Chapter 14

Brexit: Free movement of Union citizens and the Rights of Third-Country Nationals under Threat?

Kees Groenendijk

14.1. *Introduction*

The outcome of the Brexit referendum on 23 June 2016 created a shock in the UK and in other Member States. The immediate and long-term effects on the capacity of nationals of all 28 current Member States to move to and stay in other Member States became the subject of personal worries and public debate. Suddenly, free movement to and from Britain was no longer self-evident. The outcome of the forthcoming negotiations on the conditions of the Brexit will remain unknown for months or years. The outcome of the negotiations between the UK and the other Member States and the dubious position of several EU institutions during those negotiations, all intended to avoid a Brexit, most probably will never achieve the force of law. Nevertheless, the texts agreed may well influence the development of free movement law in the years to come.

On 19 February 2016 the Heads of State and Government of the 28 Member States, "meeting within the European Council", agreed on a Decision concerning "a new settlement for the United Kingdom within in the EU". The text of the Decision was published as an Annex to the conclusions of the European Council.[1] The Decision is an informal agreement between the 28 Member States aiming at changing elements of Union law without amending the Treaties. The Decision is a piece of international law not an instrument of Union law. Hence, the Court of Justice cannot rule on the validity of the Decision, but it may be asked to rule on the compatibility of some of the changes agreed with the Treaties. The Decision provides in Section E that it "shall take effect on the same date as the Government of the United Kingdom informs the Secretary-General of the Council

1 EUCO (European Council document) 10/16 of 19 February 2016, p. 8-37.

that the United Kingdom has decided to remain a member of the European Union". Considering that a majority of the British voters in the referendum on 23 June 2016 voted to leave the EU, it is highly unlikely that this condition will be fulfilled. Most probably, the agreement formulated in the February 2016 Decision will never enter into force. Nevertheless, the Decision may have far-reaching political, constitutional, legal and practical consequences within the Union and its remaining Member States. In this contribution I will describe and comment on the elements of the Decision concerning free movement of Union citizens, deal with the potential effects for Union citizens and for nationals from countries outside the EU and conclude with some remarks on the wider implications of the Decision.

14.2. *The democratic deficit of intergovernmental cooperation*

Before I embark on that programme, it should be noted that the preparation of the Decision was not an example of democratic decision making. UK Prime Minister David Cameron in 2013 announced the referendum and in 2014 outlined his wishes for reform of Union law in public speeches. In 2015 he twice spoke briefly in the European Council about his desire to start negotiations on this issue without further specification.[2] It was only after being pressured by his colleagues that Cameron wrote a letter to the President of the European Council in November 2015 outlining the areas in which he was seeking reform "to address the concerns of the British people over our membership of the European Union".[3] From the summer of 2015, UK officials held "technical discussions" with officials of the European Commission. During these discussions three wishes formulated by Cameron in his speeches in 2014, were, apparently, dropped: EU workers should have a confirmed job offer before admission in another Member State, no social benefits and social housing for EU nationals from other Member States during the first four years and the introduction of long-term re-entry bans in cases of begging or fraud. These demands did not appear in the November 2015 letter. Negotiations between the Member States with the participation of the European Commission started only after the December 2015 European Council. They resulted in a draft Decision published on 2 February 2016.[4] Two weeks later the Decision was adopted. Thus, the European Parliament, national parliaments and the general public in the Member States were effectively given only two weeks to read, comment on the draft and try to influence the content of the Decision. According to press reports, the European Parliament's (EP) President

2 EUCO 22/15, p. 8 and EUCO 26/15, p. 6.

3 Letter of 10 November 2015 to Donald Tusk.

4 EUCO 4/16 of 2 February 2016.

and leaders of the three main political factions in the EP were invited by Donald Tusk to his office on 19 February 2016 to give their opinion on or, possibly, their informal consent to the text of the Decision.[5]

The ordinary procedure for amending the Treaties in Article 48 TEU provides that the national parliaments shall be informed about the proposals for amendment before a decision is made to amend the Treaties and that a decision to amend comes into effect after national approval according to the Member States' constitutional procedures, often involving their parliaments. Even the ordinary legislative process of the EU provides for far more and longer opportunities for public and parliamentary participation than the negotiations between Member States on the Decision of 19 February 2016.[6] The Legal Service of the Council assured the European Council that the Decision "does not require any formality for the parties to express their consent to be bound. It does not require any formality such as signing or notification of having accomplished a formal ratification or any other procedure in accordance with constitutional requirements."[7] The Legal Service's opinion was sought after publication of the Draft Decision within three days of being requested. Following this advice, the consent of the national parliaments was not made a requirement for the entry into force of the Decision, although enhancing the role of national parliaments was one of the explicit aims of the Decision (see Section C). Politicians who criticize the democratic deficit of the EU and propose intergovernmental cooperation as an attractive alternative for EU membership, often forget that that intergovernmental cooperation has far fewer guarantees for democratic participation in the legislative process than provided by the current, admittedly imperfect, law making in the EU.

14.3. *What did Member State agree on Free Movement and Social Security?*

The Decision has four main sections entitled Economic Governance, Competitiveness, Sovereignty and, finally, "Social Benefits and Free Movement". This chapter focuses on the last section (Section D). This section is by far the longest and most detailed section of the Decision. Moreover, three detailed

5 *Volkskrant,* 27 February 2016.

6 For more details see: Meijers Committee, *Accommodating British EU-demands and democratic change of the Treaties*, CM 1516 of 27 October 2015.

7 EUCO 15/16 of 8 February 2016, par. 5; for a critical discussion of the role of the Council's Legal Service see E. Guild*, Brexit and its consequences for the UK and EU Citizenship or Monstrous Citizenship*, inaugural lecture at Queen Mary University of London, 27 September 2016.

declarations of the Commission with respect to the issues dealt with in Section D are attached to the Decision. This may reflect the level of agreement between some Member States and the centrality of these issues during the negotiations. In this section Member States for the first time since the beginning of free movement in the EEC agreed on major restrictions of three central elements of the right to free movement of Union citizens: their security of residence, their right to family reunification and the equal treatment of EU workers. The agreed changes in Section D of the Decision are presented as new interpretations of existing primary and secondary EU rules (under the heading "Interpretation of current EU rules") or as amendments to existing Union law ("Changes to EU secondary legislation"). Further amendments of secondary EU law are to be found in the three Declarations annexed to the Decision in which the Commission promises to propose changes in all three central secondary law instruments in this field: Directive 2004/38 on free movement of Union citizens, Regulation 492/2011 on free movement of workers and Regulation 883/2004 on the coordination of social security systems.

According to the Decision and the relevant European Council Conclusions, the "arrangements" of the Decision "are fully compatible with the Treaties". The Treaties are not amended. But whether the agreed amendments and interpretations are compatible with the Treaties is subject to considerable doubt.

14.3.1. *The emergency brake and the reduced exportation of child benefits for EU workers*

With regard to social benefits two major changes were agreed: the introduction of the "emergency brake" on non-contributory in-work benefits and the "indexation" (read: reduction) of the child benefits to children of EU workers who do not accompany the worker. The Commission promised to make a proposal to introduce a "safeguard mechanism" in Regulation 492/2011 allowing the Council in cases of exceptional inflow of workers from other Member States to decide on a proposal from the Commission to authorise a Member State to limit the access of newly arriving EU workers to non-contributory in-work benefits for the first seven years of employment in that Member State. The Commission in advance of the possible entry into force of the Decision stated that the UK would be fully justified in triggering this safeguard mechanism considering the information provided by the UK and "in particular as it has not made full use of the transitional periods on free movement of workers which were provided for in recent Accession Acts".[8] This early green light for the UK was justified as retroactive compensation for having allowed free movement workers from new

8 EUCO 10/16, p. 23 and Annex VI on p. 34.

Member States during the transitional periods, disregarding the benefits from their employment.

The Commission also promised the Member States to propose amendments to Regulation 883/2004 in order to allow Member States to reduce the child benefits paid for children of EU workers who remained in the Member State of origin or another Member State, taking into account the standard of living and the level of child benefits applicable in that Member State.[9] Until 2020 this indexation would only apply to "new" workers. The EU workers under the new rules would pay social contributions and taxes according to the (higher) level of the Member State where he or she was employed and receive the lower child benefits applicable in the Member State of origin. The Court of Justice in 1986 and again in 1989 had held a similar rule in Regulation 1408/71 to be a typical example of indirect discrimination, incompatible with the equal treatment clause in Article 48 EEC Treaty, since national workers would rarely be confronted with a reduction in benefits.[10] Would the Court interpret the prohibition on discrimination on the ground of nationality in Article 18 TFEU of the same Treaty differently 30 years later, because the benefits would now be only reduced to the level in the Member State of origin, rather than not being paid abroad at all?[11] The Member States in the Decision promised that they would do their best to ensure a rapid adoption of both proposals.[12]

14.3.2. *Limiting security of residence of EU citizens*

In the Decision the Member States also agreed to expand the interpretation of the public policy exception allowing for expulsion of Union citizens in cases where that expulsion would not be allowed under the current interpretation of primary and secondary Union law (Article 45 TFEU and Articles 27 and 28 of Directive 2004/38) by the Court of Justice. The Decision states that Member States may take "the necessary restrictive measures to protect themselves against individuals whose personal conduct is likely to represent a genuine and serious threat to public policy or security. In determining whether the conduct of an individual poses a present threat to public policy or security, Member States may take into account past conduct of the individual concerned and the threat may not always need to be imminent. Even in the absence of a previous criminal conviction, Member States may act on preventative grounds, so long as they are

9 EUCO 10/16, p. 22 and Annex V on p. 33.

10 CJEU 15 January 1986, C-41/84, *Pinna I,* ECR I-17, par. 23-24; CJEU 2 March 1987, C-359/87, *Pinna II,* ECR I-610.

11 See also the contribution of Minderhoud: Chapter four in this volume.

12 EUCO 10/16, p. 23.

specific to the individual concerned."[13] This formulation departs on at least two grounds from the constant interpretation of the public policy exception in the EEC/EC/EU Treaty and the current TFEU by the Court of Justice since the 1977 *Bouchereau* judgment[14] until today, an interpretation which the Member States unanimously codified in 2004 in Article 27 of Directive 2004/38. Firstly, the requirement that threat to public policy needs to be actual or present has been implicitly deleted. Secondly, Member States and the Commission explicitly agreed that the important guarantee that Union citizens can only be expelled on the ground of serious criminal offences for which they have been convicted by a court would disappear. The procedural guarantees of criminal law, which, generally, offer citizens far more protection than immigration law procedures can be circumvented if Member States want to expel Union citizens.

The European Commission in Annex VII further declared that it would "clarify that Member States may take into account past conduct of an individual in the determination of whether a Union citizen's conduct poses a "present" threat to public policy or security. They may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned." The Commission also promised to clarify the notions of "serious grounds of public policy or public security" and "imperative grounds of public security". How, the Commission imagined that it had the power to depart from the constant case law of the Court and the text of a Directive in guidelines remains unclear.

Apparently, Member States and the Commission considered that guidelines might not be sufficient to amend Union law and they agreed that amendment of the secondary law was necessary to reach the desired goal. This explains the final and rather vague declaration that "on the occasion of a future revision of Directive 2004/38 on free movement of Union citizens, the Commission will examine the thresholds to which these notions are connected."[15] This implies amending Article 28 of Directive 2004/38. That occasion could have been present on short notice, since on the previous page of the same declaration the Commission promised to introduce a proposal to amend Directive 2004/38 in order to severely restrict the right to family reunification of mobile Union citizens.

13 EUCO 10/16, p. 21.

14 CJEU 27 October 1977, C-30/77, *Regina*, ECLI:EU:C:1977:172.

15 EUCO 10/16, Annex VII on p. 36.

14.3.3. *Reduction of the right to family reunification*

The most far-reaching change in free movement law is not mentioned in the Decision at all, but only in a declaration by the Commission in Annex VII. In the Decision the Member States under the heading "Interpretation of current EU rules" stated: "In accordance with Union law, Member States are able to take action to prevent abuse of rights or fraud, such as the presentation of forged documents, and address cases of contracting or maintaining marriages of convenience with third country nationals for the purpose of making use of free movement as a route for regularising unlawful stay in a Member State or address cases of making use of free movement as a route for bypassing national immigration rules applying to third country nationals."[16]

The Commission, accordingly, promised to clarify (read: publish guidelines) that: "Member States can address specific cases of abuse of free movement rights by Union citizens returning to their Member State of nationality with a non-EU family member where residence in the host Member State has not been sufficiently genuine to create or strengthen family life and had the purpose of evading the application of national immigration rules."[17] Moreover, the Commission redefined the concept of marriage of convenience, now covering "a marriage which is maintained for the purpose of enjoying a right of residence by a family member who is not a national of a Member State". According to the Commission this concept is not protected under Union law, although the concept is explicitly mentioned in Article 35 of Directive 2004/38 and Article 16 of Directive 2003/86. The Commission's declaration further disregards the far more restrictive definition in the latter Article: "the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State".

The Commission's declaration on reunification with third-country national family members goes far beyond the text of Decision of the Heads of Governments. The Commission in Annex VII expressed its intention "to adopt a proposal to complement [sic] Directive 2004/38 on free movement of Union citizens in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host Member State's immigration law will apply to the third country

16 EUCO 10/16, p. 21.

17 EUCO 10/16, Annex VII on p. 35.

national."[18] This last amendment would overrule the constant case law of the Court of Justice on EU nationals returning to their own Member State after having used their free movement rights in *Surinder Singh* (1992), *Eind* (2007) and *O & B* (2014).[19] The effect of this amendment would be that Union citizens would have to choose between remaining with their spouse in the host Member State or returning to the home Member State without his or her spouse, who would then remain alone in the host Member State or be obliged to return to a third country.

The right of workers (later Union citizens) to live in the host Member State with their third-country national family members was granted in 1961 in the first Regulation on the free movement of workers and was confirmed by the Court in its case law. In the *Metock* judgment the Court rejected the plea of several Member States that family reunification should no longer be a right of the EU national but subject to national immigration law.[20] The Court rejected that plea among others as contrary to the idea of an Internal Market with common rules, different rules on family reunification would then apply in each Member State and because the Union legislator could not reasonably have had in mind to place Union nationals in a worse position than lawfully resident third-country nationals whose right to family reunification had been granted in Directive 2004/86. After the *Metock* judgment some Member States (Ireland, Denmark, and the UK) in 2008 proposed to amend Union law in order to overrule this judgment, arguing "significant misuse" of the rules on family reunification. But France and other Member States voiced opposition and the proposal was dropped after the Commission's promise to issue Guidelines on the application of the Directive.[21] In 2011 the Dutch minority government published a position paper advocating reduction of the right to family reunification of Union citizens in Directive 2004/38 to the level of the far more restricted right to family reunification of lawfully resident third-country nationals under Directive 2003/86. That government depended on a formal agreement on immigration issues with Geert Wilders and on the votes of the MPs of his one-member political party for its majority in parliament. This Dutch proposal received little support from other Member States. But in 2016 in its Declaration in Annex VII, the Commission promised to go much further, by proposing complete abolishment of the right to family reunification in Union law for Union citizens moving

18 EUCO 10/16, Annex VII on p. 35.

19 CJEU 7 July 1992, C-370/90 *Surinder Singh,* ECLI:EU:C:1992:296; CJEU 11 December 2007, C-291/05, *Eind,* ECLI:EU:C:2007:771; CJEU 12 March 2014, C-456/12, *O & B,* ECLI:EU:C:2014:135.

20 CJEU 25 July 2008, C-127/08, *Metock*, ECLI:EU:C:2008:449.

21 See the report on the September 2008 JHA Council and Council documents nos. 15903/08, 16151/08, 16483/08, 10551/09 and 13467/09.

to other Member States. This would mean a return to the situation before the beginning of the first transitional phase of free movement in 1961. Did the Commission really think that the Court would no longer adhere to the arguments it mentioned in the *Metock* judgment in 2008?

14.4. *Wider implications of the Decision*

In the Decision the Member States for the first time since 1961 agreed to reduce the right to free movement of Union citizens. In the five decades after 1961 the Member States in the Council (until 2004 the main Union legislator) and the Court gradually extended the personal scope of free movement and the material and procedural rights attached to it. Moreover, the personal and geographical scope of free movement was extended with the accession of new Member States in 2004, 2007 and 2013. Only on a few occasions was free movement somewhat reduced by the introduction of a new restriction or the abolishment of a protective rule. The 2003 *Akrich* judgment[22], requiring admission of TCN family members under national law, which was explicitly overruled by the Grand Chamber of the Court five years later in *Metock* and the abolishment in Directive 2004/38 of the automatic suspensive effect of an appeal against a decision to end the residence right of a Union citizen which was part of free movement law since 1964 are examples of such rare regressions. Until recently, the general line of development extended free movement of EU citizens.

14.4.1. *A better deal for Britain, but also for other Member States?*

The Decision was presented as a "better deal" for Britain, but the new rules and new interpretations would apply, generally, to all 28 Member States. On the four issues discussed above, the Decision reflected not only British wishes but also old wishes of at least three other Member States. Three of the four issues (restriction of access of EU nationals to social benefits, wider possibilities for expulsion and restriction of reunification with TCN family members) were raised by the Ministers of Interior of Austria, Germany, the Netherlands and the UK in a letter to the EU Council in April 2013.[23] The European Commission in 2013 reacted with a letter pointing to the absence of data on the postulated abuse, fraud and benefits tourism of nationals of other Member States. This effort to give the debate a more rational basis failed as the authors of the letter did not provide serious data. The four Member States did not get much support in the Council and the letter gradually disappeared from the agenda of the Council.[24] Three

22 CJEU 23 September 2003, C-109/01, *Akrich*, ECLI:EU:C:2003:491.

23 Published in council document 10313/13 of 31 May 2013.

24 Groenendijk, K., 'Recent Developments in the EU Law on Migration: The Legislative Patchwork and the Court's Approach', *EJML* 2014, p. 313-335, at p. 318ff.

years later the same Member States were able to get more support from other Member States and the Commission, apparently, changed its position. The initial opposition changed to cooperation with Member States' wishes to an extent that at certain points were hardly compatible with the Commission's role as guardian of the Treaties in question.

The issue of reduction of child benefits for children of EU workers remaining in another Member State was not mentioned in the 2013 letter from the four Ministers. But reducing child benefits for children living abroad has been a recurrent issue in several Member States. The two *Pinna* judgments in the 1980s concerned the exception in the original Regulation 1408/71 allowing France not to pay child benefits for the children of Italian workers who remained in Italy. The German and the Austrian chancellor immediately after the adoption of the Decision on 19 February 2016 announced a reduction of child benefits for children living elsewhere in the EU and the Dutch authorities published the total amount of benefits paid to Polish nationals employed in the Netherlands for their children living in Poland (16 million euro in 2015).[25]

14.4.2. *Who can overrule the Court?*

Several elements of the Decision clearly intended to overrule established jurisprudence of the Court of Justice either by amending secondary law or by giving a (new) interpretation to existing primary and secondary Union law that clearly departs from or is hardly compatible with interpretations given by the Court. This concerns not only old and established judgments (*Bouchereau* 1977, *Pinna I* 1986, *Pinna II* 1989 and *Singh* 1992) but also more recent judgments such as *Eind* 2007, *Metock* 2008 and *O & B 2014.* In the EU just as in Member States the democratically legitimated legislator can overrule case law of the courts, within the limits set by the constitution or Treaties. But the legislator has to play by the rules in changing the law. He cannot simply dictate binding new interpretations without changing the law. This also applies in the EU: neither a consensus among Member States nor a statement by the Commission is sufficient for changing Union law. The case law interpreting the current law remains in force, until the Union legislator changes the rules or the Court decides that its previous case law is no longer valid. The Member States are Masters of the Treaties. With consensus they can amend the Treaties, but in February 2016 on paper they decided to leave the Treaties unchanged. The European Council Conclusions state that the "arrangements" of the Decision "are fully compatible with the Treaties". The first recital of the Decision states that Member States settled issues raised by the

25 *Suddeutsche Zeitung* 20 February 2016; *Die Presse* 20 February 2016; *Volkskrant* 16 April 2016. See also the contribution of Minderhoud: Chapter four in this volume.

United Kingdom in its letter of 10 November 2015 "in conformity with the Treaties".[26] But Member States cannot authoritatively declare that their new interpretations of the unchanged Articles 45 and 48 TFEU are correct, nor do they have the power to declare that the amendments of secondary law sketched in the Decision, if adopted by the legislator, are in conformity with the Treaties. That power resides with the Court of Justice only. The European Council is a political institution not a legislator. Member States only make primary Union law. Secondary union law is made by the Council and the Parliament upon a proposal of the Commission.

14.5. *Possible effects of the Decision*

The Decision of 19 February 2016 will probably never become legally binding on the Member States. As long as the Decision does not enter into force, none of the EU institutions will be bound by it. Nevertheless, the Decision may still be politically relevant and have real effects in the practice of EU institutions and Member States' authorities.

The *Commission* in three declarations attached to the Decision agreed to introduce proposals to amend Directive 2004/38, Regulation 883/2004 and Regulation 492/2011 and to publish new guidelines concerning the interpretation and application of Directive 2004/38. The Commission is not bound by its declaration when the Decision does not enter into force. Certainly, Commission guidelines cannot overrule the case law of the Court of Justice, however much Member States agree with the content of such guidelines. Most probably, between February and July 2016, Commission officials were busy preparing drafts of those documents, which are now stored in the files. Actually, the Commission and its officials may feel relieved, if after the negotiations with Member States' officials on the 2009 Guidelines for better application of the Directive and on its 2014 Handbook on marriages of convenience,[27] it does not have to negotiate and publish yet another document with different interpretations on the same issues. But the Commission may be asked to draft texts on the same issues during the negotiations on Brexit. There may well be demand for new rules on those issues on both sides of the negotiation table again.

The *Court of Justice* in pending or new cases may be confronted by Member States with the argument that the content of the Decision represents a consensus between Member States on how the current Union law on free movement should

26 See point 2 at p. 1 of conclusions EUCO 1/16 and p. 8.

27 COM(2009)313 and COM(2014)604.

be interpreted. The Court may feel political pressure to depart from its case law and implement some of the agreed changes in the Decision. The recent judgments in *Dano*[28], *Alimanovic*[29], *Garcia Nieto*[30] and *Commission/UK*[31] on the entitlement of Union citizens to social benefits are perceived as a similar response by the Court to the prolonged debate in several Member States on the so-called benefits tourism.[32] But departing from long-standing case law interpreting Treaty provisions on free movement or equal treatment of EU workers on the basis of a political decision that did not enter into force is quite another matter. As long as the outcome of the negotiations between the 27 Member States and the UK is unknown, it will be difficult and unattractive for the Court to anticipate that outcome.

In the Member States which in recent years have been lobbying in Brussels for similar restrictions of free movement as formulated in the Decision, *politicians and national immigration authorities* may be inclined to consider the consent of other Member States in February 2016 as a sign of support for their views and start to apply the new interpretations of the existing EU free movement law concerning the public policy exception or family reunification at national level through changes in national law or administrative practices. Member States are bound to apply Union law as interpreted by the Court, but it may take years before a case on such premature application of the standards formulated in the Decision reaches the Court.

Finally, the *remaining 27 Member States*, especially the ones that for many years have been campaigning for these changes, could be inclined to use the negotiations with the UK on the consequences of the forthcoming Brexit as an opportunity to introduce some of the changes formulated in the Decision into Union law as part of the new deal with the UK. This may be the case, if the UK opts to become an EEA State (the "Norwegian model"); amending certain EU/EEA rules in order to restrict free movement could be attractive also in selling this outcome in the UK to those who voted to leave the EU. In February 2016 Member States tried to address the wishes of the UK government without amending the Treaties. The departure of the UK from the Union will make

28 CJEU 11 November 2014, C-333/13, *Dano*, ECLI:EU:C:2014:2358.

29 CJEU 15 September 2015, C-67/14, *Alimanovic*, ECLI:EU:2015:597.

30 CJEU 25 February 2016, C-299/14, *Garcia-Nieto*, ECLI:EU:C:2016:114.

31 CJEU 14 June 2016, C-308/14, *Com/UK*, ECLI:EU:C:2016:436.

32 See: Sandra Mantu & Paul Minderhoud, *Social rights as a case of Europeanization through law. The role of CJEU jurisprudence,* Nijmegen Migration Law Working Papers Series, no 2016/01, Nijmegen: Radboud University Nijmegen.

amendment of the Treaties unavoidable and thus create an opportunity to amend the Treaties on other issues as well. It is a political question whether the 27 Member States will be prepared to grant the UK more room to restrict the movement of their nationals to and from the UK, once the UK is no longer an EU Member State, than they granted the UK in February 2016 with the aim of avoiding the Brexit.

14.6. *Union citizens and third-country nationals will be affected*

Who will be affected if the changes in EU free movement law formulated in the Decision in one way or another come into force some day in the future? The categories primarily affected will be workers from Member States that recently acceded to the Union, EU workers with little education and income, EU citizens of immigrant origin and nationals of third countries. Most students and highly educated or well paid workers, irrespective of their nationality, will only be marginally affected.

The exclusion from social and tax benefits and the reduction of child benefits will primarily affect workers and the self-employed with a low income. The benefits are designed especially to assist low income groups. For those with a higher income child benefits represent only a small proportion of their income. Workers from "new" Member States, employed in "old" Member States, tend to be employed in low paid jobs. Moreover, they will, on average, have shorter periods of residence than mobile workers from "old" Member States and thus will rarely be affected by the "emergency brake". Replacement of EU free movement rules on family reunification by the national rules of Member States will put an additional burden on low income workers unable to meet the national income requirement without taking an additional job. Several Member States in recent years have raised the income requirement in order to reduce family migration. Under the current UK rules persons with an income below the national median de facto are excluded from reunification with their non-EU family members. In the Netherlands almost half of the refusals of family reunification with non-EU family members are founded on the sponsor not meeting the income requirement.[33]

Union citizens of immigrant origin clearly will be affected more often than other ("native") Union citizens by the abolition of the right to family reunification with

33 Kulu-Glasgow, I. *et al.* (2016), *Schijn bedriegt, Een onderzoek naar de prevalentie en verschijningsvormen van schijnrelaties*, WODC cahier 2016-6, The Hague: Ministry of Security and Justice, p. 79.

third-country national family members, since the first group will more often have relationships with third-country nationals and more often marry third-country nationals than "native" Union citizens. EU citizens of immigrant origin, generally, will be more mobile within the EU than "native" EU citizens, if only because they will have more often family members, friends or co-ethnics in other Member States than the "native" Union citizen. Hence, they, arguably, will also be more often affected by the other three restrictions formulated in the Decision.

The Decision of February 2016 deals almost exclusively with the rights of Union citizens. Only the abolishment of the EU right to live together with third-country family members and of the right to accompany the EU spouse or parent returning to his or her home Member State will clearly have direct negative effects for those non-EU family members. But the changes in free movement law, if actually implemented, will in several ways have far-reaching indirect effects for the rights of third-country nationals.

Firstly, abolishment of the right of EU nationals to live with their non-EU family members in another Member State, as provided in Community and EU law since 1961, and making their family reunification dependent on national law, will raise the question of whether EU nationals in this respect can be treated less favourably than lawfully resident third-country nationals who have a right to family reunification granted by Directive 2003/86. It will be hard to justify this difference in treatment under Articles 8 and 14 ECHR. This will then in turn result in pressure by Member States to reduce the level of rights granted to third-country nationals in that Directive.

Secondly, in several Directives and other instruments on third-country nationals the Union legislator used the rules of free movement as a model or used the same concept as in instruments on free movement of Union citizens. In a series of recent judgments the Court of Justice interpreted those concepts in instruments on third-country nationals as having the same or a similar meaning. For instance, the Court held that the concept of "risk to public policy" in the Returns Directive, the Refugee Qualification Directive and the Reception Conditions Directive presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of by way of analogy with its case law on the public policy exception in the rules on free movement of Union citizens.[34] If the current interpretation of the concept of public policy in

34 CJEU 11 June 2015, C-554/13, *Zh & O,* ECLI:EU:C:2015:377, point 60 with regard to Article 7(4) of Directive 2008/115; CJEU 24 June 2015, C-373/13, *H.T.,* ECLI:EU:C:2015:413, point 79, with regard

rules on Union citizens is amended in a restrictive way, because of the analogous interpretation by the Court, this will most probably have the effect of reducing the rights and protection of third-country nationals under Union law as well. The same will apply to Turkish nationals, since the Court has interpreted the public policy exception in Association Council Decision 1/80 as having (almost) the same meaning as the similar exception in the rules on EU workers.[35]

Thirdly, the rights of certain categories of third-country nationals are explicitly linked to those of EU nationals in a similar position. Article 59 of the Additional Protocol to the EEC-Turkey Association Agreement provides: "In the fields covered by this Protocol Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community." According to the non-discrimination clause in Article 3 of Association Council Decision 3/80 Turkish workers employed in the EU are entitled to full child benefits for their children living in Turkey. If the rights of EU workers to child benefits for children living outside the host Member State are reduced, a similar reduction will automatically apply for Turkish workers as well.

14.7. *Conclusions*

Until now the ordinary legislative procedure in the EU has functioned as a brake on demands from Member States to amend the rules on free movement of Union citizens in order to restrict free movement and de facto exclude certain categories of EU citizens. Over the last decade, the UK and some other Member States, with respect to three of the four main elements of the Decision relating to free movement, have tabled suggestions or concrete proposals for amendments to the EU rules. Only the "emergency brake" was a completely new and British issue. The negotiations with the UK provided these Member States with the opportunity to realise old wishes without having to respond to the European Commission's demand for facts instead of sentiments supporting the desired changes.

By choosing the form of an intergovernmental agreement and by convincing the Commission to propose amendments in secondary law and to make declarations that amounted to new interpretations of primary and secondary Union law

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to Article 24(1) of Directive 2004/83 (now Directive 2011/95); CJEU 15 February 2016, C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:284, points 64 ff with regard to Article 8(3) of Directive 2013/32.

35 CJEU 10 February 2000, C-340/97, *Nazli*, ECLI:EU:C:2000:77 with a restriction in CJEU 24 September 2013, C-221/11, *Demirkan*, ECLI:EU:C:2013:583.

departing from settled interpretations of the relevant instruments by the Court of Justice, the Member States tried to circumvent the constitutional arrangement of the EU and minimize the role of the European Parliament and the national parliaments. This road was paved and legitimized by the Council's Legal Service. The Decision of 19 February 2016 is a clear example that intergovernmental cooperation is not an attractive alternative for cooperation within the EU. Intergovernmental cooperation provides far fewer guarantees for democratic participation in the legislative process than the current rules on law making in the EU, provided that those rules are observed.

The UK and other Western European Member States in the Decision agreed to reduce the rights of workers from Central European Member States and of unskilled workers from other Member States. The Decision illustrates the lack of solidarity of the richer Member States with the less rich ones. In this respect the position of the Visegrad countries in the forthcoming negotiations on Brexit will be of interest. Those negotiations, probably, will take more time and be more visible than the negotiations on the Decision.

The Decision constituted a clear effort by Member States to shift competence from EU level to national level. It is a clear example of renationalization ("repatriation of sovereignty") with respect to one of the four central freedoms of the Treaties. The Decision would have made the EU a less social and more economic undertaking. The decrease in equal treatment with regard to basic social rights, the abolishment of the right to family reunification and the reduction of the security of residence would have removed three essential elements of Union citizenship. EU nationals residing in another Member State were to become more "foreigners" and less citizens. The agreed reduction of rights of EU nationals would have reduced rights of third-country nationals as well. This side effect did not get any visible attention during the negotiation process. Would this reduction have enhanced the integration of the large majority of EU nationals and TCNs lawfully residing in the Member States or would it have created new barriers to that integration?

The Decision most probably will never enter into force. But it has to be seen how the 27 remaining Member States will approach the same issues during the forthcoming negotiations on Brexit. Will the governments of some Member States use these negotiations as another opportunity to reduce the rights of Union citizens, in the hope of appeasing and re-attracting their citizens voting for populist or anti-immigrant parties?

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