About the episode

Wondering what the draft withdrawal agreement means for UK citizens living in the EU27? In this episode, Michaela is joined once again by EU law expert Professor Tamara Hervey to talk through the complexities of this agreement. From the legal status of this document, what it means in terms of the enforcement of rights, and causes for concern and (limited) cause for celebration, they discuss what this document reveals about the future rights and entitlement for these populations who have made their homes and lives in the EU27.

You can download this episode of the podcast at http://brexitbritsabroad.libsyn.com/what-does-the-draft-withdrawal-agreement-mean-for-uk-citizens-living-in-the-eu27

Transcript

MB Welcome back to the Brexit Brits Abroad podcast. I'm Dr Michaela Benson. For those of you who don't know, I am the research lead for a project funded through the UK and a Changing Europe scheme that looks at what Brexit means for UK citizens who've made their homes and lives elsewhere in the EU 27. The podcast is just one part of this project and you can find out about all of the other things that we've been up to on our newly updated website, www.brexitbritsabroad.com and just click on the link through to our findings. This is, and I can't believe that I'm about to say this, our 20th podcast. We've been podcasting since May 2017 fortnightly, most of the time, and we've covered all sorts of issues as they've arisen through the research but also as Brexit has been ongoing that we think are of interest to the case of UK citizens living elsewhere in the European Union. The episode today focuses once again on the issue of what Brexit means in respect to the legal status of UK citizens living in the EU 27 and this builds on an earlier podcast in episode 5 I think it was, where I was speaking with Professor Tamara Harvey and Sarah McCloskey about precisely this issue. Now with the publication of the draft withdrawal agreement, we've got a little bit more material to work with so I thought it was a good moment to bring back Professor Tamara Harvey to talk to us a little bit more about what this
document means, what it is, and also what it reveals about the future for UK citizens living in the EU 27. Just a little reminder, Professor Tamara Harvey is a Jean Monnet Professor of EU Law based at the University of Sheffield so she knows her stuff, and I've started by asking Tamara exactly what this draft withdrawal agreement is.

TH So as you know, Article 50 of the Treaty has a specific legal procedure that has to be followed when a member state leaves the European Union, and that withdrawal process is different from the process of a future relationship and I think sometimes, maybe even deliberately, those two things which are quite separate legally get muddled in together, so what we're talking about at the moment is the first phase of the UK leaving the EU, which will be covered by a legal document called the Withdrawal Agreement, and in that withdrawal agreement, which will cover all sorts of things including the island of Ireland and including other things like Cyprus or Gibraltar and so on, there will be a significant part that covers the rights of people, and in particular the people that we're interested in today to the UK nationals who are in other member states and particularly those who've retired to other member states.

MB So that's what the discussions around citizens' rights relate to when we're talking about UK nationals living in the EU 27.

TH So that's what we're talking about when we're talking about the rights under the withdrawal agreement. There may also be future rights under the future UK EU relationship but at the moment we don't know what those might be, we're not really at phase of getting to those rights, so at the moment we are talking about rights under the withdrawal agreement. So I think it's important to hold that clear in your head.

MB So what would that mean, just to help to explain a little bit more, so can you go through very very quickly what the difference is between those two things, a withdrawal agreement deals with people who are already there is that right?

TH Yes, so the scope of the withdrawal agreement, so the legal text of the withdrawal agreement will say who it covers, and the European Commission documents have a proposal as to what that should be, so the proposed scope starts with Union citizens who have already exercised their right to reside in the UK, and UK citizens who have already exercised their right to live in an EU 27 country, before the withdrawal agreement enters into force, so before what people are calling exit day. And to carry on residing there after exit day. And it also covers frontier workers and it covers family members, the family members bit gets quite technically complex but it basically draws on existing EU law in order to decide who is a family member that falls within the scope of this agreement.

MB And of course it is exactly that discussion about family members which has caused a little bit more anxiety among UK national populations living in the EU 27 as well but from what you are saying, that is guided
completely and entirely by what's already available within EU law in terms of what a family member is.

TH Well the proposal is guided by, as you've said, EU law. The legal text as I say is quite complex but I don't think from memory that the legal text exactly tracks UK law. Part of the reason for that is to do with people who haven't been born yet, so at the moment somebody who's born a national of an EU member state becomes an EU citizen straightaway and they have all the rights independently as an EU citizen, whereas under the withdrawal agreement somebody, a UK national who's born after the withdrawal agreement enters into force of course won't become an EU citizen because the UK won't be in the EU, so the provisions don't directly track EU law in that regard, they couldn't.

MB That I think helps to highlight exactly how complex this is as a legal landscape. So what do we know then in terms of what's covered in the draft withdrawal agreement in respect to citizens' rights and what's not?

TH OK so what's really interesting to me particularly thinking about healthcare rights is that there are two parts to the draft that cover citizens' rights, one of them covers what we think of as citizens' rights and what's had the most attention so the things about the rights of workers and workers' dependants and then also students and other people like that. But then there's a part that covers social security entitlements. Now that's a completely different bit of European Union law so it's not a surprise that it's a separate part of the withdrawal agreement. And the scope of that part that covers social security coordination, which covers pensions but which also covers healthcare entitlements, the legal text is really difficult to understand, and I don't mind admitting that I spent a good 48 hours really struggling with what does the text mean and I don't think it's as clear as it could be.

MB And just as a reminder, Tamara is a Professor of EU Law and she is struggling to understand the legal text and I don't think that you've been alone in that, as an EU law specialist, have you.

TH No I think a lot of us are talking about this and there's been quite some discussion, David Alan Green the Brexit blogger observed that all legal texts are complex and their meaning only becomes clear after some time, and sometimes unfortunately it has, there has to be litigation before the meaning of a legal text becomes clear. So to simplify it in a very broad-brush way, there are two ways of reading the text on the coordination of social security when we're thinking about something like access to EHIC and when we're thinking about the position of pensioners who've retired, British pensioners who've retired to another EU country like Spain. So one way of reading the text says that they would continue to have the rights that they have, another way of reading the text says that these things wouldn't continue. So that's a big difference, we would carry on having our EHIC cards or we would not carry on having our EHIC cards, that's a really big difference. So one of the things that I hope happens when the withdrawal agreement is actually agreed and
negotiated is that there is a clarification of which of those two meanings is intended.

**MB** So that's about the EHIC card which of course is for visitors, is this also true of the S1 entitlement which is the situation, well the social security structure that's in place for British people who have worked in the UK all of their lives, who then retire and move to another member state, allows them to access health care in that member state. Are we finding similar contradictions in the interpretations of the text in respect to that?

**TH** Yes, so there is a special provision on pensioners' entitlements in the draft text, there is nothing explicit on EHIC in the draft text, but there is a provision on pensioners in the draft text but the provision on pensioners is also really difficult to understand, it's not clear whether it's going to cover people who are already there or whether it will only cover people who the UK becomes responsible for once they move, so again the position is that it's difficult to understand what the meaning of the legal text will be, intention of the legal text is here, and again I suggest, or I hope that this is actually clarified in the negotiations of the withdrawal agreement because I think if the UK wanted to include UK pensioners who've worked all their life in the UK and then retired to Spain or another EU country, if the UK wanted to include those people within the provisions of this bit of the withdrawal agreement they should amend the text, and I've actually put on Steve Peers' blog I've actually put a suggested amendment to the text that would make it much clearer that the intention is to include these pensioners.

**MB** I think that's really fascinating. I just wondered if we could go back to the broader questions around citizens' rights and what we know from this European Commission document. Now this European Commission document is I believe it's kind of putting into legal text what was already outlined in the joint agreements from December. So what's there and what's not?

**TH** Probably the biggest thing that's not there, and it wasn't in the joint agreement either, the joint political text either sorry, is this notion of onward movement rights. So when, at the moment under EU law you can as an EU citizen you can move around the EU and you can keep your social security entitlements intact and you have resident's rights and you can bring your family, your dependants with you. It's not clear whether these onward movement rights are going to be covered in the withdrawal agreement, and the fact that there isn't any text on it to me suggests that they're not intended to be covered.

**MB** OK, so some people are saying that that's partly because those onward movement things are more closely allied with some of the issues around trade from phase 2, so that might be where that discussion happens. Have I misunderstood that?

**TH** No I think that's a perfectly sensible way of thinking about it. The desire of the UK to have a future relationship with the EU that's as close as possible to the relationship that we currently have has been made very clear by the UK
government, but equally the European Union so far has been absolutely clear that the single market is not a severable club and that if you want to be in the single market for goods and services then you also have to be part of the disciplines of single market law for people. So unless something changes, and of course things may well change, I can't see how that kind of you can't have your cake and eat it principle can be overcome. But you know we can be hopeful, we can be optimistic. I think as people in the UK are understanding more about human migration and about how much we actually rely on people from the EU for parts of our economy and society that matter to us, that the political opinions, political views might be changing and legal texts after all should only be there to serve political intention.

**MB** I mean the real difference between EU nationals living in the UK and UK nationals living in the EU 27 in respect to Brexit is the fact that what's happening to UK nationals is that they will potentially, well unless that court case that's happening in the Netherlands goes through, they will be losing their European citizenship, whereas EU nationals won't be losing their European citizenship, Britain will be outside the European Union and so they won't be able to exercise their European citizenship rights to live in Britain, that's the right way of understanding the difference between those populations.

**TH** Yes that's right, although the notion of EU citizenship, you could say is nothing but a bundle of different entitlements and those entitlements or rights could be given in different ways, so they could be given by national law. I'm sort of sceptical about this argument but we ought to give it at least some attention, so the idea would be that everything that an EU national is now entitled to in EU law, they would be entitled to in British law, so we've seen this argument about for instance labour rights. So the UK government has said no we're not going to change labour rights, they're going to stay the same. What's different of course, and this is why I'm sceptical about this argument, is the means of enforcing the right, so a right is only words on a piece of paper, if there's no way of enforcing it, and what's going to happen when the UK leaves the EU is that over aspects of people's rights that are not covered by the withdrawal agreement are not covered, obviously no longer covered by EU law, there'll be no way of enforcing rights involving the European Union's enforcement mechanisms in particular the European Court of Justice. And of course one of the things that's disputed about the withdrawal agreement is what's the enforcement provision going to be for rights in the withdrawal agreement and the EU wants it to be the European Court of Justice.

**MB** OK so I think that that really highlights some of the issues around kind of rights and legal structures and how they function and what might be at the heart of all of these things but I really liked how you described European citizenship as this kind of bundle of rights and entitlements, because it is quite, it's quite different when we talk about European Union citizenship, we're talking about something quite different to our citizenship of individual member states.
TH Yes, I think that's right, I mean the court case is on the basis that it's something rather closer to national citizenship than what I've outlined, so we'll have to wait and see what happens with that.

MB So for those of you who don't know which law case we're talking about, we're talking about a law case which contests whether it's lawful to remove EU citizenship from UK nationals, which is a court case that could have implications not only for UK nationals who live in the European Union, in the EU 27, but also for British citizens, just normal British citizens, because if successful it will basically mean that irrespective of the fact that the UK has left the European Union they will be allowed to maintain that EU citizenship right. So I think we'll have to watch with interest to see what happens with that I think. Tamara, what do you think are kind of the causes for concern and causes for celebration around what's kind of been drafted or not drafted into this draft withdrawal agreement?

TH OK well I think we'd better start with causes for celebration because you know there's nothing to celebrate for people about leaving the EU basically, it's going to be worse, but at least there is now a draft text. And you know on the principle of many eyes on a text makes a better text, at least now we can see what's being proposed and we can start trying to understand it and its implications and what it means. Of course it's really important to remember that the text is not agreed, it's just a proposal. And unless the whole withdrawal agreement is agreed, then nothing will be agreed, that's one of the European Union's negotiating principles which the European Union is legally bound by. There is a proposal however that's been made by Professor Steve Peers that actually what would be really good would be if the part of the withdrawal agreement that covers human beings could be separated out from the rest of the withdrawal agreement, because it does seem that there is good political agreement on most of that, we talked about some of the bits where there isn't political agreement, and if that political agreement could be enshrined into a legal text then at least that bit could be agreed and signed off, and that would mean that the rights of human beings aren't subject to failure of the UK and the EU to agree something else like what's going to happen on the island of Ireland with the hard border. So just to touch on what will happen if the withdrawal agreement isn't agreed, and remember that there is a temporal element here, the clock is ticking and the European Union legally cannot allow the UK to remain in the EU without an agreement to that effect under the terms of Article 50 after the deadline, which is two years after the triggering of Article 50, so that the clock is running and if there isn't an agreement what will happen is that people who are not living in their home member state if you like, their rights will be based on the law of the land that they find themselves resident in so the British pensioners who've retired to Spain, their rights will be based on British law in terms of what that provides for the provision of their pensions and whether pensions will be paid to people who are not in the UK and on what terms and so on, but it will also be based on Spanish law and in the case of health right even just the Spanish region, there are differences between Spanish regions, on those rights. But there is
a European Union law that gives some entitlements to what are called third
country nationals so non-EU nationals which of course UK nationals will be,
and that binds most member states, Denmark has an opt out and so does the
UK and Ireland, from that EU law. Ireland is a different case because we have
the provisions of the common travel agreement so those UK nationals in
Ireland will be governed by those parts of British and Irish law.

MB So what you're saying is that there is, there are some overarching
legal guidelines for how most member states treat those people who
live there who happen not to be citizens of that member state or of
another European Union member state, that would kick in should we
reach the stage where there's no agreement.

TH That's right yes, that's exactly the case, and those rights are not as extensive
as the rights that EU nationals have but at least they are something, and at
least they're, you know, easy to understand because they're the same across
all of the EU countries apart from those that have opted out. But the detailed
legal rights of a human being will be very complex if we leave without a
withdrawal agreement. They'll be a bit simpler if we leave with a withdrawal
agreement.

MB So whichever way we go this is likely to be complicated legally.

TH I think that's right and I think we have to work hard to make sure that people
can understand their rights because that's just a basic principle of the rule of
law, and that they're able to enforce their rights.

MB And I think that that's really, I think it's one of the messages that you
want to get across quite clearly today is to do with precisely the fact
that, you know, that people need to, we need to find ways of
communicating to people what these legal frameworks mean for their
lives in a way that they can understand, and there's a role for civil
society really in doing this.

TH Well it's really interesting to compare with the position at the moment, so at
the moment the European Union makes a lot of information available freely to
people who move across member states, and that investment of course, we
won't be able to draw on that investment in the UK, we will need to provide
something for our own people, whether we do that by government investment,
whether we do that by collaboration, whether we do that by, as you say, civil
society, that depends on how we decide to do it, but there will definitely be a
need for clearer information to be communicated to frontline workers who are
working, you know, in organisations like Citizens Advice when people come
through the door and don't know what their entitlements are.

MB I think that's a really really important point to end on today, is
empowering those frontline workers, the people who have that day to
day encounter with people who've found their rights challenged and
changed, and making sure that they have, well making sure that
there's a resource there to support them, and making sure that they
have the information to communicate to people in a way that's understandable.

TH Yes, that's absolutely right.

MB Thank you very much Tamara, that's been fascinating.

TH Thank you for hosting me, it was a great pleasure.

MB No problem at all. Thank you for listening to the Brexit Brits Abroad podcast. If you've enjoyed what we've been talking about today and want to find out more, check out our website www.brexitbritsabroad.com, or you can follow us on social media via Twitter @brexpatseu and on Facebook. And don't forget to subscribe to our podcasts on iTunes, and I'll speak to you again soon.