

Cameron's Proposals to Limit EU Citizens' Access to the UK: Lawful or not, under EU rules?

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On November 27th, the *Financial Times* published an article by British Prime Minister David Cameron setting out the measures the UK authorities would be taking to limit EU citizens' access to social benefits and their deportation, if they are homeless. The reason for the new measures, according to the prime minister, was the end of the transitional restrictions on the free movement of workers from Bulgaria and Romania, which will apply to the UK from 1 January 2014. The EU Commissioner for Employment responded the same day by warning that the UK risks being seen as a "nasty country" and by highlighting the importance of reciprocity in EU free movement law.

The BBC's *Today* radio programme, on the morning of November 27th, interviewed Nigel Farage, leader of UKIP - the UK political party with a strong Eurosceptic stance and a policy for the radical limitation of migration, which is central to its main platform. The discussion between the interviewer and Mr. Farage centred on the capacity of UKIP to attract Conservative Eurosceptic voters away from their traditional party of choice to his party, on the basis of UKIP's Eurosceptic policies.

Whatever the internal politics of the UK, one key question that must be considered is whether the prime minister's proposals will place the UK in breach of its obligations under EU law which, according to the European Communities Act 1972, is unlawful.

As the prime minister chose to announce his government's new policies in a newspaper article rather than in Parliament, we only have the final version of the article to go on as a statement of the intended legislation. David Cameron made five headline proposals:

- Newly arriving EU citizens (other than British and possibly Irish citizens) will not receive out-of-work benefits for the first three months of their residence in the UK;
- Unemployed EU citizens (other than British and possibly Irish citizens) will have social benefits payments stopped after six months, unless they can show that they have a "genuine" chance of finding work;

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- EU citizens (other than British and Irish citizens) will not be able to claim housing benefits immediately on arrival;
- Those EU citizens (other than British and possibly Irish citizens) who are found to be sleeping rough will be deported and barred from return for one year;
- Fines for employers who fail to pay the minimum wage will be quadrupled.

This Commentary will examine each of the proposals (briefly) against the UK's obligations in EU law to see whether or not they are consistent with that law. Finally, this paper will make some comments on the general issue of the end of the transitional arrangements for Bulgarian and Romanian work-seekers, and 'benefits tourism' in general.

No out-of-work benefits for the first three months

There are two relevant EU measures that touch on the subject: the EU Citizens' Directive (2004/38) and the Regulation on coordination of social security systems (883/2004). The EU Citizens' Directive entitles any EU citizen to move and reside in another member state (including the UK) for up to three months without fulfilling any formalities (beyond presenting a passport or identity document at the UK border). EU citizens who arrive in the UK and stay for three months or less can be excluded from social benefits in the host state (here, the UK). But if they are looking for work (job-seekers) it is unlawful to exclude them from a benefit of a financial nature intended to facilitate access to employment in the labour market. The Court of Justice of the European Union held this in a case about German benefits in 2009.¹ So the answer to the first question is – EU citizens can be excluded from UK out-of-work benefits during the first three months of their stay in the UK, but only if they are not job-seekers. Provision must be made so that any exclusion from these benefits does not adversely affect those EU citizens who are seeking work in the UK.

No benefits after six months

The second proposal of the prime minister is that EU citizens, who after working in the UK become unemployed, will be excluded from social benefits after six months. This seems to confuse two quite different aspects of EU law. First, the Court of Justice of the European Union held in 1991² that EU citizens who are new job-seekers in a member state (the state in question was the UK and the EU citizen a Dutch national) only have a right of residence for as long as they have a genuine chance of finding employment. The Court approved the UK's six-month rule in general but held that so long as there is a genuine chance that the EU citizen may find a job he or she has an EU right of residence. Where an EU job-seeker has a right of residence he or she also has a right to equal treatment with British job-seekers, including to social benefits for more than six months. The second issue is: How long does an EU citizen retain the status of a worker after he or she has lost his or her job? This question has not yet been answered clearly by the Court. The prime minister appears to assume that the same rule applies both to the first entrant job-seeker and a person who has already worked in a member state and finds him or herself unemployed. However, particularly for the second group, the existence of a real link with the labour market is the key test – the greater that link the stronger the claim of the individual to continuing status as a worker (though this test of a real link with the labour market also applies to the first group). The stronger the link to the labour market, the greater the entitlement to all social benefits. If the prime minister's legal argument is that EU unemployed workers in this situation are an

¹ C-22/08 and C-23/08 *Vatsouras* 4 June 2009.

² C-292/89 *Antonissen* [1991] ECR I-745.

unreasonable burden on the UK's social assistance system, then UK benefits officers must undertake a personal assessment of the EU citizen's situation in each case. Further, according to the Court of Justice, the test is whether the granting of a social security benefit could place a burden on that member state's social assistance system as a whole so as to justify ending the residence right.³

No housing benefit on arrival

Where an EU citizen (other than a British or Irish one) comes to the UK to start work, they immediately obtain the status of worker under EU law. As workers they are entitled to full equality with British workers as regards social advantages. Since British workers are entitled to housing benefit, so too are EU workers who qualify on the same grounds. It would be a breach of EU law to exclude EU workers, no matter how recently they arrived from another member state. Where EU citizens (other than British or Irish ones) come to the UK - not as workers but looking for work - the rules on job-seekers apply and they are also entitled to equality. The self-employed are also likely to fall into this category. But EU citizens who are not economically active, that is to say, students, pensioners and those who do not intend to work are in a different category. It may well be lawful under EU law to exclude them from housing benefit on arrival.

Deporting rough sleepers and barring their re-entry

This is also a problematic proposal. The first group of people who cannot be subject to deportation and an entry ban for rough sleeping are those EU citizens who are working or seeking work in the UK. Some recent studies⁴ indicate that homelessness among working EU citizens in a host state is an increasing problem resulting from low pay and high costs of housing. This problem needs to be tackled by assuring that they obtain at least the minimum wage and assistance to find housing. Secondly, as EU citizens are free to move and reside anywhere in the EU for three months without hindrance, they should not be subject to deportation and a re-entry ban just because they are sleeping rough. The Directive does permit member states to extinguish the right of residence of EU citizens where they are an unreasonable burden on the social assistance system. But sleeping rough is not such a burden, indeed it is not a burden on the social assistance system at all. Indeed, sleeping rough does not cost the social assistance system of a member state any money thus it cannot be a burden according to the Court of Justice.⁵

Similarly, barring re-entry to the UK would not be justified in such a case as it is a fundamental interference with the right of free movement. The third group is that of EU citizens who have been in the UK for more than three months but are not working, seeking work or otherwise economically active. Here there is a lack of clarity on whether they are still exercising their rights as EU citizens and thus are entitled to a right of residence.

³ C-140/12 *Brey*, 12 September 2013.

⁴ The Synthesis Report on Free Movement of Workers - Implementation in the Member States prepared for the European Commission DG Employment 2012/13 (not yet released but presented in Vilnius on 17 October 2013).

⁵ C-140/12 *Brey*, 12 September 2013.

Increasing fines on employers for failure to pay the minimum wage

This is not a matter of EU law but of UK domestic law. It seems to be an excellent idea to increase fines on employers who fail to pay minimum wages. As some studies⁶ indicate that EU citizens from other member states are often among the groups most vulnerable to exploitation by employers, this measure would assist them and, if effective, diminish the incidence of EU citizens who are still working in situations of near destitution.

Are Romanians and Bulgarians on the march towards the UK?

The UK is among a handful of EU countries that have not already removed the transitional restrictions on job-seekers from Romania and Bulgaria. The vast majority of member states already did so, some years ago. According to the EU statistical agency, the main destination countries of Romanian and Bulgarian nationals moving in the EU are Italy and Spain. Over 1 million have moved to each of those countries. Notwithstanding the attractiveness of Italy to Romanians and Bulgarians seeking work, Italy removed the restrictions on 1 January 2012.

Do EU citizens move to work or to seek benefits?

According to a study recently carried out for the European Commission,⁷ on average, EU migrants are more likely to be in employment than nationals of the state. Non-active EU migrants represent a very small share of the total population of each member state (0.7% - 1.0%) with a small number of exceptions among the very small member states. According to the study, there is little evidence in the literature or stakeholder consultations to suggest that the main motivation of EU citizens to migrate and reside in a different member state is benefit-related. This finding – that welfare is not a strong magnet for migrants – is further supported by a recent CEPS paperback book on *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, which demonstrates that even when such an effect is found, it is relatively weak compared to other mobility-related determinants.⁸

Further, when four member states (including the UK) complained to the EU presidency in April this year that EU citizens were abusing their rights in their countries, the presidency passed the complaint on to the Commission. The Commission investigated the complaint very carefully and asked the four member states for statistical evidence and other information on the matter of abuse. None of the member states were able to provide specific information.⁹ The Commission will continue to monitor the situation and assist any member states that have specific problems with the implementation of EU free movement rights.

⁶ M. Wilkinson (2012), "Out of sight, out of mind: the exploitation of migrant workers in 21st-century Britain", *Journal of Poverty and Social Justice*, 20(1), pp. 13-21 and S. Gherardi & A. Murgia (2013), "By Hook or By Crook: Flexible Workers between Exploration and Exploitation", *Research in the Sociology of Organizations*, 37, pp. 75-103.

⁷ ICF-GHK: *A fact-finding analysis on the impact on the Member States' social security systems of the entitlement of non-active intra-EU migrants to special non-contributory cash benefits and health care granted on the basis of residence*, 14 October 2013 (<http://ec.europa.eu/social/main.jsp?langId=en&catId=22>).

⁸ C. Giulietti and M. Kahanec (2013), "Does Generous Welfare Attract Immigrants? Towards Evidence-Based Policy-Making", in E. Guild, S. Carrera and K. Eisele (eds), *Social Benefits and Migration – A Contested Relationship and Policy Challenge in the EU*, Brussels: Centre for European Policy Studies (CEPS), pp. 111-127.

⁹ See <http://www.dailymail.co.uk/news/article-2460151/Iain-Duncan-Smith-tells-European-Union-curbs-benefit-tourism-stay.html> 15 October 2013.