European Parliament

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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Renegotiation by the United Kingdom of its constitutional relationship with the European Union: Issues related to "Immigration"

In-depth Analysis for the AFCO committee

EN

2016

DIRECTORATE GENERAL FOR INTERNAL POLICIES

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CONSTITUTIONAL AFFAIRS

Renegotiation by the United Kingdom of its constitutional relationship with the European Union: Issues related to "Immigration"

IN-DEPTH ANALYSIS

Abstract

This analysis examines the provisions of the agreement between the UK and other Member States on the renegotiation of the UK's membership of the EU which relate to the free movement of EU citizens. It examines in turn: the overall legal framework of the renegotiation deal as regards free movement; the issues relating to the 'emergency brake' on in-work benefits; the issues relating to export of child benefits; the issues relating to third-country national family members of EU citizens; and other issues relating to the free movement of persons arising from the renegotiation deal.

PE 556.974 EN

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and commissioned, supervised and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed on June, 2016

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
EEC	European Economic Community
EP	European Parliament
EU	European Union
UK	United Kingdom

EXECUTIVE SUMMARY

Background

This study examines the free movement of persons provisions of the renegotiation agreement reached between the UK and other EU Member States.

Aim

- To outline the main changes that the plans would make to EU law;
- To examine the detailed issues that will arise drafting and applying legislation to give effect to the plans;
- To suggest approaches that the European Parliament may wish to consider when exercising its legislative role as regards these proposals.

OVERVIEW

KEY FINDINGS

- The renegotiation deal raises key questions for EU free movement law, particularly as regards benefits and non-EU family members.
- The European Parliament will have a key role to play as regards the planned legislation, in particular as regards the details of its application and ensuring that the new rules on family members are focussed on those who seek to enter and stay illegally.

This analysis examines the provisions of the agreement between the UK and other Member States on the renegotiation of the UK's membership of the EU which relate to the free movement of EU citizens. It examines in turn:
The overall legal framework of the renegotiation deal as regards free movement (chapter 1);
The issues relating to the 'emergency brake' on in-work benefits (chapter 2);
The issues relating to export of child benefits (chapter 3);
The issues relating to third-country national family members of EU citizens (chapter 4); and
Other issues relating to the free movement of persons arising from the renegotiation deal (chapter 5).

1. LEGAL FRAMEWORK

The renegotiation deal comprises a number of connected legal texts. The provisions relevant to free movement mainly appear in Section D of the main text of the deal, which takes the form of a **Decision** of the EU Member States' Heads of State and Government (the 'Decision'). Furthermore, three of the four **Declarations** by the Commission are relevant to the issue.

While Section D contains some important attempts to clarify EU free movement law, the key feature of the deal on free movement is the intention to propose **amendments** to the three main current EU laws. These three laws are:

(a) the EU **citizens' Directive,** which sets out the main rules on most EU citizens moving to other Member States:

(b) the EU **Regulation** on free movement of workers, which contains some specific rules on workers who move; and

(c) the Regulation on social security, which sets out rules on coordination and equal treatment in social security for those who move between Member States.

All three sets of amendments are to be proposed by the Commission as soon as the main Decision enters into force. That will happen (see Section E of the Decision) as soon as the UK announces that it will remain a member of the EU – if, of course, the UK public vote to remain in the upcoming referendum.

The deal includes (in Section D.2) a commitment from the Commission to make these proposals, and from the other Member States to support their adoption in the EU Council. However, the latter commitment does not apply to the planned amendment to the citizens' Directive, since that proposal is not referred to in the main Decision.

However, all three proposals will be subject to the 'ordinary legislative procedure', meaning that they have to be agreed with the European Parliament (EP). The EP is not a party to the Decision.

2. 'EMERGENCY BRAKE' ON IN-WORK BENEFITS

KEY FINDINGS

- The planned emergency brake raises many complex issues of implementation.
- Unless it is redrafted so that it is is not directly discriminatory, it is hard to justify in light of the Treaties. Even an indirectly discriminatory measure might be successfully challenged.

The deal provides not for permanent discrimination on this issue, but temporary discrimination on the basis of an 'emergency brake'. The Commission will propose legislation on this issue, which will provide that the UK (or other Member States) can apply a four-year ban on in-work benefits, subject to substantive and procedural criteria.

Procedurally, the rules will say that a Member State will apply to the Council to authorise the ban. The Council will presumably act by the default voting rule in the Treaties: a qualified majority on a proposal from the Commission. That means no single Member State can veto the request to pull the brake.

The final deal leaves vague the exact authorisation process which will apply in the Council; but that detail will have to be addressed sooner or later. This point will be of particular interest to the European Parliament. Certainly the European Parliament will have to approve the EU legislation which sets up that process in the first place; the question will be whether it would have a role deciding if the brake should be pulled.

A Commission declaration states the UK qualifies to pull this ban immediately, in particular because it did not apply transitional controls to workers from new Member States in 2004. However, there is nothing in the renegotiation deal to suggest that *Member States* – who would have the final word – also agree with this view.

The restrictions would only to those who were 'newly arriving for a period of seven years', and would have to be phased out during that time. Again, the seven years matches the transitional period which the UK *could* have applied to control the numbers of workers from new Member States, back in 2004.
Several points of detail arise. First of all, after the seven years have expired, it is not clear how much time would then have to pass before the brake could be applied again. This issue ought to be addressed specifically in the legislation.
Secondly, it will be necessary to clarify the meaning of those who are 'newly arriving'. What about those who lived in the UK before, and are now returning to that country? How much time would they have had to spend in Poland (say) before they are considered 'newly arriving' again? Again, the legislation should expressly address this issue. It could, for instance, simply refer to the 'continuity of residence' rule that already appears in Article 16(3) of the citizens' Directive.

Presumably the brake would *not* apply to those who are *already in the UK* when the brake is pulled, but are not working at that time, due to youth, unemployment, maternity or illness. This is because the word 'arriving' suggests entry into the country, not into the workforce.

Thirdly, it will be necessary to define how to calculate the four year period. It should be relatively easy to apply it to those who begin work as soon as they (newly) arrive in the country, and who work for the full four years afterward. But what about those (a non-working spouse, or a teenager, for instance) who start work some time after they enter the country? What about those who start work, stop for whatever reason and then restart? What about those who start work during the brake period, then spend a year or so in Poland, then come back? And how can the UK determine when exactly someone entered the country in the first place? (The last point is really a matter for the UK to implement, not EU law. Presumably it cannot entail collecting additional details on EU citizens at the border, since that could conflict with EU free movement law).

The EU legislation should address these issues, providing for precise rules as much as possible on when to start and stop the clock, and when the clock keeps ticking.

The final crucial point of detail is, obviously, the grounds on which the brake can be applied. According to the Decision, it would apply where:

an exceptional situation exists on a scale that affects essential aspects of [a Member State's] social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services.

The question arises whether these provisions could be further clarified, and of course whether the UK actually meets those criteria. As noted already, the Commission declared that the UK meets the criteria, although the Council would have to concur with that assessment.

Would the emergency brake law be legal? The CJEU recently accepted a 'public finances' ground for justification of indirect discrimination, in its judgment in Case C-308/14 *Commission v UK*. In its ruling the Court stated that such a justification could apply 'in particular' to persons carrying out non-economic activities. The implication is that it could potentially apply to those carrying out economic activities as well. However, the wording of the renegotiation Decision suggests that the measure in question will be directly discriminatory. This will be a challenge to defend under the Treaties, on the basis of existing case law.

In the alternative, if the measure is drafted so that it only amounts to indirect discrimination (ie it also limits access to benefits by UK nationals who have been out of the country), it may be possible to justify on fiscal grounds, in line with recent case law. The argument would be that it satisfied the principle of proportionality because it did not apply for more than four years to each individual, would be phased out after a limited period, and would not completely exclude access to in-work benefits during that time, but gradually increase access to them. It could be argued that this is consistent with the phased approach to acquisition of permanent resident status and also to the retention of 'worker' status – which was accepted by the Court of Justice in the *Alimanovic* judgment.

3. EXPORT OF CHILD BENEFIT

KEY FINDINGS

- The restriction of child benefit exports to link it to the conditions in the country where the child resides raises important questions of detailed implementation.
- In light of the case law, this change is potentially vulnerable to legal challenges.

The renegotiation deal (section D.2.a) states that the Commission will propose an amendment to the social security coordination Regulation to specify that where child benefit is exported to a Member State other than the State where the worker resides, there will be an option to index that child benefit by reference to the 'conditions' in the receiving State. The Decision notes that:

The Commission does not intend to propose that the future system of optional indexation of child benefits be extended to other types of exportable benefits, such as old-age pensions.

The meaning of the reference to the 'conditions' in the child's Member State of residence is not further defined in the Decision. However, the relevant Commission declaration (Annex V to the main Decision) states that the 'conditions' refers to the 'standard of living and level of child benefits' in the child's State of residence. Presumably both of these elements will be taken into account, although it is not clear how.

There is nothing to limit the application of the new rules to the UK, although the following analysis refers to the UK only to simplify the discussion.

Logically the differential rates of exported child benefit will have to be adjusted as the relevant factors (ie standard of living and child benefit levels) change in the child's State of residence. It is not clear whether other factors (currency fluctuation) might also be relevant. Presumably the reference to the 'level' of benefits includes all of the criteria that go into assessing the amount of benefit received, such as means-testing and changes to the rates based on the number of children.

There is nothing to exclude the possibility that the use of the option would mean, in some cases, that a *higher* rate of child benefit than the rate normally applicable in the host Member State might have to be provided, if the calculation standard of living and level of child benefits in the child's State of residence leads to this result.

This new rule will only apply to 'new claims made by EU workers in the host Member State'; but after 1 January 2020, this 'may' be extended to 'existing claims already exported by EU workers'. Presumably the new law will state a precise date at which claims can be regarded as 'existing' (say 1 January 2017). Because the definition of 'existing claims' refers to those benefits which are 'already exported', it must follow that a 'new' claim refers to a claim to *export* a benefit for the first time.

So if a child moves to Poland after 1 January 2017, or is born after that date and resides in Poland, then child benefits could be reduced, even if the *worker* is already in the UK. If a family includes one child in the UK and one child in Poland, then presumably the child benefit will be paid at different rates for each child (if the claim for the child in Poland is

new). Equally if there are two children in Poland – one the subject of an existing claim, and one the subject of a new claim – presumably the benefit will be exported at different rates.

The Decision explicitly states that the new rules will be optional, so Member States can still be more generous and continue to export the full rate of the regular child benefit if they want to, without making any adjustments where the child lives in another Member State.

The wording of the Decision implicitly does not distinguish by nationality, but by residence. Therefore the new rules will also apply to *British* citizens who have children in other Member States.

Would the new rules violate the Treaty provision banning discrimination against EU citizens and/or workers based on nationality? First of all, as already noted, they would appear to constitute *indirect* discrimination on grounds of nationality. They would not amount to direct discrimination on grounds of nationality if, as the wording of the Decision implies, they will also apply in the same way to British citizens who have children in other Member States. But they would be indirectly discriminatory, since (for instance) Polish workers in the UK are more likely to have children in Poland than British workers are.

The most relevant case law from the Court of Justice is the older case of *Pinna* and the more recent judgment in Case C-308/14 *Commission v UK*. *Pinna* concerned an option for France only, set out in the EEC legislation, to export family allowance for children in another Member State only at the rate of allowances paid in that Member State. The CJEU ruled that this was a violation of the objective of uniform treatment, and was indirectly discriminatory. Therefore it could not be based on the Treaty rules relating to the free movement of workers and social security coordination.

However, the Court did not consider the possibility of justification for indirect discrimination. In the recent *Commission v UK* judgment, this was a key issue. The case concerns the UK's 'right to reside' test which applies to child benefits and child tax credits, and excludes those who are not economically active from those benefits. According to the Court, this test could validly be made a condition of access to such benefits under national law. Indirect discrimination existed, but it could be justified on grounds of protecting public finance, 'in particular' as regards persons who are not economically active. The UK could therefore refuse these benefits to people who did not have a right to residence on the basis of the citizens' Directive (because they were not employed, self-employed or self-sufficient), as long as the checks on their legal status were proportionate.

While the *Pinna* judgment suggests that it may be difficult to justify the denial of child benefit export at the home State's rate under the Treaties, that case concerned a rule specific to one Member State. The Court might be more willing to accept a *general* option to apply such rules, as set out in the renegotiation deal.

Additionally, the later *Commission v UK* judgment suggests that fiscal issues can be invoked to justify indirect discrimination on grounds of nationality, subject to the principle of proportionality. This principle was not limited to those who are economically active ('in particular'). So it could be argued that this can equally be a justification for the new rule, with the principle of proportionality satisfied because the rules will not apply to existing claims for several years and will not completely ban the export of child benefit.

4. EU CITIZENS' FAMILY MEMBERS

KEY FINDINGS

- These provisions of the renegotiation deal have two parts: a change in the law regarding non-EU family members in another Member State, and new guidance on those who return to their own Member State with non-EU family members.
- The former changes raise complex and important issues and many detailed issues need to be addressed by the legislation, including transitional issues. As drafted, the suggested amendments go well beyond the objective of combating those who seek to enter the country irregularly with no genuine family motivation.
- The planned guidance raises questions of compatibility with the Treaties as well as coordination with the legislative changes.

Under the EU citizens' Directive, currently EU citizens can bring with them to another Member State their spouse or partner, the children of both (or either) who are under 21 or dependent, and the dependent parents of either. This applies regardless of whether the family members are EU citizens or not. No further conditions are possible, besides the prospect of a refusal of entry (or subsequent expulsion) on grounds of public policy, public security or public health (on which, see below).

In principle EU law does not apply to UK citizens who wish to bring non-EU family members to the UK, so the UK is free to put in place restrictive rules in those cases (which it has done, as regards income requirements and language rules). However, the CJEU has ruled that UK citizens can move to another Member State (the 'host Member State') and be joined by non-EU family members there, under the more generous rules in the EU legislation. Then they can move *back* to the UK (the 'home Member State') with their family members, now invoking the free movement rights in the *Treaties*.

This is known in practice (in the UK) as the 'Surinder Singh route', because of the name of the case which first established this principle. In 2014 (in Case C-456/12 *O and B*), the CJEU clarified two points about this scenario: (a) it was necessary to spend at least three months in the host Member State exercising EU law rights and residing with the family member, before coming back; and (b) the EU citizens' Directive applied *by analogy* to govern the situation of UK citizens who return with their family members.

The main Decision states that:

In accordance with Union law, Member States are able to take action to prevent abuse of rights or fraud, such as the presentation of forged documents, and address cases of contracting or maintaining of marriages of convenience with third country nationals for the purpose of making use of free movement as a route for regularising unlawful stay in a Member State or for bypassing national immigration rules applying to third country nationals.

The Commission Declaration then states that it will make a proposal to amend the citizens' Directive:

to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a

Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host Member State's immigration law will apply to the third country national.

That Declaration also states that the Commission will *clarify* that:

Member States can address specific cases of abuse of free movement rights by Union citizens returning to their Member State of nationality with a non-EU family member where residence in the host Member State has not been sufficiently genuine to create or strengthen family life and had the purpose of evading the application of national immigration rules'

Furthermore it will clarify that:

The concept of marriage of convenience - which is not protected under Union law – also covers a marriage which is maintained for the purpose of enjoying a right of residence by a family member who is not a national of a Member State.

It seems clear that these 'clarifications' will not be included in the legislative proposal, since the declaration later concludes (emphasis added):

These clarifications will be developed in a *Communication* providing *guidelines* on the application of Union law on the free movement of Union citizens.

The amendments to the citizens' Directive will exclude two separate categories of non-EU citizens from the scope of that Directive: those who did not have prior lawful residence in a Member State before marrying an EU citizen who has moved to another Member State; and those who marry such an EU citizen after he or she has moved to a Member State. For these people, national immigration law will apply.

The background to this proposal is CJEU case law. In 2003, in the judgment in *Akrich*, the CJEU ruled that Member States could insist that non-EU family members had previously been lawfully resident in the Member State concerned (previously no such rule appeared to exist). But in 2008, in *Metock*, the CJEU overturned this ruling and said that a prior legal residence requirement was not allowed.

Several points arise. First, the basic definition: what is lawful residence exactly? Presumably it means more than lawful *presence*, ie a stay of three months on the basis of a valid visa or visa waiver. There is nothing to suggest that it means permanent residence, or a likelihood of permanent residence (a concept appearing in the EU's family reunion Directive, which concerns non-EU families). If the drafters of the renegotiation deal had wanted to impose such a restriction, they would surely have done so expressly.

So the legislative amendment could include express language confirming that 'lawful residence' means simply any lawful stay of over three months in the relevant Member State. That three-month period would match the threshold for obtaining a right to residence (if the conditions are met) under the citizens' Directive, which was treated as a 'lawful residence' rule in the recent *Commission v UK* judgment.

But what about ambiguous cases, such as a pending asylum application or an appeal against the refusal of an asylum application? The second-phase asylum procedures Directive says that asylum-seekers can usually stay until the application fails (if it fails),

and then during the appeal (subject to significant exceptions). However, the UK and Ireland are not bound by the most recent Directive on this issue, and Denmark is not bound by either version of it. Moreover, the Commission has announced its intention to propose revisions to the Directive shortly.

The CJEU has therefore ruled that the EU's main rules on irregular migrants (the Returns Directive) therefore do not apply to asylum-seekers whose application is pending. Presumably they do not apply where an asylum appeal is pending either, except arguably where the suspensive effect of that appeal has been definitively refused. There is another complication here, though: the UK and Ireland are not covered by the Returns Directive either. However, the meaning of 'lawful residence' in the context of these planned amendments surely encompasses cases where EU law requires residence to be considered lawful in the Member State in question, even if a *different* Member State is not bound by that law as such. It would be useful to confirm this interpretation also in the future legislative amendment.

While the renegotiation Decision refers to excluding people who have got married after a EU citizen moved to a Member State *or* who lack prior lawful residence in a Member State from the scope of the citizens' Directive, this appears unduly broad. It would exclude, for instance, those who were lawfully resident in a non-EU state. This would hardly be an unusual situation when the very subject-matter of the rule is non-EU family members. If new the legislation instead applied only where *both* conditions are met, this would focus it more appropriately on those people who may be more likely to have breached immigration law. To ensure that it is even more precisely focussed on that group, it could be drafted to exclude those who have been subject to a return order or removal order from a Member State (which was not subsequently overturned or rescinded), ie those who have been found to be *unlawfully* resident.

Secondly, while the Decision refers to national law alone, EU law often governs the admission of non-EU nationals, in particular in Member States other than the UK, Ireland and Denmark (who have opted out of the EU's legislation on legal migration of non-EU citizens). This includes not only EU asylum law (as referred to above), but also EU legislation on admission of students and researchers and some categories of labour migrants (the highly-skilled, seasonal workers and intra-corporate transferees). All Member States are bound by the EU/Turkey association agreement, which places a standstill on the rules on admission of Turkish citizens and regulates their position if they have legally entered and reside legally. The revised legislation should make clear that 'lawful residence' includes any type of residence derived from either EU or national law.

On that point, it should not matter whether the initial ground of admission was for a different purpose than family reunion. So an Indian student who comes to Germany and marries a German citizen, or an American businesswoman who comes to Paris to work and then marries a French man, should be regarded as 'lawfully resident' even though they were initially admitted on other grounds. (This assumes that they complied with the relevant EU and national immigration laws on initial admission and subsequent family formation).

Thirdly, it's arguable that the EU principle of *non-discrimination* applies. That would mean, for instance, that if a German woman already in the UK married her American husband, the UK would have to treat her the same as a British woman in the same situation – but *no worse*. This would in fact be relevant to every Member State – there's nothing in this part of the deal that limits its application to the UK. (One important point of detail is whether

all Member States would be *obliged* to apply the new rules on 'prior lawful residence' and 'marriage after entry of the EU citizen', or whether they could choose to waive one or both of those rules. The EU citizens' Directive already states that Member States can apply more liberal standards if they wish to).

Fourth, the consequences of the rule will need to be clearer in the future legislative amendments. Does the exclusion from the scope of the Directive mean that the family member is excluded *forever* from the scope of the citizens' Directive – even if the person concerned is *admitted* pursuant to national immigration law? That would mean that national immigration law (or EU immigration legislation, in some cases) would continue to govern issues such as the family member's access to employment or benefits, or subsequent permanent residence. It's also not clear what happen to children such as the step-child of the EU citizen, or a child that was born to the EU and non-EU citizen couple while living in a third country.

There seems no reason to exclude people from the scope of the Directive if they comply with national immigration law on admission. A distinction between them and other non-EU family members of EU citizens would be hard to justify in principle.

To address this issue, it would be best to specify in the future legislation that a non-EU family member without prior lawful residence in a Member State, or who married an EU citizen after that citizen entered the host State, is excluded from the scope of the Directive unless that person can comply with the relevant national law of the host State. If they can, then logically the citizens' Directive ought to apply to them, and this should be made perfectly clear.

Finally, it will be necessary to include a transitional rule. At the very least, those who have already moved to the host State before the new law applies, or who have married an EU citizen in the host Member State before that date, should not have their status called into question on the basis of it.

Could this legislative amendment violate the EU Treaties? In its judgment in *Metock*, the Court referred almost entirely to the wording of the citizens' Directive when concluding that there was no 'prior lawful residence' rule for non-EU family members. It mainly referred to the Treaties when concluding that the EU had the *competence* to regulate the status of EU citizens' third-country national family members. But it also referred to the Treaty objective of creating an 'internal market', as well as the 'serious obstruct[ion]' to the exercise of freedoms guaranteed by the *Treaty*, if EU citizens could not lead a 'normal family life'. It must therefore be concluded that there is *some* possibility that the revised rules would be invalid for breach of EU free movement law. If, however, they are narrowly focussed on those who are likely to be in breach of immigration law, in the way suggested above, then that prospect is surely less likely.

Would the amendment violate the EU Charter right to family life? That's unlikely. While the right to family life is often invoked to prevent *expulsions* of family members, the case law of the European Court of Human Rights gives great leeway to Member States to refuse admission of family members, on the grounds that the family could always live 'elsewhere' – as the CJEU has itself acknowledged (*EP v Council*). There is some possibility, though, that the CJEU would be reluctant to follow that case law (*EP v Council* concerns families entirely consisting of non-EU nationals) in the context of free movement, because the concept that an EU citizen should just go to another country to enjoy your family life is antithetical to the logic of free movement.

As for the 'clarifications' in future guidelines, they will of course not be binding. They first of all refer to cases where an EU citizen has moved to another Member State and come back to the home State. The definition of what constitutes a 'sufficiently genuine' move to another country is set out in the *Surinder Singh* case law which is derived from the *Treaty* (three months' stay with a family member) and mere guidelines cannot overturn this.

This line of case law does not accept that such movement between Member States is an 'evasion' of national law – as long as free movement rights are genuinely exercised with a family member for a minimum time. The CJEU also usually assumes (see *Metock*, for instance) that a 'marriage of convenience' cannot apply to cases where there is a genuine relationship, even if an immigration advantage is gained. (The Commission has released guidelines already on the 'marriage of convenience' concept).

Having said that, the planned legislative changes will complicate the plans of people who wish to move to another Member State with their non-EU family and then move back. That is because national immigration law will now apply to their move to the *host* Member State, in accordance with the changes to be made to the citizens' Directive.

This brings us back to the transitional issues mentioned before. If an EU citizen has moved to a host Member State with a non-EU citizen family member before the legislative changes apply (ie without having to satisfy a 'prior lawful residence' rule), it is strongly arguable that any new change in national law on the basis of the Commission's 'guidance' cannot apply to them, even if that guidance is issued before the new EU legislation is adopted. So they cannot be required to obtain lawful residence in the host State for the non-EU family member before that non-EU family member can come to the home State.

Such a requirement should only apply to those who are subject to the new rules because they need to show prior lawful residence in a Member State or because they married an EU citizen after he or she moved to a Member State after the change to the EU legislation came into effect. At the very least any national law changes should exempt those who have already applied for entry on the basis of the old rules before the new rules come into effect.

5. OTHER ISSUES

KEY FINDINGS

- The provisions in the renegotiation deal on benefits for those who are not economically active confirm the recent case law of the CJEU.
- The provisions in the renegotiation deal on criminality of EU citizens consist of an intention to propose guidance on this issue that differs subtly from the current case-law, and very imprecise plans to change the threshold in future as regards added protection against expulsion.
- The provisions in the renegotiation deal on free movement and enlargement state the existing legal position, but give political impetus for a longer transitional period as regards free movement of persons in future accessions.

5.1. Benefits for those out of work

Point D.1.b of the renegotiation Decision states that:

The right of economically non active persons to reside in the host Member State depends under EU law on such persons having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and on those persons having comprehensive sickness insurance.

Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement solely in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence. Member States may reject claims for social assistance by EU citizens from other Member States who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search. This includes claims by EU citizens from other Member States for benefits whose predominant function is to cover the minimum subsistence costs, even if such benefits are also intended to facilitate access to the labour market of the host Member States.

There is no commitment to amend EU legislation in this respect. This is logical because the Decision essentially restates existing law. The first quoted paragraph essentially summarises Article 7 of the EU citizens' Directive, which defines the conditions under which EU citizens qualify for the right of residence after three months in a Member State. The second quoted paragraph essentially summarises the legal position as set out in the CJEU judgment in *Dano*: a person who is not economically active and who does not have sufficient resources does not qualify for the right of residence under the citizens' Directive, and therefore does not qualify for access to social assistance.

The third quoted paragraph summarises the position as set out by the CJEU's *Alimanovic* judgment (see also *Dano*, *Garcia Nieto* and *Commission v UK*). The right to labour-market related benefits for those who are looking for their first employment in the host State (or who have lost the status of worker which they previously enjoyed in that State) does not cover benefits which are also aimed at helping with subsistence. As such there are few, if any, benefits, which they will have access to. The case law makes clear that they will not

have access to the relevant German benefits, and the UK has assumed that they will not have access to job-seekers' allowance.

5.2. Criminality and free movement law

The Treaties allow for the refusal or entry or expulsion of EU citizens on 'grounds of public policy, public security or public health'. The citizens' Directive sets out detailed substantive and procedural rules on this issue, which has been the subject of considerable CJEU case law.

On this issue, the Decision first of all states that:

Member States may also take the necessary restrictive measures to protect themselves against individuals whose personal conduct is likely to represent a genuine and serious threat to public policy or security. In determining whether the conduct of an individual poses a present threat to public policy or security, Member States may take into account past conduct of the individual concerned and the threat may not always need to be imminent. Even in the absence of a previous criminal conviction, Member States may act on preventative grounds, so long as they are specific to the individual concerned.

To this end, the Commission declaration states that it will:

also clarify that Member States may take into account past conduct of an individual in the determination of whether a Union citizen's conduct poses a "present" threat to public policy or security. They may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned. The Commission will also clarify the notions of "serious grounds of public policy or public security" and "imperative grounds of public security" [grounds for expelling people who have resided for longer periods in a host Member State]. Moreover, on the occasion of a future revision of [the citizens' Directive], the Commission will examine the thresholds to which these notions are connected.

It is not clear whether the revision of the Directive referred to at the end here is as imminent as the proposal to amend the rules to create a 'prior lawful residence' rule for non-EU family members. Otherwise the plan to issue guidelines is clearly not binding. The language in these guidelines partly reflects the existing law, but some features are new.

Examining the text in detail, the 'personal conduct' test appears in Article 27(2) of the Directive. The reference to 'genuine and serious threat' is subtly different from the wording of Article 27(2) though ('genuine, *present* and *sufficiently* serious threat'), although the word 'present' then appears in the next sentence of the Decision.

The possibility of taking into account 'past conduct' does not directly contradict the rule in the Directive that 'previous criminal convictions shall not in themselves constitute grounds for taking such measures', although it points in the opposite direction. Inevitably some past conduct is likely to be relevant in making an assessment of a public security risk. The assertion that 'the threat may not always need to be imminent' is not as such reflected in the Directive, although it is possible to reconcile with it.

The current law does not expressly require a prior criminal conviction to take measures, so acting in the absence of one does not as such conflict with it, although in practice it would probably be more difficult to justify an expulsion measure, entry ban or refusal of

entry in the absence of a conviction. The Directive bans measures taken on '*general* preventive grounds', so it is correct to say that Member States can act 'on preventative grounds' which 'are *specific* to the individual concerned'.

What of the Commission's planned clarifications? As noted above, taking into account past conduct could play a limited role in determining whether there is a 'present' threat, and specific preventative measures could be permissible. There is some CJEU case law on the concepts of "serious grounds of public policy or public security" and "imperative grounds of public security": the latter phrase can include drug traffickers (*Tsakouridis* judgment) and child abusers (*PI* case).

The only specific reference to revising the Directive relates to the thresholds for the latter two concepts. At present the "serious grounds of public policy or public security" threshold applies to those who have obtained permanent residence under the Directive. This requires five years' lawful residence. It is unclear if the Commission wants to make it harder to obtain permanent residence (which would have a broader impact, since it simplifies the grounds on which EU citizens can stay on the territory and gives them fully equal access to benefits). Alternatively this threshold could be delinked from permanent residence status.

As for the "imperative grounds of public security" threshold, it applies where an EU citizen has 'resided in the host Member State for the previous ten years' or is a 'minor, except if the expulsion is necessary for the best interests of the child'. There is some case law on the threshold, indicating that a number of factors must be taken into account in clarifying it. As noted about, the notion of 'imperative grounds of public security' has not been interpreted very strictly by the CJEU, which in practice limits the impact which this clause would otherwise have had in limiting expulsions.

5.3. Longer waiting periods for free movement of persons from new Member States

Section D.3 of the Decision briefly refers to longer waiting periods for free movement of persons in future accession treaties. It notes that for future enlargements of the EU, 'appropriate transitional measures concerning free movement of persons will be provided for in the relevant Acts of Accession', which will be agreed by all Member States. It also notes the UK's position in favour of such transitional measures.

As such, section D.3 implicitly reiterates the terms of Article 49 TEU, which provides for enlargement treaties to be agreed unanimously. (Such treaties must also be approved by the European Parliament and by each Member State in accordance with its constitutional requirements). Historically, transitional periods for the free movement of people are the norm, not the exception. In the initial EEC Treaty, free movement of workers and other persons was not due to take place until 1970, twelve years after the Treaty entered into force, although in the event this date was brought forward to 1968.

Of the twenty-two Member States which entered the Community or Union later, only eight were not subject to a transition period as regards free movement of workers: the UK, Ireland and Denmark (in 1973); Austria, Finland and Sweden (in 1995); and Malta and Cyprus (in 2004). The remaining fourteen were subject in principle to seven-year transitional periods: Greece (1981); Spain and Portugal (1986), although this period was

curtailed; Poland, Hungary, Latvia, Lithuania, Estonia, the Czech Republic, Slovakia and Slovenia (in 2004); Romania and Bulgaria (in 2007); and Croatia (in 2013).

While seven-year transition periods have been the norm, there is nothing in the text of Article 49 TEU or any other EU or international law rule to rule out longer transition periods. Indeed, the twelve-year transitional period provided for in the original EEC Treaty implicitly confirms that longer periods are possible.

However, there is a legal argument that an *indefinite* delay on extending the free movement of persons to a new Member State would not be compatible with primary EU law, given the central place that free movement has in the Treaties. Article 49 TEU refers to the 'adjustments' to the Treaties entailed by a new Member State; this arguably refers to purely technical amendments and transitional periods, not to any more substantive amendments to the fundamental Treaty rules. Using Article 49 TEU to make such changes to fundamental primary law rules would circumvent the procedural rules (such as a Convention on Treaty amendments) set out in Article 48 TEU.

Of course, it would be possible to provide by means of fully-fledged Treaty amendment that the free movement of persons might be denied indefinitely to future Member States. Equally a Treaty amendment could curtail the free movement of persons for current Member States also, with a corollary extension to new Member States. The renegotiation deal does not contemplate any such amendment, however.

CAT: QA-04-16-520-EN-C (paper)
CAT: QA-04-16-520-EN-N (pdf)

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PHOTO CREDIT: iStock International Inc.

ISBN 978-92-823-9478-6 (paper)
ISBN 978-92-823-9479-3 (pdf)

doi: 10.2861/196 (paper)
doi: 10.2861/287214 (pdf)

Publications Office