

Testing the Limits of European Citizenship

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Citizenship of the European Union was introduced to European Community law by the Treaty of Maastricht. The new citizenship provisions² reinforced the right of Member State nationals to move and reside freely within Union territory and granted the right to vote in EP elections to all Member State nationals irrespective of their country of residence or their migration status. Union citizens were also granted the right to petition the European Parliament, to vote in municipal elections of a host Member State and to receive diplomatic protection from the consulate of another Member State.

The value of the citizenship status outwith the scope of those rights explicitly defined by the Treaty is uncertain. Though initially the subject of much speculation by both practitioners and academics alike,³ development of the concept of European citizenship is widely recognised to be confined to those citizens who have exercised their economic right of free movement, with respect to whom the protection of social rights is a necessary corollary to the pursuit of the broad objectives of the Treaty. The Court has expressed willingness to re-cast certain social rights that attach to free movement – for example the right to family reunification and equal access to welfare support, education and healthcare – in terms of citizenship language, yet this ironically serves only to highlight the constraints of the 'market citizen' framework.

There are two lines of objection to the concept of Union citizenship as currently formulated. The first would consider the lack of a general Community competence to regulate for the social rights of its citizens as being a deficiency in and of itself, on the grounds that a strengthened European space necessitates a minimum allocation of social citizenship rights. The second, a more modest objection, is that the allocation of social rights within the constraints of the market citizenship framework has the potential to create uneasy distinctions between the migrant and non-migrant 'citizen'. In the illustration to be examined below, this operates so far as to subject the non-migrant citizen to 'reverse discrimination'. The non-migrant citizen is therefore not a 'citizen' in any meaningful way, as he is not entitled to the same social citizenship rights that he would receive upon movement within the Union. The application of a 'market citizen' model of citizenship is fraught with contradictions when developed so as to protect social rights that could be equally applicable to non-migrant Member State nationals. These contradictions push at the limits of the market citizen framework and ironically undermine the very citizenship status the Court is intending to bolster, by attracting resentment to European (over-)regulation and increasing resistance to the process of European integration.

The contradictions inherent in the development of a market citizenship model are never more apparent, and the line between migrant citizen and non-migrant Member State national never more arbitrary, than when the rights derived from Community law can be claimed in isolation from national policies. The allocation of such rights to migrant citizens can by their nature no longer be explained by equal treatment provisions, but signify an independent social right conferred at

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EDITOR'S NOTE

This is one in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union.

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European level. Such was the issue at the heart of a lengthy debate as to whether the right of family reunification granted to migrant EU citizens in relation to third country national family members should be fettered by an initial application of national immigration law to the family members in question.

The tension between national policies and the Union citizen's right of family reunification derived from Community law came before the ECJ in *Singh*.⁴ This case concerned the right to family reunification to which a migrant citizen is entitled upon return to the Member State of which he or she is a national. The Member States were reluctant to recognise the application of the Community right to their own nationals, claiming that it was extinguished upon return to the state of origin in a process which returned the migrant citizen to the disempowered status of static 'citizen'. The Court rejected this argument and held that upon return to his home Member State a migrant citizen was entitled to at least the same rights as if he were residing in another Member State. The judgment signalled the growth of tensions between a privileged class of migrant citizens who could derive the right of family reunification from Community law and static Member State nationals who were subject to less favourable family reunification rights under the national regime of that Member State.

The right of residence for third country national family members of Union citizens returned before the ECJ in *Metock*.⁵ The effect of the judgment provides a prime example of the unsustainable tensions created by the application of enhanced citizenship rights within the context of limited competence, and highlights the reluctance of Member States to implement both controversial determinations of the Court and even such existing European law as the Citizens' Rights Directive.

In *Metock* the ECJ held that the right of a Union citizen to reside with a non-EU national family member who had not previously lawfully resided with the Union citizen in another Member State is not conditional upon the application of national immigration criteria to that

family member. Application of national immigration laws to family members of Union citizens would, the Court reasoned, constitute a barrier to the free movement of persons by channelling Union citizens to those Member States with the least restrictive immigration criteria. The result of the judgment was that non-EU nationals who are family members of a Union citizen derive a right of residence within EU territory at the Community level, independently of Member State policy.

The reach of *Metock* does not stop at the elimination of barriers to free movement; on the contrary, it is intended explicitly to encourage migration between Member States and in so doing it privileges the migrant citizen above those who remain in the Member State of which they are nationals. This results in a situation of reverse discrimination, in which migrant citizens have enhanced rights of residence for their non-EU national family members under Community law whilst static EU citizens must rest their hopes on fulfilment of national immigration criteria which are becoming increasingly restrictive. The irony of *Metock* is that the more the Court invests in the enhancement of citizenship rights, the greater the gap between migrant and non-migrant citizens grows, and the more obvious are the contradictions inherent within the market citizenship framework.

Metock proved to be highly controversial amongst the Member States. The strongest reaction came from Denmark, where the decision was perceived to create a 'loophole' in the immigration law. National immigration law in Denmark is among the most restrictive in Europe and forms an integral part of the policy agenda of the Liberal-Conservative minority government, which has been in power since 2001 with the informal support of the right-wing Danish People's Party. Following *Metock* this immigration policy could no longer be applied to the family members of migrant Union citizens. As a result, Prime Minister Anders Fogh Rasmussen was quoted in the press as saying that 'The Danish government strongly disagrees with this ruling', claiming it to be 'unreasonable'

and a 'hijacking' of national immigration policy.⁶ The Integration Minister Birthe Roenn Hornbech stated that the judgment 'opens the way for wide-scale approval of illegal immigration' through marriages of convenience, whilst the head of the DPP, Pia Kjaersgaard, initially suggested that Denmark should ignore the ruling all together.⁷

The resentment that the tensions within the citizenship model have attracted from Member States is evidenced by the reaction to *Metock* and the implementation of both the judgment and the Citizens' Rights Directive in general. Member States have exhibited a willingness to temper the effects of the judgment by widening the grounds upon which they are able to refuse entry or withdraw rights by reason of public policy, public security or public health. A representation made by the UK to the JHA Council contended that '[h]ost Member States should also be able to consider that the cumulative damage caused by continuous low-level offending can amount to a sufficiently serious threat to public policy'. This, as noted by Professor Steve Peers, is a 'direct and flagrant breach of the general test for establishing a 'sufficiently serious threat' as set out in the free movement Directive', and ignores the higher threshold of 'imperative grounds of public security' to be applied under Article 28 of the Directive to minors and people who have been resident in the host Member State for more than ten years.⁸ The UK submission found recognition in the conclusions adopted by the Council, which made reference to the possibility for 'forceful and proportionate measures' to be applied against people who 'break the law in a sufficiently serious manner by committing serious or repeated offences which cause serious prejudice', thus lending force to Peers' argument that Community law is being re-interpreted by the dictat of some interior ministries.

The expansive use that Member States have made of the right to refuse entry on the grounds of public policy is also evidenced by the decision of the UK to refuse entry to the Dutch MP Geert Wilders in February 2009. Mr Wilders had been travelling to the UK to attend

a screening at the House of Lords of his controversial film *Fitma*, in which he calls the Qur'an a 'fascist book', when he was denied entry to the UK on the grounds that his radical views were a threat to the public good. Given that Mr Wilders was a member of the Parliament of another Member State, and that the sole purpose of his visit was to make a presentation at the House of Lords, the extent to which he constituted a real threat to public policy or public security is questionable. The notion of the threat also relied upon the premise that *others* would object to his presence and undertake unlawful acts, not that he would do so. The fact that the UK government sought to use Article 27 of the Directive to make a public stance against Mr Wilder's opinions illustrates the extent to which Member States are able to manipulate the discretion afforded to them in pursuit of political leverage and in frustration of the objectives of the Directive.

Perhaps of most concern to the effective implementation of *Metock* is the commitment made by the Danish Government and the Danish People's Party to ensure that 'a requirement of a genuine and effective residence as a precondition for family reunification will...be imposed on EU citizens'.⁹ The meaning of 'genuine and effective residence' referred to in the political agreement is unclear, but implies an examination of the motivations behind the Union citizen's decision to exercise his rights of free movement and a condition upon length or quality of residency. Such conditions would constitute an unjustified restriction upon the right of free movement of Union citizens, and one that has expressly been rejected under Community law. The ECJ has consistently held that so long the EU citizen exercises his right of free movement to take up a genuine economic activity in another Member State, the motivations for him doing so are irrelevant to his access to Community law rights. The implication that Member States may try to restrict the scope of *Metock* by examining the motivations behind the migration of EU citizens not only presents a worrying attempt to restrict the fundamental freedoms at the heart of the European

Union, but also raises questions as to how the 'effectiveness' of residence is to be determined. Denmark is moreover not alone in making such assertions, with the UK representations to the JHA council claiming that 'only those exercising their rights in the spirit of the Treaty should benefit from freedom of movement'.¹⁰

The reluctance of certain Member States to give full effect to *Metock* is symptomatic of a more general failure to effectively transpose the Citizens' Rights Directive. Although several states amended their national legislation in order to comply with *Metock*, there remain major deficiencies of the implementation of the Directive through national law in many Member States. Following a process of conformity checking across Member States, the Commission concluded that 'the overall transposition of Directive 2004/38/EC is rather disappointing, as not one Member State has transposed the Directive effectively and correctly in its entirety and, moreover, not one article of the Directive has been transposed effectively and correctly by all Member States'.¹¹

The British implementation of the Directive, and the UK's failure to amend the national Regulations in light of *Metock*, are of particular cause for concern. The UK has implemented the Directive through the Immigration (European Economic Area) Regulations 2006. These Regulations do not contain an explicit condition of prior lawful residence in another EEA state such as that which had been included in the Irish Regulations. They do, however, make the acquisition of rights under the *Surinder Singh* principle conditional upon the non-EU national family member having resided together in another EEA before return to the UK. The Regulations also make a non-EU national family member's right of admission to the UK dependent upon the acquisition of a family permit, residence card or permanent residence card, and in order to obtain an EEA family permit, Regulation 12(1)(b) states that the family member must be accompanying the EEA national to the United Kingdom or joining him there, and be either lawfully resident in another EEA or meet UK immigration rules.

Although these Regulations are clearly problematic in *Metock*, the UK has failed to take steps to amend the legislation. On 16 October 2008, nearly three months after the *Metock* judgment was delivered, a question was addressed in Parliament to the Secretary of State for the Home Department as to when she was planning to issue guidance on the UK Borders Agency website on the implications of *Metock*. Mr Woolas, the Minister of State for Borders and Immigration, replied on her behalf that the 'UK Border Agency is considering the full implications of this judgment and will publish appropriate guidance once that consideration is completed'. Four months after this statement to the House of Commons all that the UK Border Agency has done is to modify the guidelines it issues to its Caseworkers who are dealing with applications under the Directive. References previously contained in chapter three of these guidelines to the controversial case of *Akrich*, which pre-dates *Metock* and was expressly overruled by it, supporting the requirement in Regulation 12(1)(b) have simply been removed. No mention is made in the revised Casework Instructions of *Metock*. The UK Border Agency has yet to publish any review of the implications of *Metock*, and the UK government show no sign of amending the Immigration (EEA) Regulations to bring about formal compliance with Community law.

Implementation of the Directive within the UK is also unduly restricted by several procedural defects in the UK system of applying for a family card or registration card. The application forms issued by the UK Border Agency require a large amount of supporting material that are not required under the Directive, and substantial delays in the processing of applications have been reported.

Both *Metock* itself and the broader failure effectively to implement the Citizens' Rights Directive in the UK and elsewhere highlight the problems and contradictions associated with the development of an independently vested citizenship status that is confined in operation to migrant Member State nationals. In securing a right of family reunification for the migrant citizen that

operates outwith the constraints of national immigration policy, arbitrary distinctions are drawn between migrant and non-migrant citizens. The latter are subject to reverse discrimination by remaining within the territory of the Member State of which they are nationals. The potential conflict of this Community right with national regimes fosters resentment within Member States, not least from Member State governments which are reluctant to give full and proper effect to provisions that conflict with national policies.

The boundaries of European citizenship are thus being pushed to breaking point and the model is in danger of collapsing under its own weight. This is not a problem, however, that can or ought to be solved simply by vesting more social rights at the Union level. Such action is not only normatively questionable, but ignores the root cause of the tensions between diverging national policies and the formation of a strengthened European social space. If the tensions inherent within the current model of European citizenship are to be eliminated then Member States must work together to strengthen the concept of citizenship through political means.

Notes

¹ With thanks to Jo Shaw and Brendan Donnelly for their helpful comments

² Contained in Arts 17-22 EC

³ The European Court of Justice has often asserted that European citizenship is to become 'the fundamental status of Member State nationals'

⁴ Case C-370/90 *The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265

⁵ M Dougan, 'The Lindsey Oil Refinery Dispute: Legal and Policy Issues' ("British Jobs for British Workers": The Legal Framework and Lessons for the Future Seminar 2009)

⁶ EU Business, 'EU Court Ruling Threatens Denmark's Immigration Policy' (1 September 2008) <<http://www.eubusiness.com/news-eu/1220245322.26/>> accessed 16 December 2008

⁷ *Ibid.*

⁸ S Peers, 'The UK Proposals on Free Movement Law: an Attack on the Rule of Law and EU Fundamental Freedoms' (Statewatch Analysis 2008) <www.statewatch.org/analyses/no-72-eu-attack-on-fundamental-rights-08.pdf> accessed 15 December 2008

⁹ The Danish Ministry of Refugee Immigration and Integration Affairs, 'Political Agreement Between the Danish Government and the Danish People's Party on the Handling of EU Legislation on Free Movement' (24 September 2008) <<http://www.nyidanmark.dk/en-us/news/news/integrationsministeriet/2008/september>> accessed 16 December 2008

¹⁰ UK Delegation to the Permanent Representatives Committee Council of the European Union, 'Note on the Draft Council Conclusions on free movement of persons: abuses and substantive problems' (15903/08 2008)

¹¹ Commission Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM (2008) 840