Getting to Grips with EU citizenship: understanding the friction between EU free movement law and UK immigration law

Executive Summary and Briefing Note

Introduction

There are still major difficulties with the effective implementation of EU free movement law in all EU Member States. These challenges are not just practical ones about the application of the law by administrators and courts, but they also have a legal cultural dimension. It is hard to say that there is already a fully functioning **common citizenship area**, as part of the broader EU internal market despite the fact that the free movement rules make the EU the largest laboratory for human mobility in the world. Also, EU free movement is not hermetically sealed off from broader debates about immigration, and so is affected by policy changes and popular perceptions about immigration and immigrants. This project has explored these challenges by looking at EU free movement law and UK immigration law, by seeing how they overlap and interact, and by studying the frictions that arise between them. It has also reviewed the context in which EU policies such as free movement rights operate. The research studied both materials explaining the current state of EU and UK law, with a particular focus on primary materials such as recent case law of the EU court and the UK tribunal system, and also incorporated the findings from interviews with members of important stakeholder groups to ask them to explain how they saw the relationship between the two systems evolving. EU law and the relevant UK implementing measures continue to evolve rapidly, and we have attempted in this research project to present a dynamic picture of the law and its application.

Although EU citizenship is a political priority of the current European Commission and free movement of persons, especially for economic reasons such as work and self-employment but also for leisure and study, is a professed goal of all Member States, in practice when EU citizens attempt to exercise their citizenship rights by living and working (or studying) in other Member States, they often face many legal, practical and cultural obstacles. The complaints they make to the EU institutions help us to see the pattern of obstacles. But we can also find out more by looking at how the UK institutions work. For example, a high rate of refusals of applications by EEA applicants by the UK Borders Agency acting on behalf of the Home Office can be seen in recent years, especially those applications made by the family members of EU citizens. But there has also been a high rate of successful appeals against those refusals within the tribunals and courts systems, suggesting that something may be amiss in the decision-making matrix. Also, in the UK, the increasingly negative attitudes within public opinion towards both immigration and the UK's membership of the European Union has raised sensitivities about EU free movement, especially with the impending removal of the transitional measures restricting access to the labour market for EU citizens from Romania and Bulgaria at the end of 2013. But there is very little informed attention directed to the detailed issues by bodies that could hold the UKBA to account, such as Committees of the UK Houses of Parliament, when it comes to the application of EU law. There is plenty of negative press coverage, but not very much of it cites the extensive research that has been done about the fiscal and economic consequences of migration from the new post-2004 and 2007 Member States of the EU or provides robust evidence about the numbers of current and future citizens of those states taking advantage, or likely to take advantage, of the free movement rules.

The research

To unpick the issues raised in more detail, the research addressed **three descriptive and analytical questions and one normative question**:

1. In which areas do we see particular frictions between the systems of EU free movement law and UK immigration law?
2. What are the principal dimensions of these frictions, in the sense of how they play out in both legal structures and popular discourse?
3. Can we identify the possible causes of those frictions? In particular, do they stem from causes within the legal systems in question, or are they the result of external factors impacting upon how free movement law operates in the UK?
4. What types of measures or approaches might alleviate the friction between the systems and thus give rise to more effective implementation of EU free movement law in the UK?

Addressing these questions led to **four key findings** and to **conclusions and recommendations** about the best way forward in the future to ensure better fit between the UK and EU legal systems, and to promote the EU as a 'common citizenship area'.

Key Finding 1

We found that there are **four main areas** where we can see evidence of high levels of misfit or friction between EU law and UK law in the area of free movement:

- **residence rights**, especially in relation to third country national family members of EU citizens/ EEA nationals;
- problems of **access to welfare** relating to the application of the 'right to reside' test;
- problems of '**probity**' and the perceived need to distinguish between 'good' and 'bad' migrants;
- issues raised by the **transitional or special regimes** for certain groups of citizens (new Member State citizens and Turkish citizens).

Illustrating our findings with stories drawing on legal materials and coverage of the relevant issues in the press, what we saw in each case was that there were significant differences between the way that the law was applied by the UK authorities, especially the UK Borders Agency and the interpretations put forward by the European Commission and the Court of Justice. In a number of occasions, the UK law had been found not to be in compliance with EU law, but adjustment of practices at the national level was slow in arriving.

The common factor for each of these areas was that they pose challenges to the boundaries between EU free movement law, based on facilitative principles and rights such as 'equal treatment' and national immigration control, based on limited permissions which continue to draw stark distinctions between the citizen and the alien. EU law, in contrast, breaks down those distinctions through the protection it provides for migrant EU citizens. The **'edges'** of EU free movement law and UK immigration law each need careful study to help us understand how they operate in relation to each other, both in terms of legal doctrinal questions, but also in terms of differing legal cultures. EU free movement law is rights-based and UK immigration law is permissions-based. UK judges dealing with (national) immigration matters are accustomed to finding that the national rules provide exhaustive answers to most questions, and/ or leave wide discretion to decision-makers. This is not the case with EU law on free movement. These differences matter when the two systems come into close contact, and close attention should be paid to these matters both in terms of differences of legal doctrine and also of perceptions and approaches of stakeholders and 'users' within legal institutions.

Key Finding 2

We found that particular problems arise as regards the extent to which the **'culture'** of EU free movement is effectively embedded into UK law and legal/administrative practice. We found that there continued to be some degree of reluctance on the part of decision-makers fully to accept the rights-based character of EU law. The impact of this is most obvious where claimants are seeking to rely on the very 'edges' of free movement law, e.g. a third country national family member of a migrant EU citizen, or an EU citizen with residence rights seeking to resist a post-imprisonment removal order that would normally be upheld if the person in question was a third country national with no EU connections. Sometimes this means relying on the more controversial or contested parts of the EU's Citizens' Rights Directive, such as the provisions protecting extended family members, or the provisions on removal for reasons of public security or public policy, but sometimes applicants also have to rely directly upon EU citizenship rights or upon the EU Charter of Fundamental Rights. Here lack of familiarity with elements of EU law beyond the confines of the Citizens' Rights Directive and the UK Regulations on the part of decision-makers with responsibilities for applying and interpreting EU law (the UKBA and, in some circumstances, the courts/ tribunals) plays a role in undermining the capacity of these parties to make correct decisions, within the timescales laid down by EU law. We found that these problems raised both training issues for decision-makers, but also legal cultural issues relating to the character of EU law as separate from immigration law.

Key Finding 3

Our research showed that internal system-level frictions represent a very significant challenge to the effective implementation of EU free movement law within the UK. These relate to the character of the two systems, and the way in which rules are applied by decision-makers. For example, it was widely felt that some of the cultures of immigration law, which see the credibility of the claimant being placed at the heart of the enquiry, had 'seeped' or 'leaked' into EU free movement law, where a factual enquiry alone based on the principles of EU law is normally the central task of the decision-maker. Beyond that enquiry, the decision-maker has relatively little discretion in EU law, and the burden of showing that there is a substantive reason to doubt, for example, that the applicant is the person she says she is, or has the family relationship she claims she has, lies with the authorities. However, the evidence to be drawn from recent judgments of the Upper Tribunal (Immigration and Asylum Chamber), which has shown itself ready both to admonish the UKBA for obvious errors and to refer difficult and unresolved questions on the interpretation of the Citizens' Rights Directive to the Court of Justice for decision, suggests that over time some of the legal problems of implementation identified by the research may be decreasing in scope and significance. This is important given that the numbers of persons exercising EU free movement rights has grown considerably since the enlargements of the EU in 2004 and 2007, although it would be wrong to assume that all the difficulties that arise with decision-making relate solely to citizens of those states.

Key Finding 4

In addition to internal system-level friction, problems of friction can also stem from exogenous causes such as the politicisation of immigration and of attitudes towards the EU in the UK, media coverage on these matters, and the UK's powerful 'border identity' as an island state which has negotiated itself an opt-out from membership of the Schengen zone and the development of certain policies which flow from the creation of a borderless Europe, including most aspects of external immigration policy. This identity, combined with the hostility shown in sections of the press both to some aspects of EU free movement and also to European integration more generally, has led to a broad public opinion consensus at the present time which is wary of free movement, so far as it concerns flows into the UK. In fact, immigration issues and EU issues were both identified as problematic areas in terms of press coverage in the 2012 Leveson Inquiry on the *Culture, Practices and Ethics of the Press*. These factors, which may be on the increase, could act as a possible counterweight to the evidence noted above of a new approach to EU free movement law which is thus far most evident in the case law of the Upper Tribunal. The prospective easing of the transitional restrictions on the access of citizens of Bulgaria and Romania to the UK labour market at the end of 2013 has been a particular cause of controversy and debate in the press, with the potential to spill over into the application of the law.

Conclusions

Perceptions about EU free movement are changing, in both popular and political discourse, and this is reflected in what appear to be increasingly adversarial relationships around the construction of the boundaries of EU free movement rights and the relationships between EU law and UK law, in spite of the best efforts of the Upper Tribunal to clarify many aspects of the law. In fact, even the courts have commented upon the adversarial positions taken by Home Office employees from time to time. Our research was not limited to observing the internal system-level aspects of friction, as we had expected at the outset, but rather it led on quite organically in our interviews to discussions about how the UKBA works, what resources it has and how it trains decision-makers, all as part and parcel of an administrative justice system. Looked at in these terms, many of our interviewees felt that it does not match up to the highest standards such as those set by the Administrative Justice Tribunals Council Report *Right First Time*.

Recommendations

We concluded that these structural difficulties and the adversarial relationships emerging around the concept of EU free movement needed to be addressed urgently because these are having a corrosive effect upon the effective implementation of EU law. This has costs not only for citizens of other Member States who come to the UK but also potentially for UK citizens who themselves benefit from free movement rights. Challenges in the UK to EU citizens' rights could lead to difficulties for UK citizens in other Member States. In addition, as is widely recognised, free movement goes to the very core of EU law and does not represent some sort of optional competence for which the UK could easily leverage an opt out. While training and awareness raising can help to militate some of the most egregious effects of poor decision-making that is unfortunately evident in the written record of the law at present, we felt that there was an urgent to need to discuss in more detail the institutional arrangements for the application of EU law in the UK. It is well established in the UK that there are very few specific vehicles for the implementation of EU law, and this is true for the administration of free movement rights which are the responsibility of the UK Borders Agency under the broader aegis of the Home Office. There is little about the public face of these institutions which might lead the casually enquiring EU citizen at present to conclude that they evinced an open attitude towards the possibilities of free movement. In practice, the specific responsibilities of these bodies relating to EU law are not fully visible to the outside world, with the material made available on the UKBA/Home Office website often confusing in character. What is more, issues raised by the proper implementation of free movement law are not often picked up and tested out by bodies such as the Committees of the House of Commons and Lords that have responsibility for scrutiny and accountability matters in relation to both EU affairs and immigration more generally. There continues to be a significant lack of awareness about what EU free movement means, who it benefits and how, and what its costs might be, even though there is a substantial body of robust research-based evidence there to be drawn on by those who wish to seek it out.

Towards a citizenship champion

To overcome these obstacles, we propose the creation of a new office of **EU free movement or citizenship 'champion'**. The role of this 'Ombudsman-like' office would be to support the effective development of a **common citizenship area** in a manner that promotes joined up policy-making and enhances the flow of information between government institutions and those who rely upon the law. It would not be to supplant the current decision-making processes, but it would help to ensure that the 'EU flag' was clearly visible when so-called EEA decisions are taken by the UK authorities, or when the information necessary for EU citizens to make effective use of their free movement rights is made available through websites or other outlets. As with the investment in the creation of specific institutions which aim to protect human rights, raise awareness of issues around discrimination on grounds of sex, race or other protected characteristics, or even act as a strategic litigant in key court cases, innovative institutional solutions bringing together expertise with political will can, without great expense, give visibility to certain issues which are often misreported in the media.

Even with limited powers to provide information, act as an advice and reference service offering assured levels of expertise, and operate as the EU conscience of UK decision-makers, this new institution can bring great benefits. It can, in sum, act as the single reference point for EU citizens both arriving in or departing from the UK to ensure that they enjoy the full benefits of the common citizenship area and promote a profound and much needed culture change in this area.

Jo Shaw | University of Edinburgh
Nina Miller | University of Glasgow
Maria Fletcher | University of Glasgow

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