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The long legacy of EU citizens' rights after Brexit

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During the UK's referendum in 2016 on membership of the EU, the issues of immigration and free movement were frequent subjects of debate in the campaign. No one can really know why individuals voted the way they did but it has certainly become common ground between the Government and official opposition that free movement between the UK and the EU must end when a final post-Brexit deal is eventually reached. That insistence is one of the factors that has so far made it so difficult to reach that post-Brexit deal, because the EU's commitment to the principle of freedom of movement is such that it is reluctant to allow the UK to benefit from other aspects of the single market but not to allow continued freedom of movement between the EU and the UK.

The importance to the EU of the principle of freedom of movement is derived from the fundamental concept of the Union, and its predecessor organisations. Right from the start, the European project was based upon creating an integrated trading, economic and, ultimately, a political union. The purpose was economic—to allow the various Member States to integrate their economies, to enjoy the advantages of economies of scale and to be able to trade freely in larger markets. Freedom of movement of workers was seen as an integral element of that concept, on the basis that a true single market and trading union depended not just on removing barriers to the flow of goods and services but also the flow of the capital and labour that produced those goods and services. And that economic purpose was also to serve a greater objective—to reduce the prospects of a future European war, on the basis that economic integration would serve as a powerful disincentive to the taking of national rivalries and disputes to the stage of armed conflict.

That principle of allowing freedom of movement of workers as an essential element of a true single market has been enhanced by the EU's efforts to bring about a wider social and political union, which culminated in the adoption of the concept of EU citizenship. The importance of that principle is repeated frequently within EU legislation and in case law. We see, for example, at the very beginning of the "Citizens' Directive" (Directive 2004/38/EC) it is recited that:

"(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect ... (3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence ..."

That development of the concept of free movement, beyond it being an important element of economic integration into a concept that serves wider political purposes, is one reason why many key EU actors are so committed to its maintenance in an undiluted format.

However, notwithstanding the wider motivations for the existence of such a principle, the underlying right of free movement in EU law still remains one that is fundamentally concerned with its economic purpose. Thus, we see in the second recital of the Citizens' Directive that:

"(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers ..."

That Directive also provides that although EU citizens have an initial right to reside in another Member State for three months, their right to do so thereafter depends upon them either being economic actors, or if they are not, only to continue to reside if they are not "burdens" upon that Member State. Of course, EU law also allows "workers", in many circumstances, to be accompanied by relatives, and people who have ceased to work, having moved to another Member State to do so, have rights as retired people to reside in that state. But these extensions of the right of free movement are derived partly from the idea that if workers are unable to bring in family members, or are unable to retire in another Member State where they have chosen to work, they will be less likely to move to another Member State in the first place.

That free movement is essentially about the right of economic actors to move to another Member State to help create a freer, larger and more competitive market can be seen from the provisions that qualify the right in the case of workers who have ceased to work. Unless they temporarily become unable to work as the result of an illness or accident, an EU citizen residing in another Member State on the basis of being a worker, or self-employed, will only maintain that right, under the Citizens' Directive (Directive 2004/38/EC, art.9(3)), if they are in "duly recorded involuntary unemployment" and have registered as a job-seeker, or if they embark on vocational training.

Removal of the rights of EU citizens in the UK was, as I have described above, one of the major objectives of many of the leading advocates of Brexit. But, as the Brexit negotiations have dragged on, it has become clear that the ability of many EU citizens to continue to enjoy the right to reside and work in the UK is likely to continue undiminished until a long time in the future. That will not just apply to EU citizens currently residing in the UK, but for many decades into the future. The "Draft Withdrawal Agreement" between the UK and the EU (Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018 (TF50, 2018)) gives not just those EU citizens but also those who come to the UK before the end of a "transition period" (to last until the end of December 2020, although there has been recent speculation it might be extended) all the rights to reside and work in the UK as they do now. Furthermore, those rights will normally be extended to their family members, including allowing persons who move to the UK after the end of the transition period in some cases (generally, spouses, "durable partners", other close relatives, and children yet to be born).

After the end of the transition period, those EU citizens and their qualifying relatives, will be able to remain in the UK on the basis of a new citizenship status created by the UK, "settled status", if they have been continuously resident in the UK, normally for five years. That will give its holders rights that are broadly similar to those who have acquired "permanent residence" under EU law. Those EU citizens who have not been continuously resident for the required period will be able to apply for "pre-settled status", which they will be able to enjoy for up to five years, and then normally transfer with minimal checks and at no cost to "settled status".

The terms of the draft withdrawal agreement set down specific rights for those EU citizens who qualify under its terms (which will, for the most part, be those who have “settled status” or “pre-settled status”), including rights not to be discriminated against on grounds of nationality as regards employment, remuneration and other conditions of work and employment; to take up other activity; to receive assistance from state employment offices; to receive equal treatment in respect of conditions of employment and work, including remuneration and dismissal; unemployment, reinstatement or re-employment; to tax and social advantages; and to enjoy collective rights (Draft Withdrawal Agreement, art.22(1)).

In fact, in some respects, those EU citizens who obtain “settled status” will be in a better position than EU citizens in the UK currently enjoy under EU citizenship and free movement rules. The UK Government’s proposals for the new status will allow EU nationals to obtain it without having to show that they have exercised “treaty rights” (as is the case for those who currently wish to apply for permanent residence), but simply to produce evidence that they have been present in the UK, nor that they have had comprehensive sickness insurance (which is required under EU law in some cases). Those who have settled status will not lose it even if they leave the UK for a period of up to five years: under current EU rules, permanent residence is lost after two years’ absence.

Moreover, Brexit will not mean that EU citizens will thereafter have to rely only on the UK’s compliance with the final terms of the Withdrawal Agreement. The jurisdiction of the Court of Justice of the European Union (“CJEU”) will continue to apply in the UK (Draft Withdrawal Agreement, art.126) during the transitional period. Even after that date, it will continue to have the power to make preliminary rulings, with which the UK will require to comply, in cases concerning citizens’ rights that commence at first instance no later than eight years after the end of the transitional period. Quite conceivably, such a case might commence in (say) December 2028 and, allowing for the appeal process in the UK, might not reach the CJEU until 2030 or later.

When it is also borne in mind that the rights given to EU citizens in the UK under the “settled status” scheme will be life-long rights, which might in some cases be enjoyed by their future children, it can be seen that there will be certain UK residents who will be benefiting from the legacy of citizens’ rights under EU law until well into the 22nd century. It is possible that is not what the proponents of Brexit had in mind in June 2016.