

Social security in the aftermath of the EU referendum

Richard Machin gives an overview of what might happen to social security benefits whether UK citizens vote to leave or stay in the EU.



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Should the UK leave the EU, the imposition of retrospective changes to the rights of existing EU/EEA benefit claimants would almost certainly result in a wave of legal challenges.

The American writer Tom Peters said: 'If you're not confused, you're not paying attention.' This adage rings true when listening to claim and counter-claim about the impact of the UK's EU membership (currently an economic and political union of 28 countries). We are certainly not short of wildly differing economic forecasts, statistics, and legal and political opinions on Brexit. The decision in the EU referendum on 23 June will be of huge significance for professionals and clients in the social welfare law sector, with a key area being social security. EU withdrawal would affect eligibility to welfare benefits for UK-resident EU nationals, UK-resident nationals of the European Economic Area (EEA, the 28 EU countries plus

Liechtenstein, Iceland and Norway), and UK nationals living in other EU and EEA countries.

Current welfare benefit entitlement for EU/EEA nationals living in the UK

Entitlement to welfare benefits for those moving between EU member states is inextricably linked to one of the key principles of the EU: free movement of people. Free movement for EU citizens does not equate to unrestricted access to benefits in the host country. Over the past few years, the UK government has restricted benefit entitlement for EEA migrants. Government policy has been influenced by changes to EU legislation, case law and the enlargement of the EU. This complex interplay of both domestic and European law is underpinned by a commitment by all EU member states to the Treaty on the Functioning of the European Union (TFEU). The TFEU sets out the right to free movement, non-discrimination on the grounds of nationality and freedom to establish self-employment (arts 18, 20–21 and 49–53). Policy-makers must be mindful of these measures; however, in social security terms they only apply to claimants who can prove they are economically active and/or able to support themselves.

Since January 2014, the UK government has introduced a range of measures intended to reduce entitlement to social security benefits for EEA nationals (January 2014 was a significant date as this saw the lifting of transitional restrictions on the right to work in the UK for Romanian and Bulgarian nationals). The prime minister believes that changes were necessary 'to ensure our welfare system is not taken advantage of' (*Measures to limit migrants' access to benefits*, Briefing Paper no 06889, 17 June 2015). Specific measures included implementing a three-month waiting period for people entering the UK before they could claim income-based jobseeker's allowance (JSA), child benefit and/or child tax credit. EEA jobseekers and former workers must show that they have a 'genuine prospect' of finding work to continue claiming JSA. A minimum earnings

threshold has been introduced to ascertain if a worker or self-employed person is in 'genuine and effective' employment. EEA jobseekers are now prevented from claiming housing benefit (even if they are in receipt of JSA) and are prevented from accessing universal credit. Department for Work and Pensions (DWP) statistics (*Statistics on migrants and benefits*, Briefing Paper no CBP 7445, 8 February 2016) show a significant increase in the number of working-age EU benefit claimants between 2008 and 2015 (65,090 to 113,960). However, in 2015 EU nationals accounted for only 2.2 per cent of working-age benefit claims (compared with 92.8 per cent for UK citizens and 5 per cent for non-EU foreign nationals).

The government perhaps felt a vindication for these changes following the decision of the Court of Justice of the European Union (CJEU) in *Dano and Dano v Jobcenter Leipzig* Case C-333/13, 11 November 2014 (see Free Movement blog entry by Desmond Rutledge, 'Dano and the exclusion of inactive EU citizens from certain non-contributory social benefits', 19 November 2014). Ms Dano was an economically inactive Romanian national who was judged to have moved to Germany to access social assistance. In handing down its judgment, the CJEU held that member states can refuse to award welfare benefits to migrants who are economically inactive.

Impact of exit from EU on welfare benefits

If the UK leaves the EU, it will need to inform the European Council and the terms of the withdrawal will need to be negotiated within a two-year period. As with all aspects of the EU debate, hugely contrasting opinions have been offered on whether two years is a realistic timescale to secure an exit.

The structure of the social security system following an EU exit would largely depend on whether withdrawal resulted in the end of the right to free movement. The removal of the right to free movement would allow the UK to impose tight restrictions on entitlement to social security benefits for EU/EEA nationals (this would require Immigration Act 1988 s7(1) to be repealed). Amendments could be made to immigration law to specify that leave to remain in the UK is subject to an EU/EEA national having no recourse to public funds. Restrictions to in-work benefits could be achieved by limiting access to employment. Difficult decisions would need to be made about transitional protection for existing EU/EEA nationals resident in the UK at the point of withdrawal and the acquired rights of

those who have gained permanent residence. Transitional protection of EU/EEA nationals already exercising their rights under the TFEU (particularly those who are economically active) would effectively result in the current arrangements, described above, continuing for many EU/EEA benefit claimants far beyond an exit date. The imposition of retrospective changes to the rights of existing EU/EEA benefit claimants would almost certainly result in a wave of legal challenges (see EU Law Analysis blog entry by Helena Wray (posted by Steve Peers), 'What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU?', 17 July 2014).

The ending of the right to free movement would mean the current EU social security co-ordination rules (as laid out in Regulations (EC) No 883/2004 and (EC) No 987/2009) would not apply. The co-ordination rules provide a set of legal principles that member states should follow but fall short of requiring uniformity of benefit rules and eligibility across the EU. However, following an EU exit, the UK would be free to enact social security legislation without reference to EU co-ordination rules, which currently stipulate that discrimination on the grounds of nationality is forbidden.

In place of the EU co-ordination rules, the UK government could seek to make bilateral agreements with individual European countries. This model is considered in a government paper published in March 2016, *Alternatives to membership: possible models for the United Kingdom outside the European Union*. Switzerland is cited as an example of a country that has negotiated bilateral agreements with other nations on a wide range of issues. Clearly, the government does not want to promote alternatives to EU membership as attractive or viable options. However, it is interesting that, with reference to Switzerland, it comments: 'Over the last two decades, it has painstakingly negotiated over 100 individual agreements with the EU' (para 3.27, p26). Any negotiations would be influenced by the relationships the UK has with other nations. Reciprocal arrangements would presumably be based on the number of UK nationals living in the country with which the negotiation was taking place, alongside perceptions of UK immigration and social security legislation. Striking mutually acceptable partnership agreements with countries that fundamentally oppose a UK exit from the EU may prove problematic. The UK already has a number of bilateral social security agreements in place with non-EEA states (eg Jamaica and the USA) and these would perhaps provide a blueprint for future deals. Typically,

they focus on reciprocal acknowledgment of insurance contributions for contributory benefits, allow benefits to be exported between partner countries, and agree annual uprating. Note, though, that existing bilateral agreements are more limited and less generous than current provisions under EU law.

An alternative to the bilateral agreement model (which might be easier to negotiate but would almost certainly be less attractive to 'leave' campaigners) would be for the UK to negotiate an EU-wide deal. This might replicate the position of Norway, which is a member of the EEA but not the EU (and is obliged to accept the free movement of citizens). Complications around individual agreements would be avoided but it seems inconceivable that the EU would accept any arrangement that discriminated against individual member states (including the poorest). The 'leave' campaign clearly views freedom of movement as one of the pitfalls of EU membership, believing it 'stops us controlling who comes into our country, on what terms, and who can be removed' (*The EU immigration system is immoral and unfair*, Vote Leave, 2016). On the other hand, free movement rights are viewed as sacrosanct by the EU. Norway's position in Europe is interesting as the right to free movement has resulted in more than six per cent of the population being from EU countries (*Alternatives to membership*, para 3.13, p19), a higher proportion than in the UK. People choosing to move to Norway who are economically active can access domestic social security benefits (a system not dissimilar to current UK arrangements).

EU withdrawal would also have a significant impact on UK nationals living in other EU/EEA countries. The UN estimated in 2015 (*International migrant stock 2015*, UN, Department of Economic and Social Affairs, Population Division)¹ that there are 1.2m UK citizens living in other EU countries. In the same year, it was estimated (European Statistics Agency, 2015)² that around 300,000 UK citizens were resident in Spain. DWP figures from 2015³ indicate that around 30 per cent of UK residents in Spain receive the UK state pension. Other EU countries with significant numbers of UK residents include Ireland (around 400,000), France (around 175,000) and Germany (around 150,000) (*Emigration from the UK*, 2nd edn, Research Report 68, Home Office, November 2012). In the event of a UK exit from the EU, member states would be free to introduce restrictions on entitlement to social security for UK nationals. It is possible that this could result in considerable numbers of citizens returning to the UK.

What happens if 'remain' wins?

In February 2016, the government renegotiated some elements of the UK's membership of the EU. The government believes the new agreement will 'make our benefits system less of a draw for EU citizens' (*Why the government believes that voting to remain in the EU is the best decision for the UK*, 6 April 2016). The 'leave' campaign describes the deal as an 'omnishambles renegotiation' (*The government's omnishambles renegotiation*, Vote Leave, 2016). The implications for social security benefits centred on the so-called 'emergency brake' mechanism, which would allow a member state to limit entitlement to in-work benefits for new EU migrants for up to four years (*Explaining the EU deal: the 'emergency brake'*, Full Fact, 22 February 2016). The agreement allowed for 'an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host member state' (European Council conclusions, 18-19 February 2016, p23).⁴ This would be possible if it could be proved that there had been a significant influx of workers placing a strain on public services and the social security system. Legal opinion is split on whether the deal is legally binding (see, for example, Clive Coleman, 'Is Cameron's EU deal legally binding?', BBC, 24 February 2016).⁵ It is certainly true to say that the deal remains open to interpretation by the CJEU. It is difficult (but not impossible) to see how the CJEU could oppose the deal, given its compatibility with other EU treaties and the fact that it has the backing of the 28 nations of the EU council. It will be fascinating to observe how the referendum debate evolves in the run-up to 23 June, and then to see how the social security system evolves in the coming years. ■

1 www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml

2 See table, *Population on 1 January by five year age group, sex and citizenship*: <http://ec.europa.eu/eurostat/data/database>

3 http://tabulation-tool.dwp.gov.uk/100pc/sp/cccountry/cat/ccgor/a_carate_r_cccountry_c_cat_p_ccgor_claimants_living_abroad_aug15.html

4 www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/

5 www.bbc.co.uk/news/uk-politics-eu-referendum-35653495