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Brexit Advocacy Series

After a hard Brexit – British citizens and residence in the EU

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Introduction

The purpose of this briefing note is to outline what a so-called hard BREXIT will mean for British citizens seeking to visit, live and work in the EU. Assuming that no specific transitional arrangements are made and no special access is negotiated for British citizens after the UK leaves the EU this note sets out the current state of EU law on how British citizens will be treated. It covers nine specific areas which are covered in order of the length of time and activities which British citizens may want to stay and do in the 27 remaining EU states. This note is written on the basis that a hard BREXIT will result in no special treatment for British citizens' access to the EU. At the moment we cannot know whether this will be the case but for the sake of clarity in writing, this is the assumption. If the UK does obtain more preferential treatment for British citizens to access the territory and labour market of the EU the rules set out below may not apply or not in full.

Visitors – an EU ESTA system

British citizens after a hard BREXIT will be third country nationals vis-à-vis the EU in the same situation as Albanians or Malaysians. This means that British citizens are unlikely to be required to have short-term visit visas to enter the EU for 90 days out of every 180 so long as their activities are consistent with being a visitor, and presuming that the UK does not require visas for visitors from any Member State (if it does, the EU law on visas requires the EU to consider retaliating). Like an Albanian or Malaysian, when they enter and leave the EU they will be subject to a border check and their passports will be stamped. Those stamps in their passports will be the record of how many days they have spent in the EU for the purposes of calculating the permitted 90 out of every 180. This system may go electronic (the intended exit-entry system). However, all non-visa national visitors to the EU may soon be required to have extra documentation.

In August 2016 a proposal for an EU - ESTA authorisation system for non-visa national travellers seeking to enter the EU was put forward. A detailed legislative proposal is expected in November from the Commission. The idea, designed to reinforce border controls, is that any third country national who does not have to obtain a visa to come to the EU will, nonetheless, have to apply on line and receive an electronic authorisation to enter the EU before setting off for the EU.

The details of this system are not yet available but the idea has been on the table since 2011. Undoubtedly there will be a fee payable by those who need the authorisations (as is the case with the US system). Equally, the information which applicants must provide to obtain an authorisation are likely to be checked against EU databases of persons with dubious

immigration or good character histories, which will be extended to cover UK citizens as third-country nationals. The information is likely to be held in a special database for at least the period of the validity of the authorisation and possibly longer, depending on the rules which apply to each database.

In the event that the UK seeks to impose mandatory visa requirements on nationals of any existing Member State or refuses to lift visa requirements in respect of any state acceding to the EU in respect of which the UK already has a visa requirement (such as any of the Balkan candidate states) according to the EU principle of visa reciprocity, British citizens would be added to the EU mandatory visa list unless the UK government managed to negotiate an exception.

Students and researchers

The EU has common rules on the admission of students and researchers which apply in all Member States except Denmark and Ireland (and of course the UK). When the UK becomes a third country and British citizens third country nationals for the purposes of the 27 Member States the students and researchers directive will apply to them. The directive was updated in 2016 and the changes need to be transposed into national law by May 2018. Third country national students and researchers do not enjoy equal treatment with their EU citizen counterparts. Differential tuition fees are permitted (like the UK overseas student fees). There are four categories covered by the rules: students, school-pupils, unremunerated trainees, voluntary workers (volunteers) and researchers. The conditions are:

- the applicant must have been accepted by an establishment of higher education;
- the applicant must have sufficient resources to cover his/her subsistence, study and return travel costs;
- the applicant must have sufficient knowledge of the language of the course to be followed (a flexible condition left to the discretion of the Member States);
- prior payment of the fees charged by the establishment (a flexible condition left to the discretion of the Member States).

When the directive was updated four changes were made. First, third country national students will be able to work for up to 15 hours a week during their stay, they can have an extension of the residence permits for nine months after the end of the studies to seek employment or set up a business. Their close family members can join them for the duration of the studies or research. Mobility within the EU has been simplified for these categories. Finally, if a student remains lawfully in the EU for five years (although time spent as a student is discounted) and obtains a residence permit which allows him or her to stay on some other basis he or she can apply for the EU status of long term resident third country national (an integration test may be applicable).

Family Reunification

The EU rules on family reunification for post-BREXIT British citizens will be complicated. A British citizen may come within any one of three different categories each with different rules. Further, in areas of immigration which are covered by sectoral rules, family reunification is frequently covered by those specific measures, such as the Blue Card scheme for the highly

skilled or the students and intra-corporate transferees' directives. Leaving these categories aside, the main rules will be as follows:

1. *Family reunification with a national of the host EU state*

Where a British citizen seeks family reunification with a national of another Member State (who has not lived and worked in another EU state) the national laws of that state will apply. These vary widely from fairly straight forward rules in some Member States to very complex and expensive ones in others (such as the Netherlands). The categories of family members eligible for family reunification also vary according to the Member State concerned.

2. *Family reunification with a national of another EU state living in the host Member State*

Where a British citizen seeks family reunification with an EU national living in a host Member State EU free movement rules apply. For instance a British spouse of a German national living and working in Poland will be covered by the very simple EU free movement rules on family reunification. The class of family members entitled to family reunification is wide (including dependent grandparents and children over 21) and the income and sickness insurance requirements do not apply if the EU national is a worker or self-employed. The relevant EU measure is the Citizens' Directive 2004/38.

3. *Family reunification with a third country national or British citizen family member in an EU state*

Where a British citizen seeks family reunification with another British citizen or a third country national resident in an EU state (besides Ireland or Denmark) EU rules apply as a minimum standard. These rules are substantially less generous than those which apply to EU citizens exercising their free movement rights. For instance, a British citizen who seeks family reunification with a British spouse resident in Romania will have to fulfil fairly onerous income and comprehensive sickness insurance requirements. The British citizen can be obliged to fulfil integration conditions (for instance pass a language test) before a visa will be issued. The British or other third country national spouse in the host Member State must have stable and regular resources. Finally the class of family members who are eligible to apply is more restrictive. If admitted, the British citizen family member will be allowed to work. The relevant EU measure is the Directive 2003/86.

Work

EU rules on admission to the Member States for the purpose of work are complex and divided into substantially different requirements depending on the sector where the person seeks to take employment. In all the rules there is a preference for the employment of EU citizens who must be privileged in the labour market. If there is an EU national who can do the job then that person must be employed instead of the British citizen. There are also strict EU rules on sanctioning employers for hiring third country nationals who do not have lawful residence. Thus prospective employers of British citizens may be reluctant to hire them in light of the complexity of the requirements which must be fulfilled before the British citizen can start work and the length of time that authorisation may take. Denmark and Ireland do not participate in any of these measures.

A British citizen who wishes to work in the EU will need a relevant work and residence permit which normally will need to be obtained before departure from the UK. Further the process will normally be driven by the prospective employer not the British would-be employee.

1. The Blue Card scheme for the high skilled

The main requirements for this kind of EU work permit are that the person must have: a valid work contract or binding job offer of at least 1 year, offering a salary that is at least 1.5 times the average gross annual salary in that EU country; there is documentary proof the British citizen has the necessary qualifications; he or she will need a valid travel document and proof of sickness insurance. After five years of fulfilling the requirements the British citizen will be eligible to apply for permanent residence. The relevant EU measure is Directive 2009/50. At the moment Member States are permitted to operate national work permit schemes outside the scope of the Blue Card including those which may be more generous to employers and workers. Whether this national exception will be maintained remains to be seen. There is a proposal for reform of the Blue Card Directive currently under consideration by the EU authorities.

2. The Intra-Corporate Transferees

A British citizen who is employed by a business in the UK or any country outside the EU (or Denmark or Ireland) which seeks to send him or her to an EU country will need prior authorisation in accordance with the EU measure covering this category (Directive 2014/66). The key features of the directive are: a transferee can carry out his/her assignment in multiple EU countries without interruption and without the need to re-apply for admission each time he/she moves country. Family members may join the transferee and work on either a self-employed or employed basis. Transferees must have worked for a certain time with their company before being transferred. They must have a work contract and provide evidence that they will be able to transfer back out of the EU once their EU assignment ends. Trainee employees must provide evidence of a university degree and may have to present a training agreement. Payment to someone transferred should not be lower than that given to an EU national doing a comparable job. The maximum duration for a transfer should not be more than three years for managers and specialists and one year for trainees. National authorities may insist that the person being transferred has sufficient finances for themselves and their family so as not to have to rely on the local social assistance system.

3. Seasonal workers

These EU rules cover all sectors that are dependent on seasonal conditions, such as ski instructors, summer tour guides etc. The Member States must draw up a list of their relevant sectors and provide this to the European Commission. Normally the employer must obtain the necessary authorisation for the British citizen in advance of their arrival. In any event, the work and residence permit will be for a period of between 5 and 9 months out of every 12 month period. The person will have to leave the EU for at least three months a year. Seasonal workers can change employers within the limited time period and get some (minimal) equal treatment protections. The relevant EU measure is Directive 2014/36.

Long term resident Third Country Nationals

British citizens who live in EU (other than Denmark or Ireland) may acquire the EU status of long term resident third country national under Directive 2003/109. The relevant period is a minimum of five years continuous and lawful residence. The person must have stable and regular resources sufficient to support him or herself and any family members which may

constitute the family. Similarly, there must be comprehensive sickness insurance for everyone over the period. The person must not be a threat to public policy or public security (usually interpreted as relating to criminal convictions) and may be required to pass an integration test (usually language but also possibly a test of knowledge of the country). Once acquired, long term residence status provides enhanced access to work and residence in other EU Member States. Member States may (and often do) have alternative national rules on obtaining a state limited long-term residence status.

Expulsion/deportation

British citizens will come within the personal scope of the EU rules on deportation and expulsion. These are contained in Directive 2008/115, known as the 'Returns Directive'. This directive provides EU countries with common standards and procedures for returning non-EU nationals (such as British citizens) staying illegally on their territories, with certain exceptions. Any British citizen who stays irregularly in an EU Member State will come within the presumption of the directive that a deportation procedure should be commenced immediately by the relevant Member State. The British citizen will be entitled to certain protections, for instance there is a maximum limit on pre-deportation detention of 18 months and there are procedural guarantees which apply. The Directive requires Member States to allow a person subject to a deportation order to leave voluntarily (with some exceptions) but the period for departure is short – between seven and 30 days.

Re-entry bans

The same directive which regulates deportation also deals with re-entry bans. This is where someone who has been subject to a deportation procedure wishes to go back into the EU (including to another Member State). According to the Directive, an entry ban may be given together with a deportation decision. However, an entry ban must be made when no period of voluntary departure is granted or when the illegally staying non-EU national (i.e. the British citizen) has not complied with the return decision. The duration of the entry ban must be set on a case-by-case basis, taking into consideration the particular circumstances of the person concerned. In principle, the duration may not be longer than five years, unless the person poses a threat to public/national security. EU countries may choose to withdraw or suspend an entry ban for particular reasons.

Asylum

British citizens will become eligible to apply for asylum in EU Member States. The grounds for seeking asylum are set out in Directive 2011/95. A person must have a well-founded fear of persecution in their state of nationality based on race, religion, nationality, membership of a particular social group or political opinion. Alternatively, the person can seek international protection on the basis that he or she would be liable to the death penalty or execution, torture, inhuman or degrading treatment or punishment or that there is a serious and individual threat to the person's (a civilian) life or person by reason of indiscriminate violence in situations of inter national or internal armed conflict. The procedures for applying for asylum are contained in Directive 2013/32. There are also rules on how to treat asylum seekers as regards welfare and detention, and on which Member State is responsible for considering each application. These rules are all currently subject to proposals for substantive change. It is possible that

the EU as a whole, or at least individual Member States, will regard the UK as a 'safe country of origin' and fast-track any asylum claims which UK citizens may make with an assumption that they should be rejected.

Databases

The EU maintains a number of large databases containing the personal details of third country nationals. EU citizens are excluded from these databases. Law enforcement agencies in all Member States have access to these databases. These databases include the Schengen Information System which includes information on third country nationals who should be refused admission to the EU. The EURODAC database includes fingerprints of all people who have applied for asylum in the EU. The Visa Information System contains extensive personal data on all third country nationals who apply for visas. British citizens are unlikely to have to obtain visas to enter the EU. As noted above, the EU plans also to establish an entry-exit system and travel authorisation system.

Conclusions

If the UK Government and the EU institutions agree to a form of BREXIT which results in British citizens enjoying no privileged treatment regarding access to the territory and labour market of the EU, these are the rules which will apply.

ILPA has commissioned a series of papers, the Brexit Advocacy Series, on legal issues relevant to Brexit. Each paper is accurate at the date of publication.

The purpose of the papers is to provide advocacy, expertise and leadership to help policy-makers and commentators develop a response to Brexit in areas relevant to the expertise of the members of ILPA.

The position papers have been produced by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

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