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# Path dependent policymaking in the post-Brexit United Kingdom: what's new about the 'points-based' labour migration system?

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## Abstract

The end of free movement as a consequence of the United Kingdom (UK)'s withdrawal from the European Union (EU) meant that it was necessary for the UK to devise a new migration system when the transition period came to an end. One aim of this article is to determine in what respects the new system, which came into force on 1 January 2021, draws on or differs from the previous immigration system. To the extent that this inquiry reveals some similarities, another aim is to uncover how the policymaking process produced these continuities. Drawing on the concept of path dependency from the 'new institutionalism' literature, the analysis reveals that two critical decisions taken by the New Labour government (1997–2010) set in train a path dependent policy process that has shaped immigration law and policy today. Two mechanisms of path dependency are identified. First, there were continuities in the operation of conceptual frameworks, methodologies and conclusions amongst organisations tasked with designing the new immigration system. Second, the position adopted by employing enterprises favoured the retention of key features of the previous system.

**Keywords:** United Kingdom; path dependency; labour migration; high skilled; growth regime

## 1. Introduction

During the post-referendum negotiations over the terms of the UK's withdrawal from the European Union, the Conservative Party, under both Theresa May's and Boris Johnson's premier-ships, identified the end of free movement as a priority. This all but guaranteed that the UK would need to devise a new migration system when the transition period came to an end. The final shape of the new system was revealed in a government policy paper published on 19 February 2020.<sup>1</sup> The government sought to frame the new rules as a dramatic break with the past:

We are implementing a new system that will transform the way in which all migrants come to the UK to work, study, visit or join their family. It will also revolutionise the operation of the UK border, tighten security and deliver a better customer experience for those coming to the UK.<sup>2</sup>

<sup>1</sup>'The UK's Points-Based Immigration System: Policy Statement' (HM Government 2020) Presented to Parliament by the Secretary of State for the Home Department <<https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement>> accessed 22 September 2022.

<sup>2</sup>Ibid.

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The then Secretary of State for the Home Department, Priti Patel, doubled down on this presentation when she made a statement about the ‘points-based’ immigration system to the House of Commons a few days later. She described the government’s plan as a ‘radical new approach’.<sup>3</sup>

We should remain sceptical about these claims of novelty. Whilst the new migration rules will have a profound impact on EU citizens seeking to migrate to the UK for work (and for that matter, other purposes), the post-Brexit system is a far cry from the revolutionary migration policy promised. The new rules extend the previous system that applied to ‘third country nationals’ to all migrants, liberalise some conditions for the grant of work visas, and create a few ad hoc categories for entry to address pressing labour shortages in certain industries. One aim of this article is to determine in what respects the new system draws on or differs from the previous immigration system, paying particular attention to its aims and objectives, regulatory instruments, and institutional arrangements for operationalising the rules. To the extent that this inquiry reveals some similarities, another aim is to uncover how the policymaking process – from the framing of the problem and articulation of the objectives to its design and implementation – produced these continuities. At the end of this process tracing exercise, it becomes evident that policymakers rarely start with a blank slate even if the intention is to begin anew.

Economists and political scientists commonly use the concept of ‘path dependency’ to describe how the policymaking process often reproduces past practices even in circumstances where new institutions are being designed. However, to make out a path dependent process it is not simply enough to show that the past has influenced the present. Instead, it must be shown that some early choice in the policymaking process initiated a change in ideational frameworks as well as the position of organised interest groups, in a manner that effects subsequent policy design.<sup>4</sup> To provide a persuasive account of path dependency, the precise mechanisms by which previous choices have come to determine later decisions must be explicated. It could be said that providing such a path dependent account of the development of a particular policy can read like a narrative account, which is liable to raise accusations of selective storytelling. Notwithstanding this criticism, it is important to remember that a historical narrative that identifies the interplay of important interests, institutions and ideas can serve an important analytical function.<sup>5</sup>

An analysis of the policymaking process leading up to the formulation of the UK’s new immigration system reveals that two critical decisions taken by the New Labour government (1997–2010) set in train a path dependent policy process that continues to shape immigration law and policy today. The first decision was the introduction of the points-based system to assess candidates for the Highly Skilled Migrant Programme introduced by New Labour in 2002. The second decision was the introduction of the ‘tier system’ in 2008 to consolidate the various routes for the entry of non-EU nationals for the purposes of labour migration. Under the Tier 2 route, which was the primary route for labour migrants to enter the UK, it was necessary for an employer to sponsor a potential candidate, and those entering continued to be ‘tied’ to that employer for the duration of their visa. These two features – a points-based assessment regime to select hopeful entrants and the use of the work permit as a regulatory instrument – continue to be lynchpins of the new immigration system. The analysis contained in this article shows how path dependency operated during the recent policymaking process to replicate these two key aspects of New Labour’s immigration system. For the sake of clarity, this article only considers recent legislative and administrative changes to the UK’s labour migration regime. It does not cover changes that the government has made to other streams of entry, most relevantly the system of assessing asylum seekers and granting refugee status, which has also been subject to significant amendment since the enactment of the Nationality and Borders Act 2022. Although migrants entering under these streams

<sup>3</sup>HC Deb 24 February 2020, vol. 672, col. 36.

<sup>4</sup>See discussion in Section 2.

<sup>5</sup>PA Hall, ‘Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain’ 25 (1993) *Comparative Politics* 275.

will often end up participating in the labour market as well, their exclusion from the analysis in this article is justified on the basis of pragmatism.

This article begins with a short survey of the concept of path dependency in the economics and historical institutionalism literatures. It then moves on to consider how labour immigration policy has evolved from New Labour's time in office to the new system that came into effect on 1 January 2021. In this historical narrative, path dependent policymaking processes are identified together with the mechanisms through which policy changes occurred. The article concludes with a few reflections about the need to challenge conventional thinking as the UK embarks upon a new period of expanded skilled migration.<sup>6</sup>

## 2. Path dependency in economics and political science

Social scientists who study policymaking processes regularly utilise the concept of path dependency to explain how policy choices are influenced by previous decisions. The claims advanced in the literature go beyond the suggestion that history matters, or even that past choices influence future decisions. Instead, the invocation of path dependence is intended to make a set of claims about how policy choices can set in motion self-reinforcing processes that can be difficult for future policymakers to shake. There is no clear consensus on the mechanisms by which path dependency operates in various empirical contexts, leading some to question whether the concept offers any real insights at all.<sup>7</sup> These criticisms notwithstanding, the identification of mechanisms is key to a persuasive account of path dependency. That is, merely invoking path dependency is not enough; its operation must be demonstrated by showing the timing and sequence of events.<sup>8</sup>

The complexity of the concept of path dependency can be better appreciated by providing a short survey of the literature. However, the *short* aspect of this brief can be challenging since the concept of path dependence is used by scholars from a variety of disciplines, including economics,<sup>9</sup> politics,<sup>10</sup> and law.<sup>11</sup> A good starting point is to review path dependency in the 'new institutionalism' literature – composed of both economic institutionalists and historical sociologists – because it is where disciplinary boundaries blur and the discussion is most advanced. Being a part of a common project to revive institutional analysis, scholars from these two disciplinary backgrounds regularly borrow from each other, which results in the development of a common set of insights that we can draw upon to study immigration policymaking processes.

Early discussions of path dependent processes in economics date back to the 19<sup>th</sup> century, although the term was not explicitly used.<sup>12</sup> 'New' economic institutionalists' engagement with

<sup>6</sup>A note on terminology: I adopt the terms 'high skilled' and 'low skilled,' used by policymakers, throughout this article whilst acknowledging their problematic use. It is worthwhile stating at the outset that the notion of skill is not easy to objectively assess, is often operationalised in a deeply racialised and gendered way, and can function as a tool to deny agency and personhood to those deemed unskilled: see, eg, B Anderson, 'Deciphering "Skills": Class, Nation, Gender (A Forum on the Politics of Skills)' 75 (2022) ILR Review 1348–1368.

<sup>7</sup>S Liebowitz and SE Margolis, 'Policy and Path Dependency, From QWERTY to Windows 95' 18 (1995) Regulation 33.

<sup>8</sup>E Consterdine, *Labour's Immigration Policy: The Making of the Migration State* (Palgrave Macmillan 2018) 38.

<sup>9</sup>See, eg, PA David, 'Clio and the Economics of QWERTY' 75 (1985) *The American Economic Review* 332; DC North, *Understanding the Process of Economic Change* (Princeton University Press 2005); DC North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990).

<sup>10</sup>See, eg, K Thelen, 'Historical Institutionalism in Comparative Politics' 2 (1999) *Annual Review of Political Science* 369; P Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' 94 (2000) *The American Political Science Review* 251; J Mahoney, 'Path Dependence in Historical Sociology' 29 (2000) *Theory and Society* 507.

<sup>11</sup>See, eg, OA Hathaway, 'Path Dependence in Law: The Course and Pattern of Legal Change in a Common Law System' 86 (2001) *Iowa Law Review* 601; BA Hansen and ME Hansen, 'The Role of Path Dependence in the Development of US Bankruptcy Law, 1880–1938' 3 (2007) *Journal of Institutional Economics* 203.

<sup>12</sup>KJ Arrow, 'Increasing Returns: Historiographic Issues and Path Dependence' 7 (2000) *The European Journal of the History of Economic Thought* 171; L Magnusson and J Ottosson, 'Path Dependence: Some Introductory Remarks' in L Magnusson and J Ottosson (eds), *The Evolution of Path Dependence* (Edward Elgar 2009) 1–18.

path dependency relates to a series of studies published in the 1980s that sought to explain the persistence of less-than-optimal technologies. The most well-known amongst these drew on the concept of path dependency to explain how the QWERTY keyboard became ‘locked in’ despite a better alternative being available.<sup>13</sup> These dynamics were applied more broadly to describe the process of institutional change, most prominently in the work of Douglass North.<sup>14</sup> For North, two critical factors determined incremental change in institutions: a set of actors who benefit from existing institutional arrangements and the evolution of a set of beliefs that rationalise extant structures.<sup>15</sup> Although North appreciated the importance of belief systems in reproducing institutions, he failed at times to clearly set out many features of ideas, including how they come to be collectively held, change over time, and influence the behaviour of actors.<sup>16</sup>

More relevant for the analysis in this article is the way that historical sociologists have developed the concept of path dependency. Some historical institutionalists have sought to restrict the use of label of path dependency so that it is not used simply to describe events that are influenced by previous ones. Mahoney, for example, argues that path dependency should only be used to describe causal political processes that satisfy three conditions: (1) those which are highly sensitive to events which have taken place at an earlier stage; (2) those where such early historical events are highly contingent and cannot be explained on the basis of even earlier events; and (3) those processes marked overall by deterministic causal patterns.<sup>17</sup> For some, the cause of institutional inertia is due to the costs of switching to another option increasing over time.<sup>18</sup> Others have identified different self-reinforcing mechanisms such as the growth of powerful actors who are oriented to particular institutional arrangements.<sup>19</sup> Furthermore, although we see in North’s work an appreciation of the influence of cultural beliefs, historical institutionalists emphasise to a greater extent that institutions are made up of shared understandings that can act to inhibit altogether new policy solutions.<sup>20</sup>

The above discussion might suggest that policymaking is highly resistance to change, but we know that institutional change can and does occur as a result of both exogenous and endogenous factors.<sup>21</sup> This change, however, is likely to be heavily constrained by broader structural transformations in the economy. Peter Hall’s elaboration of the concept of ‘growth regimes’ provides a helpful way to make sense of institutional change in the shadow of broader capitalist dynamics, and in a way that also accounts for both agency and contingency.<sup>22</sup> For Hall, a growth regime is ‘distinguished by the distinctive way in which it generates economic growth and distributes its profits’, and the post-war period has seen three regimes, with each regime eclipsing the one immediate before it: the modernisation regime (~1945–1970); the liberalisation regime (~1980–2000);

<sup>13</sup>WB Arthur, ‘On Competing Technologies and Historical Small Events: The Dynamics of Choice Under Increasing Returns’ (International Institute for Applied Systems Analysis 1983) WP-83-090 <<https://core.ac.uk/download/pdf/33893693.pdf>> accessed 23 September 2022; David (n 9).

<sup>14</sup>North, *Institutions, Institutional Change and Economic Performance* (n 9); North, *Understanding the Process of Economic Change* (n 9).

<sup>15</sup>North, *Institutions, Institutional Change and Economic Performance* (n 9) Ch 11; North, *Understanding the Process of Economic Change* (n 9) Ch 6.

<sup>16</sup>J Faundez, ‘Douglass North’s Theory of Institutions: Lessons for Law and Development’ 8 (2016) *Hague Journal of the Rule of Law* 373.

<sup>17</sup>Mahoney (n 10).

<sup>18</sup>Pierson (n 10).

<sup>19</sup>Thelen (n 10).

<sup>20</sup>*Ibid.*, 386.

<sup>21</sup>W Streeck and K Thelen (eds), *Beyond Continuity, Institutional Change in Advanced Political Economies* (Oxford University Press 2005).

<sup>22</sup>PA Hall, ‘Growth Regimes’ (Minda de Gunzburg Center for European Studies, Harvard University 2022) Working Paper <[https://scholar.harvard.edu/files/hall/files/hall2022\\_bhr.pdf](https://scholar.harvard.edu/files/hall/files/hall2022_bhr.pdf)> accessed 23 September 2022; PA Hall, ‘How Growth Regimes Evolve in the Developed Democracies’ (22nd International Conference of Europeanists, Paris, 8 July 2015).

and the knowledge-based regime (~2000 onwards).<sup>23</sup> Economic policymakers are faced with a set of material and ideational constraints that arise from the way that growth is derived in each period.<sup>24</sup> Material constraints arise because coalitions of actors who benefit from existing arrangements will seek to block change. Ideational limits are imposed because policymakers themselves hold a set of ideas about the economy as well as the appropriate policy tools and are reluctant to embrace new positions. Nevertheless, institutions do evolve as inevitable change alters configurations of power amongst actors, and new ideas gain traction over old ones.

Scholars of migration have previously made the case for the persistence of various continuities in British immigration law and policy. Randall Hansen expressly used the concept of path dependence to explain how the UK's relatively liberal attitudes towards migration in the period 1948–1962 influenced future action.<sup>25</sup> According to Hansen, once the UK enacted the British Nationality Act 1948, which made those who were formerly British subjects citizens of the UK and colonies, it 'created an institutional structure that limited subsequent policy options and militated against its own replacement'.<sup>26</sup> A few decades later, a less liberal approach to immigration had taken root. In these circumstances, Chris Wright has argued that although a liberal attitude to migration marked the early years of New Labour, once the issue of migration became politically troublesome, the UK's 'policy legacy' of having a highly restrictionist attitude towards migration reasserted itself.<sup>27</sup> The analysis contained in this article follows the lead of these scholars to consider how the latest iteration of British immigration policy reproduces elements from the past. However, it builds upon these previous accounts to suggest that path dependency is a function of governments and firms being beholden to a particular way of generating and thinking about economic growth and employers becoming dependent upon migrant labour.<sup>28</sup> As we will see in the subsequent analysis, in the absence of a major transformation in the way that governments think about economic policy, and British firms utilise labour, it is inevitable that immigration policy continues to follow along a well-trodden path.

### 3. From New Labour's immigration reforms to the 'new' points-based system

State regulation of immigration underwent a fundamental change under the period of New Labour's rule. Described as a 'reluctant immigration state' in the 1990s, between 1997 and 2010, UK's population increased by over 2.2 million people due to immigration.<sup>29</sup> Some of this increase was due to the implementation of new policies to encourage 'high skill' labour migration. For example, Labour introduced the High Skill Migration Programme (HSMP) in 2002 to attract candidates from outside the EU, which it was thought could contribute to the UK's growth and productivity. 'Low skilled' immigration was also revived through a variety of policy measures, including changes to the Working Holiday Makers Scheme and the expansion of existing sector-specific programmes. However, the entirety of the increase in immigration cannot be attributed to deliberate policy choices. The decision to allow unrestricted access to citizens of the eight former 'Eastern Bloc' countries that joined the EU in 2004 added the largest contingent

<sup>23</sup>Hall, 'Growth Regimes' (n 22) 5.

<sup>24</sup>N O'Donovan, *Pursuing the Knowledge Economy: A Sympathetic History of High-Skill, High-Wage Hubris* (Agenda Publishing 2022) 23.

<sup>25</sup>R Hansen, *Citizenship and Immigration in Post-War Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000).

<sup>26</sup>*Ibid.*, 30.

<sup>27</sup>CF Wright, 'Policy Legacies, Visa Reform and the Resilience of Immigration Politics' 35 (2012) *West European Politics* 726.

<sup>28</sup>Hall, 'How Growth Regimes Evolve in the Developed Democracies' (n 22); Hall, 'Growth Regimes' (n 22); M Aglietta, *A Theory of Capitalist Regulation – The US Experience* (Verso 2015).

<sup>29</sup>N Watt and P Wintour, 'How Immigration Came to Haunt Labour: The Inside Story' (*The Guardian*, 24 March 2015) <<https://www.theguardian.com/news/2015/mar/24/how-immigration-came-to-haunt-labour-inside-story>> accessed 1 September 2022.

of workers to the UK labour market: an estimated 629,000 ‘A8’ workers were employed in the UK at the beginning of 2011, the year immediately after New Labour was in office.<sup>30</sup> In this case, the decision was driven by foreign policy considerations, such as the need to appease new Member States to create new coalitions at the level of the Council of the European Union, and greased by poor projections of the likely number of migrants from A8 countries.<sup>31</sup> In her insightful analysis of the ‘making of the migration state’ under New Labour, Erica Consterdine has warned against settling upon mono-causal reasons for these changes.<sup>32</sup> Instead, Consterdine suggests that a confluence of factors, including thinktank advocacy, Labour’s ideological modernisation, and ascendancy of economic framings for policy discussions within influential sections of the Civil Service, were responsible for the rapid expansion in migration.

To properly understand how the UK came to see the virtues of immigration, it is important to appreciate the economic thinking that had gained ascendancy in this period. The years in which migration was encouraged coincided with an explosion of interest in the concept of the ‘knowledge driven economy’. A White Paper drafted by the Department of Trade and Industry in the early days of New Labour’s tenure defined the concept as the ‘exploitation and use of knowledge in all production and service activities, not just those sometimes classified as high-tech or knowledge intensive’.<sup>33</sup> In a recent study of the prevalence and penetration of the concept of the knowledge driven economy, Nick O’Donovan has written that it directed policymakers to implement particular policies, including investing in R&D, skills, and education, as well as reducing barriers to the flow of capital, goods, and people.<sup>34</sup> Seen in this context, increased migration, particularly of highly-skilled workers, was seen to promote labour productivity, address short-term labour shortages in growth industries such as ICT and health, and increase the human capital stock of the country.<sup>35</sup> Even low-skilled workers were seen to be beneficial to certain economic goals, such as improving labour market flexibility and macroeconomic stability in the form of low inflation.<sup>36</sup> This economic framing of migration – revolutionary at the time – was particularly influential within Treasury, but soon trickled out to other arenas where migration policy was being determined, such as the Home Office.<sup>37</sup> Circumstances in the material world of the economy often give birth to ideas and allow them to become dominant. Accordingly, the operation of the knowledge economy at the ideational level should be seen as a response to a period of uninterrupted economic growth, declining unemployment, and the rapid expansion of the ICT, financial services, hospitality, healthcare and education sectors.<sup>38</sup>

In New Labour’s first term in office (1997–2001), efforts were made to make the process of applying for a work permit faster and more efficient. The use of the work permit as an instrument to regulate the employment of foreigners dates back to 1919.<sup>39</sup> It was variously used in the post-World War II era to recruit European workers and restrict the entry of workers from the Commonwealth who were entitled to migrate permanently to the UK as a consequence of the passage of the British Nationality Act 1948.<sup>40</sup> Changes introduced as a result of the

<sup>30</sup>C Vargas-Silva, ‘Seven Years After the Eastern European Enlargement’ (*COMPAS*, 13 September 2011) <<https://www.compas.ox.ac.uk/2011/seven-years-after-the-eastern-european-enlargement/>> accessed 23 September 2022.

<sup>31</sup>Wright (n 27).

<sup>32</sup>Consterdine (n 8).

<sup>33</sup>Our Competitive Future: Building the Knowledge Driven Economy’ (Department of Trade and Industry 1998) White Paper 2.

<sup>34</sup>O’Donovan (n 24).

<sup>35</sup>Wright (n 27).

<sup>36</sup>*Ibid.*; CF Wright, ‘Immigration Policy and Market Institutions in Liberal Market Economies’ 43 (2012) *Industrial Relations Journal* 110.

<sup>37</sup>Wright (n 27); Consterdine (n 8).

<sup>38</sup>W Somerville, *Immigration Under New Labour* (Policy Press 2007) Ch 7.

<sup>39</sup>J Salt and V Bauer, ‘Managing Foreign Labour Immigration to the UK: Government Policy and Outcomes Since 1945’ (UCL Migration Research Unit 2020).

<sup>40</sup>C Holmes, *John Bull’s Island: Immigration & British Society, 1871–1971* (MacMillan 1988).

Immigration Act 1971 meant that work permits were only issued to workers (which now included non-European Economic Community and Commonwealth citizens) with a job offer with a specific employer and in possession of a skill or qualification that was deemed necessary.<sup>41</sup> In the early 1980s only a very limited number of work permits were issued, but improving labour market conditions by the end of the decade drove an increase in their use. This was further facilitated by changes made in 1991 that introduced a simplified pathway for senior management roles and skills in short supply. Once New Labour were in office, they commissioned a review of the work permit system in 2000 and made a several reforms to simplify eligibility criteria, reduce processing times, and increase their duration from four to five years.<sup>42</sup> As a result of Labour's liberalisation, the total number of work permit holders increased from 62,975 in 1997 to 137,035 in 2005.<sup>43</sup>

In Labour's second term in office (2001–2005), the first of two fateful decisions was taken to introduce a points-based system to assess people for suitability to enter as labour migrants.<sup>44</sup> In 2002, the government introduced the HSMP to 'enable the most talented migrants to come to the country'.<sup>45</sup> Successful candidates were initially required to meet the 75-point requirement, which could be gained through a combination of qualification levels, previous income and professional achievements.<sup>46</sup> Points were tradeable in the sense that a candidate could make use of a variety of combinations of attributes to qualify. Significantly, an applicant did not require a job offer and could work in any role once granted entry, which suggests that the Australian and Canadian systems were models.<sup>47</sup> Determining what constitutes 'high skilled', of course, is no simple matter and different countries employ a variety of criteria, including education, income or occupation, to assess candidates.<sup>48</sup> In the case of the HSMP, a flexible combination of educational qualifications, work experience, and past earned income was used. The government did not intend to set an upper limit on the number of labour migrants that would be allowed entry under the HSMP.<sup>49</sup> However, due to the low number of applicants, the government soon relaxed the point requirement to 65 and began to allocate a higher number of points for previous work experience, qualification level of partners, and being under 28 years of age.<sup>50</sup> The number of HSMP applications approved rose from about 5,000 in 2003 to 27,500 in 2007.<sup>51</sup> The push to attract high skilled migrants was the consequence of the dominance of human capital theory which posited that increasing human capital, through education/training and importing high skilled workers, could contribute positively to productivity and economic growth in a knowledge driven economy.<sup>52</sup>

The requirement that applicants meet a certain number of points was then extended when the five-tiered economic entry system was launched by Labour during their third and final term in

<sup>41</sup>Salt and Bauer (n 39) 6.

<sup>42</sup>Secure Borders, Safe Havens: Integration with Diversity in Modern Britain' (2002) Presented to Parliament by the Secretary of State for the Home Department CM5387.

<sup>43</sup>Sommerville (n 38) 31.

<sup>44</sup>Technically speaking, the short-lived Innovator's Scheme (2000–2002), which allowed entrepreneurs to enter to the UK to set up a business, used a points system for assessment.

<sup>45</sup>Secure Borders, Safe Havens: Integration with Diversity in Modern Britain' (n 42) 41.

<sup>46</sup>J Carvalho, 'British and French Policies Towards High-Skilled Immigration During the 2000s: Policy Outplays Politics or Politics Trumps Policy?' 37 (2014) *Ethnic and Racial Studies* 2361.

<sup>47</sup>Salt and Bauer (n 39). For a brief discussion of the points-based systems in place in Australia and Canada at the time, see S Yale-Loehr and C Hoashi-Erhardt, 'A Comparative Look at Immigration and Human Capital Assessment' in M Crock (ed), *Nation Skilling: Migration, Labour and the Law in Australia, Canada, New Zealand and the United States* (Desert Pea Press 2002).

<sup>48</sup>CR Parsons et al, 'High Skilled Migration Through the Lens of Policy' 8 (2020) *Migration Studies* 279.

<sup>49</sup>Carvalho (n 46).

<sup>50</sup>Sommerville (n 38) 33.

<sup>51</sup>Carvalho (n 46) 2368.

<sup>52</sup>See, eg, P Zaletel, 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration' 12 (2006) *European Law Journal* 613.



office (2005–2010), consolidating the previous 80 different routes for non-EU nationals to enter the UK.<sup>53</sup> The point-based system had three main tiers for work-related entry. The first was Tier 1 for ‘high skilled’ workers who could contribute to the overall human capital stock of the labour market. Applicants under this route were not required to have a particular job offer, and so the Tier 1 replaced the HSMP. The next was the Tier 2 for ‘skilled’ workers who were needed to fill gaps in the labour market; it replaced the variety of routes for which a work permit was necessary. The Tier 2 continued to be an employer-driven scheme because an applicant was required to have a job offer from an employer who was registered with the Home Office as an approved sponsor. Employers had either to satisfy a labour market test to prove that a migrant worker was not displacing local workers or to show that the occupation for which the migrant was being recruited was on the occupational shortage list.<sup>54</sup> Tier 3 was for ‘low skilled’ workers to meet specific temporary labour shortages, which was never opened due to the large number of workers who arrived from Eastern Europe after the EU’s eastward expansion in 2004. The two remaining routes – Tier 4 and Tier 5 – were intended for international students and youth mobility programme entrants respectively. Given that Tier 2 was the primary route for non-EEA labour migration, one further clarification is necessary. We can see that the Tier 2 combined the work permit system with a points-based assessment structure. However, it was not a true points system in the sense that applicants still had to meet certain requirements (eg, holding a job offer and have English language proficiency) and could not simply trade points in one category for another. The combination of the two elements, nevertheless, was the second pivotal moment in recent immigration policymaking that continues to influence the present system.

Several far-reaching changes to the points-based system were made by the Conservative-Liberal Democrat Coalition government between 2010 and 2015, but the basic architecture remained. First, Tier 1 was amended so that it was no longer possible for someone to enter without a job offer although new streams, such as the Tier 1 Exceptional Talent and Tier 1 Investor and Entrepreneur categories were added. Second, eligibility for the Tier 2 stream was tightened in various ways – for example, by mandating job offers to be for ‘skilled occupations’ requiring a bachelor’s degree level and at a higher minimum salary. Third, to achieve their objective to reduce net migration to the ‘tens of thousands,’ the annual limit on visas was introduced, although various exemptions were created for special categories such as doctors, nurses and intra-corporate transfers. Alongside these changes to the labour migration system, the Coalition government introduced a raft of changes to deter unlawful migration (eg, the infamous ‘hostile environment’ policies designed to induce those without authorisation to live and work in the UK to self-deport), further restrict access to the asylum and refugee system, discourage family reunification, and do away with avenues for international student to work in the UK after graduation.<sup>55</sup>

Public hostility to immigration intensified due to the government’s relentless focus on migration, which partially lay the groundwork for the UK’s decision to leave the EU.<sup>56</sup> Once it was decided that the UK’s departure from the EU would definitively mean the end of free movement, Theresa May’s government commissioned the Migration Advisory Committee (MAC) to assess the impact of EEA migrants on the economy and to provide a base of evidence for the design of a new system.<sup>57</sup> The MAC was set up by the Labour Government in 2007 to provide ‘transparent, independent and evidence-based advice to the government on migration issues’ and has enjoyed

<sup>53</sup>Economic Affairs – First Report’ (2008) House of Lords Economic Affairs Committee Publications <<https://publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/82/8202.htm>> accessed 22 September 2022, Appendix 11.

<sup>54</sup>A Points-Based System: Making Migration Work for Britain’ (2006) Presented to Parliament by the Secretary of State for the Home Department Cm 6741 25.

<sup>55</sup>C Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2022).

<sup>56</sup>M Goodwin and C Milazzo, ‘Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit’ 19 (2017) *The British Journal of Politics and International Relations* 450.

<sup>57</sup>EEA Migration in the UK: Final Report’ (Migration Advisory Committee 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/741926/Final\\_EEA\\_report.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF)> accessed 23 September 2022.

bipartisan support as a source of independent economically-focused advice about immigration.<sup>58</sup> Assessing the economic impact along six broad axes – wages and employment; productivity and innovation; consumer and house prices; public finance; public services; and crime and subjective wellbeing – the MAC concluded that low skilled migration had relatively minor negative or negligible impacts and that high skilled migration had clear benefits. The MAC also outlined its recommendations for a post-Brexit migration system. The MAC proposed the parity of treatment between EEA migrants and non-EEA migrants, which would mean that the tier system currently applying to ‘third country nationals’ would in future also apply to EU migrants. The MAC also argued that the qualification threshold should be changed to occupations only requiring the possession of A-levels (ie, level 3 in the Regulated Qualification Framework rather than the previous level 6 that required graduate level training), whilst retaining the higher of £30,000 salary threshold or the ‘going rate’ for the relevant occupation. Most crucially, the MAC argued that the annual quotas for Tier 2 visa grants should be removed, and the labour market testing requirements abolished. The MAC was opposed to the creation of a route for low-skilled immigration, although it endorsed the creation of a specialist route for seasonal agricultural workers.

The May government’s response to the report was published in December 2018.<sup>59</sup> Titled ‘The UK’s Future Skills-Based Immigration System’, on the issue of migration for the purposes of work, the government endorsed most of the MAC’s recommendations. Concerned about alienating industries that had become habituated to low skilled EEA migration, the government signalled its intention to introduce a ‘transitional’ low skilled temporary migration programme to assist sectors such as construction and social care, which would not allow entrants to be accompanied by family members nor contain rights to access public funds. The Johnson government’s plan for immigration released in February 2020 was consistent with these positions in most respects. However, the new plan varied in one important area. The Johnson plan would not introduce a transitional low skilled temporary work visa, arguing that ‘we need to shift the focus of our economy away from a reliance on cheap labour from Europe and instead concentrate on investment in technology and automation’.<sup>60</sup>

How does the new system, which came into force on 1 January 2021, operate in practice? The Skilled worker visa has now replaced the Tier 2 (General) work visa but largely operates as recommended in the MAC 2018 report, although the minimum pay requirements have been lowered slightly in line with the MAC’s later advice (minimum annual salary of £25,600, and if a job is on the occupational shortage list, £20,480).<sup>61</sup> Although the government has said that it did not want low wage temporary immigration to apply pressure on wages and conditions, in March 2019, the government announced the commencement of the Seasonal Agricultural Workers pilot (SAW programme) to allow British farmers to recruit temporary agricultural workers from a range of countries to help harvest crops. Prior to the UK’s departure from the EU, workers from Eastern Europe provided the bulk of the UK’s farm labour force – according to the National Farmers Union, the agricultural sector relied on 60,000 seasonal workers annually, almost all of whom were from Bulgaria and Romania.<sup>62</sup> The SAW programme allows employers to hire

<sup>58</sup>M Ruhs, “Independent Experts” and Immigration Policies in the UK: Lessons from the Migration Advisory Committee and the Migration Observatory’ in M Ruhs, K Tamas and J Palme (eds), *Bridging the Gaps: Linking Research to Public Debates and Policy Making on Migration and Integration* (Oxford University Press 2019) 72.

<sup>59</sup>‘The UK’s Future Skill-Based Immigration System’ (HM Government 2018) Presented to Parliament by the Secretary of State for the Home Department <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf)> accessed 23 September 2022.

<sup>60</sup>‘The UK’s Points-Based Immigration System: Policy Statement’ (n 1) 3.

<sup>61</sup>Migrant workers who are qualified health and care professionals can apply for a specialist Health and care visa which operate much like the Skilled worker visa.

<sup>62</sup>W Booth and K Adam, ‘Brits Don’t Want to Work on Farms – So Who Will Pick Fruit After Brexit?’ (*The Independent*, 4 August 2018) <<https://www.independent.co.uk/climate-change/news/brexit-eu-agriculture-farms-fruit-picking-migrant-workers-labour-shortage-a8469806.html>> accessed 22 September 2022.

workers through a number of government-approved international labour recruiters to work in the British horticulture sector for a period of up to six months in any 12-month period. Originally, the number of visas issued was capped at 2,500 per annum, but it has now increased to 30,000 each year (with an additional reserve of 10,000 visas if necessary). In addition, the government's apparent distaste for low-wage labour migration did not prevent it from introducing short-term temporary visa schemes for poultry workers, pork butchers, and HGV drivers in the fourth quarter of 2021 (all routes have now expired), which attracted a paltry number of applicants. However, overall, the avenues for low-wage immigration remain limited in the new system.

The decision to use a points-based system to assess potential candidates, and the requirement that all applicants hold a job offer to obtain a time-limited work permit, are clear instances of path dependency in immigration policymaking. One important reason for the operation of path dependency in this instance is the continuing hold of ideas about knowledge driven growth and the contribution that skilled immigration can make to that vision. These ideas continue to influence British policymakers and the Conservative Party. In terms of policymakers, the MAC in particular has played a crucial role in reproducing aspects of the previous labour migration system given that it played an important role in designing the new system. In 2017, the then Home Secretary, Amber Rudd, commissioned the MAC to produce a report on the impacts of EEA migration and make recommendations to align the new immigration system with UK's industrial strategy.<sup>63</sup> The result was a report released in September 2018 that set out a range of recommendations discussed above. The requirement that the shape of the new immigration system be aligned with the government's industrial strategy was hardly a constraint due to the broad and generic way in which the industrial goals were spelled out (eg, 'make the UK one of the world's most innovative economies').<sup>64</sup> The government further commissioned the MAC in June and September 2019 to advise on the operation of salary thresholds, and the MAC responded with a further detailed report in January 2020.<sup>65</sup> The MAC's reports run into the hundreds of pages and draw extensively on a range of available and specially commissioned economic studies. They are meticulously reasoned and qualified using the economic language of cost-benefit and trade-offs. These reports make it evident that the MAC's fundamental ideas about how the benefits of labour migration for the wider economy should be assessed, how candidates should be selected, and any resulting downsides of migration should be managed, have changed little since 2007 when it was established by New Labour. For example, the 2018 MAC report lauds the benefits of high skilled immigration to productivity and the government's fiscal position, proposes selecting candidates on the basis of qualifications, and advocates limiting low skilled immigration.<sup>66</sup> The mechanisms of path dependency are evidenced by highlighting continuities in the operation of conceptual frameworks, methodologies and conclusions amongst organisations tasked with designing the new immigration system.

Government ministers are not obliged to follow MAC's advice, and in some respects, it is curious that a government that sought to politicise migration so heavily has now chosen to outsource decision-making to a body characterised by a 'utilitarian statistical ethos' fast losing purchase in political discourse.<sup>67</sup> The Conservative Party discourse on labour migration, however, hews closely to the MAC's position. If we examine Conservative Party statements, the new immigration system has been regularly touted on the basis that it will 'attract the best and brightest from all over the world' and return control to the state so that 'we can decide who comes to this country on the basis of the skills they have and the contribution they can make.'<sup>68</sup> Such sentiments, underwritten by a

<sup>63</sup>A Rudd, 'Commission for the Migration Advisory Committee' (27 July 2017).

<sup>64</sup>Industrial Strategy: Building a Britain Fit for the Future' (10 Downing Street 2017) White Paper.

<sup>65</sup>P Patel, 'Commission for the Migration Advisory Committee' (3 September 2019); S Javid, 'Commission for the Migration Advisory Committee' (24 June 2019).

<sup>66</sup>EEA Migration in the UK: Final Report' (n 57).

<sup>67</sup>H Jones and others, *Go Home? The Politics of Immigration Controversies* (Manchester University Press 2017) Ch 3.

<sup>68</sup>'Get B Done, Unleash Britain's Potential' (Conservative and Unionist Party) Party Manifesto 2019, 20 <<https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>> accessed 23 September 2022.

set of ideas and assumptions about the how the labour market and wider economy function, are not a far cry from those expressed by New Labour. This similarity strongly suggests shared pre-conceptions about the basis of economic analysis and practice. It is striking that even under Theresa May's premiership, one characterised by a desire to fashion a new conservatism based on 'civic capitalism' and the politics of place, these ideas were generally accepted.<sup>69</sup> After more than one full year of operation, most of the Conservative Party and centre-right commentariat appear to be satisfied with the new system, with only occasional murmurs of protest about the absolute numbers entering the UK.<sup>70</sup> Clearly, even as politics in the UK is going through a period of tectonic shift, ideas about knowledge driven growth continue to exert a subterranean pull.

As well continued fealty to the concept of knowledge driven growth, another key factor behind the operation of path dependency in labour migration policymaking is the position adopted by employing enterprises. In the consultations conducted by the MAC about the shape of the new labour migration system, a range of industry bodies argued in favour of the points-based system, and in particular were in favour of the decision to end visa quotas, the requirement for labour market testing, and to reduce the minimum salary thresholds.<sup>71</sup> The concerns raised related to the fact that there were few avenues for low wage migration as well as continued objections to the costs borne by employers to sponsor migrant workers. Amongst scholars, there is a diversity of views about the extent to which this represents a shift in employers' position. According to Consterdine, employers played a minimal role lobbying for the liberalisation of labour migration prior to New Labour's reforms, whilst Will Sommerville and George Menz see employers and their representatives as having played a more significant role during this period.<sup>72</sup> In any case, it is entirely predictable that after two decades of relatively high labour migration, employers would adopt a position in favour of liberalisation in the area of migration policy. As Bridget Anderson and Martin Ruhs note, 'the persistent and in many sectors increasing employer demand for migrant workers can, to a significant degree, be explained by "system effects" that "produce" certain types of domestic labour shortages.'<sup>73</sup> Put simply, having become reliant on migrant labour, employers are likely to advocate for the continuation of channels to access these workers. Applying some of the insights about institutional change via policymaking, we can say that new policy paradigm can only gain ascendancy once it is championed by strategically situated actors at moments where old paradigms seem feeble.<sup>74</sup> However, in the absence of this advocacy, path dependent processes continue to operate to reproduce certain outcomes. In this case, the position of the government and employing enterprises reinforced each other.

<sup>69</sup>'The UK's Future Skill-Based Immigration System' (n 1). For a discussion of some of the ideas animating the May government, see N Timothy, *Remaking One Nation: The Future of Conservatism* (Wiley 2020).

<sup>70</sup>N O'Brien, 'Challenge for the New Prime Minister- Immigration. But We Should Keep Our Promise to Voters and Reduce It. How Hard Will the New Prime Minister Want to Try?' (*Conservative Home*, 15 August 2022) <<https://conservativehome.com/2022/08/15/neil-obrien-challenges-for-the-new-prime-minister-immigration-but-we-should-keep-our-promise-to-voters-and-reduce-it-how-hard-will-the-new-prime-minister-want-to-try/>> accessed 23 September 2022.

<sup>71</sup>See, for example, the position of the Confederation of British Industry and Federation of Small Businesses contained in S Pepin, S Holland and M Gower, 'Post-Brexit Immigration System Proposals: Responses from Stakeholders' (House of Commons Library 2020) Briefing Paper Number CBP 8838.

<sup>72</sup>Consterdine (n 8) Ch 4; Sommerville (n 41) 108; G Menz, *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies* (Oxford University Press 2010) 157–9.

<sup>73</sup>B Anderson and M Ruhs, 'Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy' in M Ruhs and B Anderson (eds), *Who Needs Migrant Workers?* (Oxford University Press 2010) 16.

<sup>74</sup>PA Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (Oxford University Press 1986); Hall (n 5).

#### 4. Conclusion – Challenging conventional thinking

After one full year of operation of the new immigration system, we can observe two main trends. The first is the dramatic expansion in the number of Skilled Worker visas granted, since about half of all full-time jobs now qualify someone for a work visa and other regulatory restrictions (such as annual quotas and labour market testing) have been removed.<sup>75</sup> This is borne out in Home Office data which shows a 33 per cent increase in the number of high skilled visas granted since 2019 (last full year before the pandemic).<sup>76</sup> The second main change we are seeing is the proportion of non-EU workers increasing whilst the numbers coming from the EU are declining. There is evidence of this in the 2021 data, which shows that the top five nationalities for the grant of Skilled worker visas were India, Nigeria, Philippines, United States and Pakistan.<sup>77</sup> Much to the chagrin of those who saw Brexit as heralding a drastic reduction in migrant numbers, '[t]he system we have ended up implementing is much more about a switch rather than a reduction,' as Jonathan Portes, a Professor of Economics and Immigration Policy, has recently argued.<sup>78</sup>

We can expect the grant of Skilled Worker visas to increase. The combination of an employer-driven labour migration system with lower qualification and salary thresholds, political and economic pressures that militate in favour of higher immigration, and declining public concern with migrants coming to the UK,<sup>79</sup> mean that the number of labour migrants admitted each year will likely increase. In addition, for governments, the temptation to resort to labour migration to avoid undertaking deep structural reforms is likely to prove too great. For example, the UK is currently suffering a severe shortage of social care workers – a vacancy rate of some 66,000 full time equivalent workers currently and estimated to rise to 236,000 FTEs over the next 11 years – and rather than moving to address underlying causes, such as poor working conditions in the sector, the government recently commissioned the MAC to advise on visa options for social care workers.<sup>80</sup> Further, the UK's desire to fashion stronger trading and security arrangements with new partners is likely to result in arrangements allowing privileged access to the UK labour market.<sup>81</sup> The notion of 'skill' is sufficiently flexible to be able to accommodate these demands, and in any case, the complex labyrinth of rules and requirements can be tweaked in numerous ways to be more open to labour migration (eg, lowering of the salary threshold) without raising too much public awareness.

Thus far, those who have raised concerns with the new system have mainly focused on numbers. However, the more pertinent critique is that there has been little consideration thus far of how domestic labour market institutions could be developed to ensure that the benefits of migration are fairly distributed and any negative consequences appropriately managed. Much of the thinking on labour migration is informed by mainstream economics, which employs statistical modes of analysis to consider the aggregate effects of migration on labour markets. The

<sup>75</sup>J Portes, 'Immigration and the UK Economy After Brexit' (IZA Institute of Labor Economics 2021) Discussion Paper Series.

<sup>76</sup>Home Office, 'Immigration Statistics, Year Ending December 2021' (3 March 2022) <<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/summary-of-latest-statistics>> accessed 10 May 2022.

<sup>77</sup>Ibid.

<sup>78</sup>M Dathan, 'Huge Rise in Non-EU Migrants to Britain' (*The Times*, 18 April 2022) <<https://www.thetimes.co.uk/article/huge-rise-in-non-eu-migrants-to-britain-037qpx3x0>> accessed 10 May 2022.

<sup>79</sup>IPSOS survey cited in 'State of the Nation' (*New Statesman*, 2–8 September 2022).

<sup>80</sup>Commissioning letter, 6 July 2021. <<https://www.gov.uk/government/publications/commissioning-letter-to-the-mac-for-the-review-of-adult-social-care/commissioning-letter-to-the-mac-for-the-review-of-adult-social-care-accessible-version>> accessed 23 September 2022.

<sup>81</sup>S Blewett, 'India Trade Deal Will Mean Accepting Increased Migration to UK, PM Indicates' (*The Independent*, 20 April 2022) <<https://www.independent.co.uk/news/uk/boris-johnson-india-prime-minister-russia-commons-b2061993.html>> accessed 3 September 2022. There is widespread support for this position in the Conservative Party as evidenced by a recent intervention by an MP likely to become the new Home Secretary: T Tugendhat, 'Britain After Ukraine, A New Foreign Policy for an Age of Great-Power Competition' (*Foreign Affairs*, 2022) <<https://www.foreignaffairs.com/united-kingdom/tugendhat-britain-after-ukraine>> accessed 23 September 2022.

MAC's reports are a prime example of this type of analysis. Their research tells us that labour migration has marginally negative impacts amongst low skilled workers and positive effects at the high skilled end.<sup>82</sup> The economic analysis favoured by the MAC tells us about the aggregate effects of migration on employment and the wages of local workers, rather than the situation in particular workplaces or industries. To better understand the relationship between migration and labour markets in a place- and time-sensitive way, we also need to appreciate how labour institutions mediate this relationship.<sup>83</sup> Migration interacts with a variety of labour market institutions, such as labour and employment law, welfare regimes, and education/training systems, to produce a variety of outcomes. Excluding these interactions from our analysis produces an incomplete picture. The benefit of a more holistic perspective, one which takes account of this complex matrix of institutions, is that it allows us to think carefully about a range of interventions that we could use to address the distributive consequences arising out of labour migration.

Labour law is a particularly useful site for intervention. UK's 'flexible' labour market – with low rates of collective bargaining, fidelity to the notion of freedom of contract, and minimal efforts at government enforcement – provides employers with scope to use migrant workers to depress wages and conditions. Amongst labour law scholars and the trade union movement, there is a recognition that a 'rights based' approach to labour migration is necessary.<sup>84</sup> According to this perspective, reform of labour law could improve the lives of migrant workers in the labour market and prevent instances of exploitation. This would have obvious benefits for local workers as well. Additionally, scholars have also highlighted how certain visa conditions, such as employer sponsorship, exacerbate employee vulnerability.<sup>85</sup> There is an urgent need to build on these insights to consider the full suite of institutional reform that could be undertaken. For example, we could ask how employment law norms, such as the two-year qualification period to access the unfair dismissal regime, affect migrant workers on a time-limited visas. We could also ask how can our collective bargaining system be better designed to facilitate union organising and collective agreements at diverse workplaces? And finally, how could government enforcement be responsive to the needs of migrant workers? Asking these sorts of questions are likely to yield more productive answers as the UK embarks upon a new chapter in its labour migration history.

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<sup>82</sup>See, eg, review of academic studies contained in 'EEA Migration in the UK: Final Report' (n 57).

<sup>83</sup>M Dias-Abey, 'Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions' 50 (2021) *Industrial Law Journal* 532.

<sup>84</sup>See, eg, 'Labour Migration and Employment Rights' (Institute of Employment Rights 2005); 'Labour Migration in Hard Times: Reforming Labour Market Regulation' (Institute of Employment Rights 2013).

<sup>85</sup>See, eg, B Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' 24 (2010) *Work, Employment and Society* 300; V Pavlou, *Migrant Domestic Workers in Europe: Law and the Construction of Vulnerability* (Bloomsbury Publishing 2021).

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