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EMPLOYMENT & IMMIGRATION EXTERNAL RELATIONS & TRADE HUMAN RIGHTS

Op-Ed: “All is not good for EU citizens in the UK post ‘Brexit’ – reflections on the EWHC ruling on pre-settled status transformation of 21 December 2022” by Dagmar Schiek

‘The short history of the Withdrawal Agreement is punctuated with incidents of the UK’s refusal to be bound by its terms’ I stated slightly exasperated in April 2021 ([here p 3](#)). Two years on, the difficulties of providing minimal protection for EU citizens who failed to attain ‘settled status’ in the UK confirms the statement’s accuracy. No less than two years (from December 2020 to December 2022) were necessary to alleviate some of the uncertainty which EU citizens experience as a consequence of the UK’s hesitant implementation of the Withdrawal Agreement. The group affected comprises those who were granted ‘pre-settled status’, because they arrived in the UK between January 2015 and December 2020 and thus were not resident for five years on ‘Brexit day’. [On a conservative estimate these are 2.2 million people.](#)

The bone of contention in the case [now decided by the High Court for England and Wales](#) was not so much the necessity for those holding ‘pre-settled status’ (also called time-limited status) to apply for settled status, but more the legal construction by which they would lose all the rights acquired under the Withdrawal Agreement by missing the deadline for application. UK legislation adopted in 2020 could have – as provided by Article 13 Withdrawal Agreement – made an application a condition for acquiring any rights deriving from settled or pre-settled status. As 13 out of 27 EU Member States, the UK

opted for the constitutive system, on whose introduction it had insisted in the negotiations of the Withdrawal Agreement. However, it also chose to create a second constitutive moment: the 'pre-settled status' was given an explicit expiry date, and any continuation of rights derived from former EU membership would be constituted by the application to extend pre-settled status or convert it into settled status. Failing that application, EU citizens would become illegally resident immediately.

Apart from the legal merits or demerits, this case also illustrates the degree to which the IMA ([Independent Monitoring Authority for the Citizens' Rights Agreements](#)) efficiently safeguards the rights of EU citizens in the UK. The IMA needed more than a year to raise a complaint to the Secretary of State for the Home Department over this procedure: only in [October 2021 it issued a 'Pre-Action Protocol Letter'](#), which is the equivalent of a 'reasoned opinion' by the EU Commission to a Member State which is non-compliant. While the Secretary of State for the Home Department was only given 14 days to respond, another two months passed until the IMA raised judicial proceedings in December 2021. There is no documentation about what happened before October 2021 on the IMA web page. One is left to wonder why such an important issue was not taken up earlier, especially as the EU Commission and the ['3million'](#) raised the matter already in February 2021. Maybe the fact that the IMA was only completely staffed by mid-2021 is one explanation, and the very limited number of board members with experience in immigration law prior to this new role may be another one. It is also interesting to observe which actions the judgment has triggered subsequently: on [7 February 2023, the Financial Times reported](#) that the Home Office had now rejected about 141 000 applications of EU citizens on settled or pre-settled status, which had remained unattended from the latest date of application (June 2021). These EU Citizens became illegal residents with immediate effect. There is no report of any immediate action by the IMA in that matter.

The case also demonstrates the limited protection by the UK legal system for rights of EU citizens. The procedure chosen by the UK legislator mirrors judicial review for example under the Human Rights Act 1998 (which still exists!). The consequence of a human rights violation by the legislator is not the inapplicability of the contravening act, much less is the act rescinded. The UK courts only issue a declaration of incompatibility, leaving it to the discretion of the legislator to address it or not. Similarly, while the IMA (and its supporters) have won this case, all they achieve is 'a declaration that the [Secretary of State for the Home Department's] interpretation of the Withdrawal Agreement (...) is wrong in law and that the EUSS [EU Settlement Scheme] is accordingly unlawful' to the extent as it was questioned in the proceedings. In a nod to Article 4 Withdrawal Agreement, according to which the effects of the Withdrawal Agreement emulate the effects of EU law, the parties

are then invited to agree an order giving effect to the judgment. Nevertheless, this is obviously a far shot from the inapplicability of national laws which contravene EU law, and the subsequent obligation of a Member State to adapt any national administrative practice accordingly.

The legal merits of the case consist of the recognition of EU citizens' rights to retain settled or pre-settled status independently from any application after the expiry. Justice Lane rejects some hair splitting proposed by the Secretary of State, including the suggestion that falling within the scope of application of Part Two of the Withdrawal Agreement may be a legal status, but not one which grants any residence rights. However, that is where the merits end. The position of Mr Justice Lane on the interpretation of the Withdrawal Agreement are a slap in the face of all those legal academics and practitioners who continue to rely on Article 4 paragraph 3 Withdrawal Agreement in order to approximate it to EU law. Justice Lane agrees with the Secretary of State for the Home Department (and thus the UK government's line), that any rights created by title II Withdrawal Agreement does not fall into the category of 'provisions (...) referring to Union law or to concepts or provisions thereof'. Accordingly, citizens' rights under part two are interpreted under the Vienna Convention alone, and not in line with methods and general principles of Union law. So, for example, where Article 13 (1) Withdrawal Agreement states that 'Union citizens (...) shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 and 49 TFEU' this does not 'refer to Union law'. That reasoning is hard to understand. And while the outcome in this particular case may be what the EU Commission and the ['3million'](#) desired, a permanent refusal of UK courts to use dynamic interpretation, interpretation in line with the EU's values and indeed the Charter of Fundamental Rights for the European Union would have disastrous consequences for the continued value of those citizens' rights.

Despite the initially positive outcome, this case reaffirms what has been stated all along: Rights of EU citizens in the UK (more than 4 million people) under the Withdrawal Agreement enjoy much weaker protection than rights of UK citizens in the EU (about 1.4 million people) under that same agreement. The desired reciprocity of citizens' rights is in danger of being lost in the legal particulars of the UK's post membership.

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