Rights of EU Citizens in the UK after Brexit

A fair settlement - or a privileged caste with superior rights enforced by a foreign court?

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EU CITIZENS AFTER BREXIT

A fair settlement, or a privileged caste with superior rights enforced by a foreign court?

By *Martin Howe QC, Francis Hoar and Gunnar Beck*

Introduction

Both the UK government and the EU27 have expressed the desire to reach an early settlement on the rights of EU citizens resident in the UK and UK citizens resident in the EU27.

UK government position

The British government's position is that: "*We want to secure the status of EU citizens who are already living in the UK, and that of UK nationals in other Member States, as early as we can*."[1] There are approximately 3.2 million citizens from the EU27 living in the UK, while there are about 900,000 UK citizens living in the EU27 according to figures published by the ONS in January 2017.[2] Despite the large disparity in the respective numbers affected, the British government's position is to try to achieve an early settlement to secure the rights and expectations of the large numbers of individuals involved, and without seeking to use the issue or the people involved as "bargaining chips" by demanding concessions from the EU27 on other issues or by linking the issue, for example, to reaching an overall satisfactory trade deal with the EU27.

[1] Policy paper, "*The United Kingdom's exit from, and new partnership with, the European Union*", Dept for Exiting the European Union, updated 15 May 2017: https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2#securing-rights-for-eu-nationals-in-the-uk-and-uk-nationals-in-the-eu

[2] https://www.theguardian.com/politics/2017/jan/27/fewer-britons-in-rest-of-europe-than-previously-thought-ons-research

The EU27 leaders' position

The EU27's position on the rights of EU citizens in the UK was set out in the European Council's formal negotiating guidelines under Article 50 TEU, issued on 29 April 2017[3]:

> 8. The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures.

This aspect of the European Council's guidelines looked not far apart from the position of the British government, so apparently paving the way for a reasonably swift agreement hammering out the details of the persons to be covered and the means by which the rights would be guaranteed on a reciprocal basis.

EU Commission's extra demands

However, on 24 May 2017 a very different picture emerged when the EU Commission published a Working Paper on "Essential Principles on

[3] For the purpose of deciding on the negotiation guidelines with the UK, the European Council met, in accordance with the terms of Article 50(4) TEU, in the absence of the head of government of the withdrawing state. For the full Guidelines, see:

Citizens' Rights".[4] The role of the Commission in the Brexit negotiations is governed by Article 218 of the Treaty on the Functioning of the European Union (TFEU). It is supposed to conduct negotiations in accordance with the Guidelines adopted by the European Council and negotiating directives from the Council of Ministers. There seems little doubt in this case however that the Commission has stretched the wording of the European Council Guidelines to the greatest possible extent, in order to demand a series of concessions from the UK which go well beyond anything asked for in the European Council Guidelines.

First, on the substance of the rights, the Commission Working Paper demands an expansive definition of the rights to be guaranteed which goes well beyond providing that EU citizens be treated no less favourably than British citizens. Indeed, it suggests that EU citizens be given rights in perpetuity within the UK which exceed the rights of UK citizens.

The importance of this issue was further highlighted on 30 May 2017 by the Opinion of an Advocate-General of the European Court of Justice ('the ECJ'[5]) that British citizens with the dual nationality of another EU state should have the enhanced right to family reunion of citizens of other EU states.[6] If the Advocate-General's Opinion in this case is followed by the ECJ itself (which happens in the majority of cases) then many of the enhanced rights of EU nationals would continue even after those nationals had applied for and been granted British citizenship in the future.

This paper first outlines the status quo and the negotiating position of the EU. We then demonstrate that it would be quite unprecedented in

[4] "Essential Principles on Citizens' Rights", by the European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU: http://www.lawyersforbritain.org/files/ citizens-rights-essential-principles-draft-position-paper_en.pdf

[5] Despite a recent fashion for abbreviating the name of this Court to "CJEU", it remains correct to refer to it as the 'ECJ'. Before 2008, it was formally called the Court of Justice of the European Communities, yet it was virtually never abbreviated to 'CJEC'.

[6] *Toufik Lounes v Secretary of State for the Home Department* (30.5.2017), Case C□165/16

international relations, and objectionable in other ways, for the ECJ to have any continued jurisdiction over the UK's implementation of the Withdrawal Agreement. In the final part of this paper, we propose a solution whereby EU citizens with established residence in the UK at the time of its withdrawal be given permanent rights of residence on the same terms as British nationals. We propose that these rights should be enforceable in UK domestic law, and that those rights, together with the corresponding rights of UK nationals resident in the EU27, be enforceable as between the UK and the EU by international arbitration.

The Status Quo

The right to free movement of persons within the EU and other members of the European Economic Area ('the EEA'[7]) is legislated for by the EU treaties, directives and regulations and enforced by the ECJ. The purpose is to ensure that EEA citizens can live and work in other EEA states and are not subject to discrimination by member states relative to that member state's own citizens.

The consequences are significant. EU law protects the right of EEA citizens not to be discriminated against in an employment context but, as expanded in a series of cases by the ECJ, also restrains member states from restricting the right of entry and settlement of their family members (especially but not limited to spouses and dependents). This has led to a body of directives and ECJ case law, of which the Advocate-General's Opinion in *Toufik Lounes* is but the latest.

[7] Namely Norway, Iceland and Liechtenstein, in respect of whose citizens a right of free movement arises from the EEA Agreement: see http://www.lawyersforbritain.org/eu-deal-sm-free-movement-persons.shtml Switzerland is also treated, in UK and EU legislation, as an 'EEA state'; although it is not party to the EEA Agreement, its citizens enjoy rights of free movement within the EU on the basis of a bilateral Swiss-EU agreement.

One of the biggest extensions of the rights of EEA nationals resulting from the case-law of the ECJ has been the extension of rights of free movement to apply not only to EEA citizens, but also to their relatives and dependants who are not EEA citizens. Such an extension to non-EEA nationals is not provided for anywhere in the text of the relevant treaties. The original logic of this extension was that in order for an EEA citizen to avail himself or herself of the right of free movement into another Member State, it was necessary also to accord derivative rights of free movement to family members and dependants, regardless of whether they themselves were citizens of a Member State.

This doctrine of derivative rights has however taken on a life of its own and been progressively expanded by the ECJ's case law, to the extent that the rights of EEA citizens to bring family members and dependents to live in the UK are significantly superior to the rights of a UK citizen to do the same. This is because EU law does not require that the rights of EEA citizens and family members be protected *within* their own country of nationality; or, more particularly, where rights do not arise out of the exercise of free movement by that EEA national.

Thus, a UK citizen who marries and wishes to settle her husband and family from outside the EEA may only do so if she has adequate resources to maintain them without recourse to public funds (e.g. does not need to rely one housing benefit, etc); yet this requirement does not apply (for example) to an Italian citizen working in the UK who marries a non-EEA national. It is of course a legitimate area for democratic debate whether or not the rules relating to the right of UK nationals to marry and bring in their spouses to live with them are or are not too tight, and these rules will no doubt be amended and revised in the future. But it is a strange and unexpected consequence of EU membership, and of agreeing that other EEA citizens should be able to live and work in the

UK on an equal basis with our own citizens, to find that in fact we have created a class of residents with rights which are superior to those of our own citizens.

It is a common misconception that although the UK as a consequence of its EU membership has lost the right to control the entry and residence of EEA citizens, it still retains the right to control immigration from non-EEA countries. This is not so, in the case of the very significant numbers of non-EEA citizens who have acquired a right to enter and remain here as derivative rights from EEA citizens. For example, the rules against using sham or artificial marriages to by-pass immigration controls cannot be applied to nearly as great an extent to those who are or claim to be spouses of EEA citizens, both because of the case law of the ECJ and because of the greater practical difficulties of enforcing rules against sham or artificial marriages in the case of non-UK EEA citizens.

In recent years, the rights of non-EU citizens have been extended by the case-law of the ECJ to some cases where no movement between Member States is involved. In a major case, the ECJ (sitting in Grand Chamber) determined that non-EU citizens have a right to work and residence where they are the parent of and are supporting children with EU citizenship who have never left the member state of their nationality.[8] This particular right lacks any basis in the EU Treaties or EU legislation and arises purely from the expansive case law of the ECJ which has used the EU doctrine of non-discrimination on the grounds of nationality to undermine and nibble away at national legislative powers in areas which, under the Treaty principle of conferral, firmly fall outside the scope of Union law and remain matters within the democratically accountable remit of national governments.

[8] Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi (ONEm)* [2011] All ER (EC) 491

The EU's latest negotiating position

The Commission set out in its Working Paper five principles it intends to seek on behalf of the EU in the withdrawal agreement with the UK:

1) That EU27 citizens in the UK and UK nationals in EU27 have the '*same level of protection as set out in Union law at the date of withdrawal*' including the right to acquire permanent residence after a continuous period of five years of legal residence;

2) '*Equal treatment in the UK of EU27 citizens as compared to UK nationals, and in EU27 of UK nationals as compared to EU27 citizens, in accordance with Union law*';

3) Equal treatment amongst EU27 citizens by and in the UK in all matters covered by the Withdrawal Agreement;

4) That EU27 citizens and UK nationals residing legally in the UK or EU27 at the entry into force of the Withdrawal Agreement should be considered legally resident without a residence document evidencing that right; and

5) All citizens' rights set out in the Withdrawal Agreement should be granted as directly enforceable vested rights in both the UK and in EU27 as specified in Section IV of the Working Paper – see further below.

The reference to "the same level of protection as set out in Union law at the date of withdrawal" in the first principle means that EU citizens would continue to enjoy for their lifetimes greater rights that those enjoyed by UK citizens. Moreover, the content of those rights would be rigidly fixed regardless of changed circumstances. So, changed circumstances over the next 30, 50 or 80 years which require in some

way the rights of UK citizens to be amended could not be matched in the case of EU citizens.

The Commission intends these principles to apply to an expansive group. This includes British citizens who reside or *have resided* in other EU states; EU citizens residing or who *have resided* in the UK; the family members of the above; EU citizens who work or have worked in the UK while residing elsewhere in the EU; UK citizens who work or have worked in the EU while residing in the UK; and British citizens and EU citizens who are enjoy or have a future entitlement to certain income replacing benefits.

In Part III of its Working Paper, the Commission sets out the scope of the rights that should be protected under the Withdrawal Agreement. These include, for example, directives relating to access to education, co-operation on healthcare, and the right to receive cash benefits in one country while living in another. This detailed panoply of rights is particularly ill suited to be rigidly fixed over such a long period of time.

The Oversight in the UK by the EU Commission and the ECJ

Part IV of the Working Paper demands that '*the Commission should have full powers for the monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal Agreement.*' This is not limited to the enforcement of rights within the EU27 states: the paper specifically provides that EU citizens:

'...should thus be able to enforce their rights granted by the Withdrawal Agreement in accordance with the same ordinary rules as set out in the

Union Treaties on cooperation between national courts and the Court of Justice, i.e. including a mechanism analogous to Article 267 TFEU for preliminary reference from UK courts to the Court of Justice of the European Union.'

This demand has major implications. It would involve, for the first time, the extension of the powers of the Commission and the ECJ to monitor, interpret and enforce the provisions of a treaty into a non-Member state which, unlike all the remaining Member States, will no longer appoint any members of the Commission or the Court and to whom these will be wholly foreign institutions. This would be a deeply unequal treaty requiring the oversight of the laws in one country by the courts of the other treaty party. Such arrangements are virtually unprecedented in international relations.

It should be borne in mind that this would not be a short term or temporary measure: the rights of EU citizens in the UK would last for the lifetimes of all EU citizens currently resident here, and in some respects for the lifetimes of their children as well.

International precedent

To understand quite how extraordinary is the Commission's demand, one has to appreciate accepted international practice on the adjudication of disputes under international treaties. As from 20 March 2019, the ECJ will convert from being a joint court in which the UK (and a British judge and Advocate-General nominated by the UK) play an equal part, into being a wholly foreign court established under treaties over which we will no longer have any degree of control, nor any say in the appointment of the judges of the court.

It is incredibly rare for any independent and sovereign state to submit in an international treaty to adjudication of disputes by the courts of the

other party to the treaty. Such a step is both demeaning and degrading to its status as a sovereign state, and carries the practical risk that such a court will be biased and partial in its rulings.

There are of course plenty of precedents for treaties which provide for the resolution of disputes by some form or other of binding international adjudication. This can be by bilateral tribunals or arbitral bodies set up under a specific treaty, or sometimes by permanent international courts or bodies, such as the International Court of Justice (ICJ) at The Hague, or the WTO Disputes Panels and Appellate Body. In all such cases, great care is taken to ensure that the body is balanced between the parties. Often, the chairman or president must be agreed by the parties, or in default of agreement nominated by a neutral third party. The ICJ Statute has special provisions giving states who are parties to disputes the right to appoint an *ad hoc* judge to cases where they are parties if they do not have one of their own nationals on the Court already, in order to ensure strict balance.

Not only is this general and near universal international practice, it is also the general practice of the European Union in its treaties with non-Member states (so-called "third countries"). The EU has upwards of 50 association or trade agreements with third countries. In not one does the third country submit to the exercise over itself of jurisdiction by the ECJ as sought in the Commission's paper over the United Kingdom. Even tiny Andorra does not accept the jurisdiction of the ECJ, and instead has a normal international dispute settlement procedure under which disputes are decided by a panel of three arbitrators, one appointed by each side and the chairman being jointly appointed.[9]

[9] Article 18(2), Agreement between the EEC and the Principality of Andorra, 28 June 1990, OJ 31.12.1990 L 374/14

Amongst the EU's trade and association agreements are only two which come close to imposing ECJ jurisdiction on non-member states, although even they do not create a direct jurisdiction of the kind demanded by the Commission over the UK. The EU-Turkey customs union agreement requires Turkey to follow the case law of the ECJ in applying the common rules of the customs union. This requirement arises from the special nature of a customs union, which of necessity requires all customs authorities at its external borders to enforce and interpret the common rules in a rigidly uniform way.[10]

The second EU external agreement which effectively imposes ECJ decisions on non-Member states is the EEA Agreement. This is done in order to ensure that the common rules of the EU internal market are interpreted consistently across the EU and across the EEA States. But even in this case, there is no direct jurisdiction of the ECJ over the non-Member states who belong to the EEA: instead, a special EFTA Court has been established consisting of judges from Norway, Iceland and Liechtenstein which interprets the rules of the internal market in their application to those countries.[11]

One has to search long and hard for precedents similar to what the Commission is demanding that the UK should subject itself to. That is to have a privileged class of foreign nationals resident in one country enjoying rights for the rest of their lives superior to those of that country's citizens; and those rights being adjudicated upon by a foreign court whose decisions would over-ride those of the first country's domestic courts and its legislature. The closest historical precedent are the treaties which the UK (as well as other Western powers) concluded in

[10] See the Lawyers for Britain paper on the Customs Union: http://www.lawyersforbritain.org/eu-deal-customs-union.shtml#turkey

[11] See the Lawyers for Britain paper on the EFTA Court: http://www.lawyersforbritain.org/eu-deal-sm-supranational.shtml

the 19th Century with China and other Far Eastern countries, under which British citizens were exempt from the jurisdiction of local courts and instead were subject to the jurisdiction of special extra-territorial courts ultimately controlled by the Judicial Committee of the Privy Council in London, such as the (British) Supreme Court for China in Shanghai.[12]

The treaties under which these special jurisdictions were established are now (with some reason) denounced as "unequal treaties" whose terms were imposed by force; and this extra-territorial jurisdiction was ended by treaty in 1943. The history of these British (and American) extra-territorial courts has recently been chronicled by Douglas Clark in a book entitled "Gunboat Justice".[13] In their defence, the Western powers might have justified extra-territorial justice on the grounds that domestic justice systems in the Far East were at the time undeveloped. No such argument can be applied to the British present-day system of justice, which can be trusted to interpret and apply fairly any rights for EU citizens which may be agreed between the UK and the EU.

The *Demirel* case and why it is an irrelevant precedent

Some commentators have argued that it is appropriate for the ECJ to interpret the rights of EU citizens resident in the UK after exit in the light of the case of *Demirel v Stadt Schwäbisch Gmünd*.[14] Mrs Demirel, a Turkish national, sought to rely on the provisions of the Association Agreement between the EEC and Turkey in order to rejoin her husband who was working in Germany, since that Agreement contained certain

[12] Note that the comparison with the Shanghai International Settlement, and the privileged status of Western citizens and compared with Chinese nationals, also seems apt to Franklin Dehousse, former Judge of the ECJ, whose comments are quoted in the conclusion section below.
[13] "Gunboat Justice" by Douglas Clark (Earnshaw Books, 2015).
[14] Case C-12/86 [1987] ECR 3719

provisions for progressively securing the free movement of workers between Turkey and the EEC.

The first question was whether the ECJ had jurisdiction to interpret the EEC-Turkey Association Agreement for the purposes of the case. The ECJ held that it did, because the Agreement was an act of an EEC institution (the Council of Ministers) and upon its adoption became part of the Community legal order. And because the Community had assumed an obligation towards an external country to perform the obligations in the agreement, it in turn became an obligation of the Member States towards the Community "within the Community system" (Judgment, para [12]) to perform those obligations.

This case provides no basis for the ECJ exercising jurisdiction over non-Member states under international agreements concluded by the EU. In this case the ECJ's role was no different from the role of a federal domestic court within a federal state which has concluded an external treaty. For example, if the USA enters into a treaty with another state, the US Supreme Court may be called upon to interpret the treaty in order to decide what obligations it imposes on US citizens or on individual States. Its ruling will be binding within the USA. But in no way does that make its ruling, as a domestic court of one of the parties, binding on the other state which is a party to the treaty.

The ECJ's judgment in the *Demirel* case, and the many other cases on EU external agreements which have followed it, are no different from that example. The effect of the ECJ's ruling is purely an internal constitutional matter between the EU institutions and the EU Member States. Indeed, if the UK concludes an Article 50 withdrawal agreement with the EU, as a matter of course the ECJ will have jurisdiction to interpret it, because the agreement will be an act of an EU institution

and will form part of the EU legal order. But that jurisdiction will be binding only as between itself and the remaining EU Member States.

What the Commission is now seeking is something quite different and, as we have seen, wholly exceptional: a one-sided agreement in which binding interpretations are imposed on one party to a treaty by the courts of the other.

Why the ECJ particularly is not to be trusted to be impartial

The ECJ was established at the same time as the EU (then the European Economic Community) to settle disputes between the EU's institutions and its member states and to provide authoritative guidance on the interpretation of the EU Treaties and EU legislation. It has never discharged that function impartially. From the early 1960s it developed a range of principles, such as those of the uniform application and effectiveness of EU law which it then expanded into the general principles of the supremacy and direct effect of EU law over national law. None of these judge-made principles had any basis in the EU Treaties until 2009 when they were included in the Lisbon Treaty as a leftover from the failed EU Constitution drafted by former French president Giscard d'Estaing. The principle of the primacy of EU law is a judicial creation which was recently codified because once a judge-made rule has been applied again and again by the courts and it suits the integrationist agenda of most member states, no one objects to its formal recognition.

The general principles of treaty interpretation are laid down in the Vienna Convention on the Laws of Treaties ("VCLT"). Article 31 VCLT assigns a primary importance in treaty interpretation to the 'ordinary meaning' of words. It states that treaties shall be interpreted 'in good

faith' and that their terms should mean what they say interpreted in their context unless, according to Art. 32 VCLT, the meaning is 'ambiguous or obscure.' The EU is not a signatory to the VCLT (although its member states are) and the ECJ has never regarded itself as bound by its terms.

In interpreting EU law, the ECJ does not therefore accord the same primacy to the ordinary meaning of words as many other supranational courts including the International Court of Justice or the WTO Appellate Body. Instead, the ECJ adopts a flexible approach which allows it to depart from the wording of the EU Treaties or legislation in favour of a 'teleological', i.e. purposive, interpretation even where the wording of the relevant provision is neither obscure nor ambiguous. Purposive interpretations generally give courts far greater interpretative room for manoeuvre than text-based interpretation. The problem with purposive interpretations of law is that courts, and the ECJ more so than any other, do not confine themselves to purposes written into the documents they are asked to interpret. Depending on one's perspective, rules may be viewed as serving many different purposes on which the parties do not necessarily agree. Purposes may also conflict with one another, be stated at different levels of abstraction and be either short-term or long-term.

Drawing inspiration from its own distinctively integrationist vision of 'ever closer union' between the EU's members, to which the court also refers as the 'spirit', i.e. a kind of political holy ghost, of the Treaties, the court has used the purposive approach consistently to resolve legal disputes concerning the distribution of powers between the EU and members in a pro-integrationist manner. In this manner, the court has over time and without reference to the Treaties substantially extended the scope of EU law and established its own judicial oversight over many areas of national law. It has usually done so in the absence of Treaty authority and not infrequently in a departure from clear language in the

Treaties or EU legislation. The ECJ was set up to act as an arbiter between the EU and its members but it has never been a real arbiter which applies agreed rules impartially. Instead, it has been a motor of European integration.

In theory the powers of the EU are limited by the principle of 'conferral' (Articles 4 and 5 TEU). According to the principle of conferral, the EU may only legislate or act in areas where the member states have expressly authorised it to do so. In line with its general interpretative principle *in dubio pro communitate*, the ECJ has effectively neutralised the principle of conferral by introducing the doctrine of implied powers, by consistently adopting an expansive meaning of the conferred powers' and by resolving conflicts in overlapping areas of EU and national competences in favour of the scope of EU law. As a result, the scope of EU law is incrementally expanding from one judicial decision to the next.

The review of EU legislation for compliance with the principles of conferral and of subsidiarity as well as fundamental rights is one of the central functions of the ECJ, and member states regularly ask the court to do so. With the exception of annulment actions involving EU decisions which are addressed to specific individuals or companies or delegated legislation which do not affect the basic division of competences between member states and the EU, the chances of persuading the court that the EU has exceeded its competences are virtually nil. The ECJ practically never annuls an EU legislative act of general application, and in the only important case where the court did so, the annulled legislation was re-enacted virtually without changes two years later.

In contrast to its extremely permissive review of the EU's interpretation and exercise of its own competences, the ECJ has followed a very robust line in its use of the principles of supremacy and direct effect which the court itself created *ex nihilo* without treaty-base, to strike down national

laws on the grounds of alleged national infringements of EU law in hundreds of cases. The asymmetry in the court's exercise of its review function is evident too in the radically different meaning it gives to the proportionality requirement. When reviewing national legal acts under derogations from EU law, the court examines whether the national measure has minimum collateral impact on EU law – only then will the national measure not be struck down. By contrast, EU legal acts will be upheld as proportionate unless and until the EU decision-maker has acted manifestly irrationally. The court very rarely takes that view. The court effectively operates two separate standards of judicial review, a light one for all EU measures and an exacting much higher one for national laws allegedly infringing EU laws.

All these factors make the ECJ particularly ill-suited to being an impartial adjudicator in ruling on the extent of the rights of EU citizens in the UK under the Withdrawal Agreement. Given its dismissive attitude to the rights of Member States within the EU, it would be likely to be even more dismissive of the rights of the UK under a Withdrawal Agreement. This, coupled with its history of relentlessly expanding the rights of free movement of EU citizens and the derivative rights of non-EU citizens by a process of judicial decision in the absence of any concrete treaty or legislative base, would render the ECJ entirely unsuited to acting as an impartial adjudicator under the Withdrawal Agreement.

UK constitutional position - the "referendum lock"

It is to be hoped that the government will reject any idea of ECJ external jurisdiction out of hand. But even if a future government were minded to accept any such arrangement, there would be a further issue.

The European Union Act 2011 restricts the circumstances in which the British government can cede powers to the EU, and for some types of cession of powers it lays down the "referendum lock". Under section 2, these restrictions apply to "*a treaty which amends or replaces TEU or TFEU*". Upon the UK leaving the EU on 29 March 2019, the withdrawal agreement, assuming it has provisions which continue to operate into the future, will replace the TEU and TFEU and therefore would appear to fall within the scope of the Act.

Section 4 lays down a list of cases in which a treaty will attract a referendum. This list includes:

"(i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;

(j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom..."

The new supervisory jurisdiction of the EU Commission to monitor the UK's compliance with its obligations regarding EU citizens would involve, if modelled on the existing Commission powers against Member States, a right to bring direct actions against the UK before the ECJ in which that Court could impose sanctions for non-compliance. The ECJ would also have power, if the mechanism of preliminary references proposed by the Commission were to be established, to impose new requirements or obligations on the UK by "interpreting" the UK's obligations in its usual "teleological" manner.

For these reasons, it would appear that the Article 50 withdrawal agreement could not include the demands made in the Commission's Working Paper without it triggering the need for a referendum on whether or not the withdrawal agreement should be accepted by the UK.

Indefinite Leave to Remain and equality of treatment: the basis of a durable agreement

As we observed at the beginning of this paper, and as appears to be the government's position, there should be no objection to guaranteeing the rights of EU citizens resident in the UK not only to continue to reside here. but also to be treated equally to British citizens in the provision of healthcare, pensions and other public services. This is not just necessary as a negotiating position so as to guarantee reciprocal rights for UK citizens resident in the EU27, but it is right in itself in order to protect the welfare and rights of those who live and work here.

But any expectation of EU citizens of exercising their rights to free movement within the UK must, necessarily, have been limited by the understanding that the UK would remain in the EU and the EEA. Whether any of them expected the UK to leave the Union, this was a real possibility at least since the amendment of the TEU (by the Treaty of Lisbon) to provide for an explicit right of withdrawal.

It cannot be said, therefore, that the enhanced rights of EU citizens, provided for under the Treaties and over and above those rights held by British citizens, could reasonably be expected to continue after the UK's withdrawal from the treaties. Nor is there any such right which is recognised in international law. First, obligations in international law are obligations between states and do not provide rights that are acquired by individuals (although states may be in breach of international law were they to breach certain obligations regarding their own or other countries' citizens). Secondly, it is well established that EU

citizens have not 'acquired' rights, under international law, under the EU treaties.[15]

Further, the justification for those enhanced rights (insofar as they are capable of justification at all) arises from a context where there is a continuing and future right of free movement between the Member States within a functioning internal market, and in order that free movement of persons shall contribute to that functioning system in the present and future. By contrast, once the UK has left the EU, one is concerned with protecting the accrued rights of individuals who have taken advantage of free movement rights in the past, not with future free movement as an end in itself. This calls for a fair and equitable and even generous settlement of rights in favour of EEA nationals resident in the UK at the time of exit, but it does not call for those rights to be superior to those of British citizens or for those rights to be frozen in aspic for the rest of this century based on a model of rights developed in a context which will no longer be relevant.

The solution that we propose is more straightforward, will require little external adjudication and would not confer on EU[16] citizens resident in the UK at withdrawal any more rights than those of British citizens. It is both more rational and fairer. We suggest that Parliament should legislate to provide that EU citizens resident in the UK and exercising their EU Treaty rights at a certain date should be given indefinite leave to remain ('ILR') in the UK.

The concept of ILR is one that has developed both through the practice of the executive and through legislation. Under s 33(2A) of the Immigration Act 1971 ('the IA') a person is described as 'settled' in the

[15] See, for example, 'The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27' (2017), published by the European Parliament: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583135

[16] The same rights would presumably also be made available to EEA and Swiss citizens.

UK if he is '*ordinarily resident... without being subject under the immigration laws to any restriction on the period for which he may remain*'. While most are subject to deportation for committing serious crimes or where their presence is '*no longer conducive to the public good*' (s 3(5)(a) and (6) of the IA and s 32 of the Borders Act 2007), this limitation does not apply for those ordinarily resident in the UK for at least five years (s 7 of the IA).

Clearly, Parliament would need to prescribe the conditions under which EU citizens resident in the UK have the right to remain and to access public services. We observe that the second principle of the Commission Working Paper would be met by granting EU citizens ILR: EU citizens would be treated equally to UK citizens, which can be provided for, so far as access to benefits, pensions, public services, etc, in legislation. If by the 'equal treatment' in the third principle, is meant equal treatment with UK citizens, that, too, will be achieved.

It is however not right, for reasons we have explained, that EU citizens should retain the 'same rights' as they had prior to withdrawal insofar as this would require the enhanced rights of EU citizens, over and above British citizens, to continue to exist, still less that they be enforced by the Commission and the ECJ. The first part of principle (1) and principle (5) in the Commission Guidance would provide for unacceptable continued jurisdiction of the ECJ and would, as former ECJ Judge Dehousse has observed (see below), create a special class of citizens with rights greater than British nationals protected by a court which is part of an entity of which we are no longer a member. Moreover, these principles are in conflict with the second principle, which is that British and EU citizens should be treated equally.

It is right that EU citizens resident in the UK for five years should have the right to acquire British nationality. Indeed, this is already provided

for in UK nationality legislation applying to all those continuously resident for five years, not just EU citizens. This would more than satisfy the second part of principle (1) of the Commission Working Paper, which calls for a right of permanent residence after 5 years. Correspondingly, the right of UK citizens resident in other Member States to acquire their citizenship, or at least a status of permanent residence, after 5 years if they so wish would be of value.

There remain three further issues which would have to be agreed and which are likely to be contentious between the EU27 and the UK. First, the date on which EU citizens would have to be resident in the UK in order to acquire rights under the Withdrawal Agreement; secondly, the evidence they should need to demonstrate entitlement; and, thirdly, whether and to what extent EU citizens who have exercised Treaty rights in the UK in the past (for example by living and working here) should be entitled to the right to residence under the Withdrawal Agreement.

It will be necessary to provide for a date before which rights will have to have been exercised. We consider that it would be reasonable to require that they be resident in the UK as at the actual date of withdrawal and that they must have been resident for a significant period of time before that. To do otherwise is to confer long term rights of residence on individuals who may only have been in the UK for a short period, and also to risk a stampede of EU citizens moving to the UK before 30 March 2019 in the expectation of deriving rights under the Withdrawal Agreement. We would propose a requirement of residence from, say 18 months before the date of exit, i.e. from the beginning of September 2017 as being reasonable.

The Commission Working Paper also seeks rights for EU nationals who have been resident in the UK in the past. This should as a general rule be rejected. There is no reason why individuals who have come to the UK

for a period of time in the past, and then left to return to their home country or another country before the date of exit, should enjoy a permanent right to return and take up residence in the UK at some point in the future. However, an exception could be made for people who have put down roots in the UK and are long term residents here, but who happen to have moved to their home country or elsewhere for a temporary period which spans the date of exit.

The Commission's insistence that it should not be necessary to provide a residence document in order to demonstrate entitlement to rights under the Withdrawal Agreement is derived from EU law, which forbids member states from restricting the right to exercise free movement rights to those with such a card. While we do not suggest that the UK should insist on residence cards, it will be necessary to require evidence of residence before an EU citizen is able to acquire rights under the Withdrawal Agreement. EU citizens resident here should be placed on notice that they ought to keep documents which evidence their residence in the UK in the period of time leading up to March 2019. While no particular formalities of documents should be required, it is reasonable to expect evidence that residence was genuine.

It is important for the UK government to bear in mind, however, that these further issues are of considerably lesser importance – and should be treated as such – than the principle that the Withdrawal Agreement should not give EU citizens greater rights than UK citizens; and that the ECJ should have no jurisdiction over the enforcement of the Withdrawal Agreement as regards the UK.

Insofar as it is necessary for rights under the Withdrawal Agreement – both of EU citizens in the UK and UK citizens in the EU – to be enforced internationally, we propose that the Agreement provides for a standard

system of international arbitration that would be binding, in international law, on the UK and the EU.

Conclusions

We draw attention to the comments of Franklin Dehousse, a former judge of the EU General Court attached to the ECJ, in his well-argued paper published on the day the Commission Working Paper was issued:[17]

> 'First of all, "Brexit means Brexit" – for everybody. Whatever we like personally, the EU Treaties' nature changed when the States' withdrawal right was introduced. The idea of permanent rights lost its legitimacy. Additionally, as an excellent study by the European Parliament concludes, in international law, there are no acquired rights with regard to the rights contained in the status of European citizenship and in relation to the four fundamental freedoms of the single market. Second, in principle, it is hard to justify that EU migrants, through the maintaining of many European regulations, will become some sort of a super-privileged caste in the future UK (as will the UK migrants in the EU Member States). The country will thus become some kind of new 1930 Shanghai, where the EU citizens will benefit from multiple privileges (the more so if the European Court of Justice keeps a full jurisdiction). Third, such a system will tremendously complicate the future implementation of the Article 50 exit agreement (the more so if the European Court of Justice is involved). One will need to define the implementation and scope of an extremely large amount of rights. This will make

[17] 'The European Union is exaggerating in its demands for Brexit, especially about the European Court of Justice's future role', Egremont: http://www.egmontinstitute.be/publication_article/eu-exaggerating-in-its-demands-for-brexit/

the negotiations much more complex – and longer. It can also provoke a multiplication of trials later, which is absolutely not desirable.'

The Commission's demands that the UK should subject itself to the rulings of a foreign court for the indefinite future is demeaning and degrading. Such demands are unprecedented in the EU's external relations and are unacceptable in international comity, and should be rejected out of hand.

It would be fairer, more straightforward and more equitable for EU citizens to be given a permanent right of settlement in the UK but with the same rights (but no more rights than) UK citizens, and protected and enforced by domestic law. Relations between the EU and the UK should, after withdrawal, be conducted on the international law plane only, and interpretation and enforcement of the Withdrawal Agreement should be through arbitration, not by a partisan court of one treaty party such as the ECJ.

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6th June, 2017