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**Brexit:
Citizens' Rights in
the UK & the EU**

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Introduction

Brexit will affect the rights of individuals and families, not just in the UK but in other EU Member States, and in some non-EU European countries too because they are in the European Economic Area (EEA) or have a bilateral agreement with the EU (Switzerland). These rights have developed over the whole period of the UK's membership and are wide-ranging. They include:

- the right to enter or exit any Member State and reside there for up to 90 days without entry or exit visas; this is important for both tourism and business travel;
- the right to live, work or study in any EU/EEA Member State (and Switzerland);¹
- the right to establish a business in any Member State;
- the right to be treated on the same terms as a citizen of that country for many purposes (known as the principle of non-discrimination, or equal treatment);
- the protection of basic economic and social security rights for those living in another Member State;
- access to civil justice measures that cross borders; and
- certain rights if arrested in another Member State.

Many of these rights were included in the 2004 Citizens Directive.² Others are found in different Treaty articles and/or in other EU legislation and in the jurisprudence of the European Court of Justice. Taken together they are an important set of rights for EU citizens which UK citizens would lose upon Brexit unless the UK government is able to negotiate their retention (the same will apply to EU citizens in the UK). An important consideration in the negotiations will be the date at which current rights will cease to apply to those moving between the UK and the EU and vice versa. Both the UK and the EU have said that resolving the issues concerning individual rights is their top priority in the negotiations.³ The EU's negotiating directives list some of the rights discussed below but they do not refer to those relating to travel, civil justice and criminal justice.⁴

¹ EU free movement rights apply in the EU plus the countries of the European Economic Area (Norway, Iceland & Liechtenstein and, by bilateral agreement, with Switzerland. Where EEA is used in this paper it includes Switzerland unless otherwise stated

² *Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*; these rights are found in UK law in the *Immigration (European Economic Area) Regulations 2016*

³ See Senior European Experts, *Brexit: The EU's Negotiating Directives*, June 2017

⁴ See House of Lords European Union Committee, *10th Report of Session 2016–17: Brexit: acquired rights*, HL 82, 14 December 2016, pp. 10-11, paras 19-20

In this paper, we examine the main rights affected and some of the ways in which they might be handled after Brexit.⁵

Part I: The affected rights

Free movement of persons' rights

The free movement of persons is one of the four fundamental freedoms that underpin the EU Single Market (the others are the free movement of goods, of services and of capital). Current free movement of persons rights under the Treaties are set out in Articles of the Treaty on the Functioning of the European Union. They are:

- free movement of citizens [Art. 20-21];
- free movement of workers [Art. 45];
- freedom of establishment [Art. 49];
- and freedom to provide services [Art. 56].⁶

As was explained above, the detail of these Single Market-related rights are in the Citizens Directive 2004. These rights vary slightly from workers to students and to the retired, a point that may prove relevant in the Brexit negotiations because evidence suggests that most EU citizens coming to the UK do so for work (72 per cent in 2016) but a high proportion of UK citizens moving to other EU Member States do so on retirement.⁷

If, and when, the United Kingdom ceases to be a member of the Single Market, then the following free movement rights would be lost (presumably from the date of withdrawal but that point would need to be agreed) unless the UK and the EU agreed that some or all of them could be retained:

- travel rights – *i.e.* without a visa for stays of up to 90 days in any EU/EEA country and including emergency healthcare on same terms as nationals;
- the right to work in an EU/EEA country;
- the right to study or to retire in an EU/EEA country;
- the right to equal treatment, which is important in terms of employment, study, health care and social security;
- the right to permanent residence in an EU Member State for those with five or more years of continuous residence;
- the rights of non-EU spouses and family members currently living in an EU Member State with an EU citizen to remain there;
- domestic property rights – at present (broadly) EU citizens can purchase and own property on the same basis as nationals;

⁵ Please note that this paper is for general background reading purposes and should not be used when considering your own or another individual's rights

⁶ Freedom to provide service may entail movement by either the provider or the recipient of the service in question.

⁷ See House of Lords European Union Committee, *14th Report of Session 2016–17: Brexit: UK-EU movement of people*, HL 121, 6 March 2017, pp. 12-16, paras 25-30 for a discussion of the reasons for movement and the numbers involved in each direction

- the right to establish (as well as own) businesses on the same terms as nationals.

There are particular issues with some of these rights, notably: free movement between the two parts of Ireland; the right to remain after five years; equal treatment; future rights; and the right of establishment. We look briefly at each of these topics below.

Free movement in Ireland

Since the partition of Ireland in 1922, the British and Irish Governments have operated the Common Travel Area (CTA), a passport-free travel zone covering the whole of the British Isles. This has enabled an open border for the movement of people between the two parts of Ireland. As both countries joined the EU at the same time in 1973, and abolished customs controls on their shared border (along with all intra-EU borders on 1 January 1993), people living on either side of the border (and goods) have been used to moving freely between the UK and the Republic of Ireland.

This border should, under existing EU law, have border and customs controls after Brexit as it would be (on the Irish side) the external border of the EU. The reintroduction of border controls would have important political and security, as well as economic, consequences for the relationship between the two parts of Ireland, and would also mean loss of rights for people living on both sides of the border. Solving this issue is one of the EU's three priorities for the first phase of the negotiations. It is also high on the UK's priorities, although for the UK it is complicated by doubts over the general post-Brexit trade regime with the EU and over the post-Brexit immigration rules.

Brexit could also affect the rights of the 600,000 Irish citizens in the UK who have since 1962 been theoretically subject to the same immigration controls as those placed on Commonwealth citizens, although in practice that legal fact has been obscured by the operation of the CTA and free movement of people since both countries joined the EU in 1973.⁸

The right to permanent residence

EU citizens have a right to permanent residence after living continuously in a Member State for five or more years. The number of EU citizens applying in the UK for their right to permanent residence to be recognised more than doubled in 2016.⁹ Applicants are required to complete an 85-page form and, if they have not been working but are self-sufficient (that is to say, they are students from an EEA country or have retired to the UK from an EEA country), to demonstrate that they have "comprehensive sickness cover" while in the UK. Recent inquiries have shown that this apparently clear entitlement is being denied on the grounds that applicants cannot prove they have had comprehensive sickness cover while in the UK.¹⁰ The Commission is taking enforcement action against the UK, not least because the UK did not make it clear to EU migrants that they were required to purchase sickness cover. The result of this situation is that a large number of EU citizens resident in the UK (and possibly vice versa) will lose their right to permanent residence after

⁸ These issues have been discussed in Nicholas Kent, *Brexit: The Irish Dimension*, British Influence, March 2016; and House of Lords European Union Committee, *6th Report of Session 2016–17: Brexit: UK-Irish relations*, HL 76, 12 December 2016, ch. 3

⁹ See HM Government, 'Immigration statistics, October to December 2016: data tables – European Economic Area data tables', 23 February 2017

¹⁰ See House of Lords European Union Committee, *supra* n. 4

Brexit unless their interests are specifically safeguarded in the withdrawal agreement.¹¹ The situation is made more complicated in the UK by the absence of identity cards or any system of registration of citizens (both are common in the EU27) which means that the government does not know where EU citizens live in the UK, nor when they arrive or leave.

The EU's negotiating directives contain a strong statement on this point, namely that the agreement should "provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens' rights, including the right to acquire permanent residence after a continuous period of five years of legal residence". It later states that the documentation necessary for permanent right of residence should be "issued under a simple and swift procedure".¹²

Equal treatment

The principle of equal treatment means that EU citizens living in another Member State must be treated for most purposes as if they were nationals of that country. The loss of that right could mean discrimination in many fields, including employment, education, healthcare and social security. Specifically, EU citizens living in the UK would not have the same rights as UK citizens, and UK citizens living elsewhere in the EU would come under the EU's rules for third country citizens, meaning much reduced rights. EU Member States (and the UK) would be able to impose additional requirements on each other's citizens to contribute to health and social security systems and to restrict their right to claim pensions and other benefits. Students both in the UK and elsewhere in the EU might be forced to pay higher fees or be denied access on the same terms as nationals to student loan systems.

The loss of equal treatment rights is one of the largest areas of potential loss for individuals after Brexit because its scope is so wide.

Future rights

One of the most difficult areas to decide will be the question of future rights. Some commentators have argued that the rights protected should apply at the moment of Brexit but the exact meaning of that would need to be explicit in the agreement.¹³ For example, would an EU citizen already in the UK at that moment but not then working have the right to take work on the same terms as UK nationals? Similarly, would they have the same rights in terms of university access? The EU's negotiating directives take the position that a citizen's rights will be crystallised at the moment of Brexit, enabling a person to continue to enjoy those rights for their lifetime.¹⁴ But rights could be lost if a citizen's circumstances change. For example, if a person is working in the UK at the moment of Brexit, then – under the EU's proposals they would be able to stay and, after five years of continuous residence, acquire a right to permanent residence. But if they leave the UK for more than six months

¹¹ *The UK and sickness insurance for mobile citizens: An inequitable mess for Brexit negotiators to address*, Gareth Davies, *European Law Blog*, 17 March 2017

¹² European Council, *Annex to Council decision (EU, Euratom) 2017/... authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union – Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, 21009/17 BXT 16 ADD 1, 22 May 2017, pp. 8-9, para 21

¹³ For example, House of Lords European Union Committee, *supra* n. 4, pp. 41-42, paras 124-128

¹⁴ See Senior European Experts, *supra* n. 3, para 20

before the five years have been completed, then they would lose their right to return and their right to permanent residence.

EU citizens' rights have evolved over time and are likely to continue to do so. The negotiating directives adopted by the EU imply that the UK would be required to update its laws concerning EU citizens already resident in the UK in accordance with subsequent changes in EU law and that the European Court of Justice (CJEU) would continue to have jurisdiction over individual rights for EU citizens.¹⁵ This is likely to be contested by the British side.

Right of establishment

This paper is about individual rights, rather than those of businesses, but it is important to understand that EU citizens' rights to establish a business in another EU Member State are part of their free movement rights. This could mean, for example, that a British citizen wishing to work self-employed in another EU Member State might no longer be able to do so or indeed to establish a limited company or partnership in that country. As this issue is mentioned in the negotiating directives it will be one of the issues the UK and the EU will discuss.

Civil justice rights

EU legislation provides important civil justice rights for UK citizens. These cover things like divorce (including maintenance payments and the custody of children); litigation, for example because of an accident abroad; employment issues; and reciprocal recognition of court judgments which makes them enforceable.

The UK Government has chosen to opt into the three EU regulations on civil justice (known as the Brussels Regulations). They cover three main areas of civil law:

- jurisdiction, recognition and enforcement of civil and commercial matters;¹⁶
- jurisdiction, recognition and enforcement of matrimonial matters and parental matters;¹⁷
- jurisdiction, recognition, application and enforcement of matters relating to maintenance.¹⁸

The greatest area of risk is family law as there are no easily available alternatives to the current EU regulations which are often used by national courts (including in the UK) in family law cases. Part of the difficulty with this aspect of EU law and Brexit is the UK's insistence on no jurisdiction for the European Court of Justice after the UK leaves.¹⁹ Civil justice is not mentioned in the negotiating directives except insofar as they refer to proceedings already underway at the time of Brexit.

¹⁵ European Council, *supra* n. 12, pp. 8-9, 16-17, paras 21, 39 and 41

¹⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 OJ L 351/1

¹⁷ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 2003 OJ L 338/1

¹⁸ Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 OJ L 7/1

¹⁹ The problems of civil justice were discussed in House of Lords European Union Committee, *17th Report of Session 2016-17: Brexit: justice for families, individuals and businesses?*, HL 134, 20 March 2017

Criminal justice rights

The EU is in the process of implementing a series of measures to ensure justice for all persons accused of criminal wrongdoing in the EU. The first three measures are already in force:

- the right to interpretation and translation;²⁰
- the right to information, including about the offence(s) of which the citizen is accused;²¹
- the right to have access to a lawyer from the first stage of police questioning onwards; this measure includes the right for a friend or family member to be told of the detention and for the relevant consulate to be informed;²²
- the right to seek bail when charged with an offence in another Member State so that the accused can return to or remain in their home country whilst awaiting trial (the European Supervision Order).²³

Further rights have been adopted but are not yet in force:

- the right to be presumed innocent [from 1 April 2018];
- special rights for those under 18, including to be assisted by a lawyer and kept separately from adults in prison [from 11 June 2019];
- the right to legal aid (which can be means-tested) [from May 2019].²⁴

The situation is complicated by the fact that the UK opted into the legislation on the rights to interpretation and information but declined to do so for the remaining rights. None of these rights was mentioned in the Government's White Paper on Brexit, published in February 2017. In addition to these specific rights, EU citizens can challenge decisions based on EU legal instruments, such as a European Extradition Warrant, in the European Court of Justice.

Part II: Possible ways of safeguarding individual rights after Brexit

As the Government has explicitly rejected the UK remaining in the EU's Single Market, it has to be assumed that British citizens risk losing all their free movement rights. However, the situation is not straightforward because of the disputed legal doctrine of acquired rights and because it may be possible for the Government to negotiate alternative but (at least partially) comparable arrangements.

²⁰ Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 2010 OJ L 280/1 [the UK has opted into this legislation]

²¹ Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings, 2012 OJ L 142/1 [the UK has opted into this legislation]

²² Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 2013 OJ L 294/1 [the UK has not opted into this legislation]

²³ Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009 OJ L 294/20 [the UK has opted in to this legislation]

²⁴ See European Commission, *Your rights if accused or suspected of criminal offences in the EU*, 9 November 2016

Acquired rights

Before the 2016 referendum it was suggested that the rights of UK citizens in the EEA or of EEA citizens here would be protected by the legal doctrine known as “acquired rights”. This concept holds that rights that people have acquired over time are not automatically revoked if a treaty or law no longer applies.²⁵ This doctrine was used by some Leave campaigners to suggest that British expatriates in the EU (for example) had nothing to fear from Brexit.²⁶ This interpretation has since been disputed by leading lawyers and rejected by the House of Lords European Union Select Committee which concluded that there was no general protection of acquired rights available to British or other EU citizens after Brexit.²⁷

Claims that the Vienna Convention of the Law of Treaties provided automatic protection for rights acquired before Brexit, rested on a contested interpretation of that Convention. The Convention refers to the rights to the *parties* to a Treaty, which in the case of the EU Treaties means the Member States and not their individual citizens. Furthermore, there is no reference to acquired rights in Article 50, the EU Treaty Article which covers withdrawal, nor is there any general protection for acquired rights elsewhere in the EU Treaties.²⁸

The Swiss model

Some of the rights of EU citizens are also available to Swiss citizens (and to EU citizens in Switzerland) by virtue of bilateral agreements between the EU and Switzerland. The EU/Swiss Agreement of 2002 confers a range of rights similar but not identical to those in the Single Market. These individual rights include: reciprocal rights to work in Switzerland, including in a self-employed capacity; to establish and run a business there; to receive equal treatment; to have family members accompanying them; and to own property.²⁹

Although there were transitional provisions limiting the number of residence permits issued to EU citizens in Switzerland, no such restrictions have applied from 1 January 2017.³⁰ However, in a referendum in 2014 the Swiss voted for the imposition of quotas for all migrants, including EU migrants. This would have breached the EU-Swiss agreement on free movement of workers, and if that fell all the other EU-Swiss agreements would have fallen. Instead of introducing quotas, the Swiss Parliament passed a law on 16 December 2016 requiring employers in sectors or regions with above-average unemployment to advertise vacancies at job centres and give locally registered job-seekers priority before recruiting from abroad. This solution was accepted on 22 December by all 28 EU Member States and welcomed by the Commission.³¹

While the EU/Swiss agreement has protected the rights of EU citizens living and working in Switzerland, those rights are not fully comparable to those UK citizens have been used to

²⁵ Professor Sionaidh Douglas-Scott in evidence to the House of Lords European Union Committee inquiry into acquired rights: see *Written evidence (AQR0001)*, 14 September 2016

²⁶ For example, Leave Alliance, *'Expats have nothing to fear from Brexit'*, 4 March 2016

²⁷ House of Lords European Union Committee, *supra* n. 4, paras 71-72

²⁸ Professor Sionaidh Douglas-Scott, *op. cit.*

²⁹ *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons*, 2002 OJ L 114/6, art. 7

³⁰ See Swiss Confederation, *'Free Movement of Persons Switzerland – EU/EFTA'*, 29 May 2017

³¹ European Commission, *European Commission welcomes progress in relations between the European Union and Switzerland*, IP/16/4501, 22 December 2016

exercising within the EU and they are based on Switzerland accepting the free movement of people, something which the UK Government has said it will not accept.

Other legal measures

There are other legal measures which may provide some protection for individual rights. The first of these is the European Convention on Human Rights (ECHR), which is enforceable in the UK through the Human Rights Act 1998.

The ECHR protects the human rights of individuals in a number of areas; these include: property rights, the right to privacy and to family life; and the right not to be discriminated against. Individuals might be able to use these provisions to protect their rights after Brexit but they would have to pursue cases through the courts and the ECHR's provisions do not cover all aspects of EU citizen's rights.³²

In the case of civil justice rights, there are alternative provisions in existence that might help. In particular, the Lugano Convention, an agreement covering part of EU civil justice law between the EU and Iceland, Norway and Switzerland, would, if the UK became a party to it, mean the ability to retain some common rules on the jurisdiction and the enforcement and recognition of judgments.³³ Similarly, the Hague Convention of 2005, on the choice of court for legal proceedings, could be ratified by the UK (we are already signatories by virtue of our EU membership).

The difficulty of these arrangements is that they do not entirely satisfy the Government's requirement of no role for the European Court of Justice. The UK would not, for example, be under the Court's jurisdiction under the Lugano Convention but would have to take account of ECJ judgments.³⁴ There would also have to be an agreed mechanism between the UK and the EU for keeping civil justice arrangements up to date.

Although the ECHR provides important protection for the rights of accused persons, there is no comparable provision in international law for the specific criminal justice rights that the EU has introduced.

Conclusion

The rights of individuals as EU citizens have evolved over time and British citizens benefit from them every day without (in many cases) recognising they are doing so. The loss of these rights, if no alternative arrangements are made, will be felt severely on both sides of the Channel. There are a number of potential alternative remedies for particular rights but these are not ideal and in any case not as comprehensive as those granted by EU membership. As Professor Sionaidh Douglas-Scott told the House of Lords:

³² See House of Lords European Union Committee, *supra* n. 4, paras 88-92

³³ The Lugano Convention of 2007 supercedes the earlier agreement signed in 1988: *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2007 OJ L 339/3, art. 68(6)

³⁴ See House of Lords European Union Committee, *supra* n. 19, paras 142-147

A lot of the rights that are derived from EU law are simply not replicated in other instruments, so there is a real deficit ... There will be many, many rights that simply do not find a home in any of these other instruments.³⁵

It was for that and other reasons that the House of Lords concluded that the best solution is for the Government to reach agreement for the preservation of individual rights in its negotiations with the EU. Such an agreement would also need to include effective means of enforcement so as to ensure that the terms of the agreement were respected in practice.

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³⁵ Quoted in House of Lords European Union Committee, *supra* n. 4, p. 3



Senior European Experts

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