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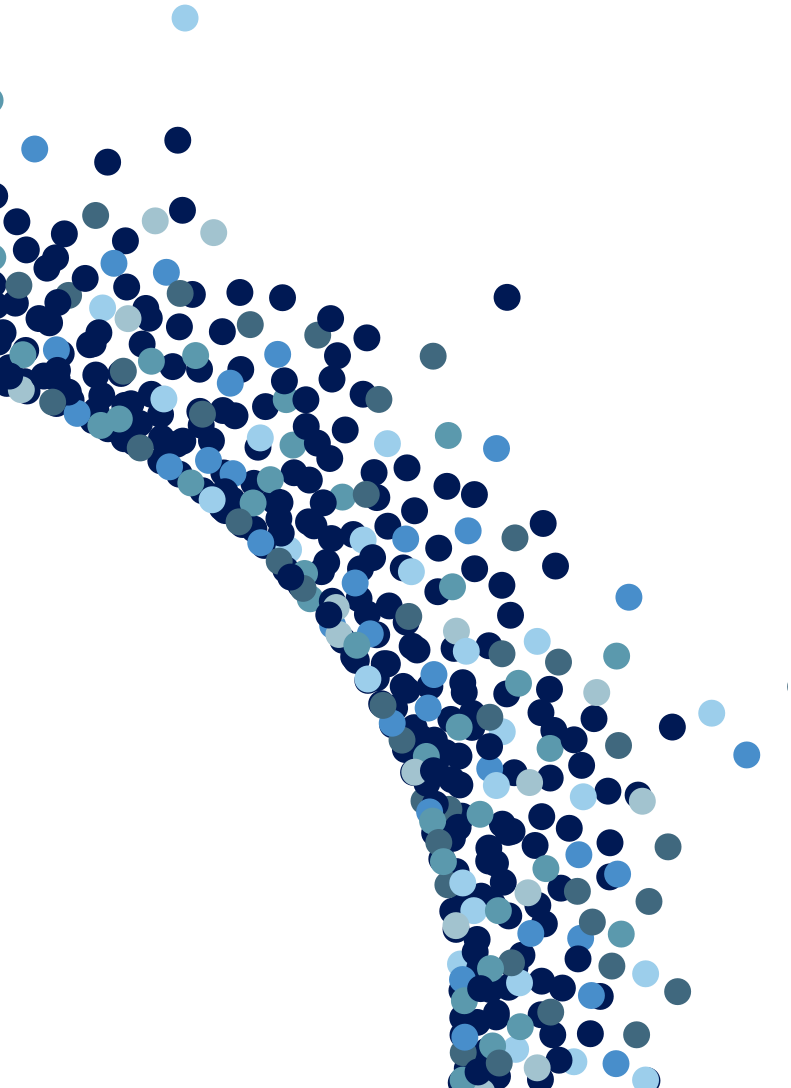
POLICY PRIMER

UK Migration Policy and EU Law



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This policy primer discusses how EU membership shapes UK migration policy.

The issue: How does EU membership shape UK migration policy?

To understand how EU membership shapes UK migration policy, one must distinguish between four aspects of EU law and policy.

First, at the core of the EU project remains a common market, which involves reciprocal commitments so that not only products (goods and services) but also the factors of production (labour and capital) can circulate freely. Free movement for workers and others exercising economic freedoms (e.g. service providers and recipients) has now been subsumed into the status of Citizenship of the Union. As explored in the next section, movement and residence in all Member States for EU nationals remains a defining feature of EU Citizenship, so that UK nationals may in principle live anywhere they choose within the EU, and vice versa. Citizenship of the Union and the internal market freedoms mainly confer rights on EU Citizens (i.e. those holding the nationality of the Member States), although they may also create some derivative rights for so-called 'Third Country Nationals' (TCNs), such as family members of EU Citizens and TCN workers 'posted' from one Member State to another to as part of an intra-EU provision of services.

Secondly, while the UK's commitments on EU Citizenship and the internal market are part and parcel of its EU membership, the UK (together with Ireland, with which it shares a land border and a common travel area) has always maintained a distinctive position on borders and visas, as manifest in its opt-out of the Schengen arrangements. As explored in Part 3, the UK's distinctive opt-out from Schengen has been legally controversial, yet it remains a defining feature of its EU relations.

Thirdly, concerning asylum, the Amsterdam Treaty (1997) marked a decisive shift, with the EU becoming competent for the first time to adopt binding EU law in this field, with the aim of establishing a Common European Asylum System (CEAS). The UK (with Ireland) has an option to participate in this policy area, and has chosen to opt in to all the key EU asylum measures adopted between 1999 and 2004. However, in this field, the new coalition government's position appears to have shifted of late, as explored in Part 4 below.

Fourthly, the EU is also competent to adopt measures on immigration of TCNs into the EU. Here too the UK has an opt-in arrangement, but has tended to opt in only rarely to EU measures in this field. As will be discussed further below, while this leaves the UK free to set its own labour migration policy, it may also end up at a disadvantage in attracting high skilled migrants.

Who enjoys rights of movement and residence in the UK as a result of EU citizenship and the Internal Market?

The Maastricht Treaty in 1992 introduced the formal status of Citizenship of the Union, building on previous rights to free movement, residence and non-discrimination for workers and service-providers. Citizenship of the Union now provides rights of movement and residence not only for the economically active, but also for job-seekers, students and retirees, within certain limits. The non-economically active usually need to have health insurance and sufficient resources so as not to become an unreasonable burden on the host state. The extent to which EU Citizens are entitled to equal treatment depends on their economic activity, their degree of integration in the host state and the nature of the benefit claimed. The precise scope of their entitlements is subject to intense debate and judicial scrutiny. For instance, while migrant EU students pay the same fees as home students, they may not be entitled to similar maintenance grants unless they have been previously resident in the UK for a considerable period of time.

The Court of Justice of the European Union in Luxembourg (CJEU), together with national courts, has been a key actor in the development of EU Citizenship, with EU legislation reflecting many precepts initially developed by the judiciary (Citizenship Directive 2004). EU rights are strong: They are individual guarantees,

enforceable in national courts, taking precedence over national law. Member States may only restrict free movement on limited, individual grounds, for instance if an individual poses a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.' This explains why the UK cannot countenance imposing a general cap on migration of nationals of EU Member States, as this would amount to a violation of EU Treaty rules.

A8 countries – temporary transitional limitations

On 1 May 2004, the EU enlarged to include ten new Members States. In relation to eight of these, (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia or Slovenia – the so-called 'A8 countries'), the Accession Treaties allowed restrictions on free movement for a temporary period, which expired on 1 May 2011. The UK (with Ireland and Sweden) decided from the outset not to use this restriction, allowing A8 nationals access to the UK labour market, albeit subject to a registration requirement (the Workers Registration Scheme) and limitations on access to benefits. Since 2004, other Member States (Finland, Greece, Portugal, Luxembourg, Netherlands and Spain) lifted restrictions, with all others having done so by 1 May 2011. That original UK decision to open its labour market to A8 nationals resulted in larger than anticipated numbers of labour migrants coming to the UK (Ruhs 2006), but it already appears that much of that migration is temporary, characterised by comings and goings, with many A8 nationals predicted to return home in coming years (Pollard N., Latorre M. and Sriskandarajah D. 2008). (See further The Migration Observatory briefing on Migration Flows of A8 and other EU Migrants to and from the UK).

A2 countries - temporary transitional limitations

Bulgaria and Romania joined the EU on 1 January 2007. Transitional provisions permit Member States to restrict the free movement of workers. Bulgaria and Romania are currently subject to restrictions in the UK, and nine other Member States (Belgium, Germany, Ireland, France, Italy, Luxembourg, Netherlands, Austria and Malta) and must obtain a work permit in order to work there. In contrast, they currently enjoy full rights to free movement in the 15 other States (Denmark, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia, Slovakia, Finland, Sweden, Hungary, Greece, Spain, Portugal and the Czech Republic). It is important to note that these transitional arrangements only apply to workers, not to service providers or those establishing businesses. These restrictive measures will expire in 2014 in any event.

TCNs, EU Citizenship and Internal Market Freedoms

EU Citizenship and internal market guarantees confer rights mainly on those holding the nationality of the EU Member States. However, by Treaty, these free movement rights are also conferred on EEA nationals, so along with EU Citizens, nationals of Norway, Iceland, Liechtenstein and Switzerland enjoy free movement rights into the UK. The EEA Agreement goes further than other agreements between the EU and third countries, in granting free movement rights to EEA nationals. In contrast, the Association Agreements between the EU and (then) candidate Central and Eastern European Countries provided rights only for those wishing to establish businesses, while the EU's Agreement with Turkey provides some rights for Turkish workers who are already resident in the EU.

In addition, in two contexts TCNs also derive rights from EU Citizenship and the internal market. First, EU Citizens may be joined or accompanied by their family members, irrespective of their nationality. In practice, this means that EU Citizens have a right to family reunification which can sometimes prevail over domestic immigration restrictions. Also, the internal market freedoms include a right for companies providing services to bring their TCN workforce with them temporarily. This phenomenon of 'posting workers' has been legally and politically controversial, for example leading to industrial strife at the Lindsey Oil Refinery in the UK in 2009 (Barnard 2009).

Overall though, the key status of EU Citizenship is confined to those holding the nationality of the Member States. Member States, at least under the current state of EU law, remain free to grant nationality as they please, although some EU principles constrain the withdrawal of nationality where this has an impact on EU rights. (See Case C-135/08 *Janko Rottmann* [2009] ECR I-0000).

Why has the UK not become a full member of the Schengen system?

When the UK joined the (then) EEC in 1972, it became committed to the common market project. The movement of persons within the EU took on additional salience with the internal market project of the 1980s, with some Member States taking the view that internal free movement of persons required the abolition of border controls within the EU. The Treaty definition of the internal market provides that it comprises 'an area without internal frontiers in which the free movement of goods, persons, capital and services is ensured.' The UK position was reflected in a special Protocol to the EU Treaties, which stipulates that notwithstanding the internal market, the UK maintains its right to keep border controls on movement from within the EU.

In part due to UK resistance, other Member States set up the Schengen system (the Schengen Agreement [1985] and its implementing convention [1990]) in order to facilitate internal free movement and establish several 'flanking policies' on immigration, asylum and visas. In one view, internal free movement requires common, restrictive policies on internal security, borders, immigration and asylum. However, this compensatory measures rationale is in reality shaky. Bigo goes so far as to describe the compensatory measures rationale, and the account of the security deficit created by the opening of the internal borders as 'one of the strongest myths of EU self-presentation' (Bigo 2003).

The Schengen Area aims to be without internal border controls. It comprises 25 countries (22 EU Member States – Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden – plus the three associated countries Norway, Iceland and Switzerland). In June 2011, the European Council summit concluded that 'As a very last resort… a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls.' This decision was in response to unilateral action by some EU Member States unlawfully reinstating internal border controls. Legally, the change requires a Commission proposal (expected in autumn 2011) and adoption by the Council and Parliament. It remains to be seen whether any substantial institutional change will emerge.

The UK has never become a Schengen member, opting to preserve autonomous border controls and visa policy, as is reflected in the Schengen Protocol. The Schengen System is now integrated within the EU framework, although the UK participates therein selectively. In general, the UK participates in the criminal law and policing aspects, but not those related to border controls. The UK's position on Schengen is officially explained as frontier controls which 'match both the geography and traditions of the country and have ensured a high degree of personal freedom within the UK', whereas on the continent 'because of the difficulty of policing long land frontiers, there is greater dependence on internal controls, such as identity checks.' (Home Office White Paper 1998). This official explanation is open to question, and seems to rest as a caricature of the continental systems (Wiener 1999). However, it is firmly established and has been reinforced by successive governments' assertions that the UK's maintenance of its own border controls is required, as the UK is simply better at protecting its own borders than the Schengen states are at protecting theirs, pointing in particular to the weaknesses of the EU's eastern land borders. The empirical premise may be open to question, but nonetheless, the policy position is that:

> Given the views of successive Governments on the comparative strengths of the United Kingdom and Schengen borders, it seems to us that 'Possibly, but not yet' will for many years to come be the reply to the question of the United Kingdom becoming a full Schengen State. (House of Lords EU Committee 2008b: para 45).

The current government is, if anything, even more wedded to a selective approach (Secretary of State for the Home Department 2011).

Although the UK remains outside of the the Schengen border free area, its existence has had an impact on UK border practices. In particular, the UK's establishment of so-called juxtaposed border controls in France is seen as a response to the internal free movement

across the continent (Ryan 2004). Moreover, the UK does participate in the policing and security aspects of Schengen. Under the Schengen Protocol, the UK may 'request to take part in some or all of the provisions of this *acquis*.' The request requires unanimous approval of the other Schengen states. The UK has challenged its legal exclusion from three EU border measures with a security dimension: the creation of Frontex (the EU's external border agency discussed below); EU measures on biometric passports and the decision allowing police services access to data in the EU Visa Information System. However, the Court of Justice confirmed that the UK's participation in new aspects of the Schengen system is in effect subject to prior approval of the other Member States regarding the UK's participation in the relevant rules on borders (Case C-77/05 *UK v Council* and Case C-137/05 *UK v Council* 18 December 2007; Riipma 2008; Case C-482/08, *United Kingdom v Council* 26 October 2010). In effect, the UK cannot expect to participate in border control/enforcement measures which are framed as 'Schengen-building' without adopting the underlying rules on border crossings first.

Frontex

While the European Commission once floated the idea of a common European border guard (see House of Lords European Union Committee 2003), Frontex is currently an agency with a more modest coordinating role between national authorities. Its main tasks include coordinating operational cooperation between national authorities on external borders; undertaking risk analyses and research on the control and surveillance of external borders; assisting in training border guards; and, potentially, supporting the running of joint return operations.

The external borders of the Member States include the borders (land and sea borders, as well as all airports and seaports) to which EU law on crossing external borders applies. The expanse of land and sea includes the Spanish enclaves of Ceuta and Melilla in Morocco, the Polish-Ukrainian land border, and the sea borders of Spain (including the Canary Islands) and Italy and Greece, including their islands. (However, it explicitly excludes Gibralter, due to the on-going disagreement between Spain and the UK on its frontiers).

Based in Warsaw, Frontex has been operational since 2005 and has engaged in several joint operations at the EU's external borders since then, mainly at the sea borders, including in the Canary Islands and around Malta, Lampedusa and Sicily. While it aims to support and supplement national border controls, not replace them (Frontex 2007), its budget and remit have grown quickly, as reflected in the adoption of the legal framework for Rapid Border Intervention Teams (RABITS) comprised of officers from various countries, including the UK, in order to provide assistance in border controls from time-to-time.

The House of Lords EU Committee conveys the current UK position on Frontex as follows: 'The United Kingdom would like to participate fully in Frontex, but the Court of Justice has ruled that it cannot.' (Case C-77/05 *UK v Council* discussed above). And further that 'for the present the UK has to accept that, not being a full Schengen State, it cannot play a full role in FRONTEX. Subject to that limitation, the Government should ensure that the UK participates effectively in the development and operation of Frontex.' (House of Lords EU Committee 2008b: para 60). The UK only has observer status on the Frontex Management Board, yet it does contribute to practical cooperation and has been involved in several joint operations. The Management Board reports annually to the European Parliament, Council and Commission. Accountability concerns remain. For instance, in 2007 the European Parliament's LIBE Committee held a hearing on 'Tragedies of Migrants at Sea' and no Frontex official was able to attend, prompting calls to the European Parliament for formal accountability mechanisms (House of Lords EU Committee 2008b: para 91). In addition, analysis of joint actions has revealed human rights concerns (Guild and Bigo 2010).

The interception of irregular migrants at sea clearly has implications for refugee protection. Cases are pending before the European Court of Human Rights which will clarify states' human rights responsibilities in this context (*Hirsi v Italy*). Under the Refugee Convention, states' obligations of non-*refoulement* are pertinent (Goodwin-Gill 2011). Interception is but one of the many tools used to prevent or deter the arrival of asylum seekers (See further the Migration Observatory policy primer on Asylum Policy.

What is the UK position on the moves towards a Common European Asylum System (CEAS)?

Asylum formed part of the Schengen system, and was for many years subject to cooperation at EU level. Prior to the Treaty of Amsterdam (1999), the EU had set up the Dublin system for allocation of responsibility for processing asylum claims, and adopted several non-binding resolutions on asylum matters. During this period, there were also strong horizontal policy transfers across European countries (Byrne, Noll and Vedsted-Hansen 2004).

The Dublin System

The Dublin System allocates responsibility for asylum claims to the first EU Member State where an asylum seeker arrives, leading to the overburdening of the Member States at the EU's periphery. Member States are permitted to take charge of asylum applications even where others are responsible. Accordingly, Member States are not obliged to send back asylum seekers, although they are obliged to take them back. The unfairness and inefficiency of the Dublin system is well-established. It overburdens countries on the EU's edges, caused extreme hardship to asylum seekers and appears to have led to an increase in the use of detention. Asylum seekers have frequently turned to human rights law, particularly to the European Court of Human Rights in Strasbourg, to resist transfers to other EU Member States, invoking dangers of refoulement from those states and the woeful conditions of asylum seekers in some EU Member States.

In the UK, legislation was passed to preclude judicial review in these situations (Rawlings 2005) which itself was ultimately found to violate the ECHR. Most recently in January 2011, the Grand Chamber of the European Court of Human Rights held that it would violate Article 3 EHCR (the right not to be subjected to torture, inhuman or degrading treatment) to return asylum seekers to Greece (*MSS v Belgium and Greece*). The UK had persisted in such transfers in spite of well-documented human rights concerns. A UK court has also referred questions about Dublin transfers to the Luxembourg Court, which are still pending at the time of writing. (Case C-411/10 *NS v SSHD* [referred 18 August 2010] OJ C274/21). It is expected that the Luxembourg court will follow Strasbourg's lead in clarifying Member States' human rights responsibilities.

The UK has opted in to the main post-Amsterdam asylum directives, being the Temporary Protection Directive, and those on asylum procedures, qualification and reception conditions adopted between 2000 and 2005. In defining the refugee, the EU is writing the Refugee Convention into EU law, and also creating a status for some who are currently non-removable under the UK's obligations under human rights law (Lambert 2006). While the EU harmonisation exercise established only minimum standards and leaves Member States considerable leeway to do their own thing, writing refugee law into EU law brings with it other EU law doctrines and (since Lisbon) entails a full role for the Luxembourg court in asylum law and policy. UK courts too have made important rulings on the Reception Conditions Directive, clarifying the right to work of asylum seekers who have been awaiting decisions in the UK beyond the one year period specified in the Directive (ZO (Somalia) [2010] UKSC 36).

These directives are referred to as the 'first phase' of the CEAS and the EU is currently engaged in their reform. The UK government has decided not to participate fully in the reform process, as is its prerogative under its Protocol on these matters, with the Home Office stating: '[W]e do not judge that adopting a common EU asylum policy is right for Britain.' (Secretary of State for the Home Department 2011: 2). It has also attempted to argue that if it does not opt in to the 'recast' (i.e. reform) measures, it will be released from its obligations under the first phase of the CEAS. This argument seems legally strained at best. Moreover, the wisdom of remaining out of the entire legislative reform process has been questioned, particularly as the UK still wants to be able to use the Dublin system to transfer asylum seekers to other EU Member States (House of Lords European Union Committee 2009).

How does the UK engage with EU immigration laws?

Since the Treaty of Amsterdam, the EU has also adopted a variety of binding measures on immigration. These

individual measures cover some forms of immigration, but are by no means comprehensive. For instance, only some high-skilled immigrants to the EU may fall under the Blue Card Directive. The Directive on Family Reunification covers some family reunification. Proposals are currently under examination for Directives on Seasonal Workers and Intra-Company Transferees. On security of residence and free movement within the EU, the key measure is the Long-term Residents Directive. The UK has not opted in to any of these immigration directives.

The House of Lords EU Committee has repeatedly urged the UK to opt in to the both the Long-term Residents Directive and the Family Reunification Directive. Such a move would strengthen the rights of the UK's economic migrants and enable them to enjoy equality with economic migrants in the rest of the EU:

> We consider that the United Kingdom should review its opt-out from both these measures, which together provide an excellent foundation of rights for migrant workers in the EU. They do not have any consequences for its position on border controls, and would enhance the position of third country nationals resident in the United Kingdom. When the Long-term Residents Directive comes into effect, third country nationals in the United Kingdom, for instance US or Indian nationals who have resided here for five years, will not be able to take advantage of the Directive's provisions to move, for instance, to Paris or Frankfurt. They remain blocked in the United Kingdom. This is neither in their interests nor in the United Kingdom's. Moreover, assimilating the position of long-term third country nationals' rights to that of migrant citizens of the Union, including by enabling participation in the political life of the country, is not only a matter of improving their living and working conditions: it is also a matter of fostering their harmonious integration into society. (House of Lords European Union Committee 2005: para 102).

The UK has opted in to some of the EU measures which aim to combat 'illegal immigration', including the Carriers Sanctions Directive (2001). However, it has not opted in to the Return Directive (2008), a controversial EU measure which obliges removal of illegal immigrants and sets time-limits for pre-deportation detention. The UK's non-participation has been explained in the following terms:

> The UK has not participated in and has no plans to implement the EU Returns Directive 2008/115/EC. We agree that a collective approach to removal can have advantages. However, we are not persuaded that this Directive delivers the strong returns regime that is required for dealing with irregular migration. Our current practices on the return of illegal third country nationals are broadly in line with the terms of the Directive, but we prefer to formulate our own policy, in line with our stated position on retaining control over conditions of entry and stay. (Phil Woolas, Statement to Parliament, Hansard, 2 November 2009).

In contrast, the UK has endorsed another central element of EU removals policy, namely Readmission Agreements with non-EU Countries, which aim not only to facilitate removal of irregular migrants to their countries of origin, but also to third countries (Ryan 2004).

The best of both worlds?

Aside from Citizenship and the internal market, the UK participates selectively in EU policy on asylum and immigration. Tony Blair famously characterised the UK's selective participation as giving it 'the best of both worlds' as the UK was not obliged to take on EU commitments in the asylum and immigration context but could opt in to measures in order to 'make sure that there are proper restrictions on some of the European borders that end up affecting our country.' (Tony Blair, 25 October 2004, quoted in Geddes 2005). It has been contended that the UK's 'selective use of the EU as an alternative, cooperative venue for migration policy management actually reinforces rather than overturns established patterns [in domestic policy].' (Geddes 2005: 723).

A common observation is that 'Britain has tended to participate in coercive measures that curtail the ability of migrants to enter the EU while opting out of protective measures [such as] on family reunion and the rights of

long-term residents that to some extent give rights to migrants and third-country nationals.' (Fletcher 2009: 81). This trend continues. The UK recently decided not to opt in to a draft EU Directive on Human Trafficking, while opting in to negotiations for international sharing of Passenger Name Records (PNR) (Secretary of State for the Home Department 2011).

The disadvantages of the UK's selective approach should also be noted. The UK may find itself excluded from EU policies it wishes to engage in, as the rulings on Frontex, biometric passports and data from the visa information system illustrate. Moreover, the new government's reluctance to engage with the reforms to EU asylum measures may also undermine its position when seeking to use the Dublin system. The failure to opt in to EU measures clearly diminishes migrants' rights in the UK, which could place the UK at a disadvantage in the race for talent. The case for the UK to opt in to the Long-Term Residents Directive is strong.

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- Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland (former Protocol No 3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997).

EU Legislation

EU Citizenship

- Citizenship Directive: Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 229/35.

Asylum

- Refugee Qualification Directive: Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12.
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Select EC Immigration Legislation

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The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

COMPAS

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