

There has been a good deal of talk around Brexit about EU citizens - and others - coming to UK. But of course British citizens also exercise their rights of free movement and establishment elsewhere in the Union - though the tabloid press generally don't report on British 'migrants' in quite the same tone.

The most up to date and comprehensive estimates of the number of British migrants living in other EU countries is published in the United Nations Global Migration Database. According to the latest available survey, in **2015** there were around **1.2 million** British citizens living in other EU countries, compared with around **3.2 million** EU migrants living in the UK. By far and away the majority of those 'Brits abroad' live in Spain, Ireland and France - which together account for almost 750,000 British expats - with another 170,000 split between Germany & Italy. The numbers living in each of the other member states are significantly smaller.

In this talk, I am going to look at four areas relevant to the lives of British citizens living elsewhere in the EU: residence, work, healthcare, and social security.

Residence

At the moment, of course, UK citizens are also citizens of the Union, and certain free movement and residence rights expressly follow from that.¹ Those rights are also underpinned by the principle of non-discrimination on grounds of nationality.² When the UK leaves the Union, both of those premises will no longer apply. At one level, the issues which arise for the EU citizens in the UK which Mungo Bovey will be speaking about in terms of the imposition of visa requirements, will almost certainly arise for UK citizens too.

From some press reports, it is possible that there will be some sort of visa-lite process for British citizens travelling to the EU for short periods along similar lines to the American ESTA scheme. On one view, that would be justified by existing EU legislation setting out those states whose nationals require a visa for a visit of less than 3 months,³ and it is also conceivable that a tighter regime for everyone might be set up under the guise of security concerns.

¹ Art 20 TFEU

² Art 18

³ Council Reg (EC) 539/2001

After Brexit, one thing which is certain on this point is that British citizens will not be able to invoke the principle of non-discrimination on the ground of nationality which is a fundamental principle of EU law, but a principle applicable as between nationals of member states. For longer term residence, it is possible that there may be more exacting rules for UK citizens residing in the EU. That, after all, would reciprocate what some in the Brexit camp would like to happen to EU citizens coming here. Reciprocity, you see, cuts both ways.

There are a couple of further points about this: would such requirements be retrospective, and would there be a uniform rule in all member states?

In my view, this is likely to be an issue in the Brexit negotiations, once those finally get under way. That is, I think, confirmed by the recent flurry caused by a letter from the President of the Council, Donald Tusk, saying that he wishes to avoid citizens of the UK and of other states becoming 'bargaining chips', and that a precise and comprehensive solution is needed as part of the negotiation. Somehow by PMQs the next day, that had become a justification for not addressing the status of EU citizens already established in the UK.

So what of retrospectivity and uniform rules? At the moment, the position for British expats is that same as for other EU nationals - they are entitled to live in other member states for longer than 3 months on certain conditions - mostly about being able to support themselves financially.⁴ Like other EU nationals, UK citizens are entitled to permanent residence after 5 years.⁵

I anticipate that for UK citizens who have already met those criteria - particularly for permanent residence - will retain those rights. That I think follows from the notion of vested rights, which has been something of a feature in the UKSC this week. That notion is likely to be protected in EU law - amongst the fundamental principles of law applicable where EU law is engaged are legitimate expectation and non-retrospectivity.⁶

For the future, I would expect that this is something which will feature in the either the Exit Agreement or the Future Relationship Agreement. I think the starting point will be an effort to have a uniform approach from continuing EU members in relation to UK expat citizens because there is a long-standing common area of freedom security and justice, which includes migration. That is the basis for a number of existing legislative acts about migration

⁴ Directive 2004/38/EC, art 7

⁵ Directive 2004/38/EC art 16

⁶ See further *Dileonardo* [2004] ECR I-6911 and *Kirk* [1984] ECR 2689.

and third country nationals. It is also plainly true that this is under strain at the moment because of the reaction to mass population flows from troubled areas in the Middle East and Mediterranean, and resulting unilateral action by some member states which has not always been consistent with their EU law obligations. After Brexit, of course, UK citizens will not be able to rely on rights attached to EU citizenship and may conceivably be affected by rules introduced by individual member states.

Working in the EU

The statistics do not have a breakdown of how many British expats are working in other EU states. Those people are currently exercising their rights of free movement as workers or their rights of establishment as business people. Those rights will come to an end with Brexit - which is not to say that their employment will come to an end, rather, unless there is a specific agreement as part of the Exit Agreement or the Future Relationship Agreement, British workers will fall to be treated in the same way as other third country nationals.

There are already EU law rules about this in Directive 2011/98/EU. That sets out a single application procedure for issuing residence & work permits, and a common set of rights for third country workers lawfully residing in member states. Those do not apply to third country nationals who are family members of EU citizens, who are instead subject to the more generous rules in the citizenship Directive.

In terms of the Third Country Nationals Directive, there is a right to enter and reside in the MS issuing the permit - so not a free pass to the whole Union - and a right to exercise the specific employment activity authorised by the permit. Once the third country national has a permit, he or she is entitled to equal treatment in terms of working conditions and certain work-related social security entitlements. So there is a level of protection, but significantly less generous and with significantly more bureaucracy than present situation for UK citizens.

Healthcare & Social Security

Thinking further about the UN survey of British expats' countries of residence brings a couple of further points into focus. The House of Commons research note has no information about the proportion of Britons who are working in other EU member states; however, looking at the states with the largest expat British population, it does seem likely that at least in Spain and France, a significant proportion may be retired or semi-retired. That would fit with the anecdotal picture too.

I suggest there are two significant issues for that group, and for expats generally: access to healthcare, and social security, including pensions.

Healthcare & social welfare

There is provision about this in Arts 34 & 35 of the EU Charter. *Everyone* residing & moving legally in EU has entitlement to social security in accordance with EU & national legislation (emphasis added). *Everyone* has right of access to preventive healthcare and medical treatment in accordance with national law (emphasis added). Reflecting the underlying obligation, The UK has 'reciprocal' healthcare arrangements with all countries in the European Economic Area (EEA). This means that UK citizens get free or reduced cost medical treatment, subject to having been issued with a European Health Insurance Card - the old E111 form. There is no reason why such arrangements should not continue, but they would require to be the subject of further negotiation.

At present, the UK has social security agreements with some countries that allow UK citizens to claim UK contribution-based benefits while living overseas, and which allow National Insurance contributions to count towards eligibility for the host country's social security benefits. Reg EC 883/2004 provides a complex scheme for coordinating social security systems, but importantly it is not a harmonisation measure. That means it provides for equal treatment, but not equalisation of outcomes. Those benefits covered (the most important of which relate to sickness, unemployment, and old age protections) are extended to Third Country Nationals by Dirv EU 2011/98. It seems to me that will be the starting point for UK citizens post Brexit.

Pensions

It is currently possible to claim UK State Pension abroad if you've paid enough UK National Insurance contributions to qualify. That is not confined to folk living in the EU - or the wider EEA. So that is unlikely to change.

A real practical problem for retired people is that someone's State Pension will only increase each year if they live in the EEA, Switzerland, or countries that have a bilateral social security agreement with the UK. There are around 16 countries where the pension increases every year as it does in the UK, and there are a larger number where it does not (including Australia, Canada and New Zealand).

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Drawing all of that together. Residence rights of existing UK expats, certainly those who have passed the threshold for permanent residence, are likely to continue on some sort of basis reflecting vested rights. However, future migration from the UK will not be on as straightforward terms. Access to healthcare and social security will be the subject of negotiation, and is likely to be affected by the UK's stance towards EU citizens here. Reciprocity cuts both ways.

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