

Politicians are clearly misreading EU provisions regarding freedom of movement

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UKIP's success in the Clacton by-election has prompted further unease in Conservative and Labour ranks, with free movement of people in the EU, a cornerstone of the Union, now suddenly under fire from the political elite. [Brad Blitz](#) writes that the shift in tone is not only at odds with previous policies, it reflects a clear misreading of EU provisions regarding the free movement of people. The free movement of people is not an absolute right and does not guarantee automatic access to the UK; states are still permitted to treat nationals and EU citizens differently and prevent benefit fraud and welfare tourism.



After 21 years UKIP finally secured a seat in Parliament, prompting both the Conservative and Labour parties to express their desire to revise European Union provisions regarding the free movement of people. Prime Minister David Cameron went on record to say that within the EU, citizens from new EU Member States should not have automatic access to the UK's labour market and that he supported a crack-down on benefits. London Mayor Boris Johnson stated that freedom of movement was central to negotiations over Britain's future in the European Union and suggested that it was a deal-breaker. Labour's Shadow Chancellor Ed Balls, though more circumspect and committed to Britain's membership of the EU, nonetheless called for raising the qualification period for unemployment benefits and argued that Britain must put a stop to the practice of EU migrants sending child benefit back to their families outside the UK.

The cross-party fury over freedom of movement is not informed by statistical evidence regarding levels of immigration from the new European Union Member States. [According to the Office of National Statistics \(ONS\)](#), between March 2013 and March 2014 an estimated 560,000 people immigrated to the UK. Though a substantial increase on the previous year when the UK received 492,000 migrants, almost half of those who arrived in 2014 were non-EU citizens (265,000). While the overall increase in UK immigration figures is attributed to EU nationals, the ONS records that only 28,000 'new Europeans', [Romanians and Bulgarians](#), moved to the UK during that period. The vast number of EU nationals who entered the UK, including these Romanians and Bulgarians, did so in pursuit of work or study.

Why has the immigration of EU nationals become such a political bugbear? For more than a decade the UK has received considerable numbers of EU nationals, the largest originating from Poland. The arrival of hundreds of thousands of migrants arguably poses a challenge to the existing social infrastructure just at a point when it is calling out for modernisation, especially in the health and education sectors. But previous British governments actively supported EU enlargement, which has been a consistent plank of UK foreign policy. Until recently both the Conservative and Labour parties expressed at least a qualified support in favour of immigration from the European Union.

Unlike most other EU member states, the UK government chose not to impose significant transitional provisions to delay the right of freedom of movement to nationals from the A10 countries – Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia – when these states joined the EU in 2004. Instead the UK opted for a registration scheme for workers of eight of the new Member States. While both the previous Labour and Conservative governments fought to protect UK rights to control immigration – the UK has never joined Schengen – British governments have, until recently, openly respected the rights of EU nationals to freedom of movement (as opposed to asylum seekers and migrants from outside the EU). In contrast to fringe nationalist parties including UKIP, which have seized upon the rise in migration as [their principal cause](#), the main parties have generally worked within the EU system.

The latest declarations from David Cameron and Boris Johnson, however, point in a different direction. The shift in tone is not only at odds with previous policies, it reflects a clear misreading of EU provisions regarding the free movement of people. The free movement of people is one of the fundamental freedoms that underscores the EU but it is not an absolute right and does not guarantee automatic access to the UK. The free movement of workers was historically treated in the context of production where labour was a central input and the desire was to remove national barriers rather than press for a common European right to mobility per se.

The rights to free movement are set out in the consolidated version of the Treaty on European Union (TEU) signed in Maastricht in 1992 and the [Treaty on the Functioning of the European Union](#) (TFEU), formerly known as the EC Treaty, signed in Rome in 1957. In addition, there is an important body of secondary legislation and the right to freedom of movement has been further clarified by the EU Court of Justice, giving rise to a significant body of case law.

While the right to free movement has been expanded, via jurisprudence or through legislation, and most clearly by the introduction of the [Citizenship Directive](#) (2004/38/EC) which encourages EU citizens to exercise their right to move and reside freely within Member States, there remains an important divide between those who may benefit from the right to freedom of movement.

The legislation extends access to the Single Market beyond the original beneficiaries, namely workers and self-employed persons, to people who enjoy various types of economic status. Nonetheless, several categories remain outside the scope of existing EU free movement provisions. This includes non-economically active people (with no family link to an EU economically active citizen) who fail to meet the test of self-sufficiency (e.g. the ill, elderly and unemployed); and non-EU nationals who cannot derive rights on the backs of family members. One obvious point of exclusion stems from the transitional provisions which qualify the right to free movement for nationals of new EU Member States.

Both the Treaty of Accession of 2003 and the Treaty of Accession of 2005 include transitional provisions which set out transition periods before workers from new member states are able to enjoy full rights to freedom of movement. Individual member states may restrict the right to work of EU citizens from the acceding states for up to seven years from the date that their home state joined the EU. In the case of Bulgaria and Romania, this period expired at the end of December 2013. Croatian citizens of the EU, however, have been denied the full/free movement rights afforded to other European nationals until 2020 and must apply for work permits in other EU member states. Although migrants who are subject to these transitional arrangements are entitled to equal treatment with national workers after a period of employment, these transitional arrangements enable social assistance and services to be refused.

Moreover, states are still permitted to treat nationals and EU citizens differently when they can demonstrate a justified distinction. Member States' actions must be in pursuit of a legitimate public interest and must be proportionate. EU Law prohibits clearly arbitrary rules and collective blanket-bans. This applies to areas which may be considered basic rights by large sections of the European population and include, for example, affordable education and decent housing. The case of *Förster* (C-158/07) illustrates this point. Förster was a German national who had been denied a grant to study because she was economically inactive and had not been a resident in the Netherlands for five years. In this case the Court ruled that the Dutch authorities were permitted to deny her the funding that would have been available to Dutch nationals. This was not a matter of nationality-based discrimination but rather a conclusion that she had not satisfied the criteria for integration – in this case, the residence test. In fact, there are many conditions that may be imposed before an EU citizen from another member state is able to access welfare support in the UK, and the government has been able to introduce several new restrictions within the existing framework of EU law.

Previously the Commission has found that the free movement provisions are not sufficient in themselves to promote mobility. The numbers benefiting from the exercise of free movement rights remain low by comparison with the inward migration of third country nationals into the European Union. Eurostat records that only 2.3 per cent of EU

citizens reside in another member state and that almost two-thirds of migrants come from countries outside the EU.

Despite the introduction of EU legislation on free movement, there are still multiple legal, administrative and practical obstacles that complicate the exercise of free movement. These include the recognition of qualifications and portability of supplementary pension rights as well as more typical challenges that face any migrant, for example, housing, knowledge of a foreign language, the employment of spouses and partners, return mechanisms, historical 'barriers' and the recognition of mobility experience, particularly within SMEs.

In spite of the development of EU case law, the introduction of the Citizenship Directive, and the promise to respect the rights of family members as set out in Regulation 492/2011 (formerly 1612/68), the practical enjoyment of the right to free movement rests on the satisfaction of several conditions. This includes not only overcoming the societal challenges associated with relocation from one country to another but also political requirements.

The UK government has sufficient tools at its disposal to address the problems of benefit-cheating among what must be a small population of new EU nationals. EU law already allows British authorities to fight potential fraud and welfare tourism, even though the government has yet to provide evidence of the scale or indeed existence of the problem. Furthermore, the suggestions made by the UK government amount to arbitrary blanket rules which are clearly not compatible with EU law. Rather, the government should simply implement EU law on a case-by-case basis instead of answering UKIP's overblown alarm call to curb the right to freedom of movement.

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