Tensions between EU and UK Law are having a negative effect on the free movement of EU citizens

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European law guarantees the free movement of citizens across EU member states. Using the UK as a case study, **Jo Shaw**, **Nina Miller Westoby** *and* **Maria Fletcher** *write that in practice there nevertheless remain a number of difficulties in ensuring that EU citizens can exercise their rights. These include inconsistencies between European and national law, and cultural obstacles. To overcome these difficulties they propose the creation of an EU 'citizenship champion' to promote the effective implementation of a common citizenship area across Europe.*

Problems of EU citizenship in the UK

Throughout the EU, implementing free movement law still poses significant challenges for Member States and exercising EU free movement rights is rarely as straightforward as one might wish for EU citizens and their families. These challenges are not only the obvious practical ones about the application of law by the courts and the executive, but also others that can have a legal cultural dimension. At the Universities of Edinburgh and Glasgow we undertook a project to explore the difficulties faced by the system in the UK with a view to explaining what the underlying causes of friction or difficulty are.

Our aim was to research the application of EU free movement law in the context of the UK. EU free movement is not hermetically sealed off from broader debates about immigration; it is affected by policy changes and popular perceptions about immigration and is integrated into national institutions alongside immigration decision-making. We wanted to see in more detail how these two legal systems – EU free movement law and UK immigration law – overlap and interact in practice.

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The research combined doctrinal research into the law with findings from detailed interviews with members of key stakeholder groups such as lawyers, judges and those working in NGOs dealing with migration and free movement issues.

Findings of the research

From our research, we concluded that there are four main areas showing clear evidence of problems of misfit or friction between EU law and UK law in the area of free movement: residence rights, especially in relation to third country national family members of EU citizens/EEA nationals; problems of access to welfare; problems of 'probity' and the perceived need to distinguish between 'good' and 'bad' migrants; and issues raised by the transitional or special regimes for certain groups of citizens (new Member State citizens and Turkish citizens).

The common factor for each of these areas was that they pose challenges to the boundaries between EU free movement law, based on facilitative principles and rights, and national immigration control, based on a system of permissions drawing stark distinctions between 'citizens' and 'aliens'. The 'edges' of EU free movement law and UK immigration law each need careful study to help us understand how they operate in relation to each other.

Problems of 'culture'

The culture of EU free movement is not effectively embedded into UK legal/administrative practice. The impact is most obvious where claimants are seeking to rely on these 'edge' situations. For example, if a third country national family member of a migrant EU citizen is trying to secure permanent residence, this can mean relying on the more controversial or contested parts of the EU's Citizens' Rights Directive, upon EU citizenship rights in the Treaty, or upon the EU Charter of Fundamental Rights.

Here lack of familiarity with the broader framework of EU law plays a role in undermining the capacity of parties to make correct decisions within EU law timescales. We found that these problems raised both training issues for decision-makers and legal cultural issues relating to the character of EU law, as distinct from immigration law, which requires legal reasoning which is mindful of the difference.

Problems of legal systems interacting

Our research showed that internal system-level frictions represent a very significant challenge to the effective implementation of EU free movement law within the UK. These relate to the way in which rules are applied by decision-makers. For example, it was widely felt that the culture of immigration law, which sees the credibility of the claimant being placed at the heart of the enquiry, had 'seeped' or 'leaked' into EU free movement law, where it is a factual enquiry alone based on the principles of EU law that is the central task of the decision-maker.

However, the evidence to be drawn from recent judgments of the Upper Tribunal (Immigration and Asylum Chamber), which has shown itself ready both to admonish the UK Border Agency (UKBA) and to refer difficult and unresolved questions to the Court of Justice for clarification, suggests that over time some of the legal problems of implementation identified by the research may be decreasing in scope and significance.

External causes of friction

In addition to internal system-level friction, problems of friction can also stem from exogenous causes. These include the politicisation of immigration, attitudes towards the EU in the UK, and the UK's powerful 'border identity' as an island state opting out from membership of the Schengen zone and the policies which flow from the creation of a borderless Europe. This has led to public opinion across the UK becoming increasingly wary of free movement, so far as it concerns flows into the UK. In fact, immigration issues and EU issues were both identified as problematic areas in terms of press coverage in the 2012 Leveson Inquiry on the Culture, Practices and Ethics of the Press.

Conclusions from our research and recommendations

Perceptions about EU free movement are changing, in both popular and political discourse, and this is reflected in what appear to be increasingly adversarial relationships around the boundaries of EU free movement rights and the relationships between EU law and UK law. In our research we tried to assess how the UKBA works, what resources it has and how it trains decision-makers, all as part and parcel of an administrative justice system.

Many of our interviewees felt that it does not match up to the best practice in the field. We concluded that these structural difficulties and the adversarial relationships that are emerging need to be addressed urgently because they are having a corrosive effect upon the effective implementation of EU law. Free movement goes to the very core of EU law and does not represent a competence for which the UK can opt out. While training and raising awareness can help to mitigate some of the most egregious effects of poor decision-making, we feel that there is a need to discuss in more detail the institutional arrangements for the application of EU law in the UK.

In the UK there are very few specific vehicles for the implementation of EU law, and this is true of free movement rights. In practice, and especially without a lawyer, attempting to understand EU free movement rights and the related role of the UK Border Agency or the Home Office can be confusing. This is made more challenging by a notoriously difficult to navigate website with tricky terminology such as 'EEA family permits'. What is more, issues raised by the proper implementation of free movement law are rarely picked up and tested by bodies such as the Committees of the House of Commons and House of Lords that have responsibility for scrutiny and accountability matters in relation to both EU affairs and immigration more generally.

Towards a citizenship champion

To overcome these obstacles, we propose the creation of a new office of EU free movement or citizenship 'champion'. The role of this 'Ombudsman-like' office would be to support the effective development of a common citizenship area in a manner that promotes joined up policy-making and enhances the flow of information between government institutions and those who rely upon the law. It would not supplant the current decision-making processes, but it would help to ensure that the 'EU flag' was clearly visible when so-called EEA decisions are taken and when information necessary for EU citizens to make effective use of their free movement rights is made available.

As with the investment in the creation of specific institutions which aim to protect human rights, raise awareness of issues around discrimination on grounds of sex, race or other protected characteristics, innovative institutional solutions bringing together expertise with political will can, without great expense, give visibility to certain issues which are often misreported in the media. As a result, we were delighted to see that a recent proposal for a new directive in the area of the free movement of workers pointed in the same direction, asking for national contact points on free movement rights and improved forms of redress for EU citizens. This could be the first step towards an effective citizenship champion – an important move in 2013, the European Year of Citizens.

For a longer discussion of this research, read the authors' report published on their website.

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Note: This article gives the views of the authors, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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