexit. The current immigration rules for non-EEA nationals have already embedded inequalities into the system. In our view, the 'brightest and the best' in practice to often means that migrants' rights are determined by their resources and perceived ability to generate wealth within the private sector.

The impacts of this can be seen in rules which, for example, reserve the right to settle permanently in the UK to non-EEA workers who earn only £35,000 per annum or more – a rule which means that many coming to work in the NHS and education system cannot settle here permanently, regardless of their skills and contribution<sup>26</sup>. Tough rules on family migration, similarly, reserve the right to bring a non-EEA spouse to the UK for British

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<sup>26</sup> See 'The £35K salary requirement to settle in the UK, House of Commons Library, 4 March 2016 Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7264>



citizens/settled persons who earn at least £18,600 per annum. This policy has priced many out of a family life and forced an estimated 15,000 British children to live apart from one of their parents<sup>27</sup>. Instead of seeing these rules extended to affect new arrivals, we advocate a fairer approach overall.

The emphasis on the 'brightest and the best' will also carry particular risks for UK employers in the context of Brexit. It is clear that, after the UK withdraws from the EU, there could be labour shortages across the UK economy and in both the private and public sectors. UK employers, and NHS bodies have argued strongly for continued migration of EEA nationals into lower-skilled occupations in the UK. Our fear is that large numbers of EEA nationals (many of whom may be highly-skilled themselves) may be permitted to come here for low-skilled work into the future, but will not be given equal or fair treatment under the UK immigration system. Equally, any continued immigration of EEA nationals into low-paid and unskilled work in the UK, including in the hospitality, food processing and packing, construction and care sectors, should be accompanied by regulatory reforms to reduce worker exploitation and improve working conditions.

In addition, the right to enter the UK for work or study will prove problematic if it is not accompanied by other rights including the ability to bring family members here and ultimately progress towards settlement. Short-term worker visas, for example, can lead to a greater turnover (or 'churn') of migrants within local communities, as workers are unable to settle here. In our view immigration policy should recognise the importance of investing in migrants who come here, and treat them in a manner which is conducive to longer-term integration.

We propose that the Government should not embed a post-Brexit 'preferential treatment' approach which offers better treatment to some nationalities than others, or confers more rights to higher earners in future rules. In June last year, leading Leave campaigners pledged to deliver a 'fairer, more humane' immigration system that creates 'fairness between EU citizens and others'<sup>28</sup>. It is our view that fair rules for *both* EEA *and* non-EEA nationals to work, study and be reunited with family should indeed be introduced. Regardless of their

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<sup>27</sup> New Report Finds that Rules to Control Immigration Now Impacts Upon Thousands of British Children, JCWI, 9 September 2015, Available at: <https://www.jcwi.org.uk/blog/2015/09/09/new-report-finds-rules-control-immigration-now-impacts-upon-thousands-british>

<sup>28</sup> Restoring public trust in immigration policy - a points-based non-discriminatory immigration system. 1<sup>st</sup> June 2016, Statement by Michael Gove, Boris Johnson, Priti Patel, and Gisela Stuart Available at: [http://www.voteleavetakecontrol.org/restoring\\_public\\_trust\\_in\\_immigration\\_policy\\_a\\_points\\_based\\_non\\_discriminatory\\_immigration\\_system.html](http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html)



background, the migrants who are given permission to come to the UK should be treated equitably and with dignity.

### 3. Address inefficiencies in current immigration laws and processes

Implementing a new set of post-Brexit immigration rules and regulations will be a significant task. Unless significant reforms are made, this could place unmanageable pressures on the UK's over-stretched and complex immigration system.

UK immigration law is notoriously convoluted. The foundation is the Immigration Act 1971 and, since then, no fewer than 13 acts of parliament have been passed which have overlaid the Act, accompanied by numerous pieces of secondary legislation. The UK Immigration Rules further supplement the 1971 Act, stating how the powers granted in the Act may be exercised: since 1994 over 125 statements of changes to the Immigration Rules have been introduced. Multiple guidance documents for Home Office decision-makers are in operation and are regularly reviewed and reissued. All primary and secondary legislation must be made and applied in accordance with the Human Rights Act, EU law, refugee law and other international instruments to which the UK is a signatory.

The House of Lords Constitution Committee raised serious concerns about this issue when examining the Immigration Bill 2015/16, which added further to the complexity of the system. They said:<sup>29</sup>

*'That the law be clear, certain and predictable are central requirements of the rule of law. It would be difficult, however, to argue convincingly that these requirements are satisfied by UK immigration law which stands out as a particularly Byzantine field. The Immigration Bill is a case in point. It is lengthy and complicated—running to 168 pages in total, it consists of 65 clauses and 12 schedules—while its complexity is exacerbated by the fact that much of the Bill will take effect by means of amending or inserting new provisions into several existing, and already highly complex, pieces of immigration legislation. This issue of complexity is compounded by the frequency with which the law changes in this area. The Bill will be enacted in the wake of, and will make changes to, the Immigration Act 2014, which was itself a very substantial and complicated piece of legislation.'*

*19. The disparate and complex nature of the legislation in this area is of real concern from a rule of law perspective. Whilst we recognise that this issue goes far beyond the provisions of this particular Bill, we wish to draw to the attention of the House this*

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<sup>29</sup> House of Lords Constitution Committee, Immigration Bill 7<sup>th</sup> Report, 21 December 2015. Available at: <https://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7502.htm>



*general concern, and our view that further thought must be given to this matter so as to make immigration law accessible and fit for purpose.'*

We argue that the need for wide ranging and radical change created by Brexit should be used to remedy these defects in immigration law and policy. A universal, simplified and fairer system is the best solution.

In addition to the tangle of legislation in this area, the heated nature of policy debate has created a chaotic context for law-making. New legislation is sometimes introduced before the impacts of previous changes have had time to bed in, or been assessed. The rate and complexity of the changes to immigration law in recent years have resulted in a system which generates confusion and anxiety for both migrants and their UK sponsors.

In addition, the UK immigration system currently offers a poor service to many non-EEA applicants and business/education sponsors attempting to navigate through it, with widespread delays, poor decision-making and poor customer service. Accountability has been reduced within the system, but the costs of immigration applications have soared in recent years. It now costs a non-EEA national a minimum of £7,000 in Home Office fees (plus any immigration advice costs) to progress from pre-entry to naturalisation as a British citizen<sup>30</sup>. Despite the high fees paid by migrants, it has been noted by the Parliamentary Ombudsman that some still receive an inferior service from the Home Office, with poor decision-making, inadequate complaint-handling and long delays all observed<sup>31</sup>.

It is clear that the Home Office will need a significant increase in its resources to deal with the higher workload following Brexit, and to deliver an immigration system which treats applications efficiently. Not only will it need to resolve the status of the 3.6 million EEA nationals currently residing in the UK, but it will need to be able to handle a significant rise in the number of applications, administrative reviews and enforcement actions relating to EEA nationals in the future. In recent years, however, the Home Office has been subject to

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<sup>30</sup> Further fee increases will enter into force on 6 April 2017, substantially increasing application fees for some categories. Dependent relatives of those serving in the British Armed Forces, for example, who are applying for settlement in the UK, will now have to pay an extra £422, as their application fees have risen from £1,875 to £2,297. Details available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/606076/Visa\\_Fees\\_table\\_A\\_pr2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606076/Visa_Fees_table_A_pr2017.pdf)

<sup>31</sup> As detailed in: Complaints about UK government departments and agencies, and some UK public organisations 2014-15, Parliamentary and Health Service Ombudsman, November 2015. Available at: [https://www.ombudsman.org.uk/sites/default/files/Complaints\\_about\\_UK\\_government\\_departments\\_and\\_agencies\\_and\\_some\\_UK\\_public\\_organisations\\_2014-15.pdf](https://www.ombudsman.org.uk/sites/default/files/Complaints_about_UK_government_departments_and_agencies_and_some_UK_public_organisations_2014-15.pdf)



budget cuts and staffing levels have declined, placing more pressure on existing staff and systems<sup>32</sup>. Over half of Border Force staff already report an unacceptably high workload, as do around a quarter of UK Visa and Immigration staff<sup>33</sup>.

We propose that wide reforms to the legislative and administrative framework must be put in place. This should include simplification of the Immigration Rules where possible in the interests of clarity. It should allow for greater training of Home Office staff and information outreach with migrant communities as well as employers, to support EEA and non-EEA nationals to navigate the Rules with dignity. It is also likely to involve investing in greater staffing numbers within the UK Border Service and Visas and Immigration, to ensure that a decent service is available for all applicants and sponsors.

#### **4. Increase the accountability of Home Office decision-making**

Immigration decisions have been uniquely targeted by cuts to independent appeal rights in recent years, enabling poor decision-making to go unchecked and placing new and unwelcome pressures on the UK courts via the judicial review process. Access to state-funded legal support that would enable migrants to navigate the system has been eroded. Reforms to the legal aid system have withdrawn state funding for immigration advice (excepting asylum cases). Good quality immigration advice is now too costly for some migrants seeking clarity on their rights and requirements.

The right of appeal for non-EEA migrants against immigration decisions has been substantially reduced. The Immigration Act 2014 limited migrants' rights to bring an independent appeal against immigration decisions to just three groups: those making requests for international protection; human rights claims; and EEA claims. Although migrants may challenge immigration decisions via administrative review, the scope for challenge is limited and the process – carried out by the Home Office itself – lacks independence. In May 2016, the Chief Inspector of Borders and Immigration conducted a

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<sup>32</sup> In 2016 the Home Affairs Committee reported a 7% decrease in the number of full-time staff in UK Visas and Immigration between Q1 2015 and Q1 2016. The work of the Immigration Directorates, Q1 2016, Home Affairs Committee. Available at:

[https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/15106.htm#\\_idTextAnchor039](https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/15106.htm#_idTextAnchor039)

<sup>33</sup> See Civil Service People Surveys 2016, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570030/BF0000\\_Border\\_Force.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570030/BF0000_Border_Force.pdf) and <https://www.gov.uk/government/publications/home-office-people-survey-results-2016>



review of the administrative review process, and found that the Home Office had failed to identify some genuinely incorrect immigration decisions through this process<sup>34</sup>.

The erosion of migrant appeal rights has been deepened by the controversial ‘deport first, appeal later’ scheme, initially introduced by the 2014 Act and extended under the Immigration Act 2016<sup>35</sup>. Under these changes, some non-EEA nationals may now only appeal against a decision to remove them from the UK from outside the country, unless removal would cause them ‘serious, irreversible harm’.

In 2016, the Government consulted on its plans to increase fees for immigration appeals heard in the Immigration and Asylum Chamber of the First Tier Tribunal by approximately 500%<sup>36</sup>. This plan was abandoned after JCWI threatened a legal challenge, on the basis that the increases would have put judicial oversight of immigration decisions beyond the reach of all but a small minority of applicants<sup>37</sup>. The Government has since announced its intention to continue to pursue fee increases after further consultation.

We envisage that immigration challenges introduced by Brexit will generate more pressure on the legal advice sector and UK courts. Demand for independent review of decisions will increase, with a new wave of legal claims against the Home Office. The paucity of reliable immigration advice will be compounded by the additional demands generated by a cohort of EEA nationals newly subject to immigration controls. It is currently unclear how any such demands would be met without significant additional resourcing to support and advice services at community level.

As such, we urge the Government to restore the right of appeal in the independent immigration tribunals which were established for this purpose. This will ensure that decision-

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<sup>34</sup> An inspection of the Administrative Review processes introduced following the 2014 Immigration Act September – December 2015, David Bolt, May 2016  
<http://icsinspector.independent.gov.uk/wp-content/uploads/2016/05/ICIBI-report-on-Admin-Reviews-May-2016.pdf>

<sup>35</sup> See House of Lords Second Reading Briefing Immigration Bill 2015: Appeals, JCWI, 16 December 2015. Available at: <https://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-appeals>

<sup>36</sup> See Proposals to amend Immigration and Asylum Chamber fees, Ministry of Justice, 21 April 2016. Available at: <https://www.gov.uk/government/consultations/proposals-to-amend-immigration-and-asylum-chamber-fees>

<sup>37</sup> Challenge to the five-fold increase to Immigration Tribunal fees, JCWI Crowdfunder page, available at: <https://www.crowdjustice.org/case/immigration-tribunal-fees-challenge/>



making is robust and can stand up to external scrutiny, thus rebuilding confidence in the system. We also urge the Government to facilitate reasonable access to legal advice for both EEA and non-EEA nationals, in order to ensure widespread understanding of new rules and improve the quality of applications.

## 5. Rethink the ‘hostile environment’ approach

Post-Brexit immigration policy will have significant long-term implications for local communities. The UK Government has the stated objective of promoting integration and British values<sup>38</sup> but does not currently have an integration strategy in place to guide its work. In early 2017, an independent review into social integration and opportunity carried out by Dame Louise Casey called for a major new government programme to support local integration, including community empowerment and more English language courses, in a ‘spirit of compassion and kindness’.

However, since 2012 the Government has embarked on a policy to create a “hostile environment” for certain sections of the population, which we argue directly undermines integration and incentivises discrimination. Under the Immigration Acts 2014 and 2016, the UK Government extended in-country immigration controls already in place in workplaces, in order to make life increasingly difficult for irregular migrants in the UK and encourage them to leave. This has resulted in employers, private landlords, banks and healthcare providers being required to check immigration status documents as part of their daily work.

Evidence suggests that this approach can have divisive and damaging impacts on the most vulnerable in society, including pregnant women<sup>39</sup>, children<sup>40</sup> and victims of crime<sup>41</sup>. This approach has been further resourced through the new ‘Controlling Migration Fund’, which

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<sup>38</sup> As stated in the Conservative Manifesto 2015. Available at: <https://www.conservatives.com/manifesto>

<sup>39</sup> Doctors of the World have evidenced the risks for pregnant women who have been ‘frightened away’ from accessing antenatal care as a result of immigration checks. 20<sup>th</sup> March 2017. Available at: <https://www.doctorsoftheworld.org.uk/news/pregnant-women-should-never-be-frightened-away-from-antenatal-care>

<sup>40</sup> There are concerns that schools are increasingly becoming a site for immigration control, potentially deterring some migrant parents from sending their children to school in future. See the work of COMPAS at Oxford University on undocumented migrant children: <https://www.compas.ox.ac.uk/project/undocumented-migrant-children-in-the-uk/>

<sup>41</sup> Victims of crime may now find themselves reported to the Home Office if they do not have immigration status, which may deter migrants from reporting serious or violence crimes to the police. See: <http://www.politics.co.uk/news/2017/04/05/met-police-hands-victims-of-crime-over-to-the-home-office>



aims to 'mitigate the impacts of immigration on local communities' by, among other objectives, directing enforcement action against irregular migrants<sup>42</sup>.

In our view, the creation of a 'hostile environment' increases divisions and tensions in local communities. In-country immigration controls impact upon everyone resident in the UK – including British citizens – who are also required to produce identity documents, and many of whom are at risk of discrimination as a result of document checks. We have looked particularly at the 'Right to Rent' scheme, which was piloted in 2015 and rolled out from February 2016. This requires private landlords to check the immigration status of prospective tenants, with those found to have rented a property to an adult without the required immigration status facing a fine of up to £3,000 or, from December 2016, a criminal sentence. JCWI has collected evidence through research that shows this is leading to unlawful racial discrimination in the housing sector<sup>43</sup>. In addition, there is little evidence that the approach is working, with just 31 instances of individuals leaving the UK in connection with the Right to Rent scheme.

Moreover, despite the fact that the purpose of the 'hostile environment' is to increase the numbers of people that leave the country voluntarily without the engagement of Immigration Enforcement, the Home Office's own figures show that this type of return is actually decreasing. Figures for irregular migrants known to have left the country without the assistance of and without informing the Home Office formally, dropped from 14,312 in 2014 to 11,555 in 2016<sup>44</sup>. This is during the period that the 'hostile environment' was supposed to take effect after the Immigration Act 2014.

With UK potentially doubling the number of migrants coming here every year who are subject to immigration control after Brexit, the demands on immigration enforcement are likely to increase. Ministers reportedly admit in private that they expect the hostile

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<sup>42</sup> Controlling Migration Fund: mitigating the impacts of immigration on local communities, Department for Communities and Local Government, November 2016. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566951/Controlling\\_Migration\\_Fund\\_Prospectus.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566951/Controlling_Migration_Fund_Prospectus.pdf)

<sup>43</sup> No Passport equals No Home, JCWI, February 2017. Available at <https://www.jcwi.org.uk/policy/reports/no-passport-equals-no-home-independent-evaluation-right-rent-scheme>

<sup>44</sup> ONS Immigration Statistics, 23 February 2017, Returns data. Available at: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/list-of-tables>



environment approach will be expanded to deal with post-Brexit pressures<sup>45</sup>. In our view, this will alienate migrants and British ethnic minorities, driving a wedge between communities rather than tackling irregular migration.

We propose that, in the context of a new post-Brexit immigration policy, the Government should move away from the hostile environment approach in favour of border controls which operate at the border, rather than at the heart of our communities. Activity at the local levels should be informed by a national integration strategy which guides actions to reach out to, rather than intimidate, migrants.

## **6. Tackle the causes of irregular migration**

In embarking upon Brexit, the UK will need to take a fair and pragmatic approach if it is to avoid an increase in the irregular migrant population. It is JCWI's experience that irregular migration is often generated by overly-frequent rule changes and lack of accountability within the immigration system, and is rarely the desired outcome for individual migrants<sup>46</sup>.

Bringing a significant number of EEA nationals under immigration control following our withdrawal from the EU could easily result in an increase in the irregular migrant population overnight. To avoid this, the Government must ensure that all rules put in place which affect EEA nationals currently residing here are simple, cheap, and fair. The aim should be to bring as many people currently living in the UK into the system as possible. Similarly, as part of the Brexit reform process, the UK Government could look at our already resident irregular migrant population and examine how some of those migrants could be brought into a secure position in which they can pay taxes and openly contribute to the communities in which they live.

Looking to the future, all new post-Brexit immigration rules should be proportionate, fair and clearly communicated to the public, as well as genuinely in step with the UK's economic and social needs. Currently, once non-EEA migrants become irregular there is little possibility for them to regularise their status. They also know that, once they leave the UK, they will

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<sup>45</sup> Landlords who flout migrant rules face tougher penalties, in The Times, 22 March 2017 [http://www.thetimes.co.uk/article/landlords-who-flout-migrant-rules-face-tougher-penalties-q0m2grjrt?utm\\_content=51251691&utm\\_medium=social&utm\\_source=twitter](http://www.thetimes.co.uk/article/landlords-who-flout-migrant-rules-face-tougher-penalties-q0m2grjrt?utm_content=51251691&utm_medium=social&utm_source=twitter)

<sup>46</sup> See House of Lords Second Reading Briefing Immigration Bill 2015: Undocumented Migrants, 16 December 2015, for evidence from the JCWI undocumented migrant advice line. Available at: [https://www.jcwi.org.uk/sites/jcwi/files/2015\\_12\\_16\\_PUB%20HoL%202nd%20Reading%20Briefing%20Undocumented%20Migrants.pdf](https://www.jcwi.org.uk/sites/jcwi/files/2015_12_16_PUB%20HoL%202nd%20Reading%20Briefing%20Undocumented%20Migrants.pdf)



struggle to return here. This is having the converse effect to the one intended by the Government – many irregular migrants choose to remain rather than risk leaving<sup>47</sup>.

We believe that providing adequate legal routes for the migration that the UK needs, including in low-paid or low-skilled occupations, will be critical. In addition, we urge the Government to consider where it could instate reasonable routes back to legal status for those who do fall outside the rules, as part of a fair and humane immigration policy.

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### The debate ahead...

We intend this position paper to lay out a broad argument for bold, long-term thinking about immigration reforms, at this critical juncture in UK politics. It will be followed by further JCWI briefings, exploring key areas of the policy reforms we have introduced here in more detail.

We welcome debate about all the issues discussed in this paper, and urge those who also want to see a fresh approach to immigration to get in touch and join the discussion. You can reach the JCWI policy staff on the contact details below:

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<sup>47</sup> ONS Immigration Statistics, 23 February 2017, Returns data. Available at: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/list-of-tables>