

## BREXIT: CREATING A NEW CATEGORY OF EUROPEAN RIGHTS HOLDERS IN SEARCH OF A STATUS

The Agreement published on 19 March sets out in legal texts the arrangements for the withdrawal of the UK from the EU on 29 March 2019 and in particular what should happen over the transitional period from then until 31 December 2020. According to Article 35, European rights established before or during that period by 3 million EU citizens in the UK and 1.3 million British citizens in the EU will have life long protection, provided they still meet the conditions set out. As long as it is not clear what kind of relationship will be established between the EU and the UK after the transitional period, the assurances which EU leaders claim the Agreement gives to citizens continue to be greeted with scepticism. There are also other difficulties: the ambiguous status of the 4.3 million, the risks of freedom of movement being subject to increasing national control and the under-estimated challenges of enforcement.

### i) European rights in transition to an unknown future

On the one hand, the Agreement seeks to provide an umbrella for the two population groups on a reciprocal basis by defining these populations and explaining how the rights to residence under the so-called citizenship directive (2004/38) as well as the rules on social security rights and recognition of professional qualifications should be preserved and applied. Most of the text is in green which means that it is agreed thus confirming that the UK and the EU negotiators are genuinely seeking to preserve the status quo on European rights, subject to certain conditions such as processing the two population groups in a simple and user- friendly fashion

On the other hand, whilst all commentators acknowledge that the agreements so far will not guarantee a borderless regime between the Irish Republic and Northern Ireland, it is equally clear that the degree of freedom of movement to and from the UK more generally remains uncertain after the transitional period. The future of European rights will depend on the position of the UK in relation to the customs union and the single market as well as its own immigration regime, which are unknown quantities.

A transitional period may be a good idea to give businesses a period in which they can plan to adjust to a new situation, but is it such a good idea for citizens who have to know where they stand in the longer term before making changes to where they live, work and bring up their children? From the citizen perspective an alternative would be to extend the negotiations for a further two years which is possible under Article 50 of the Lisbon Treaty and preserve the status quo on European rights until the future relationship is clear, which could be guaranteed unilaterally by the EU and by the UK. That would avoid citizens having to go through procedures during the transitional period only to discover that they will have to make further changes to their lives afterwards.

### ii) European rights for holders of ambiguous status

Whilst the negotiating mandate for the Commission stressed not only rights but also status, the latter has been ignored. This is not just a theoretical question. The leading case law of the Court of Justice of the EU (CJEU) is based on Article 20 and Union citizenship and the case-law can be quoted in order to claim one's European rights and should guide national authorities when it comes to enforcement. Will the 3-million though be recognised as European citizens in the UK after the country has left the EU? Will they have a special status like Commonwealth citizens? The question of status is important because it influences greatly the attitude of the administration, whatever the texts may say, to the recognition of rights.

Whether the UK recognises EU citizens will depend on how its own citizens are regarded in the EU. There are different possibilities. A European Parliament friendship group organised by New Europeans met on 28 March to consider “the curious incident of the disappearance of Art. 32 in the night-time” in the agreement, and which reads as follows:

“Scope of rights

In respect of the United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States”

This would be the most flagrant reversal of the promise to preserve acquired rights in the Agreement. ECIT has put in a request to the Commission to access all documents relating to this clause which according to Europe Street may well come back in another context. The text reveals that the Commission sees UK citizens as having acquired European rights only in the country where they are resident despite the existence of a directive encouraging free movement for longstanding third country nationals. The European Parliament on the other hand, where the idea of associate European citizenship has been floated, recognises that there is a problem and in its March resolution points out in para 54 that “many UK citizens have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 TFEU” and notes “the recent referral to the CJEU of a case bought in a Dutch court concerning the preservation of EU citizenship rights for UK citizens after Brexit”. In theory, UK citizens could become third country nationals, they could acquire a hybrid status as former EU citizens or they could preserve that status but if there is a reconfiguration of Union citizenship to become a broader European citizenship. A complaint has been submitted by Tony Venables with the support of The Good lobby to the European Ombudsman demanding clarification of the future of the European citizenship status

iii) European free movement rights subject to more national control.

From the outset in the negotiations the UK made it clear that the Government wished to introduce a regime of settled status for which the 3 million should apply after departure from the EU. Having given way to this demand which is not outlawed by directive 2004/38 the negotiators have at least reduced the original lengthy document to be filled out to a procedure which should be quick, simple and cost free. There is also a provision for lengthening the timescale for registration by one year and treating tolerantly people who fail to respect the deadline. Nevertheless, the introduction of settled status remains a massive task for which the UK authorities will have to recruit additional staff from among EU citizens. It is also questionable whether it is necessary since the whole purpose of the withdrawal agreement is to keep the status quo as far as possible. Since the negotiations are based on reciprocity the Commission apparently wrote last year to the EU 27 asking whether they intended to introduce a similar scheme for UK citizens who had moved to their country, but received no answers at the time. Now however the text of the Agreement is a very open invitation to EU 27 to introduce a similar process to the one in the UK for British citizens thus adding a further expensive administrative burden to the process of Brexit. There is also the possibility of introducing systematic criminality checks. Rather than a citizens’ right to free movement which can only be challenged under strict conditions of proportionality and public interest, the risk is that the situation will be now reversed and that people have to first ask permission from national authorities and acquire European rights from them rather than have them in the first place. The original aim of directive 2004/38 was to increase free movement and reduce the administrative burden for example by abolishing short-term residence permits and concentrating on permanent residence acquired after

five years. It is possible that the pressure to introduce more national controls and the risk that they could spread from this Agreement beyond the 4.3 million could be resisted by introducing a European citizens' card as recommended by ECIT in its guidelines.

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