

Evidence on the rights of EU citizens in the UK and UK citizens in the EU post Brexit – Scottish National Parliament – 15th December 2016

1. Highlights of arguments and structure of the response

First of all, I believe that it is crucial that the UK reaches a deal with the EU for the mutual protection of citizens in the respective territories. That would be the only solution which would guarantee *all* citizens affected by Brexit; and the only solution that would be consistent with a meaningful understanding of fundamental rights and which would effectively protect citizens' legitimate expectations. This memo is concerned with highlighting the difficulties and risks arising from the lack of such an agreement. In particular, the following consequences would arise lacking an agreement:

(a) EU citizens in the UK would be treated as normal immigrants.

This would carry three identifiable risks:

- (i) an (unbearable) emotional and practical strain on EU citizens working, living and contributing to the UK economy
- (ii) an (unsustainable) administrative drain on UK authorities who would have to process at once the applications of EU citizens (roughly 3 million); and an unstainable burden on businesses to process and support applications; and plan for potential negative outcomes of individual applications;
- (i) A potential brain and workforce drain, in that the uncertainty might have an effect on the willingness of EU migrants to come and work in the UK; and to remain in the UK.

(b) UK nationals living in the EU would find themselves in a vacuum.

Whilst I suggest that UK nationals living in the EU are protected, some categories, and especially pensioners, would be particularly vulnerable if Brexit occurred with a 'no deal situation'.

In this briefing I will focus on:

- **Existing rights of EU citizens living in a country different from that of nationality (section 2);**
- **The situation of EU citizens in the UK after Brexit (section 3);**

- The situation of UK citizens in other EU countries after Brexit (section 4);
- The situation of non-migrant UK citizens after Brexit (section 5).

2. Main rights of migrant EU citizens

Entitlement to residence and equal treatment rights in EU law is conditional upon the claimant satisfying given conditions:¹ in particular, EU citizens must be either economically active (self-employed or employed); or economically independent (i.e. have sufficient resources and comprehensive health insurance).² Work-seekers also have rights in EU law.³

2.1. Economically active EU citizens

EU citizens have an **unconditional** right to work and exercise an economic activity anywhere in the EU. This right cannot be made conditional upon any discretionary Home Office requirement, i.e. EU citizens are exempt from any visa and work permit requirement. EU citizens have a **full right to equal treatment**: this means that EU nationals must be treated in the same way as UK nationals in respect to access to employment (no quotas, no national preference); all social and tax benefits, including housing and work-related benefits, health care etc. Member States can only deport Union citizens in very limited circumstances.⁴

2.2. Work-seekers

EU citizens have a right to enter and reside in any EU country for the purpose of looking for a job; for the first three months this right is unconditional;⁵ after that time Member States might require the work-seeker to prove that they are still looking for a job, and have a genuine chance of finding one.⁶ Work-seekers do not need comprehensive health insurance (although they would be covered by the European Health Insurance Card) or sufficient resources. However, work-seekers **do not have a right to most social assistance benefits**, including **job seeker allowance**.⁷

2.3. Economically independent EU citizens (i.e. pensioners, students and self-sufficient individuals).

¹ Rights of residence and movement of EU citizens are detailed in Directive 2004/38/EC on the right of citizens of the Union [2004] OJ L158/77; this is given effect in UK law by the immigration (European Economic Area) regulations 2006, as later amended.

² Article 7 Directive 2004/38; any citizen can enter and stay in the host Member State for three months without satisfying any condition (art 6 Dir 2004/38); however, short term visitors do not have a right to equal treatment in relation to social assistance (art 24(2) Dir 2004/38).

³ Art 14(4)(b) Dir 2004/38 provides that workseekers and their family members can stay beyond the initial three months without having to satisfy the conditions of sufficient resources and comprehensive health insurance as long as they keep looking for a job and have a genuine chance of being engaged.

⁴ EU citizens can only be deported for reasons of public policy and public security (and public health within the first three months), see art 27 Dir 2004/38. The longer the Union citizen has stayed in the host-country, the more difficult it is to deport her: in particular, after 5 years EU citizens can only be deported on serious grounds of public policy and security, and after 10 years only on imperative grounds of public security (see Art 28 (2) and (3) Dir 2004/38).

⁵ Article 6 Directive 2004/38.

⁶ Article 14(4)(b) Directive 2004/38.

⁷ Article 24(2) Directive 2004/38, Case C-67/14 *Alimanovic*, EU:C:2015:597.

Non-economically active EU citizens have a **conditional** right to reside beyond the first three months: they must have (i) **sufficient resources** (so as not to become a burden on the welfare system of the host Member States); (ii) and they must have **comprehensive health insurance**.⁸ Pensioners can apply for their health costs to be paid directly by the Member State of origin (i.e. where they are insured). Whilst economically independent EU citizens have also a right to equal treatment, **the requirement to have sufficient resources means that in practice they are not eligible for means-tested benefits.**

2.4. Permanent residence

The right to permanent residence accrues after 5 years of lawful residence in a country different from that of origin.⁹ It should be noted that this right is conferred **directly by EU law**, and that the permanent residence card is only **evidence** of that right. This means that as long as the citizen can prove that she has resided in the UK for at least five years whilst in employment; or pursuing an economic activity; or having satisfied the conditions of sufficient resources and comprehensive health insurance, permanent residence can only be denied on serious grounds of public policy / security. Once a Union citizen has obtained the right to permanent residency, her right to stay in the country becomes unconditional, i.e. it is recognised regardless of economic activity or resources/health insurance.

Students also have a right to permanent residence after 5 years in the host country: however, the biggest bar for students to acquire permanent residence during or in the aftermath of their studies is the need to prove either private insurance or, in the UK, possession of a European Health Insurance Card (EHIC) issued by another Member State (most Member States make eligibility to the EHIC conditional upon residence in their territory – whilst undergraduate students are likely to maintain residence in the country of origin this is not necessarily so for PhD students who are also more likely to have ‘settled’ in the host country).

2.5. Family members of EU nationals

Family members of EU nationals¹⁰ have the same rights as their spouse/partner/parent, regardless of nationality; so non-EU citizens derive extensive rights from a migrant EU citizen family member.

Parents of minor EU citizens maintain a right to reside as long as the EU child is either self-sufficient (also through the resources of the parents)¹¹ or the EU national parent was a worker and the child is in education.¹²

⁸ Article 7(1) (b) and (c) Directive 2004/38.

⁹ Article 16 Directive 2004/38.

¹⁰ Spouses/partners if host Member State recognises partnerships, children of EU citizens or their spouse/partner under 21 or dependant, direct ascendants of EU citizen or their family member if dependant, see Article 2(2) Directive 2004/38.

¹¹ Case C-200/02 *Chen*, EU:C:2004:6; Case C-115/15 *NA*, EU:C:2016:487; but the parent cannot derive a right to reside in the host state if they/their children do not have sufficient resources, Case C-86/12 *Alokpa v. Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645.

¹² Case C-310/08 *Ibrahim*, EU:C:2010:80; Case C-480/08 *Teixeira*, EU:C:2010:83; this right arises from Article 10 Regulation 492/2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1 (previously Art 12 Regulation 1612/68) which guarantees a right to access and equal treatment in education for the children of those who are or have been employed in the host Member

Divorced spouses maintain the right to reside in the host country as long as they satisfy the requirements above (economic activity or self-sufficiency); if the divorced spouse is a non-EU citizen, they must have been married for at least 3 years of which one in the host State in order to maintain the right to reside (subject to the conditions of economic activity or self-sufficiency).¹³

2.6. Special categories

Special rules¹⁴ apply to those who have lost their job in the host country; those who have retired after working in the host country for at least 1 year before retirement and have been residing there for at least three years; to those who have become incapacitated to work; to frontier workers (those who reside in one state and work in a different one); to widowers of those having the main residence rights; to victims of domestic violence and those who require special humanitarian consideration.

2.7. The Charter of Fundamental Rights

EU citizens living in another Member State are also protected by the EU Charter of Fundamental Rights whenever a Member State seeks to limit the rights granted by the Treaty and secondary legislation. This means that any decision (especially in relation to deportation) must take into due account the fundamental rights of the EU citizen, and especially her right to family life. **The right to private and family life is currently protected more generously in the EU context than it is in the ECHR context.**¹⁵

3. EU nationals in the UK after Brexit

3.1. About 3 million EU citizens live in the UK

Estimates as to how many EU citizens are currently in the UK vary slightly;¹⁶ the latest reports put the figures at 3.18 million of EU nationals and 3.16 million of people born in another EU Member State respectively.¹⁷ Around 2.2 million of those are in work. Of all EU migrants roughly 6.5% live in Scotland, so that EU citizens amount to roughly 3.7% of the population resident in Scotland.

3.2. Economically active EU citizens post Brexit

After Brexit, and based on the unlikely scenario that no deal will be reached with our counterparties, **EU citizens will revert to the status of normal immigrants.** It should be pointed out that it is very unlikely that the UK would require registration/ or application for work visas (or similar) of EU citizens already working here as it would be logistically impossible to process these applications in a time that is useful to employers. The Home Secretary has indicated that some special ID might be released to those EU citizens working in the UK (possibly up until the referendum;

State; this interpretation does not extend to self-employed, see Joined cases C-147 and 148/11, *Czop and Punakova*, EU:C:2012:538.

¹³ Article 13 Directive 2004/38.

¹⁴ See generally Art 7(3) and 17 Dir 2004/38.

¹⁵ For an account of the case law of the European Court of Human Rights see e.g. the Advocate's General opinion in Case C-60/00 *Carpenter*, EU:C:2001:447.

¹⁶ E.g. there might be differences according to whether the figure is given by nationality (this would include children of migrants born here who have retained the nationality of their parents) or by country of birth.

¹⁷ See <http://researchbriefings.files.parliament.uk/documents/SN06077/SN06077.pdf>

possibly up until when the UK actually leaves the EU; or possibly until the date provided for by a mutual agreement) so that employers and landlords (who have visa checking obligations) might distinguish between EU nationals entitled to work and those who have arrived after the cut-off period.¹⁸

In the very unlikely event that no transitional agreement / mechanism were to be put in place, two possibilities arise:

(a) Automatic entitlement to work visas: EU citizens with an employment contract of indefinite duration would automatically be granted a working visa (5 years and 14 days); and EU citizens with a temporary employment contract would automatically be granted a visa for the period of their contract plus a month. It should be noted that even in this case there are problems both in relation to the charges usually applied to these visas, and to the fact that the existing immigration tier system does not cover unskilled work.

(b) Self-employed EU citizens: more complex is the situation of self-employed Union citizens since UK immigration rules require a minimum amount of investment which some EU citizens, currently self-employed in the UK, might struggle to meet.

3.3. The rights of non-economically active Union citizens post Brexit

It should be noted that the situation is more uncertain in relation to economically inactive Union citizens resident in the UK. This is the case for several reasons:

(i) the liberal regime afforded by EU law only makes sense given that Union citizens have both a right to work and a right to pursue an economic activity as self-employed. The non-economically active route is not used to evade the visa/work-permit system, and indeed it is not unusual for Union citizens to move in and out of work (and this might be particularly so for students).

(ii) the right of residence of economically inactive Union citizens is made possible also thanks to the overarching regime provided by other secondary legislation, and in particular the possibility to export the pension and health-care entitlement.¹⁹ Those, however, are dependent upon EU secondary legislation which would no longer apply to the UK after Brexit.

It is hoped that an agreement is reached with the EU also on the right to reside of non-economically active citizens (not least as this would make things easier for the 400,000 UK pensioners living in the EU). We will consider the situation of each category in the absence of an agreement.

(a) Students: currently students have a right to come and study in the UK and to be treated equally in respect of all matters (including fees) with the exclusion of maintenance grants. Students who take up employment (at least

¹⁸ <https://www.theguardian.com/uk-news/2016/dec/05/amber-rudd-says-eu-nationals-in-post-brexit-uk-will-need-form-of-id>.

¹⁹ See Regulation 883/2004 on the co-ordination of social security systems [2004] OJ L166/1; for healthcare see the form S1.

before starting their degree) are to be treated as workers and therefore have also a right to maintenance grant.²⁰ The main issues then are:

- **Visas:** whether EU students will automatically be guaranteed visas or will be subjected immediately to the full force of UK immigration law.
- **Fees:** after Brexit, EU students will be charged at non-EU rates; both England and Scotland have undertaken to extend equal treatment to students in relation to fees and loans for all students enrolled in 2016 and 2017.
- **Erasmus:** Students will be no longer eligible for Erasmus exchanges unless there is an agreement between the UK and the EU. Of course, it will be open to universities to set up one-to-one exchanges with EU universities, but there will no longer be EU funding attached to it. The considerable difference in fees between UK (non-EU rates) and EU universities might make this very difficult in practice.
- **Health surcharge:** currently non-EU students are subjected to a surcharge in lieu of health insurance (£ 150).

(b) Pensioners/ retired people: as mentioned above this is perhaps the most vulnerable category of EU citizens since the possibility to live in a country other than that where the retired person is insured is dependent on detailed EU rules.²¹ For instance, not all EU countries allow for the public/social pension to be paid outside of the EU and such a possibility might be dependent on a bilateral agreement to be negotiated by the parties (that is the case for instance in Italy, similarly the UK does not automatically index the pension of those residing outside the EU).

The UK has an income threshold for non-EU retired people (a minimum of £ 25,000 p/a which then is likely to be applied – absent an agreement – by EU countries to UK pensioners).

An issue that will require considerable attention relates to those workers that have acquired pensionable periods in more than one Member State. Currently these periods might be aggregated; it is to be hoped that a transitional arrangement will protect acquired rights of migrant Union citizens.

(c) Family members of Union citizens – this is another particularly vulnerable category since the rules on family reunification in the UK are much more restrictive in relation to family members of UK citizens and non-EU citizens than those provided for in EU law. In particular, the following situations are problematic:

- (i) Spouses / partners** of a migrant Union citizen on a low income, especially if they have not yet acquired the right to permanent residence. If the normal immigration rules were to apply, spouses of low income Union citizens would lose the right to reside. This is particularly a concern for

²⁰ See recently Case C-46/12 *N*, EU:C:2013:97.

²¹ In particular Regulation 883/2004 on the co-ordination of social security systems [2004] OJ L166/1.

non-EU spouses as they might be left out of transitional arrangements.

(ii) Children of workers in education – in EU law the child's right to complete her education, started when a parent migrated to work, continues even after the parent has left the host-country.²² Moreover, the other parent / carer of the child in education also obtains a right to reside because of the child's entitlement to education.²³ Yet, children in education and their primary carers do not qualify for permanent residence unless they satisfy the conditions in Directive 2004/38 (economic activity or self-sufficiency); for this reason, after Brexit, they could be subjected to normal immigration rules even after having lived in the UK for a long time. It should be noted that the constraints imposed by the HRA 1998 would apply in those instances.

(iii) Non-EU parents of minor UK citizens – Non-EU parents of UK citizens have a right in EU law to remain the UK if deportation would lead to the minor having to leave the territory of the EU (*Ruiz-Zambrano* route);²⁴ bar for the application of the HRA 1998, this right will not be maintained (and it is unlikely to be the focus of transitional arrangements). This means that parents of minor UK children could be deported.²⁵

(iv) Partners/spouses/family members of UK citizens who have exercised their right to move. UK citizens and their families are protected in the same way as if they were EU migrants once they come back after having exercised EU free movement rights (*Singh* route);²⁶ this means they are exempt from minimum income requirements, fees and that the right to family reunification is a protected *right*. Given that Brexit might lead to a counter-exodus of UK citizens, it is very important that consideration is given to afford proper protection to British citizens returning home with their non-British families.

3.4. Union citizens who have acquired a right to permanent residence: as mentioned in section 2.4. above, EU citizens have a **right** to permanent residence, which is evidenced but not granted through the domestic certification process. The most likely outcome would be that those who have acquired this right (whether evidenced or not) would be given indefinite leave to remain in the UK. Should this not happen there are several legal issues that are far from clear:

(a) It should be noted that the right to permanent residence is granted by EU law not by national law. However, non-EU nationals can apply after the same period (5 years) for indefinite leave to remain. The issue is then whether EU nationals who have obtained the right to permanent residence will be required to re-apply for the indefinite leave to remain (this is more restrictive than the

²² See e.g. Cases 389 and 390/87 *Echternach and Moritz* EU:C:1989:130.

²³ See e.g. Case C-413/99 *R v Home Secretary*, EU:C:2002:493.

²⁴ Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

²⁵ See Case C-304/14 *CS* EU:C:2016:674.

²⁶ Case C-370/90 *Surinder Singh*, EU:C:1992:296; more recently Case C-456/12, *O v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B*, EU:C:2014:135; and Case C-457/12, *S v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G*, EU:C:2014:136,

right to permanent residence and it is not a 'right' as such; it also entails the payment of a very high fee (£1,875 per person). This is very unlikely, not least as it would be an administrative nightmare.

(b) A more complex question relates to the rights of Union citizens who, at the time of Brexit, have acquired the right to permanent residence but have not applied for the Blue card (evidencing such right). The issue in that respect is whether those individuals will be required to fulfil the more stringent conditions provided for in relation to indefinite leave to remain; and whether the right to remain will be recognised as matter of right (as it would have been before Brexit) or as a matter of discretion. Technically the two situations (people who have already obtained the blue card evidencing their permanent residence and those who have not applied for the card but who have already matured the right) should be treated in the same way.

(c) In British administrative law (and EU law) there is a doctrine of legitimate expectations, pursuant to which administrative authorities (including the Home Office) might see their discretion curtailed when their behaviour has created a legitimate expectation of a certain outcome. It would not be unreasonable to apply this doctrine to those citizens who have settled in the UK and have matured (at the Brexit point) their right to permanent residence.

(d) Up until the very moment of Brexit, and for any dispute concerning that time period, any national rule or administrative act that limits or derogates from the free movement rights must be compatible with the **EU Charter of Fundamental Rights** (which also includes the protection of family life, and this right is more generously interpreted than in the ECHR equivalent). After Brexit, UK administrative and delegated acts will still have to be compatible with the ECHR as per HRA 1998; however, and as said above, the protection offered by the ECHR in immigration cases is very limited

3.3. The acquired rights discussion: some parties have argued that EU citizens in the UK and UK citizens in the EU would have their rights protected by Article 70 of the Vienna Convention on the Law of Treaties; it should be noted that the prevalent scholarly opinion is that that provision applies to state parties and not to individuals, and it is therefore irrelevant for the discussion concerning the rights of UK and EU citizens.

4. UK nationals resident in other EU states post Brexit.

When considering the rights of UK nationals residing in another Member State we should consider the situation of both workers / self-employed; and economically inactive citizens (mainly pensioners and students).²⁷

It should be noted that there are (arguably) two different elements to the situation of UK nationals in other Member States: first of all, it should be considered whether those individuals can retain rights acquired in EU law, and in particular the right to permanent residence as a matter of EU law.

²⁷ It is estimated that there are currently about 1.2. million UK citizens living in the EU (<https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>), of whom about 1/3 are in receipt of a DWP pension, and hence most likely to be retired (<http://frozenbritishpensions.org/wp-content/uploads/2015/07/SN01457-8.pdf>)

Secondly, British nationals after Brexit, will/might be covered by EU legal instruments which regulate the situation of third country nationals in the EU (e.g. the long term residence directive;²⁸ the family reunification directive²⁹); and UK nationals abroad will also be entitled to the domestic constitutional protection, including protection of their fundamental rights as provided for by domestic instruments (and arguably also by the Charter).

I will deal only with the first issue, as I believe the situation of UK citizens in the EU after Brexit is unique and that equating it to that of non-EU citizens would be a misrepresentation of both the expectations of UK citizens abroad and of the constitutional significance of Union citizenship.

4.1. UK citizens protected by existing EU law even after Brexit

Before looking at the more general situation of UK citizens resident in another Member State, it is important to highlight those situations where rights are already conferred upon UK nationals even after Brexit.

(a) UK worker with one of more children in education – it should be noted that, as a matter of established case law the departure of the Union citizen worker does not affect the right of the child to continue her education in the host country. This right does not depend on the EU nationality of either child or carer; therefore, arguably, even after Brexit, the child of a UK worker (who was a EU worker before Brexit) would maintain her right to education after Brexit, as this right arose from a pro-Brexit situation.

(b) UK citizen parent of a European Union citizen – again the right to reside would be retained if withdrawing such a right would force the child to return to the UK with her parent, as that would entail the loss of the rights the child derives from EU citizenship.

(c) UK citizen having custody or access to a child who maintains the right to reside in an EU country – again, the provisions of Directive 2004/38 would apply mutatis mutandis and the UK parent would maintain the right to reside.

(d) UK citizen married to an EU national resident in a Member State different from that of nationality – the provisions outlined above in relation to family member of EU migrant citizens would apply and the UK spouse would be protected by Directive 2004/38 in the same way as any other Third Country National.

4.2. The loss of EU citizenship as a matter of EU law

The most important issue for British nationals living abroad relates to whether, **as matter of EU law**, the loss of Union citizenship status is relevant to their protection.

The reason why this is important is because **EU law protection has significant advantages over domestic protection**: it would be **uniform** across the EU; it would benefit from the principle of direct effect and supremacy, hence being **directly**

²⁸ Directive 2003/109 concerning the status of third country nationals who are long-term residents [2004] OJ L16/44, as amended, consolidated version [2011] OJ L132/1.

²⁹ Directive 2003/86 on the right to family reunification [2003] OJ L251/12

enforceable with preference to domestic legislation; and it would carry the added protection of the **Charter of Fundamental Rights** and of the constitutional principles of the EU, also directly effective and supreme over domestic legislation. This protection would also be more effective than that provided for other non-EU citizens.

4.3. Rights acquired by virtue of Directive 2004/38 – i.e. right to reside, right to work and right to permanent residence.

As mentioned before, Directive 2004/38 regulates (although does not confer) the rights of Union citizens to move and reside in another country. Crucially though, and unlike the Treaty rights that serve as a basis for it, Directive 2004/38 does not protect only Union citizens; it protects also non-EU nationals who have a recognised (family) link with Union citizens. Even more crucially, the Directive provides that non-EU nationals who no longer have a family connection with a Union citizen retain their rights under the Directive, and therefore under EU law, in certain circumstances.³⁰

Furthermore, and as mentioned briefly beforehand, the Court has found that children of EU workers are entitled to pursue education in the host Member State even after their EU parent has left; and that the third country national parent having custody would also acquire a right to reside (not conditional) in order to ensure that the child could benefit of the right to education.

In a different line of case law, the *Ruiz Zambrano* case law briefly mentioned above, the Court also held that since Union citizenship is the fundamental status of Union nationals, Member States cannot deport the parents of Union citizens if to do so would force the child to leave the territory of the EU, and hence to lose the benefits of Union citizenship rights.

Finally, in the *Rottman* case the Court restated the centrality of Union citizenship by imposing limitations on the extent to which Member States can withdraw nationality if to do so would also entail withdrawal of Union citizenship.³¹

The rationale behind these different strands of legislation and case law is that those who have established a genuine link with the host country having moved because of a right derived from a Union citizen (spouse; parent; child) should not be penalised when that family link changes.

What is crucial in this respect is that the TCN has either spent a sufficient time in the host State to have established this link; or in the case of children of workers, that they are undergoing education. Furthermore, Union citizenship is considered such a *fundamental* status of Union citizens, that it also limits the discretion of Member States when dealing with own citizens (albeit in very extreme circumstances).

³⁰ Art 13 (2) Directive 2004/38 provides that a non-EU citizen retains the right to reside in the host Member State when: the marriage/partnership is terminated provided that the marriage has lasted at least 3 years, of which 1 in the host Member State; the spouse/partner has custody of the Union citizen's children; this is warranted by particularly difficult circumstances, such as being victim of domestic violence during the marriage; where the spouse has access to the children (by agreement or court order).

³¹ Case C-135/08 *Rottmann*, EU:C:2010:104.

4.4. Potential application of those principles to the situation of British citizens residing in the EU

UK citizens lawfully residing in another Member State come under three categories: first of all, economically active; secondly students; thirdly economically independent (including pensioners). We shall look at those situations in turn.

4.4.1. UK workers / self-employed (no children)

It is trite to say that Brexit is an unprecedented situation and thus bar for an agreement (which for the sake of legal certainty should be preferred) any decision-maker would navigate in uncharted waters. However, constitutional principles and the analogous application of Directive 2004/38 might be of use. In this respect, it is a fallacy to equate the situation of a UK/EU citizen who has exercised her rights to move under the Treaty to that of any Third Country National. Whilst it is true that, upon Brexit, UK citizens are likely to lose their EU citizenship status,³² the reason why UK citizens find themselves in another EU country is because of the fact that they have exercised rights granted directly by EU law.

As a result:

(a) UK citizens who have established a genuine link with the host country, and were protected by Directive 2004/38 as either economically active or economically independent should see their right of residence continuing under EU law, *at least* in the same way as third country national family members are protected when either they divorce or survive the EU migrant right-holder.

(b) The principle of non-discrimination and ability to work would continue to apply to those UK citizens, and they should be entitled (by analogy) to apply for permanent residence as a matter of EU law, as long as they fulfil the criteria set out in the Directive.

(c) Expulsion therefore should be limited to cases in which either the UK citizen no longer fulfils the conditions of economic activity / independence; or in cases where the Member State can demonstrate a threat to public order or security.

(d) UK citizens who have already matured a right to permanent residence in another Member State would not see their right modified by Brexit, as that right would still be subject to the provisions of EU law and in particular Directive 2004/38.

4.4.2. The particular circumstances of Students and Pensioners

Whilst I believe that the above interpretation is in line with established principles of EU constitutional law, the situation of students and pensioners might be more complex. In particular:

(a) Students need to have comprehensive health insurance in order to be eligible to a right to reside in another Member State. The extent to which the comprehensive health insurance requirement is actually enforced by Member

³² There has been some discussion about granting UK nationals some form of associate EU citizenship; see below section 5.4.

States is unclear. However, case law from the Court of Justice of the EU suggests that Member States might be able to require proof of comprehensive health insurance before granting the right to reside and the right to permanent residence.³³ As a result, students who do not have, and have not been covered by, comprehensive health insurance are not covered by the provisions of Directive 2004/38.

(b) Pensioners – as pointed out above the enjoyment of the right to reside in another Member State of pensioners in receipt of a state pension is made possible by EU co-ordinating legislation, to ensure that the pension is payable to pensioners residing in another Member State; that the pension is indexed; and that health care expenses are charged to the Member State of origin. This co-ordinating legislation would no longer apply to the UK and hence, without an agreement with other EU countries, the continuing exercise of pensioners' mobility rights might be impossible.

Pensioners who have already acquired the right to permanent residence would be protected but they would still need their pension to be payable (and indexed) even when not resident in the UK, which would require a decision by the UK Government.

5. UK nationals who have not exercised free movement rights.

Once the UK leaves the EU, UK citizens would lose all rights that are conferred by EU membership. I will consider the issues separately, to then comment briefly on the associated EU citizenship proposal recently relaunched by Guy Verhofstadt.

5.1. The right to vote for the European Parliament

The right to vote in the European Parliament is determined by Member States, even though EU law imposes some constraints.³⁴

Upon leaving the EU, UK citizens would lose this right and arguably there is no compelling argument why such should not be the case. The European Parliament is a co-legislator in the EU, and it is difficult to argue that citizens who are not bound by EU law should be given a voice or representation in the European Parliament.³⁵ As far as UK citizens in other Member States are concerned, it would be open to each

³³ Issues about health insurance have not arisen yet; however, the Court has clarified that it is only when the EU citizen satisfies the requirements in Directive 2004/38 (in the cases at issue the comprehensive resources requirement) that she would be protected by EU law. See Case C-333/13 *Dano* EU:C:2014:2358.

³⁴ In the Netherlands, the Dutch authorities were obliged to extend the franchise to vote in the European Parliament to citizens in their overseas territory, even though these citizens did not have a right to vote in the main elections, because such franchise was available to Dutch citizens resident in other countries outside of the Netherlands, Case C-300/04 *Eman and Sevinger* EU:C:2006:545; also see Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543.

³⁵ In fact the right to vote in the EP elections is not conferred upon citizens of the EEA.

of the Member States of the EU to decide to extend the EP electoral franchise to UK citizens.³⁶

As things stand at present, however, this right would be lost for all UK citizens. EU citizens resident in the UK would be able to vote for the European Parliament to the extent to which they are able to cast a vote for representatives of their national parliament of origin.

5.2. The right to do business with other EU states

The right of, or to be more precise the modalities for, UK citizens/business to trade with the EU internal market would be entirely regulated by the agreement between the UK and the EU. I do not believe that such access to the internal market can be effective without including the free movement of workers, even should there be a political will do so. I am happy to develop this point further in the oral contribution or in a different submission.

5.3. Workers' rights (and equality rights)

Upon leaving the EU, the UK would no longer be bound by the workers' rights legislation at EU level. Of course, it would be open to the UK to decide to take existing workers' rights as a minimum guarantee; however, it should be noted that law is inherently dynamic, subject to both modification by the EU legislature and interpretation by the European Court of Justice. At best, the proposed Great Repeal Bill would guarantee a snapshot of existing workers' rights, but it would not ensure the continuous development of these rights. Furthermore, UK courts would be able to depart from the case law of the European Court of Justice, and future Governments would not be bound by any assurances given by the current Government.

5.4. The Verhofstadt's proposal: Associated citizenship for UK nationals

Mr Verhofstadt MEP, the Brexit negotiator for the European Parliament, has suggested (on the motion of another MEP) that UK Citizens who elect to do so should be given associated citizenship. The details of the proposal are sketchy, but it should be noted that this would arguably require an agreement of all Member States (and their national parliaments) either as part of the agreement with the UK; or as a Treaty amendment (unlikely to happen). It should also be noted that the European Parliament might make associate citizenship a priority but unless it can secure agreement of the Member States, then the European Parliament would be left in the situation of refusing consent to the alternative agreement and force the UK out of the EU without an agreement; or to accept the proposed agreement without the associated citizenship.

5.5. Irish workers in the UK and UK workers in Ireland

Whilst it would be open to the UK to devise a special regime for Irish workers in the UK, the possibility for Ireland to do so is limited by the principle pursuant to which non-EU citizens cannot be treated better than EU citizens.³⁷ Hence, the continuing

³⁶ Whether this could be done without also extending to UK citizens the right to vote to local elections is open to debate. And whether this could be done without explicitly recognising the 'special status' of UK citizens, is even more doubtful.

³⁷ See by analogy Case C-55/00 *Gottardo*, EU:C:2002:543.

treatment of UK citizens in Ireland as 'non-foreigner' might well be impossible to realise without it being part of the UK-EU agreement (it should be noted that the European Parliament has expressed its willingness to do its utmost not to jeopardise the Good Friday agreement and the peace process).