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Navigating an archipelago of contradictions

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Introduction

One result of the UK's referendum on EU membership on 23 June 2016 has been to leave behind a situation of considerable legal and personal uncertainty for EU27 citizens and their families resident in the UK, and UK citizens and their families resident in the EU27 Member States.[1] It has also struck a blow against the viability of much of the UK economy, where a 'high employment–low wage–low productivity' triangle has largely been kept in place by a ready supply of labour from elsewhere within the Single Market, especially since the post-2004 enlargements. It is the putative impact of this supply of flexible and arguably cheaper labour on domestic labour markets which means that calls to end free movement come not just from those who oppose immigration *per se*, but also from those on the political left who profess an internationalist outlook yet who argue that free movement makes it harder to pursue domestic policies that push the UK towards being a 'high wage–high productivity' economy.[2]

The focus in this chapter is on the individual rights and status consequences of the ending of free movement as a result of leaving the EU, rather than wider questions about either the principles (Parker 2017) or the appropriate policy and regulatory mix (Boswell et al. 2017) for immigration and mobility in the post-Brexit UK.[3]

Ending free movement?

The basic situation is easy to state but hard to elaborate with sufficient precision to cover all eventualities: leaving the EU means an end to the regime of 'free movement', which has fostered and protected mobility (by workers, the self-employed, service-providers, students, pensioners and others, including third-country national family members) within the EU for the last 60 years. But designing a revised legal regime for 'free movers' after Brexit is a task of immense complexity, given the intricacy of existing EU law in this field (e.g. for social security and pension issues). Resolving these scenarios brings into play governance structures at many different levels, including national and subnational law, EU law, the European Convention on Human Rights and Fundamental Freedoms, and potentially other sources of migrants' rights at the international level. Because of the large numbers of UK and EU27 citizens involved, reciprocity is the watchword, with an agreement at the point of withdrawal needed, in order to avoid negative impacts on individuals on both sides of the equation. As negotiations under Article 50 got underway, it became clear that all parties shared the view that free movement should be at the top of the agenda, even though agreement may be hard to reach.

By July 2017, the UK and the European Commission (leading in the negotiations on behalf of the EU and the EU27) had both put forward their outline positions on the situation of EU citizens in the context of withdrawal. There was a great deal of distance between the two starting positions, noted by the negotiators themselves, although this has gradually reduced over time as the UK has conceded on key points.[4] It has been widely noted that the original UK proposals would entail a significant degradation of rights for EU citizens compared with the status quo (Peers 2017; Reynolds 2017; Yeo 2017). For example, even EU citizens in the UK with the status of 'permanent resident', with documentation issued by the UK Home Office, would need to re-apply to the UK authorities in order to benefit from the new 'settled status'. If they failed to do so, they could find themselves in breach of UK immigration law, regardless of how long they had been resident in the UK, or under what conditions. This could potentially have very serious consequences if applied strictly, especially for vulnerable persons such as the elderly, those with disabilities, or persons suffering from ill health. It has also been noted that Brexit risks exacerbating the gender bias previously observed in free movement rules because EU law does not recognise caring as 'work' (O'Brien 2017). In addition, family reunion rights would be reduced (in line with the very restrictive income-based rules applicable to UK citizens and

third-country nationals seeking family reunion) and those who left the UK for more than two years would lose their 'settled status' and would re-enter under whatever future regime applied to EU citizens (presumably as third-country nationals). The absence of an unconditional right of return (one of the classic citizenship rights) sharply differentiates the proposed 'settled status' from UK citizenship.

These are not trivial questions affecting just a few people. It is not an exaggeration to suggest that the loss of individual rights resulting from the UK's departure from the EU could be the most substantial loss of rights in Europe since the break-up of Yugoslavia in the 1990s, with the loss of the status of 'Yugoslav' citizen for millions of people. Just as with the break-up of Yugoslavia, which saw individuals in many of the successor states experience problems related to uncertain citizenship and immigration status (Shaw & Štiks 2012), so severing the bond of free movement law, which many have relied upon in order to build their lives, threatens to reduce life chances and life choices for millions now and in the future.

While none of the non-UK EU citizens resident in the UK ought to be at risk of statelessness as a result of the withdrawal of the UK, since they are by definition citizens of one (or more) of the EU27 Member States, the body of free movement law nonetheless offers substantial enhancements in the socioeconomic, political and civic domains. It offers outcomes that are well worth defending on both practical and philosophical grounds (de Witte 2016; Salomone 2017). Ironically, because of disenfranchisement effects in relation to national elections and referendums (most EU citizens resident in the UK and UK citizens resident long-term outside the UK could not vote), there were fewer opportunities for political voices to articulate the value of free movement during the EU referendum campaign (Shaw 2017). Simply to suggest that EU citizens resident in the UK should themselves become UK citizens misses the point: many cannot (for a variety of reasons); the process is very expensive; they may fail whatever probity or integration tests are applied; or they may not wish to risk losing their 'home' state citizenship. Finally, there is the sheer bureaucratic effort involved, with the UK not geared up to deal with millions of residence applications, never mind millions of new naturalisation applications. Ultimately, becoming a citizen in the formal sense (and the linkage thereby made between citizenship and immigration) is not the same thing as being a free mover. It is, however, clear from the famous 'citizens of nowhere' comment in her speech to the Conservative Party conference in October 2016, that the difficult situations in which those with fluid mobile residencies, complex multinational families

and/or transnational work/study/life commitments do not inspire instinctive sympathy on the part of Prime Minister Theresa May.

It is also self-evident that the complexities of free movement law did not enter the minds of the vast majority of those who voted in the UK's referendum. Free movement had been constructed, in the minds of many, as one of the problems facing a UK struggling with austerity and stagnant wages, not one of the solutions (Shaw 2016a). One reaction has been to treat those exercising free movement rights as 'lucky' immigrants, not subject to the 'hostile environment' rules for third-country national immigrants, introduced by successive governments and substantially upgraded by Home Secretary Theresa May between 2010 and 2016. When that narrative is applied, it starts to look wrong that in some areas (e.g. family reunion) EU citizens do better than UK citizens. It has also been easy to blame EU citizens for shortages in public services, rather than budget restrictions imposed on providers. The notion of EU citizenship as a reciprocal bond founded on enforceable rights joining together citizens across the EU28 was completely lost within public discourse, not least because the Leave campaign was regularly punctuated by sweeping and unsubstantiated claims that EU citizens would have the same status after Brexit as before.[5]

Everything that has been done since June 2016 by the UK government has reinforced a sense of chaos and uncertainty for EU27 citizens, and for UK citizens resident in the EU27. There has been a very high rejection rate (reportedly up to 28 per cent) of applications for permanent residence documentation made by longstanding EU27 citizen residents (although the Home Office has claimed that this has not changed in recent years),[6] with many rejections referring to the notorious – and arguably both unnecessary and insurmountable – comprehensive sickness insurance requirement applicable to those not in employment (Davies 2017). Such rejections come with a letter from the Home Office stating that the unsuccessful applicant is not exercising treaty rights and should make arrangements to leave the UK. This spreads fear and despondency, even if such letters are not followed up on. Successful applications often entail costly consultations with lawyers. For months, there was no official government policy on what might come next, except for blandishments of a 'generous offer' in the making. Meanwhile the European Commission issued a set of principles agreed with the EU27 suggesting that EU/UK citizens (on both sides of the UK/EU27 divide) should enjoy the exact same rights they had enjoyed under free movement, even if that meant lifelong protection, complex arrangements for social security and pension aggregation, continuation of mutual recognition of qualifications,

the right of return or onward mobility, and the maintenance of the jurisdiction of the CJEU. The latter condition runs contrary to one of Prime Minister May's 'red lines' from her Lancaster House speech.[7] Absurdly, when the UK made its widely criticised 'offer' in June 2017, this was accompanied by calls from government politicians for the EU to reciprocate the UK offer, something which was impossible since the EU paper had preceded the UK one by several weeks.

It is clear that the unravelling of the composite polity that is 'the UK in the EU' raises serious practical issues for those whom it affects directly (i.e. those who are already in the UK) – and also for those indirectly affected, including potential future movers as well as businesses and employers. There will be substantial opportunity costs for the UK economy in terms of losing access to a ready supply of labour coming from elsewhere within the Single Market under flexible conditions. But that point runs against another nostrum of Conservative Party policy, the commitment to reduce net immigration to below 100,000 per annum. Pursuing this policy is bound to push up prices for companies and consumers and it is not clear that it will lead to higher levels of better remunerated employment for so-called 'native Britons' (Portes 2017a, 2017b).

These implications, plus the loss of personal freedoms, are perhaps just starting to gain traction with the wider UK public, with one survey indicating that 60 per cent of UK citizens, including 58 per cent of Leave voters, want to keep their EU citizenship even after Brexit.[8] It is worth setting this figure against the figures for EU citizens resident outside their Member State of citizenship, which sat at just 16 million in 2016 (against a population of over 500 million), and amounts to less than 4 per cent.[9] This is somewhat misleading, however, and a better understanding of physical and virtual European mobilities emerges from the work of Salamońska and Recchi (2016), who assess the scale of the manifold cross-border practices of EU citizens and residents, across a number of dimensions including degree of permanence and frequency. They conclude that up to 20 per cent of the European population could be described as highly 'mobile' in this broader sense, but even this figure is still well short of those survey findings showing 'attachment' to EU citizenship. It is of course possible that the conflation of EU citizenship and free movement is starting to break down, so that the former is starting to be understood as a political value above and beyond the latter (e.g. giving the opportunity to participate democratically by voting in European Parliament elections). Or it could be a finding that correlates closely to another survey, which indicated that voters were more likely

to say that any trade-off between the economy and immigration should be resolved in favour of policies promoting growth and trade, even if this meant more immigration or free movement.[10] The complexities – and unpalatable consequences – of unravelling free movement might just be a catalyst contributing to the collapse of the case for Brexit. Or perhaps this is just the early stirrings of 'euro-nostalgia' that will sweep across the UK in the years to come until memories fade. Brexit Britain truly is, as I have noted previously, an 'archipelago of contradictions' (Shaw 2016b).

Free movement and citizenship

The very idea that European citizenship as a legal status for UK citizens could somehow survive the separation of the UK from the EU brings us back to the core issue of what EU citizenship actually is, and how it relates both to free movement and to national citizenship (Mindus 2017; Schrauwen 2017). Exploring the relationship to national citizenship can lead us along well-trodden pathways, especially in terms of case law of the CJEU. EU citizenship is a creature of EU law, but it is based on access points controlled under national law. The *McCarthy* case suggested that those with dual citizenship of the host state and another Member State do not enjoy the protection of EU law,[11] although the pending *Lounes* case may well see a different approach taken by the CJEU in the case of a person naturalised *after* having enjoyed family life with a third-country national in the host state whilst only a citizen of another Member State, if the advisory opinion of the Advocate General is followed in the November 2017 judgement.[12] Furthermore, the CJEU has held that EU law requires the possibility of judicial review of decisions on deprivation of national citizenship, if this would have the effect of depriving an EU citizen of substantially all of the benefits of EU citizenship. However, this proposition was developed for a scenario where it was the actions of the EU citizen in question – in combination with national citizenship laws – which triggered the scenario in which he was deprived of the benefits of EU citizenship.[13] We do not yet know how the CJEU might approach the question of loss of EU citizenship because a Member State *withdraws* from the EU.

At first sight, it seems that if EU law no longer applies after secession/withdrawal of the UK, then EU citizenship must surely lapse. Absent any international agreement specifically preserving such a status or certain rights attaching to it (e.g. under Article 50), it seems

obvious that a withdrawing state retains the power, under international law, to deprive its citizens of the status of EU citizen, and to render the legal effect of that status, for citizens of other continuing Member States, nugatory within its territory. In similar terms, other Member States have no obligation to treat UK citizens other than as third-country nationals on their territory. There is no parallel with the duties on states in circumstances of secession, as there is no risk that such an act could render affected persons stateless. They are still protected by national citizenship somewhere. There would be protection of non-citizen residents of the withdrawing state in relation to certain rights, such as family life, under international human rights law. The *Kuric* case of the European Court of Human Rights[14] (Vidmar 2014) appears to 'freeze' the rights of those who have regular residence in the host state and who do not accede to the citizenship of that state when it secedes. Although developed in the context of the secession of a former Yugoslav republic (Slovenia), the principles in this case can be applied to a UK withdrawal from the EU (Mindus 2017; Schrauwen 2017). This seems to be what the offer of 'settled status' is reflecting, although that status offers less than EU citizenship.

The general proposition must be that national citizenship status will be unaffected by Brexit. The only caveat upon that point comes from the *Tjebbes* case, pending before the CJEU, concerning legislation withdrawing Dutch citizenship from persons who are resident for more than 10 years in a third country and who have taken on that country's citizenship.[15] This case has obvious implications for the post-Brexit scenario, as the UK will be such a 'third country' after Brexit, so any intervention by the CJEU to suggest that Member States are not free to withdraw citizenship in such circumstances *because of EU citizenship* could be for the benefit of EU27 citizens resident in the UK.

For the future, we could speculate that further adjustments to national citizenship laws might be a desirable part of the solution to the upheaval brought about by Brexit, if a stronger parallel is drawn to the impact of secession from a state. Seceding parts of states must attend to issues of citizenship as a matter of urgency, as must states from which regions secede. But the UK, on withdrawal from the EU, is making no moves to facilitate citizenship access of resident non-citizens, despite the loss of their preferential 'free mover' status. On the contrary, it seems that this group must accommodate themselves to the UK's requirements, rather than the other way around, by applying for a form of 'settled status' that falls far short of both national citizenship and of the protections and freedoms previously offered by free movement. Initially, there

was no sign of other Member States with restrictive approaches to dual citizenship, such as the Netherlands, Estonia or Austria, making adjustments to citizenship law to accommodate resident UK citizens or to offer wider access to dual citizenship to protect the interests of new or existing citizens. On the contrary, the prime minister of the Netherlands appeared to double down on his country's resistance to dual citizenship (Boffey 2017a; EUDO Citizenship 2015). However, perhaps in a harbinger of further changes to come, in October 2017 the new Dutch coalition adopted a more liberal approach to dual citizenship which was the existing policy of just one of the four coalition partners (the D66 Liberal Democrats party), offering assurances to Dutch citizens resident in the UK that they would be able to keep their Netherlands citizenship after naturalising in the UK (Boffey 2017b). The details of how this might work are not as yet known.

Despite, or perhaps because of, the absence of state action to remedy the situation, some European citizens – for whom it is possible and useful – are taking action to acquire new or additional citizenships as an insurance policy against the impending restriction of free movement. Quite substantial numbers of UK citizens are pursuing ancestry-based or family-relationship-based options in order to preserve or open up new options for mobility, in addition to the classic mode of acquisition by residence/naturalisation:[16] Irish citizenship has been heavily in demand reflecting the many millions of UK citizens who have at least one Irish-born grandparent; German citizenship is an option for those descended from persons deprived of their citizenship in Nazi Germany; Italian citizenship is accessible not only on the basis of descent, but also via a spouse. For those wealthy enough, there remains the option of purchasing citizenships and residencies in a number of Member States with minimal physical residence obligations (Džankic 2015).

Many EU citizens resident in the UK are pursuing the UK citizenship route despite the considerable expense and the numerous bureaucratic hurdles in place (e.g. the prior acquisition of the permanent residence documents that those same EU citizens are now being told will be valueless after Brexit).[17] The irony is that many are seeking UK citizenship not because they feel more integrated in the UK, but precisely because they face more hostility than ever before. A wave of xenophobia seems to have been unleashed by the UK's 'Brexit experience'.[18] But there are still many mixed-nationality families, as well as highly mobile persons and groups, who find that citizenship acquisition does not match up to the fluid flexible possibilities of free movement.

Conclusions

Free movement is not, and has never been, an unconditional 'right' with benefits attached, and it remains primarily linked to economic interests. It also has a 'dark' side in the form of the posting of workers by firms providing services on a transnational basis; the position of these workers is barely regulated under EU law, and they are therefore subject to the vagaries of national law alone (MacShane 2017). But what is interesting (and even ironic) about the post-Brexit period is that a clearer perspective on the value of free movement has now opened up. It is easier to argue how free movement for individuals has operated to obviate the restrictions of national citizenship and immigration regimes and to offer mobility options with low transaction costs over the lifecourse (for work, study, family or lifestyle reasons). This highlights the extent to which – in perception and practice, if not in law – EU citizenship has evolved into a form of transnational citizenship practice that complements the lacunae that arise where overlapping national citizenship and immigration regimes are all that is on offer (Mindus 2017).

For the EU, and indeed for the international community more generally, Brexit creates an unprecedented situation. It has given rise to equally unprecedented civic mobilisation around demands for the protection of acquired rights, including several European Citizens' Initiatives registered by the European Commission. Some have raised the possibility of EU citizenship becoming a freestanding status that can be acceded to other than through the nationality of the Member States, with UK citizens being offered the possibility of 'associate citizenship' (discussed in Schrauwen 2017), but at present such proposals remain utopian rather than practical in character. Eventually, unscrambling the eggs of free movement may demand some creative solutions going beyond the scope of the Article 50 agreement itself, including increased pressure on Member States to remove barriers to dual citizenship.[19] This seems appropriate in an increasingly global age.