CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Legitimacy of Discriminatory Disenfranchisement? The Impact of the Rules on the Right to Vote in the Bremain/Brexit Referendum

by

Allan F. Tatham*

Perspectives on Federalism, Vol. 8, issue 1, 2016

Abstract

The Divisional Court of the Queen's Bench Division of the England and Wales High Court handed down its decision on 20 April 2016 in the judicial review case of *Shindler*. This ruling confirmed that British citizens living in other EU Member States for more than 15 years remain barred from voting in the June 2016 referendum.

The case sparks further consideration of the voting rules in general and may therefore be of interest to others in considering questions of legitimacy in respect of the eventual outcome of the popular vote on 23 June. Unlike other states, the UK has no established rules on referendums and each such popular vote (and the franchise for it) is therefore treated on an *ad hoc* basis. Fears have been expressed that the government could manipulate the outcome of a referendum, particularly in determining a different franchise for each popular vote.

Key-words

United Kingdom, Brexit referendum, disenfranchisement

1. Introduction

Amid the tumult of the ongoing EU referendum campaign in the United Kingdom, the Divisional Court of the Queen's Bench Division of the England and Wales High Court handed down its decision on 20 April 2016 in the judicial review case of *Shindler*.[I] This ruling confirmed that British citizens living in other EU Member States for more than 15 years remain barred from voting in the June 2016 referendum.

The case sparks further consideration of the voting rules in general and may therefore be of interest to others in considering questions of legitimacy in respect of the eventual outcome of the popular vote on 23 June. Unlike other states, the UK has no established rules on referendums and each such popular vote (and the franchise for it) is therefore treated on an *ad hoc* basis. Fears have been expressed that the government could manipulate the outcome of a referendum, particularly in determining a different franchise for each popular vote: in the June vote, the effective disenfranchisement of possibly three million prospective voters could allow the scales to tip in favour of Brexit and thus against the current Conservative Government's avowed policy of Bremain.

2. Background

When the Conservative Government under David Cameron decided to adopt the UK rules on the franchise in nationwide general elections for the forthcoming EU referendum,[II] it was following in the footsteps of the Labour Government under Harold Wilson that had done the same in the 1975 referendum on continuing EEC membership.[III] Since then, the European Union has created the concept of EU citizenship including the active and passive right to vote in local and European parliamentary elections,[IV] with the Court of Justice (CJEU) evolving such citizenship rights in a series of cases.[V] The EU Charter of Fundamental Rights merely reiterates the voting rights under the Treaties and does not contain a general right to vote.[VI]

The position taken by the British Government and Parliament to the franchise in the EU referendum may be contrasted to the one decided for the Scottish Independence Referendum of September 2014: this latter franchise was much more extensive and

inclusive, thereby seeking to gain more legitimacy for the final decision rendered by the electorate in that vote. Pursuant to the 2012 Memorandum of Understanding[VII] concluded between the British and Scottish governments, the Scottish Parliament decided to use the voting rules for Scottish parliamentary and local elections in the Independence Referendum as well as to lower the usual voting age from 18 to 16. Grounding the eligibility criteria on residency rather than on citizenship alone, EU citizens in Scotland were able to vote as well as Irish and Commonwealth citizens resident there. However, a line was drawn at giving Scottish people living in other parts of the UK or in other EU Member States the right to vote. It could be argued that it would have been difficult (absent some form of nascent concept of Scottish citizenship) to determine who these people were as ancestry and links would have needed to be considered; and that such voters represented a bloc more broadly in favour of keeping Scotland in the UK (BBC News 2012).

The British Parliament's decision then has clear consequences: on the one hand, it excludes 16 and 17 year olds; most EU citizens resident in the UK; and British citizens resident for more than 15 years abroad,[VIII] whether or not in another EU Member State;[IX] while, on the other, resident Irish and Commonwealth (including Cypriot and Maltese) citizens – who have the right to stand and vote in general elections in the UK – will have the right to vote in the referendum.[X] Further anomalies abound: for example, British citizens living abroad for up to 15 years can vote whereas EU citizens living in Britain for 15 years or more are unable to vote despite extensive ties to the country.

3. The *Shindler* case

The claimants, Shindler and MacLennan, had not been registered to vote in British elections for more than 15 years. They brought a judicial review of the European Union Referendum Act 2015 on the grounds that its provisions restricted their directly effective EU law rights of freedom of movement in a manner that was not objectively justifiable. They submitted that their exclusion from the EU referendum franchise, on the basis that they had exercised their EU free movement rights for too long, fell within the scope of and was incompatible with EU law because it disadvantaged them for having exercised their rights in EU law; and further it discouraged them from continuing to exercise their free

movement rights, since they would be required to return home to the UK in order to be able to vote in the EU referendum.

The judges on the bench of the Divisional Court made a meticulous examination of the previous relevant case-law on the CJEU as well as of the European Court of Human Rights in Strasbourg before which one of the present claimants, Shindler, had previously brought an action against the UK.[XI] In fact, the Divisional Court extensively quoted with approval the Strasbourg Court in *Shindler v United Kingdom*, which latter court had ruled that there had been no violation of Article 3 of Protocol No. 1 (right to free elections) of the European Convention on Human Rights 1950 and determined that the UK had legitimately confined the parliamentary franchise to those citizens who had "a close connection to the UK and who would therefore be most directly affected by its laws." The Strasbourg Court had further stated in relation to the 15-year rule:[XII]

> The justification for the restriction was based on several factors: first, the presumption that non-resident citizens were less directly or less continually concerned with their country's day-to-day problems and had less knowledge of them; second, the fact that non-resident citizens had less influence on the selection of candidates or on the formulation of their electoral programmes; third, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and fourth, the legitimate concern the legislature might have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.

The Divisional Court accepted that recent statements on behalf of the British Government which described the 15-year rule as arbitrary and which showed that it was committed to repealing it in its application to the parliamentary franchise. In fact, the Conservative Party had promised in its *2015 Election Manifesto* to abolish the 15-year limit altogether[XIII] and the bringing forward of the Votes for Life Bill to that effect had been promised in the Queen's Speech (setting out the present Government's legislative programme) on 27 May 2015.[XIV] However this government position did not undermine the justification for the British Parliament's decision to retain that rule for the 2016 referendum. The Court evidently considered that this was a matter solely for national law

and therefore there was no consideration of an Article 267 TFEU reference: it therefore ruled in favour of the British Government, recognizing that Parliament was entitled to conclude that applying the 15-year rule to the EU referendum was justified as a measure in support of a legitimate aim, namely requiring a relevant connection to the UK as a qualification for the franchise.

4. Clear implications of legitimate discriminatory disenfranchisement

The implications of this legitimate discriminatory disenfranchisement, however, were not far from the minds of the judges on the bench of the Divisional Court, when they observed:[XV]

> We acknowledge the very real and personal interest which these claimants have in the outcome of the EU referendum. If the United Kingdom leaves the European Union, they, in common with an estimated 1 to 2 million British citizens currently resident in other Member States of the European Union, will certainly be deprived of their EU citizenship and the important rights which accompany that status. In these circumstances it would clearly have been open to Parliament to decide that the franchise for the referendum should be extended to all citizens of the United Kingdom resident in other Member States of the European Union who wish to register to vote.

The iniquity of such rules is not just linked to the UK. A 2013 Study prepared for the European Parliament's Constitutional Affairs Committee (Arrighi *et al.* 2013) highlighted the discrepancies of rules for expatriate voters in national elections in their home State. At one end of the spectrum, citizens in the overwhelming majority of expatriate citizens in EU Member States retain their right to vote in such elections irrespective of their residency, while those of other Member States (Cyprus, Denmark, Ireland, Malta and the UK) lose such rights when taking up permanent residency in a third country, subject to certain qualifications. The expatriate franchise for national referendums is more restricted with Germany, Hungary, Portugal and Slovakia added to the five states listed above.

The discriminatory nature of these differences in the EU and their result was underlined in the 2010 *EU Citizenship Report*[XVI] in that EU citizens from certain Member

States are disenfranchised in national elections of their home Member State once they have resided in another Member State for a given period of time. In fact, no Member State has a general policy granting Union citizens from other Member States residing on its territory the right to vote in national elections. Consequently, disenfranchised Union citizens are usually left without the right to vote in national elections in any of the Member States. In order to alleviate such differences, the European Commission recommended in 2014[XVII] that where Member States' policies limited the rights of their nationals to vote in national elections based exclusively on a residence condition, such States should enable their expatriate nationals (who make use of their right to free movement and residence in the EU) to demonstrate a continuing interest in the political life in their State of origin, including through an application or a reapplication (by electronic means) after a number of years in order to remain registered on the electoral roll and, by doing so, to retain their right to vote.

Stepping aside from the purely legal aspects of the matter, the *Shindler* case actually raises a couple of interesting points more political in effect than legal. First, the Divisional Court acknowledged that it had been open to the British Parliament to extend the franchise to British citizens resident in other EU Member States, irrespective of time spent living there: one might ask the question, "Why then did the British Government/Parliament not so extend the franchise, especially in regard to 'the very real and personal interest which [such persons] have in the outcome of the EU referendum'"?

Indeed, challenging the words of the Strasbourg Court in *Shindler v. United Kingdom*, the Hansard Society has previously observed:[XVIII] "[T]his state of affairs causes huge resentment among our fellow countrymen and women in other countries. Most of them have gone abroad to work and to advance British interests; they represent an immensely important source of soft power for the United Kingdom." Moreover, British citizens living in EU Member States are not indifferent to, or ignorant of, what is happening in their own country. Modern technology enables them to follow closely what is going on and take part in social and political developments in their home State, whether through satellite television, the internet or various social media or through the extensive network of low-cost airlines and frequent travel back to family and friends in "the mother country."

Even more telling is another issue raised above: the Strasbourg Court focused on the legitimacy of the UK in restricting voting rights in general elections of non-resident British

citizens. But turning the words of this Court on their head, then what happens when British rules on the referendum discriminate not on grounds of free movement but on grounds of actual nationality? According to British election rules, adopted for the 2016 referendum, there are now effectively two classes of EU citizen living in the UK – the first, privileged group contains British, Irish, Cypriot and Maltese citizens while the second-class group contains all the rest. One wonders whether a Hungarian, a Dutch or another citizen from an EU Member State from the second group, resident in the UK, could not have challenged the referendum voting rules on the grounds of discrimination of nationality. After all, the Scottish Parliament allowed such citizens to vote in the 2014 Independence Referendum and, as noted by the Divisional Court in *Shindler* in reference to the 15-year rule discussed above, it would clearly have been open to the British Parliament to decide that the franchise for the referendum should be extended to all citizens from the EU: Why then did this not happen?

It might be claimed that both points were logistically impossible to achieve, within the timeframe provided, once the referendum was to become a reality rather than a distant possibility, following the May 2015 general election victory by the Conservative Party. Still EU citizens are required to register for the elections for May 2016 in the three smaller nations of the UK as well as for local ones in England, so that part is not problematic on grounds of organization. For British citizens abroad, a public awareness campaign (targeted at expatriate communities in particular, through printed and virtual media) could have encouraged more citizens to register to vote but the official view of such British nationals abroad is perhaps best summed up in the words of the Hansard Society: "[T]here is a lack of political will to safeguard and promote the interests of British citizens overseas. They are the forgotten voters."

Misgivings in relation to the 2016 referendum franchise already been raised online and in the media although, as might be imagined, not on the part of the Tory tabloids or broadsheets. Alberto Nardelli's article for *The Guardian* newspaper (Nardelli 2015) provided some thought-provoking ideas when he considered that a variety of possible factors based on nationality, residency and age might sway the EU referendum by as many as 7.6 million votes and thus change the result. For British expats living more than 15 years in other EU Member States, he notes that "the outcome of the referendum may have an impact on [their] lives…. At the very least it could curtail ease of doing business and access to benefits

and services. At the extreme, it could lead to some having to return to Britain." For EU citizens, he employs this argument again, observing that many have lived in the UK for a number of years (perhaps longer than in their country of origin): "They consider Britain to be their home. They have family here. They pay their taxes here. Yet, they may not have a say in a decision that would have a huge impact on their lives."

Moreover, Katie Ghose blogging on the website of the Electoral Reform Society (Ghose 2015) has noted that a further problem with a government's ability to alter the franchise for each referendum was "a perception that the voting intentions of one or another group are second guessed and factored into the decision. This can add to the general sense – fairly or unfairly – that politicians are gaming the system to suit themselves, rather than embarking on an open conversation about a matter of huge national significance."

So one begs the question again: Why would the British Parliament (and the Conservative Government) pass up on the opportunity of allowing two voting constituencies to participate in the June 2016 referendum, members of which would probably be broadly in favour of continuing EU membership (without discussing the preferences of 16 and 17 year-old voters).

One might point to opposition within the Eurosceptic ranks of the Conservative Party itself to do so and/or the potential negative reaction in the right-wing Tory press that could be used by opposing forces to undermine the message of "sceptical Bremain," promoted by the Cameron Government. Perhaps the voting force of 1.8 million British citizens in the EU and the 2.7 million EU citizens in the UK[XIX] that could eventually carry the day to remain, was too much to bear for an intensely insular electorate?

And if the Conservative Party is actually wedded to the idea of the probable one million Commonwealth citizens (Migration Watch UK 2013)[XX] being able to carry the vote for Bremain, might not this be undermined by the almost complete lack of reciprocity that such rights accrue to British citizens resident in Commonwealth states which, for the most part,[XXI] do not grant the right to such Britons to vote in their own national elections? Even if British citizenship is not an option for other citizens from the Union, perhaps one should ask their governments to expose such anachronism to the British public by seeking Commonwealth membership, some of whose states (Mozambique and Rwanda) have

never been under British rule unlike[XXII] Austria, Croatia, Denmark, France, Germany, Greece, Netherlands and Portugal?

In whatever way it may be considered, on the eve of the referendum, discriminatory disenfranchisement of two large, important voting constituencies certainly runs the risk of undermining the democratic legitimacy of the eventual result.

---

* Lecturer in EU Law, Faculty of Law, CEU San Pablo University, Madrid.

I *Shindler and MacLennan v. Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin).

II European Union Referendum Act 2015 (c. 36), s. 2: http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted accessed 1 May 2016.

III On the 1975 referendum, see Tatham 2009: 23-25.

IV Articles 20(2)(b) and 22 TFEU.

V As the CJEU stated in Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, at paragraph 31: "Union Citizenship is destined to be the fundamental status of nationals of the Member States." See also, e.g., Case C-413/99 *Baumbast and R. v. Secretary of State for the Home Department*, ECLI:EU:C:2002:493; and Case C-200/02 *Zhu and Chen v. Secretary of State for the Home Department*, ECLI:EU:C:2004:639.

VI Articles 39 and 40 CFR.

VII For full details and documents, see http://www.gov.scot/About/Government/concordats/Referendum-on-independence accessed 2 May 2016.

VIII The Representation of the People Act 1985 provided for British citizens resident abroad to be able to remain on the electoral register for a period of five years while the Representation of the People Act 1989 extended the period to 20 years. The Political Parties Elections and Referendums Act 2000 reduced the period to 15 years. For an excellent discussion of this issue, see I. White, "Overseas voters," *Briefing Paper* No. 5923, House of Commons Library, 7 March 2016: http://researchbriefings.files.parliament.uk/documents/SN05923/SN05923.pdf accessed 3 May 2016.

IX In 2015, an Overseas Voters Bill was presented to Parliament as a private member's bill, proposing the removal of the 15-year limit to the ability to register. The legislation did not proceed but the present Government expressed sympathy with the aim and intends to bring forward a "Votes for Life" Bill that would abolish the 15-year period.

X This means, in effect, that one group of EU citizens – Irish, Cypriot and Maltese citizens (Cyprus and Malta are part of the Commonwealth) – are privileged over the others.

XI *Shindler v. United Kingdom* (2013) 58 EHHR 9.

XII *Ibid.*, at paragraph 105.

XIII Conservative Party, "Strong Leadership. A Clear Economic Plan. A Brighter, More Secure Future," *2015 Conservative Party Manifesto*, at 49 when it said, "We will introduce votes for life, scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting.": https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf accessed 2 May 2016.

XIV For the relevant part on this Bill, see pages 96-97 of this Speech: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf accessed 5 May 2016.

XV *Shindler*, footnote 1 above, at paragraph 51.

XVI COM(2010) 603.

XVII European Commission, Recommendation of 29.1.2014 "Addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement": C(2014) 391 final.

XVIII See Hansard Society website: http://www.hansardsociety.org.uk/our-forgotten-voters-british-citizens-abroad/ accessed 2 May 2016.

XIX These figures are taken from Nardelli 2015.

XX Migration Watch UK is an immigration and asylum research organisation and think-tank, which describes itself as independent and non-political, but which has been characterized by some commentators and academics as a right-wing pressure group.

[xxi] Out of the 53 states currently in the Commonwealth, only the following (largely Caribbean) states grant such reciprocal voting rights to British citizens: such citizens can vote in Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Mauritius, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. New Zealand gives the right to vote to foreign citizens only if they are granted permanent residence status while in Malawi foreign citizens who have been resident for seven years can vote.

[xxii] While, generally speaking, only parts of these countries have at any time been under British rule that fact was enough to allow Cameroon to join the Commonwealth in 1995: this country gained independence in 1960 from France, with the British-administered Southern Cameroons voting to join Cameroon after a plebiscite in 1961.

References

- Arrighi Jean-Thomas *et al.*, 2013, "Franchise and electoral participation of third country citizens residing in EU and of EU citizens residing in third countries," Policy Department C – Citizens' Rights and Constitutional Affairs (Constitutional Affairs), Directorate General for Internal Policies, European Parliament, April 2013, at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET(2013)474441_EN.pdf accessed 1 May 2016.
- BBC News, 2012, "Scottish independence: SNP dismisses expat voting call," 18 January 2012, at http://www.bbc.com/news/uk-scotland-scotland-politics-16607480 accessed 5 May 2016.
- Ghose Katia, 2015, "The EU referendum: a fair franchise?", The Electoral Reform Society, 27 May 2015, at http://electoral-reform.org.uk/blog/eu-referendum-fair-franchise accessed 2 May 2016.
- Migration Watch UK, 2013, "Votes for Commonwealth Citizens," *Briefing Paper* 11.29, 27 August 2013, at http://www.migrationwatchuk.org/briefing-paper/11.29 accessed 3 May 2016.
- Nardelli Alberto, 2015, "Britain's EU referendum: who gets to vote is a potential deciding factor", *The Guardian*, 13 May 2015, at http://www.theguardian.com/politics/2015/may/13/britain-eu-referendum-who-gets-to-vote-deciding-factor accessed 5 May 2016.
- Tatham Allan F., 2009, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn.