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EU CITIZENS' RIGHTS AFTER BREXIT

The EU's extravagant demands for extra-territorial jurisdiction by the CJEU and reverse discrimination

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The tremors caused by the general election are still working their way through the political system. The implications for the nature of the UK's future relationship with the EU have been the subject of much speculation. Before too long, however, the Government must grapple with pressing questions about EU citizens' rights and the future role of the Court of Justice of the European Union (CJEU) in our domestic affairs. Whilst much of the country was focused on domestic politics over the last month or so, the EU Commission has been adopting an increasingly punitive stance in the forthcoming Brexit negotiations. In a negotiating position paper on EU citizens' rights communicated to the UK Government on 12 June 2017,¹ the Commission calls some third country nationals, to be guaranteed existing EU law-derived rights in perpetuity within the UK – rights which, in some cases, exceed the rights of UK citizens. Moreover, the paper suggests that the Commission itself should continue to monitor the observance of EU citizens' rights in this country even after the UK's exit from the EU. Finally, the Commission demands that these rights should continue to be interpreted by, and directly enforceable in, the CJEU in Luxembourg.

The Commission's recent paper represents a remarkable hardening of the European Council's position on the rights of EU nationals in the UK as set out in the Council's negotiating guidelines under Article 50 TEU, issued on 29 April 2017.² The April Guidelines, in broad terms, called for reciprocal guarantees to safeguard the status and rights derived from EU law of EU and British citizens in Britain and the remaining 27 EU countries at the time of Britain's withdrawal. Such guarantees should be 'effective and enforceable' and EU citizens should be entitled to 'smooth and simple administrative procedures.' There is no mention either of continuing CJEU jurisdiction or any monitoring or supervisory role for the European Commission within the United Kingdom. Finally, the European Council calls for equal treatment and mutual rights' guarantees between Britain and the UK – no less but also no more.

CJEU jurisdiction contrary to international practice

The Commission's demand for continued CJEU jurisdiction is not intended as an interim measure but a permanent arrangement governing the legal position of EU citizens currently resident here and their family members for the rest of their lives. This demand is extravagant and contrary both to accepted international practice on the settlement of disputes under international treaties and the EU's own practice in this regard. As Gabor Steingart, the editor of Germany's leading financial daily *Handelsblatt* recently suggested on German television, the Commission's inflated demands suggest a deliberate strategy designed both to humiliate the UK and *pour encourager les autres*.

International treaties commonly provide for the settlement of disputes by binding international adjudication.³ This may be by bilateral tribunals or arbitral bodies set up under a specific treaty, or by permanent international courts or bodies, such as the International Court of Justice (ICJ) at The Hague, the WTO Appellate Body and even the European Court of Human Rights (ECtHR) in Strasbourg. In all disputes involving the interpretation of treaties, the international tribunals or arbitral bodies are constituted in a manner that is strictly neutral and balanced between the treaty parties. In international arbitrations, for instance, the chairman or president typically has to be agreed by the parties, or in default of agreement nominated by a neutral third party.

Sovereign states do not generally submit in an international treaty to adjudication of disputes by the courts of the other party to the treaty. This is not only common international practice, but also the general practice of the European Union in its treaties with non-Member states (so-called "third countries"). The EU currently has in excess of 50 association or free trade agreements with third countries in place, in addition to several pending trade and other economic co-operation agreements. In none of them does the third country – not even the tiny states of San Marino or Andorra – submit to the jurisdiction of the CJEU as the Commission proposes for the United Kingdom. Amongst the EU's trade agreements only two provide for the application of CJEU case law by the third country, but even these agreements do so without establishing direct jurisdiction by the CJEU as demanded by the Commission of the UK. The EU-Turkey customs union agreement requires Turkey to apply the common rules of the customs union including relevant CJEU case law, whilst under the EEA⁴ agreement the so-called EFTA court ensures the consistent application in the non-EU countries of

the common rules of the internal market as interpreted by the CJEU. Neither agreement, however, provides for direct CJEU jurisdiction over the non-EU party.

For the closest historical examples of the kind of 'special jurisdiction' the Commission seeks to establish over the United Kingdom in respect of foreign residents in this country, one has to go back to the treaties concluded between the UK and various Western powers with China and other Far Eastern countries in the 19th century, under which European citizens were exempted from the jurisdiction of the domestic courts and instead were subject to the special jurisdiction of extra-territorial courts under the control of their home country. This is not a happy historical precedent, and these agreements are now widely and rightly denounced as instances of 'gunboat' diplomacy during the height of imperialism.

Any UK Government should reject continued CJEU jurisdiction not only because it is demeaning, but also because of important practical policy constraints it would place on future domestic policy-making in the areas of immigration and external relations.

First, the CJEU has never seen itself as an impartial arbiter in disputes between the EU and member states but as a guardian of the Union interest and a motor of great harmonisation and 'ever closer union' or what it itself, in its judgments, occasionally refers to as 'the spirit of the Treaties.' Once the UK has left, the court will accord it even less respect as the UK will no longer be represented by a UK judge and Advocate-General on the court and revert to being a foreign state from the EU's perspective. Moreover, compared to higher national and other international courts the CJEU, in common only with the ECtHR, follows a teleological interpretative approach which allows it to disregard the ordinary meaning of legislation not only where the wording is patently ambiguous or unclear but also where it feels that the wording may conflict or fall short of the integrationist purposes of the EU Treaties as the CJEU sees them. Purposive interpretations generally give courts greater interpretative discretion than a literal approach, and with this comes a real danger that such discretion may not be exercised impartially. This risk is magnified if the court in question is not, in its composition, balanced between the parties to a treaty.⁵

Secondly, as it currently stands, CJEU case law affords EU citizens' rights in other EU member states, rights which, in some cases, are superior to rights enjoyed by citizens in their host country or those they would enjoy in their own country. Although the Commission paper does not say so explicitly, ongoing CJEU jurisdiction, which would not be subject to any further right of appeal to the UK Supreme Court or another international court or arbitral tribunal, would allow

the CJEU to continue to apply and expand the special rights already enjoyed by EU citizens resident in other parts as well as post-Brexit Britain.

The Great Repeal Bill and Reverse Discrimination

The Government's White Paper on the Great Repeal Bill⁶ so far resists the EU's demand for special extra-territorial jurisdiction over EU citizens resident in the UK. Subject to this proviso, however, it proposes that the Great Repeal Bill ensure that, as far as possible, the same laws and rules will apply on the day after the UK leaves as before. To maximise legal continuity, the Bill would preserve domestic legislation giving effect to EU law together with directly effective rights in the EU Treaties and directly applicable EU law which will be converted into domestic law. The only major exception would be the EU Charter of Fundamental Rights which will cease to apply in Britain after Brexit day. Finally, to ensure continuity of legal interpretation the Bill would provide that pre-Brexit case law of the CJEU will be given the same binding precedent status in domestic law as decisions of the UK Supreme Court.

The White Paper thus envisages that the jurisdiction of the CJEU will formally end with Britain's departure from the EU, although pre-Brexit CJEU case law would continue to be enforced by the UK courts until the underlying legislation has been repealed or amended. The Government's commitment to end CJEU jurisdiction is reassuring, and given the enormity of the task of repealing the various EU-derived laws adopted by the UK during nearly half a century of EU membership, the transitional retention of most of these laws is practically unavoidable. However, there is at least one worrying feature of the CJEU's interpretation of the scope of EU citizens' rights, which the White Paper appears to ignore. This is the little appreciated issue of reverse discrimination.

The principle of non-discrimination on the grounds of nationality has long been an established tenet of the EU Treaties. Since the late 1990s the CJEU has heavily relied on this principle to strengthen the rights of migrant EU citizens and their family members, in some cases beyond the rights and entitlements of the domestic population. Reverse discrimination in favour of non-national EU residents has arisen in particular in family reunification cases involving the residency claims of non-EU national family members. As a general rule EU citizenship rights including the derived rights of their EU and non-EU family members arise only in 'migrant situations', i.e. in circumstances where a citizen of an EU member state decides to work and/or live in another member state.

However, in the case of *Ruiz Zambrano*⁷ the CJEU held that it was unlawful for a member state to refuse residence and work permits to third country parents of children with EU nationality if the refusal had the 'effect of depriving the Union citizen (i.e. the child) of the genuine enjoyment of his rights as an EU citizen.' In *Zambrano*, the underage EU citizens had never travelled to another EU country, and, in fact, never left their country of birth. Such purely 'internal situations' are outside the scope of the EU Treaties and consequently solely a matter of national immigration law. The CJEU's decision is therefore in clear breach of the principle of conferral which states the EU may only legislate in areas where law-making powers have been conferred on it in the Treaties. The CJEU nevertheless confirmed the ruling in *Zambrano* in a series of subsequent cases.⁸ In an initial opinion published a few days ago⁹ the CJEU's Advocate-General submits that migrant EU citizens should retain the non-Treaty based and judge-made right to family reunification with third country nationals even once they have been naturalised in their host country, e.g. the United Kingdom, and acquired either dual or a new nationality. In the great majority of cases the CJEU adopts the Advocate General's recommendation. If so, the judgment would preserve the privileged status of EU residents in Britain even once they have acquired UK citizenship.

Under the Government's current proposals CJEU case law, although no longer enforced by the CJEU, will retain the normative force of binding precedents in domestic law. This would protect the pre-Brexit rights of EU/EEA nationals in the UK even where these go beyond rights of UK citizens. Thus, for example, a UK citizen who marries and wishes to settle his/her spouse and family may only do so if s/he has sufficient resources to maintain them without recourse to public funds such as housing or unemployment benefit; yet this requirement does not currently apply to an EU citizen working in the UK who marries a non-EU national and decides to bring both the spouse and any children into the UK. As a consequence of the CJEU's expansive interpretation of the right to family reunification of migrant EU citizens, a situation has arisen where host member states in effect grant EU citizens special rights which are superior to those of their own citizens: EU citizens currently resident in Britain would be able to bring not only their current but any future (EU or non-EU) spouses and/or (EU or non-EU) children into the UK on terms more favourable than UK citizens. The Commission paper is clear that future family members of EEA residents in the UK should be entitled to privileged family reunification on more favourable terms than currently apply to UK citizens, or, alternatively, in the event that they choose to stay behind in another EU/EEA state, should be entitled to payment of all those benefits they would have been entitled to had they been joint UK residents with their EU spouse or parent on Brexit day. Any Government would be well advised

to revisit the issue of rights of third country family members of EU citizens when determining the precise future status of CJEU case law in UK domestic law.

Conclusion

As is to be expected at the start of negotiations, the UK Government's and the EU's position are at loggerheads on many issues. If negotiations are to succeed, both parties will have to give way to varying degrees on a number of issues. Notwithstanding the Government's position in the White Paper, the issue of continuing CJEU jurisdiction over EU citizens' rights cannot therefore be regarded as closed. However, the Government should continue firmly to resist continuing CJEU jurisdiction whether restricted to the enforcement of EU citizens' rights or not. Not only would the acceptance of such a special jurisdiction place the UK, when viewed through a historical lens, in an almost uniquely subservient position in its legal relations with the EU, there is also a very real risk that the CJEU would not content itself with the application of EU citizens' rights as they stood at the time of the UK's exit from the EU.

When the EU Charter of Fundamental Rights became legally binding in 2009, Protocol 30 of the Lisbon Treaty, on a literal reading of its text, appeared to render UK domestic legislation immune from any future CJEU review based on alleged incompatibility with any of the Charter provisions. To date, there has not been a single case in which the CJEU has taken account of the UK's special position in this regard. The CJEU began to cite and rely on Charter provisions even before they became legally binding and post-2009 has continued to expand its uniform Charter case law applicable throughout the EU. Although the Commission paper does not explicitly envisage the application of post-Brexit CJEU citizenship cases to EU citizens in Britain, historical precedent suggests the CJEU is most unlikely in future to develop two different strands of jurisprudence, one for migrant citizens in the rest of the EU and another, more restrictive one for EU citizens in Britain.

Courts throughout the world are committed to the 'noble lie' that they do not make, amend or develop the law. Instead, they maintain the illusion that all they do is to articulate written law and previous judicial decisions in the light of broader general principles and as they apply to particular facts. When new facts are litigated and the courts appear to change, i.e. either restrict or extend, the scope of application and/or the meaning of a previous interpretation, judges steadfastly maintain that they merely 'clarify' the meaning already inherent in previous decisions. Very rarely do they admit that they changed their position. The problem of judicial law-making disguised as legal 'interpretation' is not, of

course, confined to EU law, but it acquires heightened importance in circumstances where the UK would be subjected to a foreign judicial body whose decisions could not be overridden or moderated by Parliamentary legislation. For should Parliament legislate to rein in the CJEU, the UK could be held in a breach of the EU-UK withdrawal agreement – the finding of which would again be a matter for the CJEU.

Continuing CJEU jurisdiction would carry with it an inherent risk that this court may not discharge its judicial function impartially because it would not be an independent tribunal but a foreign court whose composition and statutes of procedure are matters over which the UK would have no, not even limited, control and which shares an interest with one party to any dispute. Furthermore, the CJEU's case law in the field of EU citizens' rights and immigration raises serious concerns which warrant a rethink of some of the Government's proposals in the White Paper on the Great Repeal Bill. The Government's proposals as they stand would, in some instances, leave British citizens with inferior rights compared to those enjoyed by EU citizens resident in Britain. This bizarre situation is but one and certainly not the most significant example of the often biased approach the CJEU has over many decades taken to resolving disputes over the allocation of powers in favour of the EU and against its member states. If the UK's departure from the EU does not involve an unequivocal and clean break with CJEU jurisdiction over the United Kingdom, any Brexit deal – which many commentators now expect to be a much more hesitant and compromised one than before the ill-fated 8th June election – will not merely be a 'soft' Brexit; it would almost certainly be a Brexit in name only.

About the author

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Endnotes

1 | European Commission, 'Essential Principles on Citizens' Rights', 12 June 2017.

2 | European Council, 'European Council (Art. 50) guidelines for Brexit negotiations', 29 April 2017.

3 | The author is indebted to Martin Howe QC for much of this concise summary of the customary practice in international practice provided in this and the subsequent paragraph of this paper. See Martin Howe QC, Francis Hoar & Gunnar Beck, 'Rights of EU Citizens in the UK after Brexit: A fair settlement – or a privileged caste with superior rights enforced by a foreign court?', *Lawyers for Britain*, 2017.

4 | The European Economic Area (EEA) is free trade area shared between the member states of the EU and Norway, Iceland and Liechtenstein, which involves the extension, and application of, the EU's internal market rules to three non-EU EEA members.

5 | The author has set out the reasons for this conclusion in an earlier Judicial Power Project blog and a longer paper published in the Oxford Yearbook of European Law 2016. See Gunnar Beck, 'The European Court of Justice is not an impartial court and has no role to play in post-Brexit EU-UK relations', *Judicial Power Project*, 7 May 2017. See also Gunnar Beck, 'The Macro Level: The Structural Impact of General International Law on EU Law: The Court of Justice of the EU and the Vienna Convention on the Law of Treaties', *Yearbook of European Law*, 2016, Vol. 35, No. 1, pp. 484-512..

6 | Secretary of State for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', Cm 9446, March 2017.

7 | *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

8 | C-356/11 and C-357/11, EU:C:2012:776.

9 | *Toufik Lounes*, C-165/16, EU:C:2017:407.

