

**Free movement of persons: the right we must leave behind?**  
**James Wood Lecture**  
**University of Glasgow, 11 November 2016**  
**Judge Ian Forrester\***

☞ keywords to be inserted by the indexer

## Introduction

We have just seen two momentous events, each relevant in a different way to my topic for tonight.<sup>1</sup> The first was the conclusion of a US election campaign where underestimated popular sentiments of exclusion and unfairness coupled with a fear of the perceived “other” delivered a surprising result. The second was the case before the High Court on the procedures to accomplish Brexit.<sup>2</sup> That was an interesting examination of the prerogative power of the Crown to take a measure which would ultimately have consequences for the status of existing rights enjoyed pursuant to parliamentary legislation.

The startling reaction of the press (“Enemies of the People”; “Judges vs People”; “unholy alliance of judges and embittered Remain backers”; “thwarting the wishes of 17 million people”, etc.) which personally accused the three judges of dishonourable conduct was much noted. The reaction of the government to these attacks on the three authors of the judgment was criticised as being rather tepid. The judiciary in this country feels entitled to a full-throated endorsement from Ministers of its impartiality and independence when these are challenged. The rule of law entails that the government from time to time will lose cases in its own courts. Indeed, if the key selling point of the “Leave” campaign endorsed by the referendum was regaining parliamentary sovereignty, it seems surprising that it would be seen as antidemocratic to find that Parliament must be involved in the process.

It is not hugely surprising that the courts have a role in deciding how Brexit shall be lawfully accomplished. Who else but the courts should decide?

As the judge of the General Court of the European Union from the UK, which has such a splendid record of robust respect for the rule of law, I particularly regret these developments. UK judges on international courts are—famously—left alone by government. They are appointed without regard to politics, and reappointed without regard to their past judgments. It is embarrassing—as has happened to me this week—to be the addressee of condolence from fellow judges who say: “We expect better from the UK.”

In any event, both dramas tend to underline the high sensitivity of how a society regards strangers, foreigners and immigrants—“Free movement of persons” is the European jargon for that phenomenon.

That said, robust debate about the merits of a judgment is highly desirable. It would be a pity if the sensitivity of the Brexit topic were to hinder lawyers, journalists, teachers or citizens from advancing views or raising questions about an immensely important topic which will remain important for years to come. Doubting the patriotic or democratic or intellectual qualities of opponents is not the best way to settle very complex questions. It would also be a pity if the concerns of 17 million people were to be discarded or disparaged because they were misinformed by careless inaccuracy during the campaign.

The UK litigation could be seen as a manifestation of the tension between direct and indirect democracy. The majority of Members of Parliament favoured remaining, while the popular majority of those who had a vote (not including people like me, who have lived outside the UK for too long, and people from EU27 who reside in the UK) favoured leaving. The referendum asked whether voters wanted to be in or out but did not seek answers as to what alternative model of relationship was desired. Nor did it clarify what were the alternatives, nor by whom, or at what cost, these alternatives should be pursued. There was no set of subsidiary questions about how to balance the interests of one business sector against the challenge of limiting migration, for example. Nor was there any enquiry as to whether the ultimate conclusion needed approval. So I did not find it surprising that there were several views about the steps to be taken. But as the negotiations and debates move forward, it is likely that more and more uncertainties and complications will emerge. I suggest that they deserve as much attention and debate as the “simple” questions of Leave? or Remain?

\* Judge of the General Court of the European Union; Honorary Professor at the University of Glasgow and Honorary Doctor of Law. It must be evident that these remarks are purely personal and are in no way to be attributed to anyone else, least of all the Court where I work. Thanks are due to Claire Montgomery, Sandra Keegan, David Edward and others unnamed. My last public lecture here was about 25 years ago and attracted such a painfully thin audience that most of the seats were occupied by fresh-faced, neatly dressed young people, newly arrived in the School of Law and instructed to look like paying delegates, to stay alert and fill up the room.

<sup>1</sup> Thanks are expressed to the trustees of the James Wood Trust which organises the annual lectures at the University, and which welcomes this publication as a contribution to the public debate.

When I embarked on the study of law (after a diversion for literature) at this university, the EEC was then in its infancy; with few famous judgments for young lawyers to discuss just yet. There was no course on European law, still less one on competition law, gaps in my education which are unlikely to be remedied. Whatever heresies this lecture may contain, the university is not to blame.

<sup>2</sup> *R. (Miller) v Secretary of State for Leaving the European Union* [2016] EWHC 2768 (Admin).

I have chosen to focus on free movement of persons under European law. That topic was one of the key sensitivities during the referendum campaign. It is also the one whose removal will have an immediate, measurable, personal impact on the lives of millions of people. As we will note, the retention—or not—of the benefits currently enjoyed by such citizens must be addressed in future negotiations. The scope and nature of these rights has been built up over decades of specific problems, new situations, controversies, litigations and legislative deals. So let us clarify what they are.

These thoughts are offered to record the rights we already enjoy, and in the hope that when ministers from the UK negotiate future arrangements with the European institutions, their goal will be to maintain or to replicate in another form the totality of these rights.

This event has been aided by the James Wood Trust. James Wood of Wallhouse, born in Paisley in 1840, was a coal merchant and mine-owner who established a number of generous trusts for good works, including these lectures at the Law School.<sup>3</sup> Scotland in those days imported labour from Ireland and from Eastern Europe. We do not know Mr Wood's approach to foreign workers but we may presume that it was favourable.

## The underlying tension

For 43 years British citizens have been able to assume that they enjoyed significant rights in the other nations of the European Community and latterly EU. As of today, that includes the right to go abroad to seek a job, to accept a job, to open a business, to hire staff, to engage in trade, to offer services, to go to hospital for treatment, to receive national treatment (not better, not worse than local nationals), to be spared discrimination based on foreign-ness, to bring along the family, to see children educated, and in due course to receive a pension on favourable administrative terms.

There is a political and sociological debate about whether immigration is a good thing (the easy, socially comfortable argument—migrants bring talent, hard work and do the jobs that locals disfavour; Scotland has seen waves of migrants from Italy and Poland) or an undesirable and sometimes risky thing (the politically incorrect argument—migrants use public services, bring

social tensions and take lower-paid jobs that British people would do for a higher wage; some immigrants have committed crimes).

Managing that balancing act is a political choice for our political leaders. But legal questions cannot be avoided—not least because several million people are currently exploiting the rights which are accorded to them by the Treaty of Rome as amended; and hundreds of millions are potential users of such rights.

I am a lawyer, certainly not a politician, but I observe that in our country today we have something like four people in work for every one retired pensioner. Some time in the next 30 years, the figure will approach two to one. So statistically, it would seem undeniable that Scotland—and other parts of Europe—will need people to do the jobs to earn the money to pay the taxes to run the hospitals and to build the roads. The First Minister implied as much on 24 June 2016:

“I want to take the opportunity this morning to speak directly to citizens of other EU countries living here in Scotland – you remain welcome here, Scotland is your home and your contribution is valued.”<sup>4</sup>

The First Minister reiterated this message in a letter to EU nationals residing in Scotland on 5 July 2016.<sup>5</sup>

So we are in the presence of contrasting goals. One is limiting the number of people entering the UK. Indeed, free movement of labour is likely to generate migration where there is a very big disparity between levels of pay in say Poland and say the UK. Another is retaining the rights of UK citizens in the EU of 27. One pole of the debate was articulated by Home Secretary Rudd on 4 October 2016. She said:

“We will shortly be consulting on the next steps needed to control immigration.---- This will include examining whether we should tighten the test companies have to take before recruiting from abroad. ---- The test should ensure people coming here are filling gaps in the labour market, not taking jobs British people could do.”<sup>6</sup>

Health Secretary Hunt said on the same day that it would be desirable to reduce the number of doctors and nurses from abroad working in the National Health Service.<sup>7</sup>

<sup>3</sup> In 1871 James Wood expanded his mining interests into Armadale and then Bathgate. His business activities extended in due course to gas, brickworks, steelworks and the shale oil industry (not fracking but not a million miles away from it). He prospered, moving to the estate of Bathville (near Bathgate) and from 1903, the estate of Wallhouse just north of the village of Torphichen. I suppose he must have had his share of personal injury claims by miners but his worst encounter with private law came in the economically difficult 1890s, when he was sequestered along with his business partner and brother, William. But James seems to have recovered remarkably swiftly from that setback, and there were no further blips in his progress to the opulence that enabled at least one further private law dimension in his career: the setting up of the trusts and endowments that bear his name and which still deploy the money he made in good works of various kinds in Armadale, Bathgate and other places in West Lothian, as well as to support lectures in the Glasgow Law School. Wood died in 1933, aged 93 a conservative in politics, a capitalist entrepreneur and probably a sceptic about governmental interference with free enterprise.

<sup>4</sup> First Minister Nicola Sturgeon, Statement on EU Referendum Result, 24 June 2016, Edinburgh. [Online]. Available at: <http://news.gov.scot/speeches-and-briefings/first-minister-eu-referendum-result> [Accessed 9 July 2018].

<sup>5</sup> Letter from First Minister to EU citizens in Scotland, 5 July 2016. [Online]. Available at: <http://www.gov.scot/Topics/International/Europe/eu-referendum> [Accessed 9 July 2018].

<sup>6</sup> Secretary of State for the Home Department Amber Rudd, Speech to Conservative Party Conference, Birmingham, 4 October 2016. [Online]. Available at: <http://press.conservatives.com/post/151334637685/rudd-speech-to-conservative-party-conference-2016> [Accessed 9 July 2018].

<sup>7</sup> “Currently a quarter of our doctors come from overseas. They do a fantastic job and the NHS would fall over without them. When it comes to those that are EU nationals, we've been clear we want them to be able to stay post-Brexit. But looking forward, is it right to carry on importing doctors from poorer countries that need them, whilst we turn away bright home graduates desperate to study medicine?”

But on the other hand, both the Prime Minister and Secretary of State Liam Fox have recognised the interests of citizens to live and work abroad. Dr Fox said:

“I think we would all hope what we get is a totally open reciprocal agreement where UK citizens in other EU countries are free and welcome to stay there as would those who are settled in the UK. But again as the Prime Minister said, to give that away before we get into a negotiation would be to hand over one of our main cards in that negotiation and doesn't necessarily make sense at this point. On the question of EU citizens, the Prime Minister made it very clear. We would like to be able to give a reassurance to EU nationals in the UK; that depends on reciprocation by other countries.”<sup>8</sup>

Proclamations post-referendum have suggested that the main preoccupation in the negotiations will be restricting EU migration and removing the UK from the jurisdiction of the Luxembourg courts:

“We are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That's not going to happen.”<sup>9</sup>

So that is the public policy background to my theme for this evening, which is “Free Movement of Persons: The Right We Must Leave Behind?”

## The Moral Case for Europe

Any discussion of free movement of people should take account of a historical and political reality. My friend, mentor and predecessor on the Luxembourg bench Sir David Edward has given a lecture called “The Moral Case for Europe”.<sup>10</sup> The maps which are the heart of his lecture show how European territories and even countries have changed repeatedly over the centuries. Norway and Poland are two which disappeared and later, due to the fortunes of war, reappeared. Serbia and Macedonia and Kosovo are new arrivals. Yugoslavia was a departure; Serbia a reappearance. Europe's frontiers today do not correspond to ethnicity, race, religion, political affiliation, history or other possible reasons for drawing a line between nations. Economic rivalry, war, local persecution, religion, dynastic claims, refugees, caused the frontiers of every country to fluctuate.

The pressures, the drivers of flight, the circumstances of actual or potential bloodshed, have changed of course. Today it is the migrants at Calais; the boatloads who risk their lives when they put to sea from Libya; the refugees from Syria; the creeping invasion of Ukraine by tanks. And these circumstances touch the whole of Europe.

Scotland is not immune, just because it is distant from the Mediterranean. It is certainly closely affected by the tensions that still afflict the island of Ireland. And Scotland had race riots in Edinburgh in the 1930s, when the targets were Italian immigrants—shops were sacked by mobs and the city was held liable in damages.

Sixty years ago, Russian tanks crushed a popular revolution on the streets of Budapest. Hundreds of young men and women died, either in the fighting or by judicial execution. Thousands fled. Ten years later, my first independent trip abroad was a trip to Vienna with my school friend Alan Rodger, whose untimely death is still keenly felt. To raise the funds, I sold men's suits. He taught in a French *colonie de vacances*. We met in Vienna. We took a boat down the Danube to Bratislava, then in Czechoslovakia. I remember walking with Alan in Bratislava in 1966, dressed like the students we were, yet being aware of the gulf in clothes, in opportunity, in aspiration, in liberty of expression, and in liberty of movement. We were cheerful young men exploring. It was obvious that there was a link between personal freedom and prosperity.

One massive achievement of the EU was ending war and military rivalry in Western Europe. Another was showing in the 1970s and 1980s that open borders and personal freedoms could deliver prosperity without repression. That demonstration helped bring down the Berlin Wall in 1989 and helped to liberate millions of people from regimes which they detested. This I personally remember, though it is history for some of my listeners.

The ending of wars in Western and central Europe has had profound implications for the nature of life in this Continent and on its prosperity. Free movement of people is part of the process of prosperity. Very simply, open borders can make conflicts less likely.

Even if we feel that the fuel tank of the EU vehicle has run dry, and even if the constitutional architecture is creaking, the need to negotiate relationships between countries cannot be avoided. These islands are part of the European continent. Continental problem solving is necessary. So whatever label is given to our future institutional relationship with the EU, before or after Brexit, there is a powerful moral case for co-operation and a respectful recognition of its past achievements.

## The challenge of squeezing toothpaste back into the tube.

Nationality has become weaker as a basis for distinguishing between people. In a democracy where there is freedom to move about, people see opportunities outside their home town. Education, training, falling in love, work, distant cousins and curiosity are incentives

<sup>8</sup> Secretary of State for International Trade, Dr Liam Fox, Fringe event, Conservative Party Conference, Birmingham, 4 October 2016, as reported by Ned Simons and Jack Sommers in “Liam Fox Says EU Nationals Are Key Negotiation ‘Card’ in Brexit Talks With Europe”, *The Huffington Post*, 4 October 2016. [Online]. Available at: [http://www.huffingtonpost.co.uk/entry/liam-fox-says-eu-nationals-are-key-negotiation-card-in-brexit-talks-with-europe\\_uk\\_57f3db60e4b038eb745a5783](http://www.huffingtonpost.co.uk/entry/liam-fox-says-eu-nationals-are-key-negotiation-card-in-brexit-talks-with-europe_uk_57f3db60e4b038eb745a5783) [Accessed 9 July 2018].

<sup>9</sup> Prime Minister Theresa May, 4 October 2014, Speech to Conservative Party Conference, Birmingham, *The Good that Government can do*. [Online]. Available at: <http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do> [Accessed 9 July 2018].

<sup>10</sup> *The Moral Case for Europe*, Europa Institute/UACES Lecture, University of Edinburgh, 8 March 2013.

to go elsewhere. That is true within this city, within Scotland, within the British Isles, within this continent. We each know someone who has chosen to work or study or retire or marry in a country other than her or his birth. The younger the person, the more they regard such a fact as normal.

Nationality has never perfectly matched predictable categorisation. There were 28 nationalities in Nelson's fleet at the Battle of Trafalgar.<sup>11</sup> British trade unionists during the Second World War corresponded with German trade unionists who were opposed to the Nazi party, and even sent ten shillings and sixpence as a contribution to the publication of "Die Arbeit" ("Labour") which endorsed modern notions of employment rights.<sup>12</sup>

*Die Arbeit's* first issue, which came out in March 1941, stated:

"... In the face of Nazi and Fascist boasting, the publication of our journal at this moment is the clearest token of the living power of international solidarity and of the unshakeable resolve of all workers to carry on the fight which has been forced upon them, until the Nazi dictatorship and all the forces which have allied themselves to it are finally defeated. German trade unionists who have been driven into exile by the Nazi Terror and the Gestapo – and in the spirit at one with their friends in Germany – will play their part for the reconstruction of a free, democratic Europe, alongside their British comrades and in close collaboration with their colleagues in and from all parts of the world."<sup>13</sup>

A letter from Jack Walton, General Secretary of North East Federation of Trades Councils under the auspices of the TUC to Gottrucht on 6 May 1941 read:

"Dear Comrade,

At the last meeting of this Federation a copy of your journal '*Die Arbeit*' was shown and delegates expressed complete approval of your aims, and wish your organisation every success. It was decided that a grant of 10/6 should be made in order, not only to help you in your work but as an expression of the solidarity we feel with you who are with us in this fight against Fascist oppressors."

When members of the European Court of Justice in such cases as *Van Gend en Loos*<sup>14</sup> in 1963 (about whether a citizen had the right to insist that a government obeyed its treaty obligations as opposed to the unreformed statute the treaty obliged it to change), they were echoing an existing trend that recognised the acceptance of limitations on the power of the public authority.

## Rights from Europe

I heard myself described in a radio programme as an "unelected judge" recently, and can only plead guilty to that reproach. The bigger complaint is that our courts intrude upon domestic law, encroaching on the independence of national judges and the primary national law. I note that courts around the world are often faced with a tension between the strict law and fairness or justice. The concept of equity was developed to palliate the unfairness of the strict law. European law could be seen as serving a somewhat comparable function (one difference being that European law needs a hook in national law before it can be invoked, whereas equitable remedies needed no such hook in the King's legal system). Thus where the UK rule denied a death grant to a UK resident as the relative was buried in Ireland, the European Court supported the grieving relative.<sup>15</sup> That seems to me like common sense and fairness.

More broadly, we might note that the Brexit debate reminds us of countries where the written constitution can be modified only pursuant to certain special procedures, such as a special majority, or the approval of a special court, for example in order to protect minority rights and other acquired rights.

The ECHR offers protection to property rights, family life and other interests, but these protections are much more remotely accessible than directly applicable EU law. European law deliberately conferred rights on individuals. To quote Professor Tridimas, it removed the monopoly of sovereign states to confer rights. I suggest that it is not a trivial matter to contemplate that these rights shall/must/might/should vapourise if the UK were to leave the EU. While it is clear that European citizenship (created by the Treaty of Maastricht) is derivative and depends on national citizenship, I do not know if there is a residue of European right which subsists despite withdrawal. Can a right granted by EU law be taken away by national law? If, after Brexit, the Italian living in England as a model taxpaying citizen is denied a death grant to help with the costs of burying his father in Italy, does he have a remedy? Or the Scot living in Brussels? Do the formerly subsisting rights disappear or will they be preserved?

Public international law, reeling from the appalling events of the 1930s and 1940s, has progressively recognised a panoply of new personal rights. I point out to a Scottish audience that Sir David Maxwell Fyfe, later Lord Kilmuir, was a pioneer in addressing the problem that democratically elected legislatures had in the 1930s enacted abominable laws which national judges had to implement or lose their jobs. He was a father of the European Convention on Human Rights, which was intended to limit the powers of parliaments, politicians,

<sup>11</sup> Frank Mulholland is entitled to the credit for this improbable statistic based on a review of the muster rolls.

<sup>12</sup> Dr Rebecca Zahn brought to my attention this surprising piece of social socialist history from the records of the DGB Archive of the Friedrich-Ebert Stiftung.

<sup>13</sup> *Bulletin of the International Federation of Trade Unions*, No.3, Saturday 15 March 1941, pp. 2–3.

<sup>14</sup> *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (26/62) [1963] E.C.R. 13.

<sup>15</sup> *O'Flynn v Adjudication Officer* (C-237/94) EU:C:1996:206.

administrators and officials to do harm through laws inconsistent with the agreed minimum standard of basic rights.

Sir Hersch Lauterpacht, the teacher and UK judge on the ICJ, wrote<sup>16</sup> of the need to secure the personal rights of individuals on a broader footing than the uncertain pleasure of sovereign states. And in various cases the European Court has in different words confirmed the special nature of European law. In the *locus classicus* of *Van Gend en Loos*,<sup>17</sup> there is reference to a new legal order of international law for the benefit of which the states have limited their sovereign rights. It is said that

“Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”

The language may sound flowery, but that doesn't make it meaningless. Individual students, university teachers, furniture removers, nurses, pianists and tens of thousands of others have rights today. It seems to follow from this that the interests of British people in the EU 27 and of EU 27 people in the UK exist today and need to be addressed in whatever forum the discussions about future relations are conducted.

So when the Heads of Government in Hanover in 1988 spoke of the process of integration as being “irreversible”<sup>18</sup> they were not exaggerating. The Europe of 28 countries is today peopled by men and women who believe that to look for a job in another country or to marry a citizen of another country or to study there or to retire there is quite an ordinary act. And, to state that which is obvious but fundamental, if Scots or Britons look at the possibility of going to work in Taormina or Innsbruck or Thessaloniki as their right, so it is equally true that the resident of Echternach or Granada or Cracow can look forward to working in Tain or Edinburgh or Kelso. Free movement flows both ways.

As of today, the law of Scotland—of which European law forms part—recognises that there is powerful and repeated authority, both judicial and legislative, to the effect that freedom of movement of workers in particular and persons in general is an established right in our social and economic life. There is no current example of a European country which has full access to the single market without free movement of people. Nothing is really incapable of being negotiated, of course; and the future extent and nature of the rules on free movement of people are yet to be established. I suggest that doing these well should be an important priority.

I propose to look more closely at the rules on access to regulated professions, the rules on pensions, and the rules on studying abroad.

## Free movement of persons

The Treaty of Rome was intended to create prosperity by allowing people to go to where the jobs were. The goal was originally economic. People, like capital and machines, are factors of production. In the same way as New Yorkers can seek work and settle down in Nevada, or the Orcadian in Cornwall, so the concept was that the Common Market would best thrive if national regulations were committed to treating “foreign” workers like local workers. Now, while physical goods do give rise to problems (is the blackcurrant liquor potentially addictive to German drinkers?<sup>19</sup> Is the local British pornographic doll banned on the same terms as an imported one?<sup>20</sup> Must German margarine be packaged to ensure it can't be taken for butter by Dutch consumers?<sup>21</sup>), these problems are as nothing by comparison to those presented by people. “Persons” have spouses, children, ex-spouses and relatives, their employment may be full-time, part-time or vestigial. They may get into trouble and deserve deportation (or not); they may have a different nationality than their spouse, child or parent; they will be fussy about how their name is spelled in official documents; they may be impoverished, and they will get sick and need treatment.

## Who is eligible?

The current EU of 28 is a single internal market based on the four freedoms. People (like the lecturer, the chef, the student, the translator, the musician, the fruit picker, the pensioner), goods (cars, whisky, phones), services (banking, lawyers, accountants) and capital can move freely. Viewed over 50 years, that has been a winning formula.

The concept may have originally been rather radical, but is not so routine as to have become banal. “Worker” includes someone who is employed and the protection afforded by the EU Treaties extends to a person seeking employment.<sup>22</sup> Indeed, the freedoms extend to setting up a business, forming a company, entering into a partnership, buying a factory, being a manager or a director or a partner or a professional footballer, or an artisan or a dishwasher or a teacher or a travelling salesman.

More specifically, a person can enter another Member State in search of a job (but has to leave after a period of not finding one), and once he or she has found a job is entitled to reside there. Hundreds of thousands, maybe

<sup>16</sup> Iain Scobbie, *The Theorist as Judge*, (1997) 2 EJIL 264.

<sup>17</sup> *NV Algemene v Netherlands Inland Revenue Administration* [1963] E.C.R. 13.

<sup>18</sup> See the conclusions of the European Council Hanover, 27–28 June 1988: “The European Council considers that this major objective [completion of the single market] set by the Single Act has now reached the point where it is irreversible, a fact accepted by those engaged in economic and social life.”

<sup>19</sup> *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (“Cassis de Dijon”)* (120/78) EU:C:1979:42.

<sup>20</sup> *Regina v Maurice Donald Henn and John Frederick Ernest Darby* (34/79) [1979] 2 C.M.L.R. 495.

<sup>21</sup> *Walter Rau Lebensmittelwerke v De Smedt PVBA* (261/81) EU:C:1982:382.

<sup>22</sup> *R v Immigration Appeal Tribunal, ex parte Antonissen* (C-292/89) EU:C:1991:80.

millions, of people work in one Member State yet have their home in another. Large numbers of French citizens work in London and take the train “home” at weekends. The same applies, differently, in the island of Ireland, and in Luxembourg.

For the sake of completeness, I should note that as the notion of an economically integrated European continent has expanded and has become routine, so movement of people between countries gradually became routine. Now, in its original conception, cross-border rights included the right to accept employment, to stay in the country to perform the work, and stay on afterwards. It did not include a right to migrate and become a burden on the new country. There was no right of entry, and no right of residence, unless the individual was linked to economic activity. A number of Directives (90/365; 90/366; 90/364)<sup>23</sup> extended a right to reside to students to retired EU citizens, and to the comfortably off (those who had enough resources in the form of pension or insurance or money that they would not be a burden on the local social security regime). The concept of Union citizenship following the Maastricht Treaty granted further rights. Directive 2004/38 allows to Union citizens and their families the right to reside for three months if they are prosperous enough not to be a burden on the host state. Thus free movement of workers has evolved into something rather broader, but not without limitations.

## Regulated Professions

Free movement of workers is not limited to employed manual workers, far from it. Some of the self-employed will wish to work in regulated professions. In order for a person possessing a professional qualification to move from Belgium to Germany in order to practice his trade, the German authority responsible for his profession must accept that his qualifications are adequate. Therein lie many opportunities for checking, for doubting, for insisting on being cautious. Academic courses, numbers of years, subjects to be covered, practical training, all may not be equal. So the massive task was to agree, profession by profession, common minimum standards and a promise of mutual recognition.

I was an employed lawyer in Brussels, then opened my own chambers and was admitted to the Bars of Brussels and England by reference to my original qualification at the Scots Bar. Snowboard instructors,<sup>24</sup> glider pilots,<sup>25</sup> lawyers,<sup>26</sup> osteopaths,<sup>27</sup> dentists<sup>28</sup> and many others have encountered and resolved problems to cross frontier establishment and rendering of services. There is an extensive apparatus of measures which, simply put, aim to ease the administrative obstacles established for the protection of the public interest (and sometimes for the protection of the local profession). Hairdressers,<sup>29</sup> veterinary surgeons<sup>30</sup> and art restorers<sup>31</sup> have given rise to a variety of questions. Commission officials have pursued mutual recognition of national qualifications in some cases and common standards in other cases, as well as using common sense and patience and the basic principles of the European Treaties.<sup>32</sup> A huge amount of painstaking work has been done to achieve mutual recognition of equivalent diplomas. Tens of thousands, probably hundreds of thousands, of people have benefited from the opportunities to earn a living thereby created. I was one of them when a practicing member of the Bar.

## Equal pay and other gender-related questions

The benefits brought to female workers by European law have been extensive. Thus while it is not exactly a question of free movement, equal pay rules have greatly affected the interests of female Scottish workers. One classic example relates to sex discrimination. Article 119 (now art.141) of the EEC Treaty provided: “Each Member State shall... ensure and... maintain the application of the principle that men and women should receive equal pay for equal work.”<sup>33</sup> The goal of the drafters had not been to help women get equal pay, but to help those Member States which had legislation on sex discrimination to insist that other Member States adopt legislation which imposed an equally burdensome obligation on their industries.<sup>34</sup> Gabrielle Defrenne worked

<sup>23</sup> Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L180/30; Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26.

<sup>24</sup> *Commission of the European Communities v French Republic* (C-200/08) EU:C:2009:769.

<sup>25</sup> Personal information to the author from Dr Colin Jackson.

<sup>26</sup> *Thieffry v Conseil de l'ordre des avocats à la cour de Paris* (71/76) [1977] 2 C.M.L.R. 373; *Reyners v Belgium* (2/74) EU:C:1974:68; *Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* (C-340/89) EU:C:1991:193; *Ordre des avocats au Barreau de Paris v Rechtsanwalt Onno Klopp* (107/83) [1985] 1 C.M.L.R. 99; *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (C-55/94) EU:C:1995:411; *Proceedings brought by Koller* (C-118/09) [2011] 2 C.M.L.R. 25.

<sup>27</sup> *Criminal proceedings against Bouchouca* (C-61/89) EU:C:1990:343.

<sup>28</sup> *Commission of the European Communities v Italian Republic* (C-162/99) EU:C:2001:35.

<sup>29</sup> *Criminal proceedings against Aubertin, Collignon, Creusot, Diblanc, Josse, Martin and Normand* (C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 & C-35/94) [1996] 2 C.M.L.R. 1.

<sup>30</sup> *Auer v Ministère public* (271/82) [1985] 1 C.M.L.R. 123.

<sup>31</sup> *de Bobadilla v Museo Nacional del Prado, Comité de Empresa del Museo Nacional del Prado and Ministerio Fiscal* (C-234/97) EU:C:1999:367.

<sup>32</sup> “Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice”, Dieter Kraus: *A True European – Essays for Judge David Edward*.

<sup>33</sup> A broader principle is now set out in art.157(1) of the TFEU, which provides: “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.”

<sup>34</sup> *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (43/75) [1976] E.C.R. 455 at p.472; See Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective* (2005) 19 Temp. Int'l & Comp. L.J. 351, 377 (“[T]his provision ... was included for economic rather than human rights reasons”).

as an air hostess for the now sadly defunct Belgian airline, SABENA.<sup>35</sup> Female stewards had to stop working at 40, whereas no such age limit was placed on male stewards.<sup>36</sup> Was there an infringement of art.119?<sup>37</sup> The Member States argued—accurately—that art.119 was not actually meant to give women a right to equal pay.<sup>38</sup> They also pointed out that equal pay as between men and women did not necessarily address how long someone could work. Nevertheless, Mme Defrenne prevailed.<sup>39</sup> The ECJ stated:

“[T]his provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.”<sup>40</sup>

A series of references from English courts concerned equal pay. Anthony Lester QC was involved in a number of them (as well as acting for Ms Johnston, the Northern Ireland policewoman who successfully challenged the rule that female police officers could not bear arms and could not be recruited). The first was *Macarthy Ltd v Smith*.<sup>41</sup> Mrs Smith said that she was paid comparatively less than her male predecessor for doing the same work.<sup>42</sup> The employer argued that the equal pay provisions of domestic legislation only covered situations where Mrs Smith could compare herself to a male colleague who was being paid more *at the same time in the same workplace*.<sup>43</sup> The English Court of Appeal referred a question to the ECJ to find out if the principle of equal pay contained in the EEC Treaty was confined to situations where men and women worked contemporaneously.<sup>44</sup> The ECJ held that the work undertaken need not be contemporaneous, but did not go as far as to confine admissible comparisons to

“parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment.”<sup>45</sup>

A second reference, *Worringham v Lloyds Bank Ltd*, was a test case brought on behalf of the 14,000 female employees of Lloyds Bank.<sup>46</sup> The case concerned whether pension schemes could come under the remit of “pay” for the purposes of art.119 of the EEC Treaty.<sup>47</sup> The ECJ reformulated the question submitted to it, possibly aware of the political sensitivities and vast amounts of money at stake, so that the question which it answered differed from that posed by the English court. Did monies paid by the employer to a retirement benefit scheme, by way of addition to a gross salary, come within the concept of pay under art.119?<sup>48</sup> Mrs Worringham and Miss Humphreys won their case, but the question of the status of pension schemes, as formulated by the English court, had not been fully answered. The ECJ was invited to take a huge step, but it took a smaller one.

The legal developments on equal pay are not mainstream freedom of movement matters, but I think it is relevant to mention them since the right to look for a job abroad, and the right to be treated fairly in that job, are closely linked.

## Universities, musicians and students

Education is a big part of the Scottish economy. This university alone employs around 7,109 people<sup>49</sup> and in 2014–15, it had a turnover of nearly £543 million.<sup>50</sup> Teaching and research are big business. Recruiting the best staff implies recruiting the best candidates, not those with the right passport. Today 21 per cent of the teaching staff at this university come from the EU of 27. There is already a diminution of candidatures from EU 27 students to do Masters’ degrees in law in the UK. The professional scholar is traditionally a nomad. In music, the same applies. Handel, Mozart, Debussy, Bach each travelled in search of jobs. The European Baroque Orchestra (of which I am a proud trustee) recruits professional musicians each spring, entirely on merit, and is recognised as one of Europe’s top bands. Nationality is not coextensive with talent. Maintaining access to good pools of talent for chemists, doctors, physicists, musicians and lawyers from all over Europe would be high on the agenda of university administrators. We must hope that the door to that remains wide open.

<sup>35</sup> See *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (43/75) [1976] E.C.R. 455, 471. For a discussion of this case, see L. Neville Brown, *Air Hostesses and Discriminating Employers*, (1984) 47 Mod. L. Rev. 692.

<sup>36</sup> As provided for in art.5 of the standard employment contract for female SABENA staff. *Defrenne* [1976] E.C.R. 455, p.457.

<sup>37</sup> There were, in all, three *Defrenne* cases. See *Defrenne v Belgian State* (80/70) [1971] E.C.R. 445; *Defrenne* [1976] E.C.R. 455; *Defrenne v Société anonyme belge de navigation aérienne Sabena* (149/77) [1978] E.C.R. 1365.

<sup>38</sup> *Defrenne* [1976] E.C.R. 455 at pp.459–460.

<sup>39</sup> *Defrenne* [1976] E.C.R. 455 at pp.481–482.

<sup>40</sup> *Defrenne* [1976] E.C.R. 455 at p.472.

<sup>41</sup> *Macarthy Ltd v Smith* (129/79) [1980] E.C.R. 1275.

<sup>42</sup> *Macarthy Ltd v Smith* (129/79) [1980] E.C.R. 1275 at p.1286.

<sup>43</sup> *Macarthy Ltd v Smith* (129/79) [1980] E.C.R. 1275 at pp.1286–1287.

<sup>44</sup> *Macarthy Ltd v Smith* (129/79) [1980] E.C.R. 1275 at p.1287.

<sup>45</sup> *Macarthy Ltd v Smith* (129/79) [1980] E.C.R. 1275 at p.1289. For an analysis of issues raised in the case, see A. Lester, “The Uncertain Trumpet: References to the Court of Justice from the United Kingdom: Equal Pay and Equal Treatment Without Sex Discrimination”, in Henry G. Schermers et al. (eds), *Article 177 EEC: Experiences & Problems* (Elsevier Science, 1987), pp.164–194.

<sup>46</sup> *Worringham v Lloyds Bank Ltd* (69/80) [1981] E.C.R. 767 at p.787.

<sup>47</sup> See *Worringham v Lloyds Bank Ltd* (69/80) [1981] E.C.R. 767 at p.789.

<sup>48</sup> See *Worringham v Lloyds Bank Ltd* (69/80) [1981] E.C.R. 767 at pp.790–791.

<sup>49</sup> University of Glasgow, March 2015, *Staff numbers*. [Online]. Available at: <http://www.gla.ac.uk/about/facts/staffnumbers/> [Accessed 9 July 2018].

<sup>50</sup> University of Glasgow, *Reports and Financial Statements for the year to 31 July 2015*. [Online]. Available at: [http://www.gla.ac.uk/media/media\\_438197\\_en.pdf](http://www.gla.ac.uk/media/media_438197_en.pdf) [Accessed 9 July 2018].

## Erasmus

The original Erasmus programme, which has been re-born as part of Erasmus +, was intended to encourage students to study abroad. The richness of the experience of doing an Erasmus year will vary depending on the student and the university, but the average satisfaction of Erasmus and Erasmus + beneficiaries is very high. The current funding round runs from 2014–2020. Over these seven years, almost €1 billion will be allocated to the UK alone, with around 30,000 of its young people benefiting from Erasmus + opportunities per year.<sup>51</sup> With funding afforded by Erasmus +,<sup>52</sup> students studying at universities in the EU can benefit from the chance to study (from three to twelve months) or undertake a work placement abroad. This helps them to improve their language skills, learn more about other education systems and cultures and become more independent.

A study published by the European Commission suggests that more than a quarter of those who took part in the previous Erasmus scheme met their long-term partner while studying abroad—and that more than 1 million babies may have been born as a result!<sup>53</sup>

Those undertaking vocational educational training in schools and colleges can receive grants to undertake a period of their training abroad, either in a classroom or a work setting. A training assignment must last a minimum of two days and cannot last for more than two months. Erasmus + grants are designed to cover costs for travel and subsistence. Erasmus+ funding is also available for staff at schools, higher education institutions, vocational education and training and adult education organisations to teach or train elsewhere in the EU. Staff can also take part in training events or job shadowing/observation/training in a relevant organisation abroad.

## Deportation

Deportation is an issue which figured in the referendum debate. EU law has expanded the rights of the accused foreigner far beyond the early cases of *Bonsignore*<sup>54</sup> (where an unlicensed gun caused the accidental death of a family member) or *Bouchereau*<sup>55</sup> (smoking marijuana). Today, deportation is reserved for situations involving a “serious threat affecting one of the fundamental interests of society”, and after ten years’ residence the test is even stiffer.<sup>56</sup> I mention these matters because the status of

foreign criminals has been discussed during the EU referendum campaign. It may be that ministers faced with the question of whether EU27 criminals shall have rights to challenge deportation (or UK criminals, conversely) will not attach much political importance to the topic.

## Compensation to victims of crime

In a number of countries, the state has established a regime to pay some compensation to the innocent victims of violent crime. Mr Cowan was attacked in the Paris Metro and would have been eligible for the French scheme save for his nationality.<sup>57</sup> The case was argued by my former colleague Michel Renouf, and Mr Cowan got his compensation. The ECJ found that when Community law allows a person to move freely in another Member State, the corollary right is that the individual be protected on the same basis nationals of that Member State. There have been a number of broadly parallel cases since.

Mr Wood,<sup>58</sup> for example, was a British national who had been settled in France for over 20 years. When his daughter was killed in a road traffic accident in Australia, he and his French spouse applied for compensation in accordance with French law. The French state attributed funds to Mr Wood’s wife and other children, but withheld payment from him on the grounds of his British nationality. The ECJ held that this constituted unlawful direct discrimination.

## The right to one’s own name

Mr. Konstantinidis<sup>59</sup> was a Greek citizen who was a resident of Germany, a country which has a reputation for being bureaucratically punctilious. The transliteration of his name from Greek for purposes of his German identity card was not felicitous. In a particularly lyrical opinion, Advocate General Jacobs spoke with sympathy of the human situation and well-articulated the legal concepts by which Mr Konstantinidis’s case should be governed.

Similarly, we may note the success of Belgo-Spanish parents of two children in Belgium in resisting having their father’s surname imposed on them by the Belgian state, despite Spanish tradition of combining maternal and paternal surnames.<sup>60</sup>

<sup>51</sup> Erasmus +, *Key Erasmus + Facts and Figures*. [Online]. Available at: <https://www.erasmusplus.org.uk/key-erasmus-facts-and-figures> [Accessed 9 July 2018].

<sup>52</sup> For 2016/17, the grant can be up to €280 to €330 a month, depending on the country one visits. For students eligible for the various higher education widening participation premiums, there is a monthly supplement of €100.

<sup>53</sup> See European Commission Press Release, 22 September 2014, *Erasmus Impact Study confirms EU student exchange scheme boosts employability and job mobility* [Online]. Available at: [http://europa.eu/rapid/press-release\\_IP-14-1025\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1025_en.htm) [Accessed 9 July 2018]. This notes that 33 per cent of former Erasmus students have a partner of a different nationality, compared with 13 per cent of those who stayed at home during their studies. 27 per cent of Erasmus students met their long-term partner while on an Erasmus exchange. On this basis, the Commission estimates that around 1 million babies are likely to have been born to Erasmus couples since 1987. I am sure that other calculations might yield other figures, but the merit of educated reproductiveness can hardly be denied.

<sup>54</sup> *Bonsignore v Oberstadtdirektor der Stadt Köln* (67/74) EU:C:1975:34.

<sup>55</sup> *Régina v Bouchereau* (30/77) EU:C:1977:172.

<sup>56</sup> See Directive 2004/38/EC, art.28(3), which provides that where an individual has resided in the host Member State for the previous 10 years, “an expulsion decision may not be taken against Union citizens, except if the decision is based on *imperative grounds* of public security, as defined by the Member States.” Article 28(2) provides that there must be “serious grounds of public policy or public security” justifying an expulsion decision where an EU citizen has a right of permanent residence in the host state.

<sup>57</sup> *Cowan v Le trésor public* (186/87) EU:C:1989:47.

<sup>58</sup> *Wood v Fonds de garantie des victimes des actes de terrorisme et d’autres infractions* (C-164/07) EU:C:2008:321.

<sup>59</sup> *Konstantinidis v Stadt Altensteig* (C-168/91) EU:C:1993:115.

<sup>60</sup> *Garcia Avello and État belge* (C-148/02) EU:C:2003:539.

## The right to be treated equally

In an early case, Mr Marsman,<sup>61</sup> a Dutch national, was a migrant worker in Germany, was dismissed after an industrial accident. The German rule did not allow such claims by migrant workers, only residents. It was found that there had been an infringement of the principle of non-discrimination.

Mr O'Flynn<sup>62</sup> was refused a payment to assist with the burial of his son, since the burial had occurred outside the UK: the rule was indirectly discriminatory as national workers would be more likely than foreign workers to bury relatives in the UK.

Ms Groener<sup>63</sup> was refused employment as an art teacher in Ireland since she failed the Irish language test. She challenged the refusal as discrimination based on nationality, but was unsuccessful since measures to protect and promote the Irish language were legitimate and this one was not disproportionate. On the other hand, Ms Giersch,<sup>64</sup> the child of a frontier worker from Belgium who worked in Luxembourg, was successful in challenging Luxembourg's refusal to grant her financial aid for higher education.

In an important case on what is often called welfare tourism, Mrs Dano<sup>65</sup> from Romania resided with her son in Germany without seeking a job. She applied for social assistance to cover lodging and heating and other expenses, but lost: economically inactive persons are not eligible for benefits.

There are a number of such cases, and some of them are probably rather difficult to reconcile. It is not my purpose to describe all the instances where a migrant has had a disagreement with the host state, but eligibility for benefits or services. The point to take away is that some hundreds of EU citizens have challenged features of national regulation which make a distinction between "locals" and "others". Sometimes they were successful, sometimes not. The cases offer detailed examples of how the broad right to avoid discrimination has been interpreted. There is an extensive body of law regarding the treatment of persons living outside their own country in the EU.

Mrs Watts<sup>66</sup> needed a hip replacement but was told that the NHS waiting list was such that she would have to wait a year. She went to have her operation in France and prevailed before the ECJ when she was refused reimbursements of her hospital costs by the NHS. The Court found that where the NHS cannot provide treatment within a medically acceptable period, it must provide reimbursement of treatment elsewhere.

## The difference between a right and a right to ask

I have lived as an alien in a foreign country. Dealing with the business of residence and visas can range from worrying to quite miserable. Depending on a sceptical official's approval of whether you can stay, where you can work, what papers and what other proof you need—these are real burdens. They are worst for the poorest, the least educated, and the less confident. There may be a huge amount of time, anxiety, errors, and wasted effort for maybe four million people in this country and elsewhere in the EU 27.

London is now home to something like 300,000 French citizens. Figures for 2015 put the number of Polish citizens living in the UK at 916,000<sup>67</sup> and the number of Irish citizens at 332,000.<sup>68</sup> It is estimated that approximately 181,000 EU 27 nationals live in Scotland.<sup>69</sup>

Of course there are not going to be mass deportations and it would be foolish to pretend that there is a risk of abusive treatment of EU 27 residents in the UK. However, it is evident that the referendum campaign has coincided with an increase in ugly incidents of personal hostility towards "foreigners".

I suggest that the ordinary worries and problems of ordinary people who would no longer have a constitutional right (or might have retained only a part of it) deserve to be weighed carefully against the governmental advantages to be gained by taking those rights away.

## Pensions

Pensions are governed by the national laws of the Member States. It is common for pensions to be earned only after several years of working in one country. Thanks to a series of judgments and pieces of legislation in this technical area, the EU citizen who has worked in several Member States can cumulate pensionable work in each of those countries. Pension rights can be cumulated across work in several Member States and citizens can retire anywhere in the Union, whilst continuing to receive a national pension. Thus a person who has worked eight years in Germany, nine years in the UK and ten years in Poland will receive from each of the three countries a pension fairly reflecting the period worked

There are limitations. Directive 2004/38 provides that before being able to retire in the sun of Spain, the pensioner must either have worked there for at least three

<sup>61</sup> *Marsman v M. Roskamp* (C-44/72) EU:C:1972:120.

<sup>62</sup> *O'Flynn v Adjudication Officer* (C-237/94) EU:C:1996:206.

<sup>63</sup> *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* (C-379/87) EU:C:1989:599.

<sup>64</sup> *Giersch and others v État du Grand-Duché de Luxembourg* (C-20/12) [2014] 1 C.M.L.R. 2.

<sup>65</sup> *Dano v Jobcenter Leipzig* (C-333/11) EU:C:2014:2358.

<sup>66</sup> *R. (on the application of Watts) v Bedford Primary Care Trust* (C-372/04) [2004] EWCA Civ 166; [2004] 2 C.M.L.R. 55.

<sup>67</sup> ONS, *Population of the UK by Country of Birth and Nationality: 2015*, 25 August 2016 [Online]. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/august2016#statisticians-quote> [Accessed 9 July 2018].

<sup>68</sup> ONS, *Population of the UK by Country of Birth and Nationality: 2015*, 25 August 2016 [Online]. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/august2016#statisticians-quote> [Accessed 9 July 2018].

<sup>69</sup> Scottish Parliament Information Centre, *Financial Scrutiny Unit Briefing – EU Nationals Living in Scotland*, 3 November 2016, p.3.

years (and worked there for the 12 months before retirement)<sup>70</sup> or must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State. They must also have comprehensive sickness insurance cover in the host Member State.<sup>71</sup>

The principle of non-discrimination has been used in a number of cases about pensions. Thus when Mrs Frilli,<sup>72</sup> one of the many Italian nationals living and working in Belgium retired, she was eligible for a small pension reflecting her years of employment, but not for a special minimal supplement for those in special need. That was payable only to Belgian nationals, and to those whose home countries had done a reciprocal deal with Belgium. Italy had not entered such an arrangement. Forty years ago, the Court of Justice held this requirement to be contrary to the principle of non-discrimination:

“the absence of a reciprocal agreement may not be set up against such a worker because such a requirement is incompatible with the rule of equality of treatment, which is one of the fundamental principles of Community law.”<sup>73</sup>

EU law also confirms the right to make *accumulation* of pension rights. In some EU countries (such as the UK), citizens must have worked for a minimum period of years to be entitled to a pension. In such cases, “the principle of aggregation of periods” dictates that a pension authority has to take into account all the periods the person worked in other EU countries to assess whether the citizen is entitled to payment. Thus a short period worked in the UK is not lost sight of when the final pension entitlement is calculated.

Migrant workers must not lose their pension rights because they have exercised the right of freedom of movement. In *Commission v Cyprus*,<sup>74</sup> a Cypriot law provided that civil servants under 45 who resigned to carry out professional activity outwith Cyprus (i.e. in another Member State, within an EU institution or other international organisation) lost the right to have their pension consolidated and paid at the age of 55. By

contrast, those under 45 who remained employed by the Cypriot Civil Service retained that right. The court held that:

“it is settled case-law that all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.”<sup>75</sup>

Today a retired person in this country can insist on the time they worked elsewhere in Europe being cumulated with time worked in the UK. And they get the benefits of the so-called Triple Lock, which ensures an annual increase in the UK pension by reference to three criteria by the higher of inflation, or of average earnings, or by a 2.5 per cent minimum.<sup>76</sup>

Department for Work and Pensions data from April 2014 shows it paid pensions to 475,000 people in EEA countries. The largest number of recipients live in the Republic of Ireland (28 per cent), Spain (23 per cent) and France (13 per cent).<sup>77</sup> There were 306,000 UK-born people with residency in Spain in 2015, according to Eurostat, which used figures reported by Spanish authorities. Around one-third of British nationals resident in Spain receive the UK state pension.<sup>78</sup> (I am unable to assert that these numbers are definitely accurate but the orders of magnitude are obviously high.)

Certain countries and dependencies have bilateral agreements with the UK to enable pensioners to qualify for the uprating.<sup>79</sup> Those who retire elsewhere—Canada, Australia, South Africa or New Zealand, for example—see their pensions frozen. It is theoretically possible for the government to negotiate maintenance of the “triple lock” as part of Brexit negotiations, but I may note that the UK has not arranged a similar deal with a non-EU country since 1981.<sup>80</sup>

<sup>70</sup> Article 17(1)(a), Directive 2004/38.

<sup>71</sup> Article 7(1)(b), Directive 2004/38.

<sup>72</sup> *Frilli v Belgian State* (C-1/72) [1973] C.M.L.R. 386.

<sup>73</sup> *Frilli v Belgian State* (C-1/72) [1973] C.M.L.R. 386 at [19].

<sup>74</sup> *Commission v Cyprus* (C-515/14) [2016] 2 C.M.L.R. 30.

<sup>75</sup> *Commission v Cyprus* (C-515/14) [2016] 2 C.M.L.R. 30 at [39].

<sup>76</sup> There is a further pensions question. Prior to the referendum, Prime Minister Cameron warned:

“One area we’d be forced to look at [in the event of Brexit] is pensions. We’ve made a special effort to protect pensioners... That’s why, in 2010, we introduced the Triple Lock.

We did this in the expectation of a growing economy. But if we had a big black hole, we could struggle to justify this special protection any longer. In fact, even if we could justify it morally, it wouldn’t actually be affordable.

Not when pensions represent a huge portion of public spending – over £90 billion this year – and when inflation is forecast to hit 4 per cent if we leave Europe. So here is the reality: if we leave, the pensioner benefits would be under threat, and the Triple Lock could no longer be guaranteed in the long term.”

<sup>77</sup> UK Government, *Review of the Balance of Competences between the United Kingdom and the European Union, Single Market: Free Movement of Persons*, summer 2014, para.2.69. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/335088/SingleMarketFree\\_MovementPersons.pdf#](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf#) [Accessed 8 November 2016]. The figure includes both UK born citizens and the citizens of other Member States who have worked in the UK long enough to acquire entitlement to a UK state pension.

<sup>78</sup> Tamara Kovacevic, “Reality Check: How many Brits live in the rest of the EU?”, *BBC News*, 14 April 2016. [Online]. Available at: <http://www.bbc.com/news/uk-politics-eu-referendum-36046900> [Accessed 9 July 2018].

<sup>79</sup> The countries are Barbados, Bermuda, Bosnia and Herzegovina, Jersey and Guernsey, the Isle of Man, Israel, Jamaica, Kosovo, Macedonia, Mauritius, Montenegro, the Philippines, Serbia, Turkey and the US. See Department of Work and Pensions Guidance, *Countries where we pay an annual increase in the State Pension*, [Online]. Available at: <https://www.gov.uk/government/publications/state-pensions-annual-increases-if-you-live-abroad/countries-where-we-pay-an-annual-increase-in-the-state-pension> [Accessed 9 July 2018].

<sup>80</sup> Social Security Committee, *Uprating of State Retirement Pensions Payable to People Resident Abroad*, Third Report of 1996–7, HC 143, Ev, p.40.

The sums at stake can be very significant, as can be seen in an ECHR challenge to the absence of such an arrangement in respect of South Africa.<sup>81</sup> Ms Carson had emigrated to South Africa and paid additional National Insurance contributions for ten years in order to qualify for a UK state pension. But once eligible, she found that the sum to which she was entitled was frozen at £67.50, whereas if she had lived in an EEA country, it would have been worth £95.25 by the time the judgment was rendered. (The rate for 2016/17 is £119.30.) Mr Jackson, who retired to Canada, had spent 50 years working in the UK. He emigrated to Canada on his retirement in 1986 and became eligible for a State pension in 1987. His basic State pension was then £39.50 per week, and it had remained fixed at that level since 1987. Had his State pension benefited from uprating since 1987, it would have been worth GBP £95.25 per week when the judgment was rendered in March 2010. (The Strasbourg court found in favour of the UK on the basis that the Convention did not grant a *right to acquire* property.) I cite the case to show that the sums at stake are substantial.

Thus, there are multiple uncertainties which touch nearly half a million Britons in the EU and a number which is possibly lower, but I speculate not much lower, of retired people in the UK with passports from the 27. These matters require diligent and careful attention, which will almost certainly take time.

## Conclusions

If the decision is to leave, then there are very important choices to be made. What decisions and policies and rules from the past will be discarded? For example, do we really

want to discourage the employment of foreign-born nurses and doctors? As to the future, will we entrust decisions on technical matters to the experts of the 27 or will we have two parallel regimes? If a dispute arises between a Polish citizen living in the UK about entitlement to a pension, before which forum and according to which law will it be decided? I invite us to consider whether a democratic vote can suffice to remove rights which are enjoyed actively. And I will hope that Ministers will bear these rights in mind once the negotiations begin.

It is not obvious that a democratically expressed vote can remove rights which have accrued and are being enjoyed actively. Thus discrepancies between the currently applicable regime and a revised regime might present delicate constitutional uncertainties.

If we wish to stay in the Single Market, what to do about free movement of people? The human interests of over 4 million people living outside their home country should not be forgotten. If we leave the Single Market, what do we do to avoid prejudice to people and employers and their families whose business model or livelihood or happiness in retirement depends today on the continued availability of that regime?

We should not pretend that something is easy when it is not. Governments follow migration figures very closely and of course they should. But what actions to take requires careful thought. I would suggest that the ordinary worries and problems of ordinary people who would lose rights deserve to be weighed carefully against the governmental advantages to be gained by taking those rights away. These are very delicate questions which need balanced debate and respectful listening, in which universities can play a part.

<sup>81</sup> *Carson & others v United Kingdom* (42184/05) (2010) 51 E.H.R.R. 13, EctHR.