

THE UK REFERENDUM ON MEMBERSHIP OF THE EUROPEAN UNION

One choice hides another: to keep or give up European citizenship

by Tony Venables, Founder of ECIT Foundation

*ECIT (a Foundation on European citizens' rights, involvement and trust)
is a newly created think tank working exclusively on European citizenship*

INTRODUCTION

The campaign leading to the referendum on 23 June in the UK on whether or not to remain a Member of the EU has not touched on European citizenship. This is a glaring omission, since the choice of whether to remain or leave the EU is automatically a choice in favour of keeping or giving up EU citizenship. This first transnational citizenship of the modern era has been described by the Court of Justice of the European Union (CJEU) as “the fundamental status of nationals of Member States”. Article 20 of the Treaty on the Functioning of the European Union (TFEU) makes the choice clear: “citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” Once a Member State decides to leave the EU, its citizens lose Union citizenship. For example if in September 2014 the Scottish referendum had resulted in a majority in favour of secession from the UK, a Member of the EU, Scots would have lost their EU citizenship at least for the period before being able to re-enter as an independent country. The referendum campaign is criticised for being based on hypothetical claims as to what the future inside or out of the EU could bring. How is it possible that such a basic fact as the loss, whether one likes it or not, of part of one’s citizenship should be overlooked? The first part of this article attempts to explain this omission by both the “remain” and “leave” campaign. The second part examines the possible consequences of retaining or losing European citizenship with more or less long periods of uncertainty and in the case of BREXIT no guarantees that European rights can be maintained, and if they are, it will be without the possibility of defending and promoting them effectively.

Why is a blind eye being turned to European citizenship?

The most obvious explanation for the glaring omission is that European citizenship is regarded widely in the UK as insignificant. Indeed, when Union citizenship was first added to the Maastricht Treaty in 1993, many people shared the view that this was “citizenship-light” and thought it was just a pro-European public relations exercise. Does Union citizenship represent much more than confirmation that free movement of persons is a founding principle of the EU, starting with workers and now extended to citizens in general? A generation later, even the sceptics recognise that the landmark judgements of the CJEU from Martinez Sala to Ruiz Zambrano have made of this a real citizenship, even though limited in its extent, and focussed primarily but not exclusively on the rights to live, work, study or retire in other EU Member States.

European citizens’ rights attached to Union Citizenship:

- Right to travel and live freely within the EU
- Not to be discriminated against on the grounds of nationality
- Right to vote and stand as a candidates in municipal and European Parliament elections wherever they live in the EU
- if their own country is not represented, right to be assisted by another EU country’s embassy or consulate outside the EU, under the same conditions as a citizen of that country
- right to petition the European Parliament, apply to the European Ombudsman and address the EU institutions (in any official EU language)
- right to organise or support, together with other EU citizens, a citizens’ initiative to call for new EU legislation

For the younger generation the new freedom to explore the continent from Edinburgh to Athens, Lisbon to Riga is often taken for granted. Freedom of movement is the most popular of the EU’s achievements. Out of deference however to national citizenship and sovereignty, Union citizenship is not promoted by the EU Institutions; its policies and programmes are scattered, and its symbols of the flag, the anthem, Euro notes and coins are deliberately low key, particularly outside the Eurozone. This is a citizenship which does not dare to speak its name.

Another reason for the omission is that in the UK the concept of European citizenship comes less naturally than to fellow Europeans exposed more to the diversity of different national languages and cultures with open land borders, where it is impossible to ignore one's neighbours. In the referendum debate, "EU citizen" is shorthand for citizens from other Member States, not UK citizens in the rest of the EU. The main emphasis is on UK holiday makers. This is borne out by regular Eurobarometer opinion polls, which show that on average in the EU, European citizenship is becoming more popular and the rights attached to it better known. On average in the EU, according to Eurobarometer poll no. 84 of Autumn 2015, 38% define themselves still in terms only of their national citizenship, 52% as both national and European citizens, with 6% as Europeans primarily. For the more euro-sceptical UK, the figures are almost the other way round: 64%, 31% and 3% respectively. The national averages in turn obscure differences within each country with young people for example, including in the UK, being much more enthusiastic about being a European citizen than the older generation. It is also clear from the opinion polls that this is a citizenship beyond the national one which brings benefits to those who are relatively well-educated and linguistically competent, whilst those less fortunate feel excluded from its benefits even though they could be the first to welcome the advantages it offers if they had the opportunity. This is however a criticism not so much of European citizenship itself, but the failure of the EU and the governments to make more of this status and make it accessible to all. Those able to take advantage of the Erasmus exchange programme among university students, lower air fares, roaming charges and the freedom of the continent are likely to see the EU as an advantage or at least as a fact of life to be improved. For others what is the relevance of EU citizenship?

Whilst underestimation by the EU of its own creation and euro-scepticism in the UK may account for everyone turning a blind eye to such a basic choice as one about citizenship, it is not the whole story. No one really knows what European citizenship is, our approaches to citizenship being so different depending on history, culture and political opinions. What would be the advantage of either side in the campaign raising a debate which is complex and the results of which would be unpredictable? People find it difficult to imagine a citizenship without statehood, even though the EU Treaties have made it clear that "citizenship of the

Union shall be additional to and not replace national citizenship” (Article 20 TFEU). The Treaty of Lisbon also provides safeguards to back this up and makes sure that the EU does not encroach on the policy areas such as personal taxation, health, social security, education or culture which we associate with our national citizenship (Articles 3-6 TFEU). Many people find it difficult to imagine a citizenship except the national one and will therefore associate European citizenship nevertheless with some kind of attempt to create a European federation, rather than a way of linking our citizenships together.

Those who do not share this view maintain that citizens have a long way to go just to catch up with the EU in its present form and that valuing EU Citizenship does not mean creating some kind of super-state. No one however can predict the future of European citizenship, for which there is no policy or blueprint. On the one hand, a transnational citizenship must be part of the answer for the EU to manage crises more effectively such as the euro, debt, migration or security threats. The margin for manoeuvre to take democratic European decisions is limited as long as politicians can only appeal to their electorate in strictly national terms. On the other hand, with the rise of populist nationalistic parties which would certainly be encouraged by BREXIT, union citizenship could emerge as a victim rather than answer to these crises. On 23 June, most people in the UK will be unaware that their vote is also one to keep or give up European citizenship. If European citizenship stays the same and its practice spreads, or if it develops as a concept to become much stronger, voters may come to wonder why they were not told and come to regret their decision. Many will accept the loss because of the association of EU citizenship with freedom of movement they voted against. In the way it is framed in the EU Treaties, EU citizenship is not however tied to a particular policy; one can argue that it should be linked to all policies.

What does the vote imply for European rights and citizenship?

In the case of a vote to remain in the EU, the decisions by the European Council of 18-19 February 2016 and the related Commission declaration of free movement will be translated into formal legislative proposals. These concern the emergency brake, and other measures – the payment of child benefits, alleged abuses of rights and restrictions on family reunion with third country nationals. Governments have shown a collective will to control free movement and make it easier to expel European citizens from their territory. What will be

the impact of the settlement with the UK in actual practice? It could be limited to European citizens moving to the UK, but there could be wider implications. Whilst an earlier proposal for the agreement referred only to the UK, the final text refers to “Member States.”¹ There is risk of contagion and that other governments may use the UK precedent to demand restrictions of their own, an opportunity which will certainly be considered with interest by parties of the extreme euro-sceptical right. Nothing however will be clear until after an initial period of uncertainty. Since there is a unanimous decision by the European Council on the settlement with the UK, with very indication that it should be put into force quickly, implementation is a given. It will have to go through the legislative process, which may take one to two years with a further period given to national administrations to put the legislative changes into effect. Some aspects of the settlement could also be open to challenge in the European Parliament and the CJEU.

Over this period, European citizens already in the UK or considering to move there will be uncertain as to where they stand. Even when implementing legislation is agreed by the EU that is not all, since much will depend on the detail of the application measures in the UK. When Directive 2004/38 on free movement and residence of European citizens and their family members was adopted, implementation was delayed in several Member States leading to uncertainty. When the new regulation on the coordination of social security arrangements (Regulation 883/2004) was adopted it did not come into force immediately: there was a delay whilst an implementing regulation had to be agreed (Regulation 987/2009). The settlement in case of a vote to remain is by far the lesser of two evils, and should affect far fewer people and narrowly defined aspects of their European rights to equal treatment rather than their rights as a whole and status as European citizens.

In the case of a vote to leave the EU, UK citizens lose their European citizenship and the Council settlement of February 2016 becomes irrelevant. In its paper the process of withdrawing from the European Union (Cm 9216 of February 2016), the UK government explains that the only possible route for exit is through applying article 50 of the Treaty on

¹ Letter by Donald Tusk to the members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union (press release 23/16 of 2.02.2016). European Council (18-19 February 2016) Conclusions EUCLLO 1/16.

the European Union. This article has not been used before and there will therefore be a longer and more serious period of uncertainty this time for both 2 million UK citizens living in the EU and 3 million EU citizens in the UK, this total of some 5 million representing over just one third of those according to Eurostat permanently living and working in another Member State. The impact of BREXIT will be experienced throughout the EU. It is not surprising that increasing numbers of British citizens with a family connection to Ireland are considering dual citizenship, whilst EU citizens in the UK are wondering whether they should take on British citizenship since their European status will not count any more. A decision to opt now for dual citizenship rather than wait for the outcome of the UK's terms of settlement with the EU is understandable.

The process described in Article 50 is weighted in favour of the existing 27 Member States, which first draw up guidelines among themselves before opening talks with the UK. The UK government paper draws attention not only to the uncertainties of the procedure, but also the breadth of the issues which have to be negotiated after 40 years of membership. How to ensure that European citizens' rights are given priority when there will be so much lobbying for economic interests? Article 50 provides that "The Treaties shall cease to apply to the State in question" (and therefore to European citizenship) "once a withdrawal agreement is reached or failing that for two years, unless there is a unanimous agreement to prolong that period for a further two years". The most likely scenario is that UK citizens will be "European citizens on the way out" for a four-year period. How long beyond that would it take for a settlement to be implemented? No one knows, but it is estimated that it would take the UK outside the EU up to 10 years to negotiate trade deals, those directly impacted by BREXIT could face a longer period of uncertainty. This makes it very difficult to plan one's own and one's children's future.

During this period, there are likely to be increasing difficulties and tensions at certain borders: Calais, the border between Northern Ireland and the Republic, or Gibraltar. UK pensioners may well find their residence and access to health care and other public services becoming open to challenge in Spain and other Southern European countries. Rights to work and remain in the UK for many EU citizens, particularly from the new Member States in

Central and Eastern Europe may well be called in question coupled with the EU demands to exert control over free movement of people from the UK. The longer the period of uncertainty lasts, the more likely it is that tensions will accumulate which will make the final settlement harder to achieve. For this settlement, there is a choice between the UK remaining part of the internal market and having to accept in return free movement of persons, or there could be a settlement of a different kind in which case there is no guarantee of European rights continuing in their present form. The calculation of pensions by totalling work periods in different EU Member States in case of BREXIT will be a major issue for UK citizens who have retired in the EU, those who have worked in the EU and retired in the UK and European citizens who have worked in the UK.

The last page of the UK government document on the process for withdrawing from the European Union contains a commitment to uphold acquired rights:

How these negotiations might affect UK citizens

UK citizens get a range of rights from our membership of the EU. If the UK were to leave the EU, all of these rights would have to be covered in a successor arrangement. If we left the EU without agreeing what would happen to these rights, it would at the least bring them into serious question, creating difficulty for UK citizens who relied on them. A selection of these rights includes:

- The right to live, work and own property in all 28 countries of the EU;
- The ability to retire to another EU country;
- The right to receive healthcare that is free at the point of use and paid for by the NHS, using the European Health Insurance Card;
- The right to vote in local elections in other EU countries;
- Mutual recognition of child custody decisions across the EU;
- The use of the European Small Claims Procedure to reclaim up to €2,000 from individuals in other EU countries; and
- The right to use public services in other EU countries

The document states “there would be no requirement under EU law for these rights to be maintained if the UK left the EU”. Should an agreement be reached to maintain these rights, the expectation must be that this would be reciprocated for EU citizens in the UK. The assumption made by the government is that such an agreement might be reached in the context of the UK joining the European Economic Area (EEA) with a similar status to that of Norway requiring that in exchange for access to the internal market, free movement of persons to and from the UK would be maintained. But this will never be easily accepted by many in the ‘leave’ campaign. The argument on the EU side and one which has been made for example following the referendum on 9 February 2014 in Switzerland in favour of immigration quotas, is that the internal market is not like a Swiss cheese with holes in it and that the four modern commercial freedoms of people, goods, services and capital are indissoluble.

In turn, however, the UK Government will have a mandate to negotiate tougher restrictions and emergency brakes on EU citizens than those agreed in February. Even if in the most optimistic scenario the core of the European rights might well be preserved, although with additional restrictions, their enforcement will be an uphill struggle. This is especially so since EU governments and institutions consider that in the February 2016 agreement they gave the UK an opportunity to accept a generous concession which would have been rejected. There is no guarantee however that this will happen and that the UK will stay part of the internal market. In which case the rights or some of them listed in the government document will disappear and the rest of this description of a possible BREXIT scenario becomes irrelevant.

The main issue in the area of free movement of persons is the gap between the fine principles of European law and the way European rights face numerous obstacles and red tape on the ground. If in the case of BREXIT, the UK remains part of the internal market, its citizens will still be able to use EU assistance services for citizens and businesses such as Europe Direct, Your Europe Advice and Solvit. For more serious complaints it would be possible to go to a ‘surveillance authority’ or have the case referred from a national court to a special EFTA-EEA Court which exists alongside the CJEU in Luxembourg. However, whilst support outside the EU from the UK government would become more important, the latter

would not be party to legislative decisions which affect internal market rules and European rights – it is a question of “co-shaping” not “co-deciding”. A number of joint expert, ministerial and parliamentary committees bring together EU decision-makers and the representatives of neighbouring states which are part of the internal market, but these are not effective forums for raising and solving citizens’ concerns. The government would be part of the internal market, subject to EU decisions but without participating in decision-making in the EU institutions. The position of UK citizens would mirror that of the government being part of the internal market but without the European arm of their citizenship. To an increasing extent, European rights in the internal market beyond the EU are shaped by the European court’s case law based on the citizenship articles which can only be invoked by EU citizens, rather than EEA citizens.

There is no reason why people in the UK, like many in Switzerland or Norway, should not feel just as much European citizens as those in the EU, even without the formal status of EU citizen. The loss of Union citizenship may not result in the loss of all the rights associated with that status, but it will make access to the appeal mechanisms which are responsible for their enforcement much more difficult. There is no reason why UK citizens should not petition the European Parliament, but the extent to which the Petitions Committee takes up a petition and hears its representatives depends on its substance and political importance. A petition from those who do not vote in European elections is inevitably a second order petition. Using other channels to appeal or defend European rights with the EU Institutions is even more difficult. The European Ombudsman deals with complaints from EU citizens or organisations with a registered office in Member States. Using the EU’s freedom of information or access to documents regime² is also subject to citizenship or residence in the EU. Only EU citizens over the age of 18 can sign a European Citizens’ Initiative (ECI), whereby a minimum of 1 million people demand that the Commission presents a new law.³

Anyone examining the annual reports relating to these mechanisms for access and appeal or looking through the register of ECIs will understand that they are in their infancy. As awareness of European rights increases and possibilities expand through social media for

² Regulation (EC) no. 1049/2001 regarding public access to documents of 30 May 2001

³ Regulation (EU) on the citizens’ initiative no. 211/2011 of 16 February 2011.

collecting signatures across national borders, the importance of channels of communication between citizens and the EU institutions will increase. The fact that they will be beyond the reach of British citizens in the case of BREXIT will be problematic not only for the defence of European rights, but also when internal market rules more generally apply to the UK. BREXIT would also be a setback for all reformers pushing for a more transparent, accountable and democratic EU – they would lose support from an important part of the EU’s active citizens.

CONCLUSIONS

It has been argued that one of the most immediate impacts of the outcome of the referendum on 23 June will be for UK nationals to keep or lose their EU citizenship. This is fact rather than speculation. In a campaign which has been criticised for not bringing out the facts, the fact of the loss of EU citizenship has been entirely overlooked. In the first half of this article we have offered some possible explanations for this omission, which to historians in the future may well appear puzzling. In the second half of the article we have concentrated on the direct impact of the outcome of the referendum on those in the UK or from the UK relying on their European rights, drawing attention in particular to the long periods of uncertainty involved. In reality however the decision has implications for the whole population of the EU and not only those five million relying on their European rights. BREXIT would be a strong signal to populist and xenophobic political parties to campaign for a general return to national frontiers in Europe, a threat which is already apparent as a result of divergent reactions to the crises of asylum and migration. It would also become more difficult to campaign for a stronger European citizenship with more appeal to counteract such pressures, if this becomes a status from which a significant part of the European population withdraws even if the majority may have been unaware of this consequence.

European citizenship not only provides for individual rights – it is also the framework for European action not just from the top down but also from the bottom up. To an increasing extent, citizenship is seen as more than just a set of formal individual rights; it is also about people coming together to act in civil society. This creates a grass roots Europe, which could be called sociological Europe and which can be quite different from political Europe. This distinction is particularly relevant in the case of the UK. The Government stresses the “best

of both worlds” being inside the EU but with safeguards against adopting the Euro, Schengen, aspects of security and justice, the application of the Charter of fundamental rights and with the February settlement, the additional exemption from the aim of “ever closer Union”. This “special status in a reformed EU” puts the Government in a semi-detached position in its relations with the EU. The EU is not however just about the “Brussels” Institutions and intergovernmental negotiations, but also European networking. The official EU provides the background for citizens, associations of business or the third sector, interest groups and stakeholders to become involved. They may do so as advocates for a particular cause in relation to the EU, or to run European networks to exchange experience, share best practice or campaign for change. Like EU citizenship this other Europe has not made its presence felt in the campaign for the referendum.

British citizens, regardless of their attitudes to the EU, are often the most active petitioners and defenders of their European rights. In acts of transnational citizenship, the UK participants, far from being semi-detached like the Government, often play leadership roles through having the lingua franca, organisational skills, a strong voluntary sector, more deeply rooted democratic practices and a leading role in several areas such as research. For example, the former Mayor of London may be campaigning for BREXIT whilst London itself, as the most cosmopolitan city in Europe is a birth place of such initiatives as BEUC the European consumer lobby, the European Public Health Alliance, Culture Action Europe or more recently European Alternatives and New Europeans. Taking just the non-profit charitable sector where I used to work as founder of European Citizen Action Service, I would rate the UK contribution as second to none. This is surprising given the fact that the general culture in the UK is less enthusiastic about Europe than on the “continent”. British civil society organisations have understood, however, that to be strong at home they need to be active in Europe and help build European associations and partners EU-wide and beyond. The UK has been a reference point for reformers in Central and Eastern Europe seeking to build their own civil society with the support of the EU in newly democratic and independent States. With BREXIT, there is no reason why people from the UK should not continue to be active in this cultural, civil and sociological Europe, but to be realistic it cannot exist entirely independently from political Europe. Being outside the EU would make

it more difficult to find support both at home and abroad for European initiatives. The UK would lose its leadership role in this other Europe, where its contribution is often seen as making up in some way for a lack of real engagement by successive governments. And there would be a real loss to the rest of Europe.