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Michael Doherty

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BREXIT, Social and Environmental Rights

Through the Looking Glass: Brexit, Free Movement and the Future

Michael Doherty*

This article looks at some of the implications of Brexit for free movement of persons within the European Union, for both UK citizens and those from other EU Member States. It begins by briefly outlining the principle of free movement of persons, one of the four ‘fundamental freedoms’ set out in the EU Treaties since the Union’s foundation. The next section looks at the reasons why free movement of persons became such a fundamental issue in the UK referendum on EU membership, focusing on the issues of jobs, labour standards and welfare. The article goes on to consider possible alternatives for the UK’s relationship with the EU, post-Brexit, in terms of free movement of person rights. In the concluding section, the article considers the future of free movement of person rights within the EU itself.

I. THE PRINCIPLE

‘Begin at the beginning,’ the King said gravely, ‘and go on till you come to the end: then stop.’¹

The four freedoms, free movement of capital, goods, services and labour, have been seen as the cornerstones of the European Union since its foundation. The Union’s core aim, since the Treaty of Rome, has been to ensure that the Member States create a single trading entity, a ‘common market’, and remove obstacles to free trade. In the context of current debates on the future of the EU, it is on the core principle of free movement of workers that most attention has centred; it is this principle that, arguably, had greatest impact on the decision of the UK electorate to vote to exit the Union.

Article 48 of the Treaty of Rome stated that ‘freedom of movement for workers shall be secured within the [Union] ... Such freedom of movement shall entail the abolition

* Professor Michael Doherty, Department of Law, Maynooth University, Co Kildare, Ireland. Email: michael.b.doherty@nuim.ie

¹ Lewis Carroll, *Alice’s Adventures in Wonderland* (1865; Reprint Publishing 2016), p.65.

of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. This provision (now Article 45 of the Treaty on the Functioning of the European Union (TFEU)) has provided the constitutional basis for the various directives and regulations governing the free movement of persons since 1958. An obvious point to note is that the provision refers to 'workers', ie, economically active persons. However, in Article 51 (now Article 48 of the TFEU), the Treaty of Rome commits to adopting such measures in the field of social security as are necessary to provide freedom of movement for workers *and their dependants*; from the outset, the Treaties recognised the inescapable fact that workers, unlike goods and services, may not always travel across borders unaccompanied. Notwithstanding the establishment of the general principle in 1958, practical implementation of this free movement right was slow, and it was only with the passing of Regulation 1612/68² that the details were fleshed out. The Regulation required that Member States established equal rights to social and tax benefits as between workers moving from another Member State and host State workers; and that family members of such workers were also allowed to reside and work in the host State. The ability of family members to move with the worker, and be entitled to equal treatment in the host State, meant that it was not only economically active citizens that would move, but also, for example, children and elderly relatives; the presence of the latter groups on the territory of the host State had obvious implications for social services in the fields of education, healthcare, and so on.

Over the years, Treaty changes, legislative developments and European Court of Justice case law³ have developed, clarified and, in overview, enlarged the concept of 'free movement of workers'. This is not the place for a full review of these developments. Throughout the article, the focus will be primarily on two elements of free movement of workers, which were pivotal in the Brexit debate: first, the extent to which free movement impacts on labour rights and standards in the host country, and, secondly, the question of welfare and benefits, and the availability of same to economically active, and non-active, EU migrants. In the next section, the focus will move to look at these issues in the specific context of the Brexit debate; first, though, some points of general principle.

In terms of labour rights and standards, it is important to be clear for what the EU does, and does not, have competence to legislate. A range of core labour rights, applicable in all the Member States, derives from EU legislation.⁴ Rights include access to paid annual holidays, health and safety protection, access to unpaid parental leave, equal treatment for part-time, fixed-term and agency workers, and consultation

² Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

³ See Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, 5th edn 2016) part III.

⁴ Of course, it is not argued here that such rights would not exist *but for* EU law (although this did become an issue in the Brexit referendum campaign, see below), merely that they are mandated by membership of the EU.

procedures for worker representatives in the context of corporate restructuring.⁵ The TFEU is explicit that the EU does not have competence to legislate in the areas of pay, or freedom of association and the right to strike (Article 153(5)). Any legislative proposals in the areas of social security and social protection of workers, protection of workers on dismissal, and conditions of employment for third-country nationals legally residing in Union territory are subject to requirements of unanimity, ie, each Member State retains a veto. As will be seen below, the areas in which the EU has legislated on labour rights featured only to a very marginal extent in the Brexit debate. It was rather the areas in which there is no EU competence, or where national governments have a veto, that took centre stage.

In terms of welfare payments and benefits, it is important to highlight EU developments since the Maastricht Treaty came into force in 1993. This treaty introduced the status of 'EU citizenship'; each citizen of a Member State was henceforth also accorded the status of EU citizen.⁶ Citizens of the Union have the right to move and reside freely within the territory of the Member States, 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.⁷ The significance of Union citizenship became clear when the Court of Justice found that it could confer on EU citizens the right to reside in a host Member State *irrespective* of the economic status of the person.⁸ This idea reached its high (or low, depending on one's perspective) water mark in *Grzelczyk*, where the Court declared that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.⁹ However, both the Court and the Treaties are clear that citizenship rights may be subject to limitations. In essence, the rights of EU migrant citizens, for the purposes of this article, are, predominantly, subject to the detailed rules laid down in the Citizens' Rights Directive and the Regulation on the coordination of social security systems.¹⁰ Again, this is not the place for a detailed analysis of the provisions of the legislation. It will suffice to say that the rights granted and acquired under them are heavily qualified by the economic status of the EU migrant; workers get the most rights, and non-economically active citizens the fewest. Furthermore, to access rights, most non-economically active migrants must show some relationship of dependence on a worker.

5 See the TUC report, 'UK Employment Rights and the EU' (2016) <www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf> accessed 30 September 2016.

6 TFEU, Art 20.

7 TFEU, Art 21.

8 Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

9 Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31; see Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 *Common Market Law Review* 13.

10 Directive No 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

Having sketched the outline of what free movement of persons involves under EU law, the next section will examine the main difficulties with the concept that featured in advance of the vote of 23 June.

II. THE PROBLEM

‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’¹¹

The purpose of the article is not to rehearse the various arguments put forward during the referendum. Instead, this section will analyse some of the key issues relating to the two core areas of focus, labour standards and welfare rights, in the context of looking to the future of free movement rights in the UK and EU.

Two aspects of the ‘renegotiation package’ agreed by the UK and the European Council in advance of the referendum related directly to labour standards.¹² The first was that there would be increased emphasis on reducing unwarranted regulatory burdens on employers (cutting ‘red tape’); as Craig puts it ‘competitiveness should be written into the “DNA” of the EU’.¹³ Implicitly, ‘regulatory burden’ referred, at least in part, to employment law. Secondly, the package referred directly to free movement and immigration; in particular, that a ‘safeguard mechanism’ would be put in place for Member States responding to situations of inflow of workers from other Member States of an ‘exceptional magnitude’ over an extended period of time. This would authorise such Member States to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment, and would have a limited duration, applying to EU workers newly arriving during a period of seven years. In essence, then, one measure sought greater room to manoeuvre in reducing the burden on industry of employment protections,¹⁴ while the other sought to reduce the ‘pull’ factors felt to be enticing other EU citizens to the UK, and, therefore, to reduce the number of EU citizens seeking to enter the UK.

On both aspects, available data seemed to question the extent to which there was a problem at all, or how acute it might be. The UK’s labour market is already one of the

¹¹ Lewis Carroll, *Through the Looking-Glass* (1871; Public Domain Books 2006), p. 99.

¹² <www.consilium.europa.eu/en/meetings/european-council/2016/02/18-19/> accessed 30 September 2016.

¹³ Paul P Craig, ‘Brexit: A Drama in Six Acts’ (2016) *European Law Review* (forthcoming).

¹⁴ In the line of fire, in particular, was the Working Time Directive (Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L307/18). In his Bloomberg speech of 2013, former Prime Minister David Cameron stated that ‘it is neither right nor necessary to claim that the integrity of the single market, or full membership of the European Union, requires the working hours of British hospital doctors to be set in Brussels irrespective of the views of British parliamentarians and practitioners’ <www.gov.uk/government/speeches/eu-speech-at-bloomberg> accessed 30 September 2016.

most flexible, and lightly regulated, in the world.¹⁵ Indeed, to refer back to the issue of areas of competence, the UK has only recently reduced the level of unfair dismissal protection, by increasing the qualifying period of employment necessary to take a claim from one year to two,¹⁶ and has seen a dramatic decrease in the number of claims being brought to employment tribunals, as a result of the introduction of a regime of fees;¹⁷ the regulatory burden had been reducing fast even within the EU. On the 'numbers issue', there certainly has been an increase in the numbers of EU citizens moving to the UK in recent years. The Office for National Statistics (ONS) Labour Force Survey estimates for 2015 showed that there were 3.3 million EU citizens in the UK; 1.6 million from the EU14, 1.3 million from the EU8, 300,000 from Romania and Bulgaria, and the remainder from the other EU countries of Malta, Cyprus and Croatia.¹⁸ Although this represents only 5 per cent of the UK population, and the number of non-EU migrants living in the UK is higher, the decision of the UK government in 2004 not to apply restrictions on the entry of migrants from the 'new' Member States, and the increase in migration from Southern European Member States, where the impact of the crisis since 2008 has been particularly felt, has resulted in increases in net migration to the UK.¹⁹ The question of the economic costs and benefits of such migration, of course, became a key issue in the referendum debate.

Jobs and Working Conditions

As mentioned above, the implications of 'cutting red tape' for employment rights protection in the UK did not seem to get a huge amount of traction in the campaign. This reflects, perhaps, the rather less than positive, and less than energetic, support for Remain amongst many on the left, whose main message appeared to be: 'the EU isn't great, but things could be worse outside, under a Tory government'.²⁰ As previously noted, the issue was clearly highlighted by the Trades Union Congress. However, on a

15 To take one measure by way of example, on the OECD 'Strictness of employment protection—individual and collective dismissals', the UK is placed third of OECD countries <https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV> accessed 30 September 2016.

16 The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012/989.

17 <www.acas.org.uk/index.aspx?articleid=1889> accessed 30 September 2016.

18 Approximately 1.2 million UK citizens live elsewhere in the EU <www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/february2016> accessed 30 September 2016.

19 'What do we know about EU migration to the UK?' (Oxford Migration Observatory) <www.migrationobservatory.ox.ac.uk/resources/commentaries/what-do-we-know-about-eu-migration-to-the-uk/> accessed 30 September 2016.

20 This is, of course, a rather simplistic generalisation; forensic analyses of the difficult issue of which way those committed to strengthening, rather than weakening, labour protections should vote were readily available; see, for example, John Hendy, 'Workers' and Trade Union Rights: The Dilemma of the EU Referendum' <www.ier.org.uk/sites/ier.org.uk/files/11%20John%20Hendy%20papers.pdf> accessed 30 September 2016.

fundamental level, the union movement found itself in a quandary. Whilst acknowledging that EU membership had resulted in the securing of important employment rights, unions across the EU have been highly critical of recent developments in the realm of social policy in the EU. The Court of Justice, in a series of judgments known as the ‘Laval Quartet’ has ‘subjugated the fundamental human rights to strike and bargain collectively to the freedoms of business enshrined in the Four Pillars of the EU Treaty’.²¹ At the same time, the EU institutions have imposed severe austerity measures on countries such as Greece, Portugal and Ireland, which have included requirements to dramatically decrease the role of collective bargaining.²² As the EU has been seen by the labour movement to take an increasingly neo-liberal turn, it was difficult then to robustly defend it as a guarantor of workers’ rights.

The debate around whether or not EU migrants were ‘taking’ jobs from, and thus increasing unemployment amongst, UK citizens, and/or depressing labour standards, is a complex one (although one might not always have realised this from the tenor of the referendum debate). Again, some of the data seemed to cast doubt on such claims. The UK’s unemployment rate remained relatively low in the 2008–15 period, peaking at just over 8 per cent in 2011, before falling back to just over 5 per cent by 2015. However, ironically in the case of the ‘welfare debate’ below, the employment rate in 2015 amongst EU12 citizens (including here Cyprus and Malta) was higher than the rate amongst UK citizens.²³ The extent to which migrant workers depress wages and/or living standards is notoriously difficult to measure from an economic perspective.²⁴

Perhaps, then, it is better to focus less on the veracity of the various claims and more on the role they played in the referendum outcome. First, individual, unemployed UK citizens encountering Polish taxi-drivers or Romanian sales assistants are unlikely to be impressed by what macro-economic data suggest, especially in the context of austerity. Secondly, it is clear that migration is not spread evenly across the UK; what macro-figures do not show are strains in terms of unemployment, low wages and pressure on social services in specific local areas. Third, and similarly, the impact of migration in terms of employment rates and working conditions has a sectoral dimension; it is

21 Hendy (n 20) 3. The ‘Laval Quartet’ refers to Case C–341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11767; Case C–438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP* [2007] ECR I–10779; Case C–346/06 *Rüffert v Land Niedersachsen* [2008] ECR I–1989; and Case C–319/06 *Commission v Luxembourg* [2006] ECR I–8673.

22 Eftychia Achtsioglou and Michael Doherty, ‘There Must Be Some Way Out of Here ... The Crisis, Labour Rights and Member States in the Eye of the Storm’ (2014) 20 *European Law Journal* 219.

23 Eurofound, ‘Workers’ Mobility and Migration: How to Achieve a Balance in Europe?’ *Foundation Focus* (December 2015) <www.eurofound.europa.eu/publications/foundation-focus/2015/labour-market-social-policies/foundation-focus-workers-in-europe-mobility-and-migration> accessed 30 September 2016.

24 See Stephen Nickell and Jumana Saleheen, ‘The Impact of Immigration on Occupational Wages: Evidence from Britain’ (2015) ‘Channel 4 FactCheck: does immigration drive down wages?’ the Bank of England report that led to yet another media spat between the Leave and Remain camps <<http://blogs.channel4.com/factcheck/factcheck-boris-johnson-alex-salmond-does-eu-immigration-drive-down-wages/23102>> accessed 30 September 2016.

clear that in sectors like construction the impact of intra-EU migration, including the separate but related question of the posting of workers temporarily to the UK to work on construction sites, was more significant than in other sectors.²⁵ Finally, it should be noted that the issue of 'precarious work' was a significant one in the run-up to the UK general election of 2015, particularly the issues of 'zero hours' contracts and low pay.²⁶ Such contracts are used widely in construction and agriculture, but have become increasingly associated with service sector employment (notably in accommodation, food services and retail),²⁷ all sectors with significant numbers of migrant workers.

The key question is, in all of these areas, will Brexit fix the problem? To answer this, one might assess which problems stem from membership of the EU and which do not.

To begin with, as a non-Eurozone country, austerity measures in the UK have been mostly imposed on a fully autonomous basis by the UK government itself.²⁸ In terms of geographical and sectoral concentration of migrants, it must be emphasised that the issue is not simply one of labour *supply*. As Dominic Casciani has pointed out:

The key factor in all the changes is the economy. The UK has been growing faster than many parts of the Eurozone. British employers have become savvy at how to get cheap foreign workers—with employment agencies working hard on the continent to identify and sign up foreign labour.²⁹

An exclusive focus on the 'flood' of cheap labour supply misses the point that UK legislative and policy choices, and employer preferences, have created the conditions where *demand* for cheap labour has flourished; in this respect, the prevalence of precarious contracts, the diminution of trade union rights and the withdrawal of institutional support for sectoral collective bargaining, and the inadequate resourcing of labour inspectorates are all issues that must be laid at the national, rather than European, door.

However, as will be argued in the concluding section, it would be a mistake to overly particularise the UK position. At a fundamental level, the antipathy, and hostility, towards the EU demonstrated by a large section of the UK electorate, might be seen as symptomatic of a much wider issue. Globalisation, Milanovic argues, has

²⁵ See, for example, Catherine Barnard, "'British Jobs for British Workers": The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38 *Industrial Law Journal* 245.

²⁶ 'Zero-hours Contracts: A 2015 General Election Hot Topic' <<http://realbusiness.co.uk/hr-and-management/2015/02/26/zero-hours-contracts-a-2015-general-election-hot-topic/>> accessed 30 September 2016.

²⁷ Office for National Statistics, <www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/september2016> accessed 30 September 2016.

²⁸ <www.gov.uk/government/policies/deficit-reduction> accessed 30 September 2016.

²⁹ <www.bbc.com/news/uk-31748423> accessed 30 September 2016. The article reports on research carried out by the Migration Observatory at the University of Oxford, which put together a suite of information about migrant numbers at the local level: <www.migrationobservatory.ox.ac.uk/resources/reports/projected-number-foreign-born-residents-local-areas-2014/> accessed 30 September 2016.

generated winners and losers and, firmly in the latter camp, are the lower and middle classes of the wealthiest countries (like the UK).³⁰ Without some regulatory intervention and compensatory measures (see concluding section), it is not hard to envisage why these groups would feel threatened by competition on the jobs (and housing, etc) markets from mainly young, skilled and low-wage migrants from the East. Free movement—of goods, services, capital and labour—has been robustly promoted by the EU institutions, with the right to provide cross-border services proclaimed by the Court of Justice in *Laval* as a freedom so fundamental it must trump fundamental social rights, like freedom of association. However, the Union, whilst opening up markets and promoting free trade, has left social policy (including wage and tax policy) largely in the hands of national governments (except where social rights must cede to the demands of the internal market), which, in terms of Eurozone members, are in turn severely constrained by the fiscal rules imposed since the 2008 crisis began.³¹ Moreover, as Pogátsa argues:

This has allowed eastern European governments to pursue a variant of capitalism that is based on pursuing the advantages of low wages, limited trade union rights, and no more than rudimentary welfare ... The same model that has relocated low wage jobs from west to east is also pushing easterners to the west in search of real opportunities.³²

For those left behind in the EU after Brexit, a new balance between market rules and social solidarity measures will have to be struck, that is sensitive to, not only national, but regional and localised concerns about intra-EU migration.

On the more specific issues of the difficulties caused by posting of workers, and the related issue of cross-border agency work, the report card is mixed. The new enforcement directive for posted workers has now been transposed in most Member States,³³ and the Juncker Commission has given some indications that a revision of the parent posting directive itself is being contemplated.³⁴ The Temporary Agency Work Directive has provided important protections for agency workers, but

³⁰ Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016).

³¹ See Michael Doherty, 'Back to the Future of EU Labour Law? A Review of Marc Rigaux, Jan Buelens and Amanda Latinne, From Labour Law to Social Competition Law?' (2014) 25 *King's Law Journal* 467.

³² Zoltán Pogátsa, 'The Solution to Brexit Lies in Eastern Europe' <www.socialeurope.eu/2016/07/solution-brexit-lies-eastern-europe/> accessed 30 September 2016.

³³ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/11. It should, of course, be noted that the UK government, prior to 1996, sought to resist attempts to adopt the posted workers directive at all, expressing concern that such a measure would restrict the operation of a free European labour market; Tonia Novitz, 'UK Implementation of the Posting of Workers Directive 96/71/EC' in Stein Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (University of Oslo 2013).

³⁴ 'The Commission presents reform of posting of workers – towards a fair and truly European Labour Market' <<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2488&furtherNews=yes>> accessed 30 September 2016.

may not be sufficient, in itself, to protect against cross-border exploitation of such workers.³⁵ Of course, post-Brexit, the UK government will be in a position to repeal all of this legislation.

Welfare Tourists?

Perhaps the most dispiriting aspect of the Brexit referendum (to this author, at least) was the debate around restricting welfare and benefits. In the 'renegotiation package', it was made clear that, under the Treaties, Member States retain the right to define the fundamental principles of their social security systems, and may impose conditions in relation to certain benefits to ensure that there is a real and effective degree of connection between the person concerned and the State's labour market.³⁶

The deal for the UK essentially focused on the availability of in-work benefits (discussed above) and the exportation of child benefits to a Member State other than the UK. In the ensuing debate, however, much of the rhetoric focused on 'benefit tourism' more generally. Statistical evidence produced was largely ignored; by way of example, one can look at the study by the UCL Centre for Research and Analysis of Migration (CReAM), which showed that European immigrants to the UK paid more in taxes than they received in benefits, and that migrants arriving since 2000 were 43 per cent less likely than natives to receive state benefits or tax credits, and 7 per cent less likely to live in social housing.³⁷

Nonetheless, the issue clearly resonated with a section of the electorate, probably for similar reasons to those outlined in the previous section. It is interesting that recent case law of the Court of Justice has, in fact, been highly criticised by some for effectively starting to chip away at the equal treatment principle in the areas of social security and social assistance, in cases like *Dano*³⁸ and *Brey*.³⁹ Following Brexit, the UK will be able to arrange its welfare system as it pleases, in terms of non-UK citizens (leaving aside, for the moment, the question of 'acquired rights'). The concessions offered to the UK, however, are likely to be viewed with interest by other Member States, leading to a possible further erosion of the equal treatment principle.

³⁵ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L327/9. See Chris Forde and Gary Slater, 'Labour Market Regulation and the "Competition State": An Analysis of the Implementation of the Agency Working Regulations in the UK' (2016) 30 *Work, Employment and Society* 590.

³⁶ <www.consilium.europa.eu/en/meetings/european-council/2016/02/18-19/> accessed 30 September 2016.

³⁷ <www.ucl.ac.uk/news/news-articles/1114/051114-economic-impact-EU-immigration> accessed 30 September 2016; Christian Dustmann and Tommaso Frattini, 'The Fiscal Effects of Immigration to the UK' (2014) 124 *Economic Journal* F593.

³⁸ Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

³⁹ Case C-140/12 *Brey* ECLI:EU:C:2013:565. See Dagmar Schiek and others, *EU Social and Labour Rights and EU Internal Market Law* (2015) 59 <[www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU\(2015\)563457_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU(2015)563457_EN.pdf)> accessed 30 September 2016.

III. THE ALTERNATIVES

‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’⁴⁰

To paraphrase a former US Secretary of Defense, we are now at a point where there are very few ‘known knowns’ indeed. The UK Prime Minister has indicated that formal negotiations on the UK’s exit from the Union will commence in spring 2017. The options for the UK’s future relationship with the EU seem to amount to the ‘Norway model’, the ‘Swiss model’ or the ‘WTO model’. In terms of free movement of persons, a brief outline of each is as follows:⁴¹

- Norway:⁴² the UK remains a member of the European Economic Area (EEA). This would seem unlikely to satisfy the Leave voters, as the UK would be required to accept free movement of persons. Should this option prevail, free movement law will continue to apply to the UK.
- Switzerland:⁴³ relations between the UK and the EU would be governed by bilateral treaties on a case-by-case basis. Thus, the issue of free movement of persons could be the subject of specific treaty negotiations and agreements. However, to think free movement of persons could simply be ‘hived off’ into a separate arrangement, if agreement could be reached at all, would be naïve. This option will be considered further in the closing section.
- World Trade Organization (WTO):⁴⁴ This is the ‘cleanest break’ option, in that EU free movement of person rules would cease to apply. Some system of work permits/visas would be put in place for non-UK citizens; of course, other states (and the EU) would put in place reciprocal (or retaliatory ...) measures. It would be tricky, in this instance, to maintain free movement of services, as this is intimately linked with free movement of persons. Furthermore, UK citizens in other EU countries would become third-country nationals.

At this point, we simply do not know what the ultimate outcome of negotiations will be. For those UK citizens living in another EU State, or other EU citizens living in the UK,

⁴⁰ Lewis Carroll (Charles L Dodgson), *Through the Looking-Glass* (1934) chapter 6, 205.

⁴¹ For a full account, see Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (CUP, 3rd edn 2014); a new chapter 5A, ‘The Authority of EU Law beyond the Union’ is now available.

⁴² ‘Lord Nelson! Lord Beaverbrook! Sir Winston Churchill! Sir Anthony Eden! Clement Attlee! Henry Cooper! Lady Diana! Maggie Thatcher—can you hear me, Maggie Thatcher! Your boys took one hell of a beating! Your boys took one hell of a beating!’ (Bjorge Lillelien on Norwegian TV, as Norway beat England 2-1 in Oslo in a World Cup qualifier in September 1981).

⁴³ ‘The Swiss option, EFTA membership plus a host of bilateral treaties, is the best starting place and is informative in many ways. It is not perfect for us however. It incorporates “free movement of people” for the moment ... the optimum aim for us would be similar, but without the free movement of peoples’ (David Davis, UK Minister for Exiting the EU, speech on Brexit at the Institute of Chartered Engineers, February 4, 2016 <http://www.daviddavismp.com/daviddavis-speech-on-brexit-at-the-institute-of-chartered-engineers/>).

⁴⁴ ‘June 23rd will go down in history as our Independence Day’ (Nigel Farage, former leader of UKIP, <https://www.rt.com/news/348129-farage-brexit-independence-day/>).

the question of what, if any, rights will be 'acquired' is a key one. Douglas-Scott has argued that neither EU law nor international law guarantees clear protection of acquired rights, absent a suitable withdrawal agreement focused on them.⁴⁵ Many EU citizens will have gained a right of residence in the UK by 2019; UK citizens abroad may well be entitled to rely on principles of legal certainty in terms of their residence rights. However, ultimately, this is, unfortunately, likely to be a key political question to be resolved in the withdrawal negotiations.

IV. THE FUTURE

'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'⁴⁶

For those who voted Leave on the basis of some of the issues explored in section 2, Brexit will not be a magic wand, sweeping away discontent. For the EU, Brexit will not allow a return to 'business as usual' following the departure of the 'problem child'. There are wider issues at play here.

It was argued above that a new balance between market freedoms and social protection will have to be struck; this applies in the EU, but also in a post-Brexit UK. In short, the 'losers of globalisation' will have to be better protected and compensated. This will require, at a fundamental level, a rethinking of fiscal rules supporting austerity policies, a change in the direction of 'structural reforms', which seek to make labour markets ever more 'flexible', whilst reducing social security protection, and, at EU level, a rethinking of the primacy accorded market freedoms over social rights. An interesting thought; if a large issue behind Brexit was the pressure immigrants put on social services, why were there so many voices calling for fewer immigrants and so few calling for more social services? Simply put, protecting those losing out from free movement will require national, and supra-national, state expenditure.⁴⁷

The gap between macro-data and local experience has been highlighted above. In the UK, not insignificant sections of the electorate who voted Leave were based in local areas that have been devastated by de-industrialisation.⁴⁸ If the EU wishes to promote maximum mobility of citizens, then the EU must play a role in mitigating negative localised effects. This could involve some sort of 'migration fund', where the money follows the EU migrants, and aid is available to Member States or regions disproportionately affected by intra-EU migration. Similarly, EU-wide levies on capital to finance a larger 'training fund' for workers 'displaced' by migration flows could be countenanced (a 'beefed-up' version of the 'globalisation fund'). Lastly, concrete measures to achieve

⁴⁵ Sionaidh Douglas-Scott, 'What Happens to "Acquired Rights" in the Event of a Brexit?' (*UK Constitutional Law Blog*, 16 May 2016) <<https://ukconstitutionallaw.org/>> accessed 30 September 2016.

⁴⁶ Lewis Carroll, *Through the Looking-Glass* (1871; Public Domain Books 2006), p. 99.

⁴⁷ Dani Rodrik, *The Globalization Paradox* (Oxford University Press 2012).

⁴⁸ Of course, the extent to which the 'blame' for this can be laid at the EU's door, given UK industrial policy since the 1980s is extremely debateable, but a debate for another day ...

the ‘access to adequate minimum income’ trumpeted by the Commission’s ‘European Pillar of Social Rights’ strategy would be welcome.⁴⁹

In conclusion, let’s return to the ‘Swiss model’. It was noted during the UK referendum campaign that, while Swiss voters had accepted the free movement of Romanian and Bulgarian workers in 2009, in 2014 a plebiscite passed, which centred on immigration quotas for foreigners, including EU citizens. Erne and Imboden argue that what made the difference in the earlier referendum was agreement amongst trade unions, employer organisations and government to implement ‘flanking measures’ in order to boost popular support for the opening of the Swiss labour market to European migrant workers.⁵⁰ These measures ensured that workers posted to Switzerland were subject to local wage and employment conditions, facilitated the legal extension of collective agreements to all employers and employees operating in a given sector, and set up tripartite commissions, with extensive law enforcement powers to enforce the principle of equal wages for workers of different origins. In other words, the measures were all aimed at preventing the abusive undercutting of local wage and employment conditions, particularly in low-wage sectors: ie, aimed at reducing the *demand* for cheap labour. By 2014, however, the changing mood, Erne argues, can be significantly explained by the ‘limited sectorial scope of the flanking measures and a gradual erosion of the class-compromise that hitherto had been sustaining them’.⁵¹ The Swiss have not yet legislated for the plebiscite. At the time of writing this seems imminent. However, look away now Brexiters, it will be achieved following agreement with the European Union ...⁵²

In conclusion, the answer, then, to both UK and EU concerns about cross-border mobility seems to lie in a combination of state support for those that lose out, and regulatory intervention to prevent exploitation of those that move. A recognition of this may yet mean, to quote Churchill, that this is not the end, or not even the beginning of the end, but is, perhaps, just ‘the end of the beginning’.

49 Towards a European Pillar of Social Rights <http://ec.europa.eu/priorities/publications/towards-european-pillar-social-rights-policy-domains_en> accessed 30 September 2016.

50 Roland Erne and Natalie Imboden, ‘Equal Pay by Gender and by Nationality: A Comparative Analysis of Switzerland’s Unequal Equal Pay Policy Regimes across Time’ (2015) 39 *Cambridge Journal of Economics* 655.

51 Roland Erne, ‘How To Explain The Swiss Vote Against The Free Movement Of Workers’ <www.socialeurope.eu/2014/03/explain-swiss-vote-free-movement-workers-european-union/> accessed 30 September 2016.

52 Bloomberg, ‘Top Swiss Diplomat Says EU May Accept ‘Light’ Immigration Plan’ <www.swissinfo.ch/eng/top-swiss-diplomat-says-eu-may-accept-light-immigration-plan/42485236> accessed 30 September 2016.