**Reflecting on Brexit: migration myths and what comes next for EU migrants in the UK?**

On a number of occasions in recent years, this section has focussed on the extent of EU migrants’ entitlement to social welfare for themselves and their family members (O’Brien 2015; Puttick 2015; O’Brien 2016). This reflects the increased interest and controversy surrounding such issues in the build up to the referendum on the UK’s membership of the European Union on 23 June 2016. In the editorial of the previous issue of this journal, Stalford (2016, 115) highlighted how “one of the most hotly debated issues has been the ability of migrants who are employed or registered job-seekers to apply for welfare benefits, including child benefits in the UK, on the same basis as nationals.” This short comment considers some of the claims made by the Leave campaign regarding migrants’ family and welfare entitlement that appear to have been so influential on the outcome. It argues that misconceptions should be challenged rather than brushed aside before the process of negotiating the future status of EU migrants in the UK (and UK migrants in other EU countries) begins. Such migrants presently face considerable uncertainty as to their own and their families’ future legal status and entitlement to welfare rights. Whilst the vast majority of those campaigning for the UK to leave the EU (publicly at least) argued in favour of those *already present in the UK at the time of the referendum* having their status protected, the government has been considerably less vocal in its support for this outcome. Certainly at the time of writing this, Prime Minister Theresa May has failed to make any assurances that this group will have their current rights protected in the long-term. From a legal point of view, it is only once the UK formally notifies the European Council of its intention to leave, activating the Article 50 TEU procedure, that official negotiations will commence to establish the details of the UK’s withdrawal agreement. The status of EU migrants in the UK, and UK nationals in EU countries, will comprise a substantial component of this negotiation process.

Attention has now largely, and somewhat understandably, turned to considerations about the way in which Brexit will now proceed, with commentators proposing variable scenarios ranging from “hard” Brexit (presumably involving full withdrawal from the Single Market and the removal of entitlement relating to free movement of persons for EU/EEA migrants) to “soft” Brexit (presumably reflecting the much discussed EEA agreement, or Norway model, which very much insists on the incorporation of free movement rules). Nevertheless, there are a number of misconceptions surrounding the rights of EU migrants and their family members which dominated and, at times, misinformed the “debates” in the lead up to the referendum. First, it was claimed repeatedly by the Leave campaign that the Court of Justice of the EU was interpreting the free movement rules contained in the main Treaty on the Functioning of the European Union (TFEU),[[1]](#footnote-1) and related secondary legislation,[[2]](#footnote-2) expansively, so as to broaden the rights of migrants – even those without a job in the host state – and their family members, in an overly generous way. Secondly, it was asserted that Member States have very little discretion to place limitations on the rights of migrants from other EU countries, and crucially their access to social benefits. Thirdly, the renegotiated deal secured by David Cameron before the referendum, which sought to set out a “New Settlement” for the UK within the EU,[[3]](#footnote-3) but which will now obviously not enter into force, was largely dismissed as having little restrictive impact on the entitlement of migrants by the tabloid press (e.g. Sculthorpe 2016). In actual fact, one of the most striking aspects of the renegotiated deal was its focus on migrant *workers* access to social welfare. This is a group that have traditionally been regarded as the most privileged in terms of entitlements – particularly in relation to accessing an extensive range of social benefits – on the same grounds as nationals (pursuant to Article 45 TFEU, Directive 2004//38, Regulation 492/2011; see caselaw such as Case 207/78 *Even* [1979] ECLI:EU:C:1979:144).[[4]](#footnote-4)

All of these claims can be challenged. With regards to the first two claims, for example, it has been abundantly clear that the direction of the case law on free movement and citizenship of the Court of Justice has been towards *restricting* entitlement of migrants and their families, or at least sanctioning heightened limitations imposed by Member States (Dougan 2013; Thym 2015; Currie 2016; O’Brien 2016). This has been especially targeted at those out of work and those seeking work, even in circumstances when the individuals involved have been resident in a Member State on a long-term basis and have been in work previously. In *Alimanovic* (Case C-67/14 ECLI:EU:C:2015:597)*,* for example, a Swedish woman, and one of her adult daughters, both of whom had previously been in (temporary) work in Germany for 11 months, were found to be outside the scope of protection of EU law. The applicants had sought access to German social welfare benefits, including a subsistence allowance for the long-termed unemployed. The Court of Justice, in contrast to earlier case law on free movement and citizenship (e.g. Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493), applied the provisions of the secondary legislation in a literal sense. According to Article 7(3) of Directive 2004/38, those who become involuntarily unemployed (as Ms Alimanovic and her daughter had), only retain worker status for a period of six months. Once this term has expired, individuals concerned lose access to the worker status and, crucially, the valuable rights that attach to it. Significantly, in *Alimanovic,* the Court did not refer to the supposed “fundamental” nature of the status of Union citizenship, nor did it incorporate proportionality and conduct an “individual assessment” of the claimant’s circumstances, both hallmarks of the citizenship free movement case law since *Grzelcyk* (Case C-184/99 ECLI:EU:C:2001:458). This more individual approach has traditionally involved the Court assessing whether the specific person (or family) would constitute an unreasonable burden on the social assistance system rather than a draconian application of the black-letter provisions. This style of reasoning had previously contributed to more teleological judgments and had softened the impact of the secondary legislation provisions which, on their face, suggested the individuals concerned were not entitled to receive support from the host states concerned.[[5]](#footnote-5)The abandonment of this approach in *Alimanovic* is most clearly demonstrated by the Court’s finding that, while the single claim of the Alimanovic family would not be an unreasonable burden on Germany’s system, the *accumulation* of all the individual claims that would follow would be bound to do so (para. 62). As a result of this change in emphasis away from the individual and towards the collective impact, combined with the literal application of the Directive’s provisions, the Alimanovic family found themselves categorized as work seekers without recourse to the equal treatment principle. This was in spite of having worked on the territory for almost a year and having spent a considerable amount of time in Germany previously. Indeed, all the three children in the family had been born there during the 1990s.

Another case worthy of note, *Dano,* concerned an economically inactive Romanian national resident in Germany with her son who had been born there in July 2009 (Case C-333/13 ECLI:EU:C:2014:2358). They lived with Ms Dano’s sister who also provided for them materially. In July 2011, Ms Dano had been issued with a residence certificate of unlimited duration by the German authorities, however later claims to access benefits were refused. This included subsistence benefits for herself and social allowances and a contribution to accommodation and heating costs for her son. In its judgment in this case, the Court of Justice placed significant emphasis on how Ms Dano’s residence did not comply with the terms of Directive 2004/38 (e.g. she was not a worker, or in possession of sufficient resources pursuant to Article 7). Consequently, she had no right to rely on the principle of equal treatment set out in Article 24 in order to access the social benefits at issue. Although EU law has never provided unqualified access to benefits for economically inactive migrants,[[6]](#footnote-6) this case is significant for the very palpable way that the Court “was at pains to reassure Member States concerned about benefit tourism” (O’Brien 2016, 946). The outcome, and the Court’s reasoning in the judgment, also contrast markedly with the earlier case of *Martinez Sala* (C-85/96 ECLI:EU:C:1998:217), another case which concerned an economically inactive migrant, this time a Spanish national in Germany, who did not comply with the specific terms of the secondary legislation in force at the time but who was found to have a right to reside under national law as she had been allowed to remain on the territory (as, arguably, Ms Dano could also have claimed). In the case of *Martinez Sala,* however, because of her residence on the German territory, the claimant was found to have a right to challenge a refusal of access to social benefits by virtue of her status as a Union citizen and the related principle of non-discrimination on grounds of nationality.

Finally, in a judgment that was delivered just days before the referendum, in *Commission v UK* (Case C-308/14 ECLI:EU:C:2016:436) the Court appeared to attempt to send a final signal to the UK about the extent of its willingness to sanction efforts to limit EU migrants’ access to benefits. The Commission had challenged the UK’s “right to reside” test so far as it applies to applicants seeking Child Benefit and Child Tax Credit. Whereas UK nationals automatically fulfil the test, EU national claimants are required to show that they satisfy the conditions of Article 7 of [Directive 2004/38](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF). That is, they need to demonstrate they are either a worker, have left work but have retained worker status, or qualify as a family member of an EU migrant worker. The Court, building on its approach in *Alimanovic* and *Dano,* dismissed the Commission’s action and found imposition of the UK test to be lawful. Overall, it is clear that the trend of the case law of the Court of Justice is towards the curtailment of EU migrants’ entitlement, in particular those unable to qualify as migrant workers, for example because they have been in temporary work and have not been able to secure a follow-on job. It has moved towards a position whereby it emphasises the specific terms of the secondary legislation over and above the more aspirational concept of Union citizenship, an approach that has previously inspired a more teleological interpretation with a focus on individual circumstances. In other words, the Court is increasingly keen to stress that it is for Member States to set the parameters of access to the national welfare systems for those not deemed to be currently working.[[7]](#footnote-7)

The third claim, that the New Settlement agreement would not have brought about significant change, is also not supported by evidence. The decision, which of course would only have come into effect had the result of the referendum been in support of the UK remaining in the EU, would have allowed the UK to restrict the exportation of child benefit by indexing the benefit to the standard of living in the child’s country of residence. A “safeguard mechanism” would also have been introduced, purportedly to allow the UK to respond to migration of an exceptional magnitude over an extended time (a state of affairs that the Commission had already indicated was applicable to the UK).[[8]](#footnote-8) The significance of this would have been that new EU migrants’ access to in-work benefits could have been restricted up to a maximum period of four years. The New Settlement, therefore, would have seen EU law effectively validating nationality-based discrimination against *working* EU migrants. It would be exceedingly difficult for the Court to introduce restrictions to this in-work group’s access to benefits given the very clear and far-reaching protection from discrimination they are afforded under the TFEU and secondary legislation.[[9]](#footnote-9) Given that the deal will not come into force, the rights of EU migrants working in the UK remain unchanged for the time being. In other words, in a formal sense, EU law continues to apply and migrant workers should still be able to access the same in-work benefits as UK workers. There is a clear irony here in that, as a consequence of the vote in favour of leaving the EU, the UK is now prevented from reducing the entitlement of migrant workers. The status of migrant workers in the UK, for the short term, then is actually stronger than it would have been under David Cameron’s renegotiated deal.

It will take time for any level of clarity to emerge, but the European Economic Area (EEA) (or Norwegian model) is frequently mentioned as the potential alternative way that the UK’s relationship with the EU might be managed. If the UK does ultimately seek to become a member of the European Free Trade Association (EFTA) and participate in the EEA, it is highly likely that free movement of EU citizens/EEA nationals, at least as far as workers are concerned, will continue (assuming the other EEA/EFTA parties agreed to the UK joining). Indeed, free movement entitlements of migrants in the EEA are largely the same as in the EU, although they flow not from the overarching status of Union citizenship, but from the “worker” status of the migrants. Again, ironically, under this model the UK would have less power to place restrictions on the ability of migrant workers to access social benefits than if the New Settlement had entered into force.

While the desire to move the discussion on from the arguments for and against the UK’s withdrawal from the EU may be understandable, it is also crucial that inaccurate statements about migration do not go unchallenged. The propagation of misconceived ideas surrounding EU migrants and the extent of their entitlement will only serve to derail the very pertinent discussions and negotiations which will determine the answer to the question of “what next?”. Looking forward, there is surely a need for migration to be discussed more responsibly and reasonably by politicians, commentators and journalists. For a considerable period of time, the dominant narrative has been one of negativity, with high profile politicians directly linking migrants with issues such as job displacement, benefit tourism, and pressures on public services (despite the evidence suggesting that migrants have a positive economic impact and do not impose burdens on services: Dustmann and Görlach, 2016). In his May 2015 Immigration speech, David Cameron (2015) reinforced this narrative: “[U]nder the free movement rules, national welfare systems can provide an unintended additional incentive for large migratory movements… That’s why I and many others believe it is right for us to reduce the incentives for people who want to come here.” Such a view of migration has been a prevailing sentiment of the Conservative government’s discourse, and this has gone without significant challenge by the other main political parties.

It is highly likely that those EU migrants already in the UK will be entitled to remain, once the political fallout from the referendum settles further and negotiations commence; it is even feasible that, eventually, an EEA agreement will apply, meaning that EU/EEA migrants will continue to have free movement rights and linked social welfare entitlement. Therefore, on the surface, in spite of Brexit, the legal rights of migrants may not actually alter significantly, not even to the extent they would have if the referendum result had been in favour of remaining in the EU and the UK-EU New Settlement had entered into force. What is very well likely to have changed, however, is the inclination of many migrants to remain in the UK or the preference of EU nationals to move to the UK in the future.

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1. Such as Article 45 TFEU, which establishes the free movement of workers, and Article 21 TFEU which sets out a general right of free movement for all EU citizens subject to the limitations and conditions set out in the Treaties and secondary legislation. [↑](#footnote-ref-1)
2. Particularly, Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ [2004] L158/77, and Regulation 492/2011 on freedom of movement for workers within the Union OJ [2011] L141/1. [↑](#footnote-ref-2)
3. European Council, ‘A New Settlement for the United Kingdom within the European Union’ OJ [2016] C 69 I/01. [↑](#footnote-ref-3)
4. In contrast, the entitlement of economically inactive migrants, including students, are more dependent on satisfaction of “resources requirements” so as to avoid becoming a burden on the host state’s social security system (Article 21 TFEU; Article 7(1)(b) of Directive 2004/38). [↑](#footnote-ref-4)
5. See also Case C-456/02 *Trojani* ECLI:EU:C:2004:488 and Case C-209/03 *Bidar* ECLI:EU:C:2005:169. [↑](#footnote-ref-5)
6. E.g. Article 24(2), Directive 2004/38. [↑](#footnote-ref-6)
7. For a further example of the Court’s increasingly restrictive approach, see also: Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114. [↑](#footnote-ref-7)
8. Draft Declaration of the European Commission on the Safeguard Mechanism, 2 February 2016, EUCO 9/16. [↑](#footnote-ref-8)
9. Particularly Article 7(2) of Regulation 492/2011 which specifically provides migrant workers should be able to access the same social and tax advantages as nationals. [↑](#footnote-ref-9)