

BRITISH IN EUROPE: CONTINUING FREE MOVEMENT

Freedom of movement was not mentioned by either of the chief negotiators in the Press Conference following the last round of negotiations, and British in Europe is extremely concerned that this issue of vital importance might be quietly dropped. In our view, the thinking that risks leading to that result is seriously flawed, and we therefore submit this further analysis of the question. We have previously prepared a paper on continuing free movement rights for UK citizens in the EU or UKinEU (Addendum to Response of British in Europe and the 3million to the second round of negotiations, hereinafter the "Addendum")¹. We will not repeat the contents of that paper. We would like now to address (1) arguments made to us to justify why continuing free movement would not be within the scope of the Withdrawal Agreement and (2) the impact of recent case law in relation to free movement and the rights contained in Article 21 of the Treaty.

1. Continuing free movement and the scope of the Withdrawal Agreement

(a) Protection of existing as opposed to future life choices

The argument has been made that the protection of existing life choices falls within the scope of the Article 50 negotiations, while future life choices do not. This argument is specious. The Article 50 negotiations on citizens' rights are not about choices but about *rights*; the existing rights derived from EU law that the protected group - UKinEU and EU citizens in the UK (EUinUK) - have prior to withdrawal.

This is clearly set out in the negotiating directives, where there is no mention of life choices, whether current or future; the negotiating directives set out to safeguard the status and rights of UKinEU and EUinUK (para 11), to "provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens' rights". In particular, para 20 states:

"The Agreement should *safeguard the status and rights derived from Union law at the withdrawal date* [our emphasis], including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date."

The Essential Principles on Citizens' Rights published on 12 June clarify this further:

"The following general principles should apply in accordance with Union law, as interpreted by the Court of Justice of the European Union at the date of entry into force of the Withdrawal Agreement

¹ <https://britishineurope.org/addendum-to-2nd-round-response/>

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

Moreover, the Essential Principles also set out clearly the material scope of the rights to be covered and list separately the rights set out in Articles 18, 21 “[citizens – free movement]”, 45, 48 and 49 of the Treaty to those set out in Directive 2004/38.

(b) Free movement in the Negotiating Directives

Para. 21 of the directives, headed “Definition of the rights to be protected: this definition should include at least the following rights:” provides “(b) the residence rights and *rights of free movement* derived from Articles 18, 21, 45 and 49” TFEU”. The reference to free movement was added in the final version of the directives, not having been included in the draft. This deliberate amendment must be given meaning. The reference to the right of free movement is literally meaningless unless it applies to continuing movement because if the intention were simply to legitimise a past exercise of free movement, the amendment would have been otiose: sanctioning a right of residence inevitably sanctions the past exercise of the free movement exercised to get to the country of present residence.

(c) The solution must be reciprocal

It was put to us that our proposed solution on free movement of lifelong rights to return for EUinUK and continuing free movement for UKinEU was not a reciprocal solution. A reciprocal solution would mean that an Italian who moved to the Netherlands should have the continuing right to move to the UK if UKinEU continue to have rights of free movement. But reciprocity in this context does not mean reciprocity between the situation of EU 27 citizens in the EU 27 and UK citizens in the EU, but between the members of the protected groups as set out in paragraph 20 of the negotiating directives: EUinUK and UKinEU. The personal scope does not cover either EU 27 citizens in the EU 27 or UK citizens in the UK.

(d) Will not free movement for UKinEU open the floodgates for UK citizens in the UK in the future?

The answer to this is clear from the scope of the Withdrawal Agreement. UK citizens in the UK have existing rights of free movement before withdrawal but have not exercised them and do not fall within the personal scope of the Article 50 negotiations. On the other hand, UKinEU have existing rights of free movement before withdrawal, have exercised those rights, and do fall within the personal scope of the Article 50 negotiations.

However, this position is not merely confirmed in the negotiating directives and the position agreed by the EU and UK to date in the technical note. It is also confirmed by the most recent case law of the CJEU. The judgement in *Case C-165/16 Lounes* of 14 November 2017 makes clear that the position of a citizen who has exercised his/her right of free movement is not comparable to that of a citizen who has not, as we set out below.

(e) Even if the scope of the Withdrawal Agreement were about life choices the exclusion of free movement would still be wrong

The life choice made by many UK citizens who moved to another EU country was precisely to choose freedom of movement, not to move to a particular country and settle there for all time. What attracted many of them was the ability to move freely from one country to another, as is evident from the case studies which British in Europe has provided². The EU's stance is inconsistent with the fundamental aim of its own Treaty of offering "its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured" (Article 3.2 TEU). It is also based on an outdated idea of a "job for life" - i.e. a young person gets a job in another country, moves there, works there and retires there. This is simply not how things work today. Companies move their businesses, move employees to subsidiaries in other countries and sometimes fail. Dynamic individuals move jobs and countries and thereby improve the performance of their employer, their business and that country. This flexibility is a vital element of the EU's success and many UK citizens have worked in a number of EU countries in reliance on it. At the same time people's skill sets are increasingly specialised, so the opportunities available in any one State are more limited than they were. A UK citizen working in, say, Luxembourg needs to be able to work in other countries if their present job ceases to exist or is moved or if they want to enhance their career.

Moreover, how does this argument deal with the UK citizen who, as so many have, has worked in a number of EU countries? The proposal is that they maintain their rights only in the country in which they find themselves at Brexit. Why? Their past life choices, on this argument, included a number of other countries. Nor is this a purely theoretical riposte. Such citizens may well have formed the intention of returning to one of these countries long-term, bought property in which they would like ultimately to live, but moved to another country for a few years to work.

2. Continuing free movement rights and the *Lounes* judgment

In the Addendum, BiE argued the following key points in relation to continuing free movement for UKinEU:

² See reference above

- (a) The right to move and reside freely across the territory of the Member States are two elements of a single composite acquired right under Article 21 TFEU. The current EU position in the Article 50 negotiations protects only the latter and not the former, and only in relation to the current country of residence.
- (b) The territorial scope of the right of free movement is the territory of the Member States; it is one continuous right exercised across that entire territory and, even in the case of the derived rights of TCN family members of EU citizens, that was the case. It is not now open to the EU to re-erect barriers simply to keep British Europeans out of member states where they do not currently live.
- (c) Changes in circumstances did not result in the deprivation of rights that had been exercised and acquired, even in the case of third country national (“TCN”) family members of EU citizens, and relied on the arguments of Professor Eleanor Spaventa that “In the same way as a change in personal circumstances is not determinative of TCN family members’ rights, it cannot be determinative of the rights of British citizens in the EU. Furthermore, if Union citizenship means anything at all, it is unthinkable that a TCN with derived rights would be treated better than a Union citizen who has exercised Treaty conferred rights, which are then lost by virtue of withdrawal from the EU. ”
- (d) EU citizenship is the fundamental status of EU citizens. UKinEU should not be penalised for having exercised their free movement rights. What does this fundamental status mean if it can be withdrawn from an EU citizen who had exercised her/his rights of free movement by the actions of a Member State (over which, we note, the majority of such EU citizens had no control as they were excluded from the democratic process)?

The *Lounes* judgment confirms several key points that support the arguments that British in Europe have made above and adds to them:

- The judgment clarifies the free movement rights of a dual citizen. While it is settled case law that free movement rights in principle can only be invoked by EU citizens in a Member State other than that of their nationality, the CJEU looked at the situation of a Spanish citizen who had moved to the UK and acquired British citizenship. So she was both an EU citizen in a Member State other than that of her first nationality but also living in a Member State (the UK) of which she was a national.
- The judgment confirms settled case law that the purpose of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States which is conferred on citizens by virtue of Article 21(1) of the Treaty (§31). The Directive determines the conditions for the exercise of this right. As noted in the

Addendum, “having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness.”³

- Notwithstanding this, the primary right, and rights deriving from that primary right, remain exercisable outside the scope of the Directive, in line with existing case law of the CJEU. Mr. Lounes, who did not benefit from a derived right under the Directive since his wife had acquired dual citizenship, could rely directly on the primary right under Article 21 as granting him a derived right which went beyond the rights set out in the Directive. Thus, while the Directive facilitates and determines the conditions for the exercise of the right under Article 21(1), the right applies directly to individuals and the Directive does not determine the limits of its scope. This appears to undermine the current EU position that the only rights that can be protected for UKinEU are those set out in the Directive, and only in the current country of residence.
- Moreover, as already mentioned above under 1, the position of a citizen who has exercised his/her right of free movement is not comparable to that of a citizen who has not because citizens acquire rights under Article 21 through their exercise of that right (see §§55 and 58) – in the *Lounes* case, for example, the right to a normal family life and family reunification. This supports the argument that the free movement rights of UKinEU should be different to those UK citizens in the UK who have not exercised their rights of free movement.

3. CONCLUSION

In short, both the negotiating directives and the *Lounes* judgment (along with other CJEU case law on Article 21) provide clear support for continuing rights of free movement across the EU 27 for UKinEU.

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British in Europe

³ see for example Cases C-127/08 *Metock and others*, and Case C-456/12 *O. and B*