Briefing for a 10 minute rule bill on persons exercising rights under EU law and their position in the event of the UK leaving the EU.

Introduction

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ILPA commissioned a series of position papers on the immigration law implications of the EU referendum and these are available at http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html

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Current uncertainty is causing distress to persons exercising rights under EU law and to their British, settled and third country national family members. It is causing uncertainty for those who might have exercised rights of free movement, such as those who might have come to study at UK educational institutions and thus for those institutions. It is causing uncertainty for businesses and indeed for the public sector. They need to plan now and take decisions to limit exposure to risk or with a view to mitigating risk. We see clients who are individuals asking for advice on their position, or reconsidering whether or not to study in the UK and whether to retain key business activities in the UK. MPs of all parties described this in the 6 July 2016 debate.[1] The Minister, the Rt Hon James Brokenshire MP, said in that debate

> There are nearly 250,000 EU workers in the public sector, and as has been said, in September 2015, 9.4% of NHS doctors and 6.3% of NHS nurses in England were from an EU country. Almost 125,000 EU students study at UK universities.[2]

Certainty now could have direct impact on the decisions current students and those who have accepted places on courses, and businesses, take. Racist attacks are reported against EU nationals and other foreign nationals in the UK and moving rapidly to make provision for EU nationals is one way of demonstrating a commitment to them in the face of such treatment. The Minister said in the 6 July 2016 debate, following accounts from MPs of all parties of racist attacks:

> *In recent days, we have seen some appalling hate crimes perpetrated against EU nationals and others living in the UK, including damage to a Polish community centre in Hammersmith, hateful leaflets targeted at children in Cambridgeshire and abuse hurled at people walking in the streets. The Metropolitan police has said that 67 hate crimes are being reported every*

[1] HC Report, Vol 612, 6 July 2016, col 937ff.
[2] Ibid. Col 946.

> *day. Hate crime of any kind has absolutely no place in our society. We will not stand for these attacks, which should be investigated by the police.*[3]

Whatever flows from the referendum result, the position of persons exercising EU law rights must be addressed now. The Minister said in the 6 July debate

> *The Government fully appreciate the importance of giving certainty to EU citizens when the UK exits from the European Union. Addressing this issue is a priority that we intend to deal with as soon as possible.*[4]

The Parliamentary Under-Secretary of State, Karen Bradley MP, said "...we all agree that steps must be taken to guarantee the legal status of EU nationals, as the motion says, "with urgency"."[5]
The official Vote Leave campaign proposed in its immigration statement of June 1 2016 that: "there will be no change for EU citizens already lawfully resident in the UK. These EU citizens will automatically be granted indefinite leave to remain in the UK and will be treated no less favourably than they are at present." This implies a commitment both to according permanent rights of residence to a broad group, and to maintaining all acquired rights.

Proposed long title of a Bill: A Bill to set out minimum standards for the treatment of persons with rights deriving from the United Kingdom's membership of the European Union in the event of the United Kingdom's leaving the EU.

Practicalities

We consider that there should be a special post-EU status, set out in a separate set of rules, separate from current leave under the immigration rules (e.g. the rules on indefinite leave to remain). This may also be important if treaties and multi-lateral or bilateral agreements are negotiated.

We suggest that it would be necessary to have residence documents confirming the rights to the new status. We are acutely aware however of the logistical problems this would entail. There needs to be a right to be issued with the relevant documentation within a reasonable time, otherwise how are rights to rent, drive, work etc. to be evidenced?

The Home Office has a strong interest in not having to make individual decisions on a large number of cases in a short time frame. People need to be able to convert their current status simply and easily.

There are good reasons of fairness, administrative convenience and cost for having a simpler system that the current system under the immigration rules. The status of persons benefiting from these provisions should be easy to understand. The current immigration rules are extremely complex and no one would want to replicate such a system.

Status of proposals in any Bill

Should a Bill be a statement of intent or set out what minimum rights persons will have? Setting out what minimum rights persons will have has the advantage of providing certainty; a statement

[3] *Ibid.* Col 952.
[4] *Ibid.* Col 948.
[5] Col 977.

of intent allows for modification in the light of negotiations. We recommend a proposal, but for minimum standards to allow for enhanced protection in the light of negotiations.

The Bill has potential to be starting point for negotiations on the position of both persons in the UK and UK nationals in other EU countries and thus it is necessary to consider whether reciprocal proposals would work for the treatment by the EU27 & EEA for British citizens and whether the proposals could be incorporated into any UK-EU27 exit treaty.

Scope

Recommendations

- *Relevant date for the application of any protection*: we recommend the date of leaving the EU.
- *Beneficiaries*: all EEA (not only EU) citizens and Swiss and their qualifying non-EEA family members. Need to refer to Articles *21, 45 (*workers*)* and 49 (establishment) and 56 (services) (and predecessor provisions) to cover all free movement of persons. Since Articles 49 & 56 include legal persons, it will be necessary to refer to natural persons if it is desired to exclude rights of legal persons e.g. companies providing cross-border services. The Minister said in the 6 July debate

  > *"This issue is not simply about the immigration status of an individual. Under free movement law, EU citizens' rights are far broader than just the right to reside in the UK. There are employment rights, entitlements to benefits and pensions, rights of access to public services, and rights to run a business, which is so closely aligned with the right to provide cross-border services, as well as the ability to be joined by family members and extended family members, in some cases from countries outside the EU. Of course, under current arrangements these rights extend to European economic area and Swiss nationals, who are not in the EU. They all need to be considered, and we must remember that people do not have to register with the UK authorities to enjoy basic EU rights to reside. We will need to work out how we identify fairly and properly the people who are affected.*[6]
- It will be necessary to make provision for persons who may subsequently become part of the family unit: e.g. babies born to a couple benefiting from the protection.
- The Bill should only be a minimum position as to who will be protected. It is important to avoid blocking protection for others being added later.

Content

Recommendations - General

- Should set minimum standards, not close the door to enhanced protection in future.
- Equal treatment of all beneficiaries: based on Article 24 of the Citizens Directive (Directive 2004/38/EC). For example, we do not recommend a special status for Irish citizens at the outset but, as per reference to minimum standards above, the legislation should not close off the possibility of special arrangements, including for Irish citizens, in the future in the event of particular difficulties arising in their cases.
- The Bill should incorporate in full the previous EU free movement regime (including derived rights). This would be analogous with what usually happens in domestic immigration law, when there are substantial changes to categories of stay under the Rules. Normal practice is that the rights of those on a route to settlement are preserved (see e.g. the pre and post November 2014 Tier 1 (Investor) changes; Part 8 of the Immigration Rules and its replacement by Appendix FM to those rules etc.). The implications of this approach are set out in the points below

[6] Col 951.

- Permanent residents (with or without a document) should get access to a right of indefinite stay. This we understand to be uncontroversial. The Minister said in the 6 July debate "It is important to put on record that those who have been continuously lawfully resident in the UK for five years qualify for permanent residence."[7] The Parliamentary Under-Secretary of State, Karen Bradley MP, said "We should not be frightening people. They have a right to remain, and after five years' lawful residence they automatically acquire and benefit from a permanent right of residence in the UK."[8] Persons with rights of permanent residence but not residing in the UK on the date selected (recommended: date of withdrawal) but who have permanent residence (e.g. those studying outside the UK on that date) should benefit. A possible model would be the Immigration Act 1971 section 34(3) "shall be treated as having an indefinite leave, if he is not at the coming into force of this Act subject to a condition limiting his stay in the United Kingdom. Those who do not yet have permanent residence should be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law (i.e. preserve this basis of qualification in separate provisions as described above).
- Consideration should be given, for simplicity's sake to giving rights of permanent residence to persons with a certain number of year's residence, e.g. five, without looking at detail within that period. This would be administratively more convenient.
- In terms of current conditions in the bullet above: qualification under either the EEA Regulations or the Citizens Directive should be sufficient. Either/ or is the current legal position, and there are some differences. For example, the Regulations are broader than the Directive, in that they fully cover civil partners.
- Provision should be made for *de facto* EU residents, e.g. the economically inactive partners of British citizens (British citizens are generally not protected by EU free movement law), who do not have comprehensive sickness insurance and are thus not treated as exercising treaty rights as self-sufficient persons, but who have built lives and families here. For this group and to avoid other complications we strongly suggest that rights of access to the NHS be treated as comprehensive sickness insurance cover.
- Provision should be made for persons with rights acquired through residence which includes residence in the Channel Islands / Isle of Man. Residence in these areas is counted in calculating whether a person has acquired permanent residence.
- We suggest that a Bill should be confined to questions of residence; do not address visa waiver etc. – matters of movement (e.g. for tourism) rather than residence.

Questions:

- Is the new status to be automatic as EU rights are now (i.e. you accrue the right by fulfilling the conditions and residence documents merely evidence the right that you have, they are not constitutive of it)? Given the relevance of immigration status to all aspects of life and the volume of applications needing to be processed, it will be important to make clear that persons are protected pending the issuing of official documentation, while at the same time resourcing such provision so that documents are issued without delay. Increasingly, immigration officers, employers, landlords etc, have to know who has a right to reside and who does not, and evidence is needed to prove this.
- For those short of permanent residence, the question of whether an outer limit is placed on claims to eligibility (i.e. must you have achieved permanent residence within a

[7] Col 948.
[8] Col 976.

particular time frame. Some people take a long time to acquire it because of repeated absences). Any sunset provision should be far enough in the future to allow persons to naturalize before that date.

- Deportation: the Citizens Directive offers greater protection from deportation, increasing with length of residence. We have proposed replicating this but it may be felt that the question of losing rights is separate to that of accruing them.
- How would the interpretation of EU law by the Court of Justice be treated after the cut-off date? As advisory only? We suggest that there would be greater certainty were it treated as authoritative, or at the very least, only to be departed from with good reason.

ILPA
7 July 2016