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RESTRICTING FREE MOVEMENT OF PEOPLE THROUGH BREXIT

Keerthi Kumburuhena¹

¹LL.M (Aberdeen), Magistrate/ Additional District Judge, Bandarawela, Sri Lanka.

ABSTRACT

Free Movement of People is a principle which confers the right to live and work within any European Union State and certain European Free Trade Association States in the European Economic Area. According to Article 45 (1) of the Treaty on the Functioning of the European Union, freedom of movement of workers should be protected within the Union. On March 29, 2017 the British Government formally informed the European Council of its intention to leave the EU following the procedure laid down in Article 50 of the Treaty on EU. The scheduled departure which was due on March 29, 2019 has been extended to April 12, 2019. Until a proper exit is organised, the UK should follow EU laws as usual including the principle of FMP. It is high time the UK Government renegotiated its trade deals with the European Union. The author discusses three Brexit options; hard, soft and medium and recommended a limited form of FMP as a solution to avoid complex trade issues while remaining in the European Economic Area and the Customs Union.

KEYWORDS: *Free Movement of People, Brexit, EU Citizens, European Court of Justice, European Economic Area, Customs Union*

INTRODUCTION

The Free Movement of People (FMP) is a principle which confers the right to live and work within any European Union (EU) State¹ and certain European Free Trade Association (EFTA) States which are members of the European Economic Area (EEA). According to Article 45 (1) of the Treaty on the Functioning of the European Union (TFEU), freedom of movement of workers should be protected within the Union.²

Any kind of discrimination relating to work, remuneration and other employment conditions on grounds of nationality is prohibited.³ EU citizens ('citizens') could accept job offers and move freely to occupy themselves within any of the twenty eight Member Countries and EFTA-EEA

States such as Iceland, Liechtenstein and Norway. They could remain in any member country not only during employment, but also after the completion of service. Even if a worker loses his job due to some reasons he has a right to remain.⁴ FMP has been playing a major role within four freedoms of EU as freedom of goods, capital and services could not exist if there was no free movement of citizens.⁵

RECOGNITION OF FMP

EU citizenship has been established by Article 20 (1) of the TFEU. Citizens have freedom of movement, residence, voting rights in EU elections, right to diplomatic protection and right to petition.⁶ It is prohibited to discriminate any citizen on grounds of nationality.⁷

Article 21 (1) of the TFEU says that "Every citizen of the Union shall have the right to move and reside freely within the territory of the

¹ Ian Dunt, *BREXIT, What the Hell Happens Now?* (Canbury 2016) 392

² Treaty on the Functioning of the European Union (TFEU), art 45 (1).

³ *ibid* art 45 (2) ; and art 18.

⁴ TFEU, art 45 (3) (d).

⁵ Dunt (n1) 611.

⁶ TFEU art 20 (2) (a)-(d).

⁷ *ibid* art 18.

Member States, subject to limitations and conditions laid down in the treaties and by measures adopted to give them effect".⁸ Therefore, even an economically inactive person is entitled to the right of free movement despite his nationality.

However, according to the EU Directive 2004/38/EC an economically inactive person should have ample resources to prevent him from being a burden on social security benefits. Hence, a Member State has a right to reject social benefit claims if the claimant could not prove that he was a job seeker with a higher possibility of being engaged.⁹

BURDEN OF ECONOMICALLY INACTIVE CITIZENS

Economic inactivity has a negative impact on the social security system of Europe. There are many economically inactive EU citizens in Britain. Although moving and working in another EU country is a fundamental right of all citizens, it would be unfair to have free and unconditional access to social benefits of another country.

STRENGTHENING FMP IN CITIZENSHIP CASES

The concept of EU citizenship has been continuously strengthened by judgments of the European Court of Justice (ECJ) ('the Court').¹⁰ It has recognised the rights of economically inactive citizens while interpreting Articles 18 and 21 (1) of the TFEU when deciding cases of citizenship. In *Michel Trojani v. Centre Public d'Aide Sociale de Bruxelles (CPAS)*¹¹ the Court has interpreted Article 18 and held that even an economically inactive citizen has a freedom of residence like an economically active person.

The Court held in *Horst Otto Bickel and Ulrich Franz*,¹² an EU citizen has a right to have criminal proceedings conducted in a language in which he is conversant and such a right should not be discriminated on the grounds of nationality. In *Maria Martinez Sala v. Freistaat Bayern*,¹³ a Spanish lady was unemployed at the time she applied for child raising benefits in Germany. Her social benefit claim had been rejected on the basis that she was not a national of Germany. The Court held that though she was not a national, she was a legal resident of Germany and therefore entitled to benefits.

⁸ TFEU art 21 (1).

⁹ Directive 2004/38/EC, art 24 (2) and 14 (4) (b).

¹⁰ Francis G. Jacob, 'Citizenship of the European Union—A Legal Analysis' [2007] European Law Journal 13 (5) 591,593.

¹¹ [2004] ECJ Case C-456/02.

¹² [1998] ECJ Case C-274/96.

¹³ [1998] ECJ Case C-85/96.

In *Baumbast and R v. Secretary of State for the Home Department*,¹⁴ while interpreting Article 18, the Court held that even a person who is economically inactive, has a legal right to reside in any member country if he was an EU citizen.

SIGNIFICANT RETREAT BY ECJ RESTRICTING FMP

Recent decisions taken by the Court indicate a significant retreat from its past views in terms of FMP. In *Peter Brey v. Pensionsversicherungsanstalt*, it was held that if an economically inactive person claims social security benefits, he should have satisfied the primary conditions required for legal residencies.¹⁵ In other words, if a citizen is unable to comply with the said conditions then he would not be entitled to social security benefits.

Court further held that a citizen who does not have sufficient resources to maintain himself and his family is a burden and consequently it could have an impact upon the social benefits system of that country.¹⁶ Therefore, before granting social benefits, individual conditions of the person should be considered.¹⁷ In the matter of *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, it was held that a person who was not capable of being a legal resident could not be entitled to have equal treatment in terms of social assistance benefits.¹⁸

In *Jobcenter Berlin Neukolln v. Nazifa Alimanovic and Others*, it was held that instead of the 'individual condition test' an 'accumulative impact test' should be followed.¹⁹ This means, instead of considering the burden placed upon individual claims the overall impact by accumulation of such claims should be considered in determining the policies relating to social assistance benefits.

The said judgment indicates that Court has left more discretion to the Member Countries to decide upon the policies relating to economically inactive persons as only a member country could

¹⁴ [2002] ECJ Case C-413/99.

¹⁵ ECJ [2013] Case C-140/12, para [44].

¹⁶ *ibid* para [61].

¹⁷ Anne Pieter van der Mei, 'Overview of recent cases before the court of justice of the European Union' [2016] European Journal of Social Security 18 (1) 74, 76.

¹⁸ Gareth Davies, 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' European Legal Studies [2016] (2) 1, 8.

¹⁹ [2015] ECJ Case C-67/14 para [62].

easily measure the accumulative impact of claims affecting the benefits schemes.

Furthermore, due to the strict application of ‘legal residence test’ in terms of social benefits, there have been many complaints from non-British EU residents in Britain as their social benefits had been refused as they had no legal rights of residence.²⁰ Consequently, European Commission filed a case against UK saying that UK authorities have discriminated against EU citizens.

In the said case, *European Commission v. United Kingdom of Great Britain and Northern Ireland*,²¹ it was held that there was no discrimination perpetrated by UK in requiring legal residencies in order to provide social benefits and therefore, Article 4 of Regulation No. 883/2004 had not been breached.²²

Considering the afore-discussed cases *Brey*, *Dano*, *Alimanovic* and *Commission v. UK*, it seems they had a common view that social benefits should be subject to the conditions of legal residence.²³ This is a substantial change by the ECJ from its past views concerning the concept of EU citizenship. Hence, it was necessary that United Kingdom rethink and compromise their membership with EU in new terms. This background had led to the development of Brexit.

THE DEATH OF FMP

On March 29, 2017 the British Government formally informed the European Council of its intention to leave the EU following the procedure laid down in Article 50 (2) of the Treaty on European Union (TEU). A two-year period was provided under Article 50 (3) to organise such an exit. The scheduled departure which was due on March 29, 2019 has been extended until April 12, 2019. The UK should immediately renegotiate her trade deals with other EU States and organise how the Brexit should be performed before the said deadline.

If UK was unable to organise a proper exit, it could request for an extension of another two-year period with the consent of Member States. Failing which, it would be automatically out from

all trade deals with the Union.²⁴ Until a proper exit is organised, the UK should follow EU laws as usual, which means the FMP is still alive.

However, sometimes it would be impossible to conclude all negotiations with the EU and its members before the extended Brexit day April 12, 2019. As an internal exit solution, the European Union (Withdrawal Bill) was introduced in July 2017 to repeal the 1972 European Communities Act. However, such an internal exit would not directly affect the external exit process.²⁵ After the exit, the UK could at any time, re-join the EU by following the procedures in Article 49 and enjoy FMP benefits.²⁶

HARD BREXIT

The hard Brexit is an option where UK would leave both EU Single Market and the Customs Union. Consequently, there would be no FMP between UK and the EU. The British Government does not have to pay any contribution to the EU. UK may adopt WTO and UNCITRAL Model Laws and trade with EU States based on them. In addition, the British Parliament could prepare more national legislation governing trade, tariffs, borders and customs.

One of the main benefits of the hard Brexit would be that the UK could easily and freely engage in free trade agreements with any country in the world. However, WTO Regulations may limit freedom of UK and therefore future trade deals with the EU would turn more difficult.²⁷

SOFT BREXIT

A soft Brexit option would allow the UK to remain either in the European Economic Area (EEA) or Customs Union. A significant benefit of this is the possibility to continue FMP.²⁸ For instance, though Norway has joined the EEA, they are not part of the Customs Union.

Norway is a member of the EFTA which was founded in 1960 to allow European countries which are not EU members to enjoy benefits of free trade among them. FMP is included in the objectives of EFTA Convention.²⁹ An issue in the

²⁰ Court of Justice of the European Union, ‘The UK can require recipients of child benefit and child tax credit to have a right to reside in the UK’ (Luxembourg 2016) press release No 63/16, p 1.s

²¹ [2016] ECJ Case C-308/14

²² *ibid* para [86].

²³ Charlotte O’Brien, ‘Don’t think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK’ (EU Law Analysis June 2016), <<http://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html>>

²⁴ TFEU, art 50 (3).

²⁵ Nigel Foster, *EU Law Directions* (5th edition, OUP 2016) para 4.2.

²⁶ TEU, art 50 (5).

²⁷ Andrew Duff, ‘After Brexit: A New Association Agreement Between Britain and Europe’ (Policy Network October 2016) 10.

²⁸ Adam Lazowski, ‘Withdrawal from the European Union and alternatives to membership’ [2012] *European Law Review* 37(5) 523,535.

²⁹ European Parliament, ‘Free trade agreements between EFTA and third countries: An overview’ (EP April 2016) 3.

Norway Model is though it does not confer voting rights in the EU decision making process, it is bounded to follow EU policies governing the EEA.³⁰

If the Norway Model could be followed by UK then the right of FMP could be protected, and the UK could remain part of the ‘Schengen Area’.³¹ Additionally, the UK would be able to follow trade policies with non-EU countries, as it would not be bounded by the EU Customs Union.³² However, UK would be bounded from EU laws in certain areas, except in defence, agriculture and fisheries, although they have left the EU,³³ the UK would have to continue paying contributions to the EU.

MEDIUM BREXIT

A medium Brexit option such as the Swiss Model have certain benefits. Switzerland has neither been a full member of the EEA nor of the Customs Union. They have limited access to EEA.³⁴ In addition, Switzerland is also a part of EFTA. There are separate bilateral agreements between them and EU including recognition of FMP. Although the FMP was refused by a referendum due to migration issues in 2014,³⁵ it was once again recognised in 2016 in agreement with EU.

Another example is Turkey which is a part of the Customs Union, it adheres to the common tariff system when entering the EU and therefore movement of goods into EU have become much easier. However, FMP does not exist in this model. Although the objective of the FMP was included in Turkey-EU agreement 1963, it is still under negotiations. In the Turkey Model it is difficult to pursue separate isolate trade policies with non-EU countries.³⁶

CONCLUSION

The scheduled Brexit which was due on March 29, 2019 has been extended until April 12, 2019 and therefore it is high time the UK Government renegotiated her trade deals with the

EU. The afore-discussed recent citizenship cases indicates that there has been a significant retreat by the ECJ from its past view and has suggested a more limited version of the FMP.

To avoid complex trade issues, remaining in the EEA and the Customs Union with a limited form of FMP, would be a solution. Finally, such an economic cooperation between the UK and the EU would permit EU citizens to enjoy the benefits of FMP while delivering their services across the Europe.

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³¹ HM Government, ‘Alternatives to membership: possible models for the United Kingdom outside the European Union’, (Foreign and Commonwealth Office March 2016) 16.

³² Duff (n27) 10.

³³ HM Government (n31)17.

³⁴ ibid 26.

³⁵ Jean-Claude Piris, ‘If the UK votes to leave: The seven alternatives to EU membership’ (Centre for EU Reform 2016) 8.

³⁶ Duff (n27) 11.