

Could EU citizens living in the UK claim 'acquired rights' if there is a full Brexit?

11/04/2016

Immigration analysis: In the event of a Brexit, what are the rights of EU citizens resident in the UK? Tim Eicke QC, barrister at Essex Court Chambers, looks at the withdrawal provision in the Treaty on European Union and how/whether 'acquired' or 'vested' rights principles in international law may come into play. He believes there is little doubt that the UK and the EU will seek to negotiate specific provisions, whether transitional or as part of the 'future relationship' between the UK and the EU, to address the situation of EU citizens resident in the UK and of UK citizens resident in the EU.

Does the Treaty on European Union (TEU) specifically include transitional provision for nationals of other Member States who are exercising right of residence in a host state when it leaves the EU and would the position be different for those who have acquired permanent residence?

As a matter of EU law, the consequences of a decision by the UK to withdraw from the EU are identified in Art 50 TEU. In so far as relevant to this question, Art 50 TEU makes clear that, as a matter of EU law:

- the provisions of the EU treaties (and the secondary legislation adopted thereunder, such as Directive 2004/58/EC (the Citizens Directive)) do not cease to apply immediately (whether as of the date of the announcement of the result of the referendum or the date of the mandatory notification by the UK of its intention to withdraw)
- the relevant EU law only ceases to apply once the withdrawal agreement enters into force or, absent that, two years after the UK has notified the EU of its intention to withdraw (even though this deadline can be extended by unanimous agreement between the UK and all the Member States of the EU)

Art 50 TEU does not, however, expressly provide for or anticipate any transitional provisions, whether generally or specifically in relation to the position of EU citizens resident in the UK (or UK nationals resident in the EU). Any such transitional provisions would have to be (and would most likely be) the subject of any withdrawal agreement, assuming that such an agreement can be negotiated prior to the expiry of the two-year deadline (or any extended deadline).

The situation under English law is, of course, further subject to the continued operation (at least during the Art 50 TEU negotiations) of the European Communities Act 1972. In the (highly) unlikely event that that Act (and relevant secondary legislation, such as the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (the EEA Regulations)) were to be repealed prior to the conclusion of a withdrawal agreement, affected individuals would find themselves in the unusual (and probably uncomfortable) position that, despite the fact that, as a matter of EU law, they continue to enjoy a right of residence, those rights would be difficult (if not impossible) to enforce in or through the English courts.

One can, of course, only speculate what the position of EU citizens in the UK (or UK citizens in the EU) would be under the withdrawal agreement. However, absent any transitional provisions, it is not obvious how the immigration status of EU citizens in the UK would or could be 'converted' into one or other currently existing categories for the grant of leave to enter or remain (for any extended period), whether to (continue to) pursue economic activity in the UK or otherwise. Considering the current rhetoric of those advocating withdrawal from the EU based on or around the need to control (and reduce) immigration, including from (at least some Member States of) the EU, the negotiations about transitional provisions and/or the creation of domestic provisions for the 'transfer' of those currently exercising EU free movement rights into one or other category under the Immigration Rules may well themselves be not without difficulties.

In principle, these difficulties would be no different whether the relevant EU citizen is currently exercising a (renewable but temporary) right of residence under EU law or whether, having resided here for the required continuous period of five years, they qualify for permanent residence under the Citizens Directive (as implemented through the EEA Regulations). After all, both exercise a status which is derived wholly from EU law given effect in the UK merely as a result of the duty to transpose the relevant EU Directive. The one potential exception to this may be (and it is not possible to put this higher than a definite 'may be') for those who have been in the UK long enough to have had their 'residence permit or residence

document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely' under the old paragraph 255 of the Immigration Rules (repealed with effect from 30 April 2006). After all, arguably, individuals in that position had been accorded a status under the Immigration Rules not (at the time) required by EU law and may, therefore, be treated as having been granted (and retained) 'indefinite leave to remain', as provided for under the Immigration Rules.

It has been suggested that '[p]eople who had a right to permanent residence in other EU countries could probably keep it, as this right is derived from the European Convention on Human Rights' (see Jean-Claude Piris 'If the UK votes to leave—The seven alternatives to EU membership', Centre for European Reform, Jan 2016, pg 12). It is not clear what the legal basis for that assertion is. After all, (with perhaps the one exception noted above) the residence status of the individual EU citizen is plainly derived from EU law, whether it is article 21 of the Treaty on the Functioning of the European Union (TFEU) or the Citizens Directive (as implemented in the UK).

With the one possible exception identified above, that legal basis for their residence would cease to apply once the UK has withdrawn from the EU (subject to any withdrawal agreement). The European Convention on Human Rights (ECHR) does not per se grant, or provide for a positive obligation to grant, any particular immigration status. At best, the ECHR may provide a basis (most likely under the right to respect for private and family life under ECHR, art 8) on which an EU citizen resident in the UK could seek to rely in order to resist removal from the UK.

Would an EU national exercising a right of residence in the UK at the time of a Brexit have any vested/acquired rights of residence under international law, eg art 70 of the Vienna Convention on the Law of Treaties (the Vienna Convention)?

It is difficult to see what basis the individuals concerned could have in public international law to assert any 'vested' or 'acquired' rights.

Understandably, reference is frequently made to Vienna Convention, art 70—which is probably reflective of customary international law in any event—which provides that termination of a treaty (which is likely to include the withdrawal of the UK from the TEU/TFEU thereby terminating that agreement at least as between the UK and the remaining 27 Member States):

- 'releases the parties from any obligation further to perform the treaty' (here the UK and the 27 member states of the EU)
- 'does not affect any right, obligation or legal situation of the parties created though the execution of the treaty prior to its termination'

These consequences are, however, prefaced by the words 'unless the treaty otherwise provides or the parties otherwise agree'. There is, therefore, a real risk that Vienna Convention, art 70 would not, in fact, apply on the basis either that:

- the withdrawal agreement would 'otherwise' provide and, therefore, override the general rule laid down by Vienna Convention, art 70, or
- in absence of a withdrawal agreement, Art 50 TEU, in fact, would be held to 'otherwise' provide and, therefore, lead to a cessation of all rights and obligations under the treaties on expiry of the deadline provided for (two years unless extended)

However, even if Vienna Convention, art 70 were to apply, it is plainly:

- operative on the international law plane only (and it is, therefore, unclear on what basis it could be enforced through the English courts), and
- addressed at the position of the 'parties' to the terminated treaty—ie the states which are parties to the EU treaties (and perhaps the EU itself)

It is not, in fact, concerned with the position of individuals and their rights at all and, in so far as an EU citizen resident in the UK would seek to rely on Vienna Convention, art 70, that would have to be on the basis that denial of a right of residence in the UK (by way of example) would be contrary to a 'right, obligation or legal situation' of her home Member State (rather than herself).

Furthermore, in particular where the rights of citizens under EU law are primarily an aspect of the 'internal market', the two provisions identified above are clearly in tension. If withdrawal, under Vienna Convention, art 70, releases the UK from its obligations under the EU treaties (as Art 50 TEU also clearly envisages), it is difficult to see how it cannot affect the individual's right (and the UK's obligation to permit her) to continue to reside (and work) in the UK. After all, it is the express purpose of those seeking withdrawal from the EU that the UK will be able to control itself (without being subject to the obligations arising under the EU Treaties) who enters and resides in the UK.

That said, while there may be very real difficulties in establishing a legal basis (and even less an enforceable right) for continuing and/or future enjoyment of any right to reside (and/or work) in the UK (or at least to reside in the UK as a matter of right rather than discretion), international law and/or the ECHR (at the very least on the international plane and, in relation to the ECHR, at least as long as it remains part of English law) are almost certain to protect certain rights established in the past by virtue of the individual's presence in the UK. By way of example, the ECHR should protect EU citizens (just like any other 'person' present in the UK) from deprivation of any property which they acquired while resident here under EU law, or removal from the UK where that would be in breach of the right to respect for private and/or family life under ECHR, art 8.

Finally, in this context, it might worth noting that perhaps the most significant basis for the 'rights' EU citizens enjoy in the UK (and vice versa), which will almost inevitably be lost unless specifically provided for in the withdrawal agreement, is the prohibition (subject to only very limited exceptions) of discrimination between British citizens and EU citizens.

Even the European Court of Human Rights has accepted that the special legal order created by EU law currently makes it permissible under the ECHR for EU citizens to be treated more favourably to other 'foreigners', ie third country nationals. Once the UK has withdrawn from the EU, it may become more difficult to justify under ECHR, art 14 (absent perhaps the withdrawal agreement) treating one category of foreigners (ie EU citizens) differently from others.

Could any UK domestic law principles apply, for example, legitimate expectation?

In light of the fundamental change of circumstances which would be brought about by the UK's withdrawal from the EU, both political as well as in the legal position of EU citizens in the UK (or UK citizens in the EU) it is difficult to see—other than by reference to the Human Rights Act 1998—how any principle of domestic law would protect EU citizens resident in the UK from the impact of that change in legal position (in particular if reflected in changes in domestic primary/secondary legislation). Furthermore, there would have to be or to have been a sufficiently clear and unequivocal representation as to the future status of EU citizens post-withdrawal by (one assumes) the government to give rise to an enforceable substantive legitimate expectation and, as far as I am aware, no such statement has so far been made (or, one would assume, is likely to be made). Finally, of course, ultimately any such expectation is capable of being overridden by whatever legislation Parliament decides to adopt in order to give effect to the withdrawal.

What do you think would happen in practice in the event of a Brexit, eg agreement for transitional provisions?

Ultimately, there appears to me to be little doubt that the UK and the EU will seek to negotiate specific provisions (whether transitional or as part of the 'future relationship' between the UK and the EU) to address the situation of EU citizens resident in the UK and of UK citizens resident in the EU. As has frequently been pointed out, when Greenland (a Danish dependent territory) 'left' the EU in 1985, the EU Commission stressed the importance of both transitional provisions and the protection of 'vested' rights, however defined.

As a result, the real question will more likely be whether, in light of the express aims of those who advocate withdrawal from the EU, it will be possible to agree terms of a withdrawal agreement which:

- satisfy both sides of the negotiation, and
- still provide the fullest possible protection of those citizens resident within the jurisdiction of the other negotiating party.

In considering this issue it is important to bear in mind that any withdrawal agreement, in order to be accepted, has to be signed and ratified not only by the UK but also the EU acting through the Council (acting by a qualified majority, not of course, counting the UK). In turn, the Council can only sign and ratify the withdrawal agreement once it has obtained the

'consent' of the European Parliament (this is on the assumption that any withdrawal agreement would not be classified as a 'mixed' agreement which would also require ratification under the constitutional procedures of each of the remaining 27 Member States). There are, therefore, a significant number of political actors whose interests will need to be taken into account in negotiating any withdrawal agreement.

In any event, it is virtually inevitable that any such negotiations would have to be conducted on the basis of an expectation of reciprocity. The effect of this would be that any benefit the UK might seek for its estimated two million citizens living (and working) in the EU—eg to secure their continued right to work, reside and/or acquire property in other EU states, and to access public services such as medical treatment in those states—it would have to be willing to extend to EU citizens. Importantly, negotiations are conducted on behalf of the EU and not by the 27 individual Member States, without being able to distinguish between the citizens of different EU Member States).

The government, in its white paper 'The process for withdrawing from the European Union', identified the following prominent examples of areas as being of interest to UK citizens living in the EU so as to have to form the subject of negotiations in the context of agreeing a withdrawal agreement, whether by way of transitional provisions or a permanent new 'future relationship' between the EU and the UK:

- 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
- the right to use public services in other EU countries

As identified above, it has to be assumed, that in order to obtain or retain any one of these rights or benefits the UK would also be required to extend them—on the basis of reciprocity—to the citizens of the (then) 27 EU Member States. Whether and/or to what extent the UK would be willing to do so is, of course, ultimately a political judgment.

Tim Eicke QC is recognised as one of the leading advocates in Public and Constitutional Law, European Union Law, International Human Rights Law and Public International Law. He has particular expertise in cases involving the inter-relationship between two or more of these (at times competing) areas of law. Tim has appeared in more than 20 reported cases in the UK Supreme Court and is also admitted to appear in the Singapore International Commercial Court. Until his appointment as QC, Tim was a member of the Attorney General's A-Panel of counsel and he continues to be instructed by the UK Government in complex and difficult cases.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



CLICK HERE FOR
A FREE TRIAL OF
LEXIS®PSL

About LexisNexis | Terms & Conditions | Privacy & Cookies Policy
Copyright © 2015 LexisNexis. All rights reserved.