Reading the small print: will Cameron's EU migration reforms pass legal muster?

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11/02/2016

The draft renegotiation deal obtained by David Cameron would amend three EU laws relating to migration: the free movement of citizens, their right to seek work in another Member State, and their right to claim social security benefits. ***Steve Peers*** *explains what the proposals will mean and looks at whether they may be liable to legal challenge. He concludes that other Member States will probably accept the amendments on family members and may agree to the child benefit reforms, but the changes on in-work benefits are highly vulnerable.*

The draft deal takes the form of six draft legal texts: a **Decision** of the EU Member States' Heads of State and Government (the 'draft Decision'); a **Statement** of the Heads of State and Government (which consists of a **draft Council Decision**); a **Declaration** by the European Council (which consists of the EU Member States' Heads of State and Government, although when acting collectively they are legally distinct from the European Council): and **three declarations** by the Commission. Of these, Section D of the draft Decision and two of the Commission declarations relate to immigration issues.

Having said that, the key feature of the draft deal on immigration 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 draft Decision enters into force. That will happen (see Section E of the draft Decision) as soon as the UK announces that it will remain a member of the EU (that would only happen, of course, if the UK public vote to remain in the upcoming referendum). The draft deal includes a commitment from the Commission to make these proposals, and from the other Member States to support their adoption in the EU Council (oddly, the latter commitment does not apply to the proposed amendment to the citizens' Directive, since that proposal is not referred to in the draft Decision).

However, all three proposals are subject to the 'ordinary legislative procedure', meaning that they have to be agreed with the European Parliament. It is also possible that their legality would be challenged before the EU Court of Justice. I can't appraise the political likelihood of the European Parliament approving the proposals, but I will offer some thoughts about possible challenges to their legality if they are agreed.

Unlike some other parts of the draft deal (on the position of non-Eurozone states, and the clarification of 'ever closer union'), there is no mention of possible future Treaty amendments to give effect to any part of the text dealing with free movement (immigration) issues. It should be kept in mind that the texts are not final, and at least some amendments might be agreed before their formal adoption – which is planned for later in February.

Although the press discussion has focussed on the 'emergency brake' in in-work benefits, there are three categories of issues: benefits (including a couple of points besides that emergency brake); the family members of non-EU citizens; and EU citizens who commit criminal offences. I refer back to Cameron's November 2014 speech on EU immigration issues (which I analysed here) where relevant.

It should be noted that there is no proposed text in the deal on two of the issues which Cameron had raised: removal of job-seekers if they do not find a job within six months, and a requirement to have a job offer before entry. Both these changes would have required a Treaty amendment, in light of the *Antonissen* judgment of the CJEU.

Benefits

There are three benefits issues in the draft deal: (a) the 'emergency brake' for in-work benefits; (b) the export of child benefit; and (c) benefits for those out of work.

'Emergency brake' on in-work benefits

Pulling the emergency brake is simpler on the San Francisco metro system. Photo: Tito Perez via a Creative Commons 2.0 licence

Cameron had called for no access to tax credits, housing benefits and social housing for four years for EU citizens, but later signalled his willingness to compromise on this point. The position of non-workers and jobseekers is discussed below; but the position of workers is legally and politically difficult, since the Treaty guarantees them non-discrimination.

In the end, the draft deal suggests not 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, which will approve it by a qualified majority on a proposal from the Commission (the European Parliament will have to approve the legislation, but would have no role on deciding if the brake should be pulled). A Commission declaration states the UK qualifies to pull this ban immediately; but there is nothing in the deal to suggest that *Member States* – who would have the final word – also agree. As I have already pointed out, there is no legal requirement in EU law that the legislation would have to give the final word to the Council, rather than the UK itself. The restrictions would only apply for a certain number of years (the exact number is not yet agreed), and would have to be phased out during that time. It's not clear how much time would then have to pass before they could be applied again.

On what grounds could the brake be applied? According to the draft 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'.*

There's certainly a widespread perception that one of more of these problems exist in the UK and are caused by the large increase in the number of workers from other Member States in recent years. However, there are two serious

problems with the proposed mechanism. Firstly, as Jonathan Portes has argued, objective evidence for this view is lacking. Secondly, while the CJEU has been willing to accept certain limits to free movement rights on the grounds of protecting health systems (see my prior blog post for details), this proposal would have a much more far-reaching impact on non-discrimination for workers. It's certainly *conceivable* that by analogy from the Court's obvious willingness to keep EU monetary union afloat, along with its endorsement of restrictions for non-workers in recent years (see below), it *might* accept that these plans do not violate the Treaties. But as EU currently stands, that is probably a long shot.

Export of child benefit

Cameron sought to end payment of child benefit to children living in other Member States. This payment is provided for in the EU social security coordination Regulation, which would have to be amended to change those rules. There was a strong argument that the plan would have breached the Treaties, since in the case of *Pinna* the CJEU struck down EU legislation that allowed Member States not to export such benefits at all as a breach of the rules on free movement of workers.

The draft deal does not go as far as Cameron wanted: instead child benefit can be limited by indexing it to the standard of living in the receiving State. It's an open question whether this would breach the Treaties, since there is no case law on the point.

Benefits for those out of work

Cameron sought to end social assistance for jobseekers. The EU legislation already rules out social assistance for jobseekers, so this reflects the status quo. Although the CJEU has said that jobseekers have a right to access benefits linked to labour market participation, if they have a link already with the labour market in question, it took a narrow view of this rule in the judgment in *Alimanovic*. Pure benefit tourists (who have never had work in the host State) are not entitled to benefits, according to the judgment in *Dano*. So the draft Decision simply reiterates this case law, which has already satisfied Cameron's main objectives in this field.

EU citizens' family members

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 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 with their family members, now invoking the free movement rights in the *Treaties*. In 2014, the CJEU clarified two points about this scenario (as discussed by Chiara Berneri here): (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.

In his 2014 speech, David Cameron announced his desire to end all distinction between EU citizens and UK citizens as regards admission of non-EU family members, by allowing the UK to impose upon the EU citizens the same strict conditions that apply to UK citizens. Since this would have deterred the free movement of those EU citizens who

have non-EU family members, there is a good change that it would have required not just a legislative amendment but a Treaty change. (Note that according to the CJEU, EU free movement law does not just require the abolition of discrimination between UK and other EU citizens, but also the abolition of *non-discriminatory 'obstacles'* to free movement).

However, the draft deal does not go this far. The main draft 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'; and*
>
> *'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.'*

Let's examine the planned legislative amendments, then the 'clarifications'. The proposed amendments would exclude two separate categories of non-EU citizens from the scope of the citizens' 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. It's possible to fall into both categories; the first category will exclusively apply to those who got married while an EU citizen lived in a non-EU state, or those who got married in an EU State even though the non-EU citizen was not lawfully resident there. 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. But what about ambiguous cases, such as a pending asylum application or appeal? EU legislation says that asylum-seekers can usually stay until the application fails (if it fails), and then during the appeal (subject to some big exceptions). According to the CJEU, the EU's main rules on irregular migrants therefore *don't* apply to asylum-seekers whose application is pending.

Secondly, it's odd to refer to national law alone, since sometimes EU law governs the admission of non-EU nationals. Even the UK (along with Ireland) is bound by the first-phase EU asylum law, and by the EU/Turkey association agreement. Denmark is bound by the latter treaty. And all other Member States are bound by the second-phase asylum law, along with EU legislation on admission of students and researchers and some categories of labour migrants (the highly-skilled,seasonal workers and intra-corporate transferees).

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 proposal that limits its application to the UK.

Finally, the consequences of the rule need to be clearer. 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.

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. 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.

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: the idea that you could go away and enjoy your family life somewhere else 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 (known in the UK as the *Surinder Singh*route). The definition of what constitutes a 'sufficiently genuine' move to another country is set out in the case law (three months' stay with a family member) and mere guidelines cannot overturn this.

It should be noted that the *Surinder Singh* case law is in any event derived from the *Treaty*. 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: see analysis by Alina Tryfonidou here).

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, since national immigration law will apply to their move to the *first* Member State. It will be important to see how the legislative amendments address the transitional issues of people who have already moved to a host Member State before the new rules apply. Can the home Member State say that those families must now obtain lawful residence in the host State for the non-EU family member, before the non-EU family member can come to the home State?

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.

What would the renegotiation deal do? First of all, the draft decision 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's not clear whether the revision of the Directive referred to at the end here will be as imminent as the planned proposal to amend the rules on a 'prior lawful residence' rule for non-EU family members. Otherwise the plan to issue guidelines is clearly not binding. The language on these guidelines partly reflects the existing law, but some features are new: the greater emphasis on past conduct, the lesser need to show that a threat is imminent and the possibility of expelling someone as a 'preventative' measure.

These changes fall within the scope of Cameron's desire to have 'stronger measures to deport EU criminals'. However, it should be noted that there is no specific reference to his plans for 'tougher and longer re-entry bans for foreign rough sleepers, beggars and fraudsters'. While a conviction and re-entry ban for fraud might be covered by

the guidelines referred to above, there's no mention of clarifying entry bans as regards those guidelines, or changing the legislation on this issue. Also, as I noted in my comments on Cameron's plans at the time, EU legislation does not allow for re-entry bans for rough sleepers and beggars, since the EU citizens' Directive states unambiguously that a ban on entry cannot be imposed where a person was expelled for grounds other than public policy, public security and public health.

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

Finally, it should be noted that the draft Decision briefly refers to Cameron's plan to have longer waiting periods for free movement of persons in future accession treaties. It does not incorporate his suggestion, but merely notes it. However, since the details of each new Member State's adaptation to EU law are set out in each accession treaty, which has to be approved by each Member State, the UK can simply veto any future accession treaties unless longer waiting periods for free movement are indeed included. The next accession to the EU is at least four years away, probably more. So nothing really turns on the absence of agreement with the UK's position for now.

Conclusion

How to appraise the planned changes to free movement law? The most fervent supporters of the EU are likely to see some or all of them as a betrayal of the EU's principles that should never be tolerated. But the departure of a large Member State is liable to do far greater damage to the EU's integration project than acceptance of these changes ever would.

The changes, if they are all implemented as planned, would fall short of a *fundamental* change in the UK's relationship with the EU. But equally it is clearly wrong to say that they mean *nothing* – if in fact they are implemented. The changes would be modest but significant: amendments to three key pieces of EU legislation that would for the first time roll back EU free movement law, not extend it. Leaving aside the calls for non-binding guidelines, there would be cutbacks in in-work benefits (albeit for a limited period), significantly more control on the admission of non-EU family members of EU citizens, and more limited export of child benefit.

The plans not only raise questions of interpretation (although most legislative reforms do that), but of political and legal feasibility: the Commission is willing to propose them and the Member States support two of them, but do Member States support the third proposal – and the UK's intention to pull the 'emergency brake'? Will the European Parliament support any of them? Which of them would get past the CJEU? My assessment, as detailed above, is that the amendments on family members will probably be acceptable; the child benefit reforms are an open question; and the changes on in-work benefits are highly vulnerable.

Others may reach a different legal conclusion, of course. And British voters will also be making an assessment not only of the rest of the renegotiation package, but also on the broader pros and cons of EU membership. These changes go nowhere near far enough for the EU's strongest critics, but much too far for its biggest admirers. Time will soon tell whether the British public believes that they are a reasonable compromise.

Reference: Barnard & Peers: chapter 13

This post represents the views of the author, and not those of BrexitVote, nor the LSE.

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