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for EU Citizens**

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Intersection points of International and European Law

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Secession and the Loss of Rights for EU Citizens

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In the Scottish and Catalanian debates on independence EU citizenship has been invoked as a prism through which to view secession as internal enlargement of the EU. One could qualify this as a mere strategic position. Nevertheless, this positive view on the potential of the concept of EU citizenship, though not shared by the EU itself, is quite remarkable and could not have been foreseen when the Maastricht Treaty introduced the concept. The likelihood that such a view becomes reality is rather small, as Paula Garcia Andrade shows in her contribution to this series of think pieces. It seems therefore inevitable to look at secession as exit from the EU. Whereas the procedure for withdrawal provided for in Article 50 TEU obliges the Union to try to negotiate for at least two years an agreement, also taking into account the future relationship EU-withdrawing State, it is arguably not applicable in the case of secession because the procedure can only be set in motion by a Member State – a status which a seceding entity does not possess. The lack of a legal EU framework for secession renders thinking about consequences for individual EU citizens within the scope of secession rather speculative, but very necessary if we want people to cast an informed vote on independence.

This short paper discusses possible scenarios following secession, and tries to reflect on some of its consequences individual citizens might have to face when Scotland or Catalonia become independent. The first section of the paper assesses the consequences of possible approaches of nationality law of both the predecessor and the seceding polity for the status of EU citizens. It continues by looking at what might happen to individuals affected by secession both living in the seceding state (section 2) and living in Member States of the EU (section 3). A final section will look at possible ways to remedy loss of EU citizenship rights.

Before we start our assessment, one remark on the role of EU citizens in the process of secession itself needs to be made.

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Depending on national law, EU citizens residing in the seceding territory may or may not participate in the decision to secede. In Spain, only nationals can participate in a referendum.¹ For Scotland, Section 2 of the *Scottish independence referendum (franchise) bill* not only entitles British citizens, Commonwealth citizens and citizens of the Republic of Ireland resident in Scotland, but also citizens of other EU countries resident in Scotland to vote in the independence referendum.² This can be explained by the fact that eligibility to vote is based on the franchise at Scottish Parliament and local government elections as set out in section 2 of the (UK) Representation of the People Act 1983. However allowing these citizens to participate in such a fundamental political and constitutional choice shows a very positive approach to the political rights attaching to EU citizenship.³ Furthermore, it is an explicit recognition that the position of EU citizens residing in Scotland will be affected by secession.

1. Nationality law and secession

Article 20.1 TFEU accords citizenship of the Union to nationals of the Member States. It implies that retaining or losing EU citizenship after secession all depends on nationality laws and it is very unlikely that loss of previous nationality will not cause loss of EU citizenship. It is no wonder that the separatists point at double nationality as the best available option. For now, both Spanish and British nationality law make that possible. Spanish nationality law does not cause loss of Spanish nationality if within three years after acquisition of a new nationality a declaration to retain Spanish citizenship is submitted.⁴ However, that declaration is not necessary if the new nationality is that of South-American countries, Portugal, Andorra, Philippines or Equatorial Guinea. The likelihood that Spain would add Catalonia to this 'community of Ibero-American nations' is rather speculative. On the other hand, withdrawing Spanish nationality would imply recognition of Catalonia as independent State, which for now seems a very unlikely path. UK nationality rules are quite complex and recognize different types of citizenships, where British citizens, and not other British

¹ See <http://eudo-citizenship.eu/electoral-rights/comparing-electoral-rights?application=ElectoralRightsNonCitizen&p=&search=1&modeby=country&country=Spain> (last visited 1 July 2014).

² <http://www.scottish.parliament.uk/S4/Bills/Scottish%20Independence%20Referendum%20Franchise%20Bill/b24bs4-aspassed.pdf> (last visited 1 July 2014).

³ J. Shaw, EU citizenship and the edges of Europe, CITSEE working paper 2012/19, available from www.law.ed.ac.uk/citsee/workingpapers, p. 9.

⁴ Article 24 of the civil code as reformed by Ley 36/2002, of 8 October.

nationals, are EU citizens.⁵ British citizens can renounce their nationality, but will not lose it upon acquisition of a new nationality.

Of course, double nationality would also have to be accepted by the seceding entity. The statements made by those in favour of secession hint indeed at accepting double nationality and in such a case the nationals of the seceding States will retain their EU citizenship status and furthermore, for EU law purposes the effective nationality will always be the nationality that brings EU citizenship with it.⁶ But the solution of dual nationality does not necessarily guarantee preservation of EU citizenship status for a longer term. Needless to say that for dual British-Scottish nationals, EU citizenship will be lost in case the UK decides to leave the EU. Furthermore, next generations might lose the status as most nationality laws have set limits to the perpetuation of generations of nationals living abroad. Article 24.3 of the Spanish Civil Code provides that children born abroad from a Spanish father or mother also born abroad will lose the Spanish nationality when the country of residence attributes them its nationality, unless they declare their will to retain it within three years of their attaining majority or emancipation.⁷ In general, a person born outside the UK to a British citizen otherwise than by descent is born a British citizen by descent. Thus, British citizenship by descent generally lasts one generation.⁸

Both the UK and Spain could change their nationality laws with respect to dual citizenship. Though the point of reference for the CJEU in dealing with nationality is no longer state sovereignty but shifts towards EU citizenship as a status worthy of protection,⁹ the European proportionality principle that limits state powers of citizenship

⁵ Most recently Declaration on nationality by the UK no. 63 annexed to the Lisbon Treaty. See also Case C-192/99 *Manjit Kaur* [2001] ECR I-01237.

⁶ See also Paula Garcia Andrade in her contribution to this series, p. 3.

⁷ Nationality legislation in Spain has remained strongly anchored in the paradigm of a country of emigration, and has a strong focus on the links with Spanish communities abroad, see R. Rubio Marín a.o., *Country Report: Spain. Revised and updated November 2012* EUDO Citizenship Observatory Country report, RSCAS/EUDO-DIT-CR2012/11, p. 1. Emancipation from parental authority comes upon achieving majority, when a minor marries, with consent of those exercising *patria potestas*, or with judicial authorisation.

⁸ Section 2 British Nationality Act 1981. See also C. Swayer and H. Wray, *Report on United Kingdom. Revised and updated November 2012* EUDO Citizenship Observatory Country report, RSCAS/EUDO-CI-CR 2012/04, p. 22. There are exceptions for persons whose parents retain a connection with the UK through a residence period or when the parent is a member of the armed forces or diplomatic staff.

⁹ S. Mantu, *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives* PhD thesis, Nijmegen, especially Chapter 5.

withdrawal does not seem to oppose such a change. As predecessor States UK and Spain may provide that those acquiring voluntarily the nationality of the new state will lose their previous nationality. If they do, nationals of the newly created states would indeed lose EU citizenship status and the enjoyment of free movement and residence rights in EU member states.¹⁰ The only way to guarantee EU citizenship status for citizens of the seceded states would be accession to the EU.

2. (Former) EU citizens in the seceding State

In case the nationals of the new states would have double nationality and keep their EU citizenship status, they would be both nationals of the new states and EU citizens living in third countries. In such a case, they would profit from all the rights and benefits of EU citizenship in the EU member states, but not necessarily in their own, new state.

Arguably, there would also be a category of EU citizens not acquiring the nationality of the new state, depending on how nationality law of the new states defines its potential citizens. Does it consist of only citizens of the predecessor State residing in the seceding territory and having opted for the new nationality, or is the option to voluntarily take on the new nationality open to all those who have been residents for a certain amount of time? In any case, those retaining EU citizenship status will lose the rights attached to that status in the new State. Their residence status would become entirely dependent upon the internal law of the new State, as would be their right to work in the new State. The internal law of the new State could indeed grant free movement and equal treatment rights to EU citizens, and even provide that development of the *acquis* and interpretation of the relevant provisions by the CJEU will be followed by courts in the new State. It would of course curtail the new State's freedom to issue legislation that is divergent from that of the EU, and hence create an illusion of sovereignty.¹¹ Obviously, the courts of the new States would have no possibility to address preliminary questions to the CJEU.

In case the nationals of the new State lose their former nationality, the rights they acquired while working in other EU States are at jeopardy. The right to be joined by family members with the nationality of a third country upon return to the new State no longer

¹⁰ Paula Garcia Andrade, as cited above, p. 2-3.

¹¹ A similar approach, but then on a voluntary basis and in the context of bilateral agreements, can be found in the EU-Swiss agreements. See R. Schwok, "Switzerland's Approximation of its Legislation to the EU *acquis*: Specificities, Lessons and Paradoxes", *European Journal of Law Reform* 9 (2007), p. 449-466.

falls under EU law and thus would depend on the internal law of the new State. Again, internal law could follow EU law in this respect.

Regulation 883/2004 with respect to social security would no longer apply in case nationals of the new State lose their nationality.¹² Even though the acquired rights are defined with respect to the possession of the nationality of a Member State at the time of the employment and the payment of the contributions,¹³ the payment of benefits acquired under the social security system of one or more Member States is guaranteed only to persons who reside in the territory of a Member State.¹⁴ The effects of non-application concern both EU citizens and non-EU citizens alike. As a consequence, the payment of pensions and other social security benefits such as pre-retirement benefits or family benefits for which contributions were paid during employment in an EU Member State is no longer a matter of EU law, but becomes dependent on the national legislation of the Member State where the contributions were paid and might result in deductions or limitations as long as no agreements have been signed between the new State and the respective EU Member State.

3. Citizens of the new States in EU Member States

In case citizens of the new States obtain dual nationality and hence retain their EU citizenship status, they keep enjoying the free movement and residence rights attached to that status when they reside in other EU States than that of their former nationality. In case these citizens lose their former nationality, they will become third country nationals for EU law purposes in the entire EU. The consequences would be rather drastic, similar to those for British expatriates if the UK leaves the EU that Steve Peers qualified as leading to a status that would be 'solitary, poor, nasty, brutish and short'.¹⁵ *In concreto*, it means that travelling into the EU might become more cumbersome, as the EU would be free to impose visa requirements. Though it seems unlikely the EU would impose visa requirements,

¹² Article 2 of the Regulation limits its scope to nationals of a Member State, stateless persons and refugees residing in a Member State.

¹³ Case 10/78, *Belbouab* [1978] ECR 1915 with respect to former Regulation 1408/71 (now Regulation 883/2004).

¹⁴ Case C-105/89, *Buhari Haji* [1990] ECR I-4232, with respect to former Regulation 1408/71 (now Regulation 883/2004).

¹⁵ S. Peers, 'What happens to British expatriates if the UK leaves the EU?' *EU Law Analysis blog*, 9 May 2014, available from <http://eulawanalysis.blogspot.nl/2014/05/what-happens-to-british-expatriates-if.html> (last visited 3 July 2014). The examples he gives, some of which are mentioned here, equally apply to citizens of the new States.

stricter border controls in order to verify the purpose of the visit to the EU can be expected. Access to employment in the EU will be more difficult, as third country nationals are subject to possible quotas and no longer benefit from EU-preference rules in labour migration. There would be no mutual recognition of diplomas and qualifications under EU law in case nationals of the new State enter the labour market of a EU Member State. It cannot be excluded that a part of the nationals of the new States, if they become unemployed, will be obliged to return to the new states and apply for social benefits. High skilled workers might have to apply for a Blue Card. Students can no longer benefit from equal treatment with respect to tuition and admission rules. Those already residing in a EU Member State for a longer period might want to apply for long-term resident status under EU law, but will be subjected to integration and language tests in a number of Member States. Similar tests plus possible waiting periods can be applicable for family reunion with non-EU nationals (including the family members of their own new State). In case there is an option between keeping former nationality and retaining EU citizenship status on the one hand, and acquiring the nationality of the new State on the other, those residing in the EU might thus be tempted to keep their former nationality. Again, Regulation 883/2004 no longer applies to the social security rights they might have acquired in the seceding State before they moved to a EU Member State.

Crossing borders to visit family in the (new) home State equals leaving the Schengen area and would be subject to whatever requirement the new State imposes. In any case, Schengen visa would not apply to the seceding States, which could make it less attractive for tourists from outside the EU to include the seceding States in a tour through Europe – an argument that the tourist industry in Catalonia should be aware of.

4. Negotiating free movement

The most secure way for the seceding States to guarantee EU citizenship rights to their nationals would be a quick accession to the EU. The unanimity required by Article 49 TEU makes such a quick accession unlikely, as especially Spain is unwilling to acknowledge secession. A next best option would be to negotiate an agreement with the EU on free movement in reciprocal terms,¹⁶ though a similar argument with respect to unanimity in the Council applies.¹⁷ Nevertheless, an Agreement with the EU seems the only path to take

¹⁶ See also P. Garcia Andrade, as cited above, p. 7.

¹⁷ Article 217 j° 218.8 TFEU.

because, as we have seen above, the unilateral decision of the seceding States to apply the *acquis* and follow the legislative and jurisprudential developments in the area of free movement of persons cannot guarantee the acquired EU rights of nationals of the new States. Therefore, it seems wise to try to have such an agreement as soon as possible after secession.

Some inspiration might be found in both the European Economic Area Agreement and the EU-Swiss Agreement on free movement of persons. The Free Movement of Persons Agreement with Switzerland provides in its Article 16 that 'the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European [Union] to which reference is made are applied in relations between them'. Furthermore, if the application of the Agreement involves concepts of EU law 'account shall be taken of the relevant case-law of the Court of Justice of the European [Union] prior to the date of its signature'.¹⁸ Article 6 of the European Economic Area Agreement¹⁹ is similar, but provides in firmer terms that provisions in the Agreement identical to those of the [EU] Treaties 'shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the [EU] given prior to the date of signature of this Agreement'. Thereby, future divergent developments are not excluded, and a similar provision in an agreement between the EU and the seceding State would at least leave some leeway for the non-EU party to regulate free movement after secession.

The EEA agreement also contains a provision to protect acquired rights in case developments within the EU are not followed and application of acts affected by the divergent development is suspended under the Agreement.²⁰ According to the Agreed Minutes annexed to the Final Act, the Contracting Parties agreed that in such a case acquired rights, but not expectations only, would be protected.²¹ Seceding States might want to negotiate a similar approach to free movement of persons and acquired rights within as short a time limit as possible. Meanwhile, protection of acquired rights will depend on how

¹⁸ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJEC L114/6 of 30.4.2002.

¹⁹ Agreement on the European Economic Area, OJEC L 1/3 of 3.1.1994.

²⁰ Article 102.6 EEA Agreement.

²¹ OJEC L1/556 of 3.1.1994.

European and national judges apply principles of good administration such as equality, fairness, and legal certainty.²²

²² In his Conclusion on *Belboubab* (as cited), AG Capotorti argued for interpretation of European social security law in light of the general principle of non-discrimination, [1978] ECR 1915 at 1931.