Like a Bargaining Chip: Enduring the Unsettled Status of EU Nationals Living in the UK

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It hasn't been the best 12 months to be an EU national living in the UK. Practically invisible to the entire political spectrum during the referendum campaign but for when accused of stealing British jobs, milking the British benefits system or overburdening the NHS; then after the referendum's outcome, whilst still in utter disbelief, targeted by the surge of revamped xenophobic attacks; now left hanging as to their future in the country once the UK leaves the EU, these 2.9 million people are among those who arguably have the most to lose with Brexit. And yet they have been incredibly left, despite some commendable displays of support by the First Minister of Scotland or the Mayor of London, hanging and worrying for their future by Her Majesty's Government.

Finally, a week ago, the Commons backed a Labour motion – with the votes of some Tories and in particular of Brexit champion Boris Johnson – to urge the government to guarantee EU nationals living the UK the right to stay after Brexit. Albeit not binding, the motion constituted indeed a significant political move that could not be left unheard by the Government. And in fact, at last, yesterday the Government has spoken on the matter, with a joined statement ('the Statement') by the Cabinet Office, the Home Office and the Foreign & Commonwealth Office that reassures EU nationals living in the UK as to their status *post-referendum* (and not post-Brexit). Is this what the Commons asked for? While hundreds of EU nationals channel their relief through social media in welcoming the news and British businesses praise the Government for giving them the reassurance needed, to a more expert eye – *pace* Michael Gove – things seem much less reassuring.

The Statement interestingly opens up with what seems like a declaration to the effect that

> *The decision about when to trigger Article 50 and start the formal process of leaving the EU will be for the new Prime Minister.*

So the Government has eventually taken official position on the hottest legal debate since the vote, rejecting the opinion of some academics according to whom the last word in triggering the mechanism ex Art 50 should reside with Parliament. As a legal challenge is currently under way, we shall see what happens in this regard.

The Statement goes on to re-affirm the obvious in that the 'UK remains a member of the EU throughout this process, and until Article 50 negotiations have concluded', and then:

> *When we do leave the EU, we fully expect that the legal status of EU nationals living in the UK, and that of UK nationals in EU member states, will be properly protected.The government recognises and values the important contribution made by EU and other non-UK citizens who work, study and live in the UK.*

Now, while the second is indeed a welcome, albeit late and perhaps uninspired, political recognition of the contribution of EU nationals (and other non-UK citizens…) in this country, the first sentence enshrines instead what has been the much criticised stance professed by some members of the Government and of the ruling party, and namely that the UK will not commit unconditionally to protect the right to residence and legal status of EU nationals currently living in the UK post-Brexit. This has been widely criticised as an attempt to use EU nationals like bargaining chips

to secure some negotiating strength once the formal discussion on Brexit between the Government and the EU Commission begins. That the Government has indeed decided to endure in its reprehensible stance seems confirmed by a careful reading of the following, and most interesting, part of the Statement:

> *EU nationals who have lived continuously and lawfully in the UK for at least 5 years automatically have a permanent right to reside. This means that they have a right to live in the UK permanently, in accordance with EU law. There is no requirement to register for documentation to confirm this status.*

To the expert eye, this statement doesn't offer any reassurance whatsoever to EU nationals who have been living in this country for more than five years. If anything, it raises more questions than it settles. First and foremost, it is stated that the EU citizens' right to live in the UK permanently is conferred on them by EU law – so the question of what happens to this right once EU law doesn't apply anymore to the UK is left resoundingly unanswered by the Government. It is also important to note that when the Government claims that

> *There is no requirement to register for documentation to confirm this status [i.e. permanent residence]*

it seems to openly contradict official governmental guidance towards naturalisation, which requires instead EU citizens to apply for a permanent residence card in order to *prove* the status in question and to 'normally' wait for 12 months, once obtained such permanent card, to apply for citizenship (section 6). Is the Government craftily playing with words – and with people's lives – here? Is there a substantive difference between 'confirming' and 'proving' the status of permanent residence for EU nationals? If not, can EU nationals who meet the other requirements apply now for naturalisation without having to obtain a permanent residence card first? And in any case, what is the value of that permanent residence card in the post-Brexit – and not *post-referendum* – Britain?

Given the very clear request formulated by the Commons last week, one would have hoped the Government would have provided the public with an unambiguous position as to the status of EU nationals who already live here in a post-Brexit United Kingdom. It didn't, which leaves EU citizens in the same wearying position as before – worrying about what will happen to them. If anything, if arguments of basic morality, common sense and decency, scientific interest, or economic rationality fall on deaf ears, it might be then worth reminding ministers and politicians that what is at stake is not just the lives of 2.9 million EU citizens living in the UK, but also the countless more of those millions of British nationals for whom those EU nationals are friends, relatives, partners, associates, colleagues and neighbours. Definitely not bargaining chips.

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