5. After 'Brexit': will rights acquired in the context of the free movement of persons be protected? A comparative perspective

Após 'Brexit': serão protegidos os direitos adquiridos de livre movimentação? Uma perspectiva de direito comparado

(Autor)
CHRISTA TOBLER

LLM (Professor of European Union law at the Europa Institutes of Basel University, Switzerland, and Leiden University, the Netherlands). r.c.tobler@law.leidenuniv.nl

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Resumo:

O voto do “Brexit” em 23.06.2016 levantou diversas questões relativas à relação entre o Reino Unido da Grã-Bretanha e Irlanda do Norte (“Reino Unido”) e a União Europeia (“UE”), especialmente no que tange aos direitos adquiridos. Diversas opiniões foram expressas a respeito do possível fundamento para um direito individual de proteção dos direitos adquiridos e a maioria dos autores entende que deverá haver um acordo entre o Reino Unido e a UE. A partir deste contexto, este artigo focará na questão dos direitos adquiridos no âmbito da circulação das pessoas. A esse respeito, o Tratado da Groenlândia, o Acordo União Europeia – Suíça e a lei do Espaço Econômico Europeu (“EEE”) – embora seus dispositivos relativos a direitos adquiridos também levantem diversas questões e embora estes nunca tenham sido adotados ou aplicados – podem
servir de inspiração para as negociações entre o Reino Unido e a União Europeia, podendo envolver, por exemplo, uma previsão referente à proteção dos direitos adquiridos. Um caso comparavelmente simples seria se o Reino Unido se tornasse um Membro da Associação Europeia de Livre Comércio (“EFTA”) e, subsequentemente, do EEE, ou se o Reino Unido firmasse um tratado em separado, mas com conteúdo semelhante. No entanto, vale notar que o EEE inclui a livre circulação de pessoas, tema que foi amplamente debatido no “Brexit”. Assim, resta ver qual será a melhor opção a ser adotada do ponto de vista do Reino Unido.

Abstract:

Among many other issues, the vote in the advisory referendum on continued membership in the European Union (EU) of the United Kingdom of Great Britain and Northern Ireland on 23 June 2016 raises the issue of the protection of acquired rights, i.e. the legal position of people who exercised rights under Union law during membership, in a situation where those rights will no longer be available after withdrawal or, depending on the alternative arrangement, will be available only in more narrow framework. In the context if Brexit, this will be a matter for negotiations. The article takes a comparative look at a certain other legal contexts. Both the law of the European Economic Area and the EU-Swiss Agreement on the free movement of persons contain a provision on the protection of acquired rights. Further, the so-called Greenland Treaty envisaged such a provision.

Palavra Chave: Brexit - Direitos adquiridos - Circulação de pessoas - Tratado da Groenlândia - Acordo União Europeia - Suíça - Espaço Econômico Europeu - Associação Europeia de Livre Comércio

Keywords: Brexit - Acquired rights - Free movement of persons - Comparative law - Greenland - Switzerland - European Economic Area Agreement

1. Introduction: Brexit and the issue of acquired rights

The so-called “Brexit” vote, i.e. the vote in the advisory referendum on continued membership in the European Union (EU) of the United Kingdom of Great Britain and Northern Ireland on 23 June 2016 has raised many questions. A narrow majority of voters declared themselves to be in favour of leaving the EU, and they did so in a situation where it was not clear what would follow the actual withdrawal. The new UK Government yet has to trigger the procedure set out in Art. 50 TEU. It has stated that before doing so, it first needs to determine its position on a number of important issues, such as what kind of alternative relationship with the Union it wants to aim at and what kind of approach it plans to take with respect to the treatment of people who exercised rights under Union law, in a situation where those rights will no longer be available after withdrawal or, depending on the alternative arrangement, will be available only in more narrow framework.

The latter issue concerns the protection of so-called acquired or vested rights. In the case of “Brexit”, this is a very large issue, as rights are exercised in many different legal context under Union law. A research paper of the UK House of Commons describes the issues as follows and mentions some examples:

"If the UK left the EU, would all the complex web of rights and obligations that apply to British citizens and businesses in the EU – and EU citizens and businesses in the UK – simply disappear overnight? If so, UK citizens working in EU countries would suddenly become illegal immigrants. Fishermen from EU countries would be excluded from UK waters. British farmers would lose subsidies under the Common Agricultural Policy. UK citizens would lose the right to bring damages claims based on EU law. Or would some “vested” or “executed” rights continue, either through a transitional arrangement or automatically as a principle of international law?"

In the legal discourse on this matter, different opinions have been expressed with respect to the possible basis of an individual right to protection of acquired rights, ranging from the case-law of the Court of Justice of the European Union (CJEU) on individual rights to public international law and to future negotiations with the Union in view of an agreement on this issue. Most writers think that an agreement will be needed.
For example, PIRIS\(^5\) writes:

“There is nothing in the EU treaties nor in the case-law of the Court of Justice which could be used to establish a theory of acquired rights of the citizens of a State that has left the EU. Thus, in the absence of any Agreement of the UK and the EU, it would not be legally possible to build a theory according to which any ‘acquired right’ would remain valid for dozens of millions of individuals (what about their children and their grandchildren?), who, despite having lost the EU citizenship, would nevertheless keep its advantages for ever. This would also lead to absurd consequences.”

Against this background, the present paper focuses on the issue of acquired rights in the specific context of the movement of persons (i.e., to the exclusion of other, economic rights such as those related to the trade in goods). The messages in the UK have been mixed in this respect. Before the vote, the Leave Campaign in June 2016 promised roundly that there will be no change for EU citizens already lawfully resident in the UK. These EU citizens will automatically be granted indefinite leave to remain in the UK and will be treated no less favourably than they are at present.\(^6\) However, RYAN\(^7\) at the time pointed out that this broad promise raises numerous questions, for example:

- Does the promise of indefinite leave apply to all EU citizens, or only to those with an EU right of permanent residence?
- What would be the position of EU citizens who were actually resident in the United Kingdom, but who did not meet the requirements for lawful residence?
- Would the rights of residence of non-EU family members be protected?
- Would those with protected rights of residence be obliged to obtain residence documents?
- Would those with protected rights of residence benefit from EU rules concerning deportation?
- Would nationals of Iceland, Liechtenstein, Norway and Switzerland be protected?

After the vote, the new Prime Minister, Theresa May, stated that the UK will guarantee the rights of EU citizens living in the UK only if British citizens are afforded the same rights in other EU countries.\(^8\) David Davis, her “Brexit” minister, suggested that persons arriving in the UK after the “Brexit” vote might not find their rights protected once the UK would leave the Union.\(^9\)

It remains to be seen what the parties will be able to agree on in this respect. In conducting negotiations on the matter, they may wish to look for inspiration from other contexts. Both the law of the European Economic Area (EEA) and the EU-Swiss Agreement on the free movement of persons contain a provision on the protection of acquired rights. Further, the so-called Greenland Treaty envisaged such a provision. The present article looks at these examples. The discussion will begin with the Greenland Treaty (below 2.), followed by the EU-Swiss Agreement (below 3.) and EEA law (below 4.). Thereafter, the text returns to the UK (below 5.).

2. The protection of acquired rights under the Greenland Treaty

In the “Brexit” debate, Greenland was sometimes mentioned as an example for a territory leaving the then Communities.\(^10\) However, Greenland did not actually leave but rather changed its status within the Communities.\(^11\) In 1973 Greenland, being part of Danish territory, became part of the then European Communities. In 1979, Greenland Home Rule was established. Greenland remained part of Denmark but within this framework now enjoyed autonomy. In 1982, the Greenland people in an advisory referendum voted in favour of leaving the Communities. This led to negotiations about the future status of Greenland vis-à-vis the Communities. Through the Greenland Treaty\(^12\) Greenland became an associated overseas territory of the Communities within the meaning of Art. 198 TFEU (present numbering). In 2014, the parties decided to set up a special partnership\(^13\) and in 2015 a framework document on the relationship was signed.\(^14\) There is
also a special Agreement for the field of fisheries.\textsuperscript{15}

Art. 2 of the Protocol attached to the Greenland Treaty\textsuperscript{16} gave the European Commission the task of suggesting to the Council transitional measures among others “with regard to the maintenance of rights acquired by natural or legal persons during the period when Greenland was part of the Community”.\textsuperscript{17} However, this was never done and the reasons for this are not clear.

In the view of the Government of Greenland, Greenland people are citizens of the European Union and enjoy all rights derived from this status, including the free movement of persons.\textsuperscript{18} This implies that the protection of acquired rights was, in fact, not necessary. However, according to the European Union’s External Action Service, “OCT [Overseas Territories and Countries] nationals are in principle EU citizens, but these countries are neither part of the EU, nor subject to EU law”.\textsuperscript{19} Accordingly, they are not part of the internal market and the four freedoms do not apply here as such. With respect to goods, services and capital, the Overseas Association Decision\textsuperscript{20} provides for a certain framework. With respect to persons, Art. 202 TFEU envisages special legal acts, which have not been adopted so far.

Given the fact that provisions on the protection of acquired rights within the meaning of Art. 2 of the Protocol attached to the Greenland Treaty were not adopted nothing can be learned from this example for present purposes other than that such provisions were thought to be necessary at the time of the change of status of Greenland.

3. The protection of acquired rights under the EU-Swiss Agreement on the free movement of persons

3.1. General context

A second example concerns the EU-Swiss Agreement on the Free Movement of Persons (FMP).\textsuperscript{21} It is interesting for present purposes because here an explicit provision on the protection of acquired rights can be found in the context of the free movement of persons, namely Art. 23.

The legal relationship between the European Union and Switzerland is regulated by a large number of so-called sectoral (EU terminology) or bilateral (Swiss terminology) agreements.\textsuperscript{22} The beginning of this complex legal relationship goes back to the 1950s when the first agreements were concluded by Switzerland and the then European Communities. Switzerland was not one of the founding states of these Communities but, like for example the UK, participated in setting up the European Free Trade Association (EFTA) instead. In 1992, the EFTA States, including Switzerland, and the European Community and its Member States concluded the European Economic Area (EEA) Agreement. However, later in the same year the Swiss voting population rejected EEA membership. Thereafter, the country continued to conclude sectoral or bilateral agreements with the European Communities and/or the European Union. There are now far more than a hundred such agreements.

Notably, following the rejection of EEA membership in Switzerland packages of agreements were concluded on two occasions, namely the so-called “Bilaterals I” in 1999 and the “Bilaterals II” in 2004 (further agreements followed thereafter, but no longer in the form of packages). One agreement of this phase is of particular interest for present purposes, namely the FMP Agreement. This agreement is part of the package of the Bilaterals I, which essentially regulates market access in selected sectors. A special feature of this particular package is the fact that the agreements contained therein are legally linked to each other. Each of them contains a provision stating that should this Agreement be cancelled, the others will cease to apply automatically.\textsuperscript{23} Following that clause, the termination of one agreement will therefore have far-reaching effects. In Switzerland, this mechanism is called the “guillotine clause”.

In the case of a cancellation of the FMP Agreement, Art. 23 on the protection of acquired rights would be triggered. So far, this has not materialised. However, potential cancellation has long been part of the political debate in Switzerland, most recently following the popular vote in 2014 on a federal initiative aiming at
Art. 23 FMP Agreement provides: “In the event of termination [...] rights acquired by private individuals shall not be affected. The Contracting Parties shall settle by mutual Agreement what action is to be taken in respect of rights in the process of being acquired.” Different from the case of the UK or that of Greenland, there is, therefore, an explicit provision on the protection of acquired rights in the EU-Swiss Agreement, which could serve as a model for the “Brexit” negotiations. At the same time, the Swiss example also shows that the provision raises numerous questions. To date, little that has been written about the specific meaning of Art. 23 FMP Agreement, listing essentially questions and hardly finding answers. The questions raised concern, on the one hand, the temporal implications of Art. 23 FMP Agreement and, on the other hand, the substantive meaning of the terms used in the provision (“acquired rights”, “rights in the process of being acquired”).

3.2.1. Temporal aspect

With respect to time, Borghi\textsuperscript{27} raises the question of what is the relevant time for the protection of the acquired rights: is it the time of the notification of the cancellation of the Agreement or rather the time when the Agreement ceases to apply? The author is of the opinion that it should be the former as otherwise there could be a “run” for securing rights that afterwards would have to be protected. As was seen in the introduction to this article, this appears to be the line also taken by the UK “Brexit” minister Davis in the context of “Brexit”. Conversely, the present writer has put the emphasis on that fact that the Agreement remains fully in force until it ceases to apply and therefore has argued that this should be the relevant time for determining what rights have been acquired and need to be protected.

3.2.2. Substantive meaning

With respect to substance, two questions arise: what are “acquired rights” and what are “rights in the process of being acquired”? The term used for the latter in the German language version of the FMP Agreement, Anwartschaften, points in the direction of one particular legal context, namely that of social security. Like the EU law from which it is derived, the FMP Agreement does not contain provisions harmonising the social security systems of the parties to the Agreement. Instead and again in line with EU law, Annex II to the Agreement provides for the coordination (i.e. the interplay) of the systems in cases with cross-border elements, combined with a prohibition of discrimination on grounds of nationality (Art. 8 FMP Agreement).\textsuperscript{28} By participating in a social security system people may engage in the acquisition of rights, for
example the right to an old age pension. The term Anwartschaften used in the German version of Art. 23 FMP refers to that situation. It is less clear whether “rights in the process of being acquired” in Art. 23 FMP Agreement also covers other types of situations, for example the situation where a migrant worker has applied for a residence permit for family members living at present in another country and where the permit has not yet been granted when the FMP Agreement ceases to apply.

According to Art. 23 FMP Agreement the parties shall settle by mutual agreement what action is to be taken in respect of such rights in the process of being acquired. Obviously, the content of such an Agreement will depend on the negotiations between the parties.

With respect to rights already acquired, Borghi argues that the FMP Agreement covers so many different rights that it is not possible that all of these should fall under Art. 23 of the agreement. The most likely categories according this author are those of already existing residence permits and of access to the markets of employment and occupation already exercised. Similarly, the Swiss Federal Administration mentions already existing residence (though possibly meaning to include the right to market access). However, even within this narrow framework various questions arise. For example, is this only about residence permits already granted to workers and the self-employed (Art. 4 FMP Agreement) and to persons who are not economically active (Art. 6 FMP Agreement) and to special permits granted to frontier workers (Art. 2(1) Annex I FMP Agreement) or is it also about the renewal of such permits? The Swiss Federal Administration appears to be of the opinion that the renewal of permits would fall under the new national immigration rules rather than being covered by Art. 23 FMP Agreement (although it adds that for persons holding permanent residence permits this would not have any negative consequences as such permits in principle are of unlimited duration and, further, not regulated by the FMP Agreement). Similarly, in the parliament of the German Bundesland Baden-Württemberg, reference was made “to already existing special permits of frontier workers”.

In a similar vein, with respect to migrant workers it may be asked whether Art. 23 FMP Agreement protects only present employment or whether a worker may look for a new employment relationship. In such a case, do Art. 7 a) FMP Agreement (prohibition of discrimination on grounds of nationality, which prohibits quota and national preference as well as preference of those already resident) and the standstill clause of Art. 13 FMP Agreement continue to apply? Further, what about the rights of family members under Art. 7 d) und e) FMP Agreement? Can additional family members join the migrant and thereafter also benefit from market access? And what about job seekers under Art. 2(1) Annex I FMP Agreement? Are they allowed to continue their search for employment?

Further, what does the protection of acquired rights mean with respect to market access (rather than residence) of the self-employed (Art. 4 FMP Agreement) and of service providers (Art. 5 FMP Agreement)? Can such persons continue to exercise their activities under the rules of the agreement? The present writer suspects that this would be the case for the self-employed, as they are present on a permanent basis, but not for service providers who are present only temporarily or occasionally (and, in the specific context of the FMP Agreement, for no more than 90 calendar days per year). In the latter case, practical considerations arise, as it might be difficult to determine who is concerned. From the perspective of Switzerland, the so-called 8-days rule under Swiss law might be useful. However, as the Union considers this rule contrary to the FMP Agreement, it might not agree with this criterion. Borghi also finds it difficult to imagine the protection of acquired rights of service providers.

There are more questions. What about the mutual recognition of diplomas and professional qualifications, without which it might be difficult or even impossible to access the market (Art. 9 FMP Agreement)? To take the example of a person with a continued right to residence, does the right to recognition relate only to qualifications acquired before the cancellation of the agreement or also thereafter? In the present writer’s opinion, it should be the latter.

Further: What about those aspects of the coordinating social security law which do not relate to rights in the process of being acquired, in particular the prohibition of discrimination on grounds of nationality?
According to the present writer, it should continue to apply to persons with a continued right of residence, and the same should apply with respect to the right to equal treatment in relation to immovable property under Art. 7 f) FMP Agreement.

The above shows that there are, indeed, many questions and hardly any answers. Should the situation arise where Art. 23 FMP Agreement is applied, it will be decisive whether it is interpreted as relating merely to the protection of already acquired, specific legal positions (e.g. an already acquired residence permit or family members already present) or, conversely, to a more generally defined legal position of the already acquired right to free movement (e.g. the continued right for persons already resident to look for new employment or to welcome a further family member).

4. The protection of acquired rights under EEA law

The third example concerns EEA law. Like the EU-Swiss Agreement on the free movement of persons, EEA law contains an explicit provision on the protection of acquired rights, namely Art. 102(6) of the EEA Agreement. According to BORGHI, Art. 23 FMP Agreement is inspired by this provision. However, the context is different. Rather than to the termination of the agreement, the relevant provision of EEA law relates to the dynamic nature of the EEA Agreement. Similar to the EU-Swiss Agreements (in particular those on economic matters), the substance of EEA law is modelled on EU law. However, different from most of the EU-Swiss Agreements, EEA law provides for a in principle compulsory continuous updating of EEA law in line with new EEA law in the relevant fields. Updating is not automatic but has to be decided by the EEA Joint Committee. “Compulsory” in this context means that there will be legal consequences if this Committee does not agree to updating of EEA law in a specific instance. In principle, the consequence in such a case is that the relevant part of the EEA Agreement or the relevant annex to the Agreement is provisionally suspended (Art. 102(5) EEA Agreement). It is in this context, that Art. 102(6) EEA Agreement provides for following on the protection of acquired rights:

“The practical consequences of the suspension referred to in paragraph 5 shall be discussed in the EEA Joint Committee. The rights and obligations which individuals and economic operators have already acquired under this Agreement shall remain. The Contracting Parties shall, as appropriate, decide on the adjustments necessary due to the suspension.”

At the time of the conclusion of the EEA Agreement, the parties stated the following about how they intended Art. 102(6) to be interpreted: 40

“Article 102(6) applies only to actually acquired rights but not to expectations only. Some examples of such acquired rights would be:

- a suspension relating to free movement of workers will not affect the right of a worker to remain in a Contracting Party he had moved to already before the rules were suspended;

- a suspension relating to freedom of establishment will not affect the rights of a company in a Contracting Party in which it had established itself already before the rules were suspended;

- a suspension relating to investment, e.g. in real estate, will not affect investments made already before the date of suspension;

- a suspension relating to public procurement will not affect the execution of a contract awarded already before the suspension;

- a suspension relating to the recognition of a diploma shall not affect the right of a holder of such a diploma to continue his professional activities thereunder in a Contracting Party not having awarded the diploma.”

BAUR explains: “This is to ensure that economic operators or individuals do not acquire new rights under
the suspended part of the EEA Agreement. Ultimately though, it would most likely be up to the competent court to draw the precise line case by case.”

In practice, Art. 102(6) EEA Agreement has never been applied as there has been no instance in which part of the Agreement was suspended. Even so, the above-quoted explanation on the meaning of 102(6) EEA Agreement appears to indicate that the protection of rights (and obligations) only concerns those already acquired in a specific context. It remains open what this means for the renewal of permits or the change to a new economic activity.

5. In conclusion: “Brexit” revisited

At present, it is the perspective of “Brexit” that raises the issue of the protection of acquired rights in a concrete context. When preparing for negotiations on the withdrawal agreement, the UK will do well to remember the examples discussed in this contribution. Like in Switzerland, persons who have already been residing more than five years in their host country will normally enjoy this right as a matter of national law. For others, however, an agreement containing a specific provision on the protection of acquired rights will be needed. Peers has suggested that the withdrawal agreement between the UK and the EU should contain the following clause:

“I. Any citizens of the UK residing in the EU as of [Brexit Day], and any EU citizens residing in the UK as of that date, shall retain any rights which they acquired pursuant to EU free movement law before that date. They shall also continue to acquire rights which were in the process of acquisition as of that date.

2. The parties shall give full effect to this principle in EU or national law, as the case may be.

3. The EU/UK Joint Committee may adopt further measures to implement this rule.”

However, the examples of Art. 23 FMP Agreement and of Art. 102(6) EEA Agreement show that even an explicit provision may raise numerous questions. In the case of EEA law, the statement of the parties on the meaning of Art. 102(6) EEA Agreement would appear to indicate that only specific positions that have already been acquired should be protected. But even so, many questions remain, for example with respect to the renewal of permits, change of employment and family rights. At present, there are no answers to these questions due to a lack of practice.

If the EU and the UK will agree on a provision relating to the protection of acquired rights, then much will depend on its wording and on possible declarations made in this context.

In this context, the future relations of the UK with the EU, which are also a matter for negotiations, will also be relevant. A comparably simple case would be that where the UK were to become a member of the EFTA and, on this basis, subsequently of the EEA (Art. 128 EEA Agreement), or where it would be able to conclude a separate treaty with the same content. In this case, many economic rights would be maintained essentially on the same level as under Union law, though not rights exclusively based on Union citizenship. However, EEA law includes the free movement of persons, which was a major issue in the “Brexit” debate (and a long-standing point of criticism of the Cameron Government). In this context, it remains to be seen whether the mere granting to the UK of the possibility to limit free movement during an initial, transitional period or the possibility to invoke the safeguard clause under Art. 112 EEA Agreement would be sufficient from the UK point of view.

Pesquisas do Editorial

- LIMITES TERRITORIAIS DA REPÚBLICA FEDERATIVA DIANTE DOS ATUAIS EFEITOS PROVENIENTES DA GLOBALIZAÇÃO ECONÔMICA NO MUNDO DO TRABALHO, de Dinaura Godinho Pimentel Gomes - RDCI 97/2016/315
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