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HOUSE OF LORDS MOVES TO PROTECT EU CITIZENS IN THE PROCESS TO TRIGGER ARTICLE 50

The draft legislation needed to authorise the Government to notify the UK's intention to withdraw from the EU, the European Union (Notification of Withdrawal) Bill, has been making its way through Parliament since it was introduced on 26 January this year. It went through the House of Commons without any of the proposed 140 pages of amendments being accepted and was approved by a majority of 372. It then progressed to the House of Lords for two days of debate this week. The Government does not have a majority in the House of Lords, and many more peers supported Remain than Leave in the referendum campaign, but it was thought unlikely that the Lords would seek to amend a bill that had been approved by such a large majority in the Commons.

Nevertheless, the Lords have approved an amendment to the Bill to protect the rights of EU citizens currently living in the UK. The proposed amendment is as follows:

Within three months of exercising the power under subsection (1), Ministers of the Crown must bring forward proposals to ensure that citizens of another European Union or European Economic Area country and their family members, who are legally resident in the United Kingdom on the day on which this Act is passed, continue to be treated in the same way with regards to their EU derived-rights and, in the case of residency, their potential to acquire such rights in the future.

The rights of EU citizens resident in the UK, estimated to be over 3,000,000, have been the subject of much debate in the media. Although privately most Conservative commentators concede that it is almost unthinkable that the group would not be given the right to remain post Brexit, the Government's position has been that it would not give any such assurance without a reciprocal undertaking from the EU in relation to UK citizens living there. That group is estimated to be in the region of 1,000,000, of whom around 300,000 are retirees resident in Spain. The Government acknowledged in its White Paper that "securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of [its] early priorities for the forthcoming negotiations", and has been at pains to stress that it would have preferred to resolve the issue ahead of the negotiations, but this has been resisted by the EU. Nevertheless it has led to accusations that the UK Government is using the rights of 3,000,000 people as a "bargaining chip". In fact, there is no EU-wide migration policy for non-EU citizens, and it may well not be within the gift of the EU to grant EU-wide rights to UK citizens resident in the EU after Brexit. Many commentators in the UK believe that it would be better for the UK to recognise the rights of EU citizens unilaterally, in the interests of securing the goodwill of those citizens and their home countries.

Conceptually, the protection of the rights of EU citizens in the Bill does seem consistent with the reasoning in the Supreme Court's ruling in the Miller Case, which decided that the Government did not have the right to deprive citizens of rights (as will be an inevitable consequence of leaving the EU) without the approval of Parliament. However the Government see the Bill as a purely mechanical device to meet the legal requirement identified by the Supreme Court, hence the brevity of the Bill (it runs to seven lines without the amendment).

WHAT HAPPENS NEXT?

The Bill will be further debated in the House of Lords on 7 March. It is thought that a further amendment will be proposed and may well be voted through, namely, to require the Government to enshrine greater Parliamentary scrutiny of the negotiation process and the promised vote of both Houses on the final deal. The Bill, with the proposed amendment and any further suggested amendments, will then go back to the House of Commons for a further vote. This could mark the beginning of a phase known as "ping-pong" when the two Houses bat a piece of legislation to and fro until agreement is reached or legislative time runs out. In the present case Labour's leader in the Lords has ruled out any attempt to "kill" the Bill. Accordingly, it will be for the Commons to decide whether to accept the Lords' proposed amendments. Interestingly, an amendment to protect the rights of EU citizens in the UK was defeated by a margin of only 42 at the House of Commons committee stage; it remains to be seen whether the House of Lords' challenge will embolden members of the Commons when they vote this time.

In any event, it seems Mrs May is still on track to meet her self-imposed deadline of 31 March to trigger Article 50.



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