



Brexit: Preserving the Rights of EU Citizens in the UK

Summary

1. There is a clear political will to protect the position of EU citizens in the UK and vice versa but the issues are not as simple as is often suggested. The position of the EU is that the European Court of Justice should have jurisdiction over citizens' rights, that rights be conferred on all past EU residents regardless of whether they presently live in the UK, that there should be no cut off point prior to Britain's departure and that EU citizens should continue to have more extensive rights than British citizens to bring in a spouse or partner. All four of these positions are clearly unacceptable. This note describes the issues and suggests six key principles for an eventual agreement (paragraph 14). One potentially fruitful way forward might be to ensure that the agreement includes provision for the reciprocal grant of citizenship in the country of residence.

Introduction

2. The EU's approach to this key issue poses a number of serious problems for the UK. Their position that all rights derived from Union law should be preserved in the future would mean EU nationals enjoying more extensive rights than those currently enjoyed by British nationals. In addition, the EU is of the view that the Court of Justice of the European Union should have jurisdiction over this matter. As a third country and with no representation on the Court, this would be a highly unsatisfactory outcome.

UK-EU Negotiations on Britain's Departure from the Union

3. The formal negotiations between the UK and the EU on Britain's departure from the bloc are reported to commence in the week beginning 19th June 2017. The European Commission will be leading the negotiations for the European Union and have appointed Michel Barnier to lead these talks. The European Council will maintain overall political control. A number of documents have been published by the various EU bodies, which together set out the position of the EU in the forthcoming negotiations. These are discussed below.

Negotiating Guidelines of the European Council

4. The European Council (the heads of government) published its draft negotiating guidelines on 29th April 2017 (see [here](#)) detailing principles and general positions. The EU has been clear that it envisages two stages to the negotiations, the first of which will cover matters that must be addressed if the UK's withdrawal is to be orderly. This principally includes the rights of EU and UK nationals exercising their treaty rights in another member state, an agreed settlement on the border between the UK and the Republic of Ireland and the financial settlement, amongst others. The second phase of the negotiations will address the future relationship between the UK and the EU and will only begin when 'the European Council decides that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal.'

5. The first priority for the negotiations, according to the guidelines, is to address the issue of the status of EU nationals exercising a treaty right (living, working or studying) in the UK and British nationals in another EU member state. The guidelines state: *'Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory, and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures.'*

6. Crucially, the negotiating guidelines state *'the withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement'* and continues *'this should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union.'*

Negotiating Directives of the European Commission

7. Following the publication of the European Council's Negotiating Guidelines, the European Commission published their Negotiating Directives on 3rd May 2017 (see [here](#) and the Annex [here](#)) covering the first phase of the negotiations. The Directives go further than the Guidelines on Citizens' Rights and it is worth quoting in full. It states *'The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) both for EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and for United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27....Those rights should be protected as directly enforceable vested rights for the life time of those concerned.'*

8. The 'Definition of the persons to be covered' includes those *'economically active, i.e. workers and self-employed, and inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date.'*

9. The 'Definition of the rights to be protected' includes a reference to residence rights and 'the right of permanent residence after a continuous period of five years of legal residence'. There are further references to social security, the right to free movement for workers within the Union and the right to take up and pursue self-employment.

10. The Commission Directives also go further than the Negotiating Guidelines on enforcement of the exit agreement. With regards to citizens' rights, the Directive states that 'In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained.'

11. On 22nd May 2017 the European Council adopted the Directives proposed by the Commission and authorised negotiations to begin.

Speech by Michel Barnier at European Union State of the Union Conference, 5 May 2017

12. Michel Barnier, appointed as negotiator for the European Commission, gave a speech at the European Union State of the Union Conference on 5th May 2017. The speech covered many of the issues outlined in the Guidelines and the Directives and elements of the speech are quoted below. To read the full speech, see [here](#).

Issues Raised by European Union Position

12. There are four main issues with the EU position that are likely to become sources of contention in the negotiations. These will be explained in turn.

a) Court of Justice of the European Union jurisdiction over matters of Citizens' Rights

The European Council Guidelines, the Commission Directives and the speech delivered by Michel Barnier are all clear that the Court of Justice of the European Union should have jurisdiction over the enforcement of the exit agreement with regard to citizens' rights (amongst other matters). Mr Barnier argues in his speech that 'the EU requires crystal-clear guarantees that rights will be effectively enforced' which clearly the EU sees as requiring ECJ jurisdiction.

It is hard to see how any UK government could allow judicial oversight by a foreign court, once we have left the EU. It is worth remembering that the European Court of Justice is comprised of 28 judges, one from each Member State and therefore once the UK leaves the EU she will no longer be represented on the Court. A major plank of the 'Leave' campaign ahead of the referendum was the issue of sovereignty and campaigners argued that leaving the European Union would mean that British judges, rather than European judges, would preside over matters that concerned the UK. The Prime Minister Theresa May has committed to ending the jurisdiction of the court in Luxembourg. This issue is likely to be a sticking point in negotiations in much the same way that ECJ jurisdiction has proved to be a sticking point between the EU and Switzerland over the years.¹

b) Scope of the agreement – 'Definition of the persons to be covered'

The EU and the UK government have been clear that they wish to resolve the issue of EU nationals living and working in the UK and British nationals elsewhere in the EU. However in the Commission's Negotiating Directives, the scope of those who should be covered by the agreement has been expanded considerably to those living and/or working in the UK/EU **and** those who have lived and/or worked in the UK/EU in the past.

1 Buchan, D. Outsiders on the Inside, Swiss and Norwegian Lessons for the UK, September 2012, URL: https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/buchan_swiss_norway_11oct12-6427.pdf

According to this definition, an individual who came to the UK in 2001 and worked, even for a short period, before returning to their home country should be covered by the agreement. Or indeed any EU national who has lived and/or worked in the UK at any point since 1973 would be covered by the agreement regardless of whether they remain residents in Britain.

The numbers involved would be enormous. It is not possible to know the exact number of EU nationals who have at some point in the last 43 years lived/worked in the UK. However, we can take registrations for National Insurance Number (NINo) as a broad proxy for those that might qualify under the EU terms of the agreement. In reality however, the number will be higher as an individual does not need a NINo to live in the UK and most children, many young people, and people not working will not necessarily have obtained a NINo while living in the UK. Leaving this aside, since 2001 alone over 5.7 million EU nationals have registered for a NINo. This points to the potential numbers involved. Those in the UK when Article 50 was triggered amounted to approximately 3.2 million.

c) A 'cut off' point

EU citizens who have been exercising a "treaty right" in the UK for five years will already have the right, under EU law, to "Permanent Residence" (which, unlike Indefinite Leave to Remain (ILR) cannot be revoked). After a further year they can apply for British citizenship.

One option would be to declare the cut-off point as 31st March 2017 (the date that Article 50 was formally triggered by the Prime Minister Theresa May). Those already in the UK who had not achieved five years by then could be granted some intermediate status, perhaps a work permit, that fell short of permanent residence.

The EU is very clear that the 'cut off' point, after which EU citizens cannot have their rights of residence guaranteed, should be the date that the UK withdraws from the European Union, likely to be March 2019. Michel Barnier in his speech to the State of the Union Conference said 'The cut-off date is simple and logical: it is the day when the UK leaves the EU.'

Neither the Labour Party nor the Conservatives have indicated their preferred 'cut off' point, perhaps for negotiating purposes. However, a cut off point in the future, including the date of the UK's departure, would almost certainly be unacceptable to the UK side lest it lead to a rush of movement to the UK. The Home Affairs Committee made this very point in a 2016 report.²

d) Scope of the agreement 'definition of the rights to be protected'

The EU position is that all rights 'derived from Union law' should be protected by the agreement. This includes basic rights such as the right to work etc., but it also includes the right to family reunion. The Directive 2004/38/EC relating to free movement of EU citizens across the bloc states: *'The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.'*³ This means that, at present, any EU national who is in the UK or who wishes to move to the UK can bring in their non-EU partner, with no conditions attached. This right, 'derived from Union law' goes beyond the rights of UK citizens who must satisfy immigration rules if they wish to sponsor their non-EU spouse for a partner visa; these currently include a requirement for the sponsor to have a minimum income of £18,600.

2 Home Affairs Committee, The Work of the Immigration Directives (Q1 2016), July 2016, URL: <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf>

3 EU Directive 2004/38/EC, URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

Were all rights 'derived from Union law' to be protected in any agreement on citizens' rights then EU nationals would have rights that go beyond those currently enjoyed by British citizens. Many politicians and the British public would rightly consider this to be unacceptable.

Some have argued that the best solution to this problem would be to remove the minimum income requirement for a partner visa.⁴ This would indeed solve the problem, however it would also preclude any future UK government from imposing any conditions on partner visas since any such requirement would automatically mean that EU nationals would have more extensive rights than UK nationals. This would tie the hands of the UK government in an unacceptable manner.

An Acceptable Agreement on Citizens' Rights – General Principles

14. In any negotiated solution, a number of key principles should be adopted:

- a) Any agreement should only apply to those currently exercising a treaty right in the UK and therefore excluding those who have previously lived and/or worked in the UK but have left permanently.
- b) EU citizens living/working in the UK should have certain rights protected. Rights that the agreement should cover should include:
 - The right to free movement to and from the UK;
 - The right to employment and to self-employment;
 - The right to continued benefits and state pension;
 - The right to health care free at the point of use;
 - Free education for their children and further education on the same basis as UK citizens;
 - Entitlement to social housing where appropriate.
- c) EU citizens living/working in the UK must provide reasonable evidence of their entitlement to these guaranteed citizens' rights.
- d) The rights granted to EU citizens cannot be more extensive than those enjoyed by British citizens. This means, for example, that the right to free movement granted to future non-EEA partners of EEA citizens, 'derived from Union law', can no longer continue.
- e) Judicial oversight must be by a British court in the long term. It would not be acceptable to the public for the UK, as a third country, to be subject to the jurisdiction of the European Court once we have left the Union.
- f) There should be no discrimination either for or against EU citizens when it comes to retention of rights.

4 Jonathan Portes, The Times, How to solve the sticky problem of EU migrants' rights, 11th May 2017, URL: <https://www.thetimes.co.uk/article/how-to-solve-the-sticky-problem-of-eu-migrants-rights-swbh7qgfz>

The Right to Citizenship

15. As mentioned above, EU nationals currently have the right to obtain citizenship in the UK a year after certification of permanent residence, itself acquired after five years continuous exercise of a treaty right. It is possible that granting the right for EU citizens to acquire full citizenship in their country of residence could form the basis of any future agreement with the European Union on citizens' rights. This might require some Member States which do not permit dual citizenship to amend their citizenship laws – a domestic matter over which the European Union does not have competence. This would address many of the concerns raised by the EU about the protection of their citizens' rights in the UK and would address many of the concerns in the UK with regard to independence and the primacy of UK law in Britain.

13th June 2017