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ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

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## Rights of Entry and Residence

*Steve Peers, University of Essex, 17 May 2016*

### Introduction

The free movement of EU citizens to the UK (and vice versa) is a key feature of the UK's EU membership. However, it is too simple to describe this as a 'loss of control of British borders'—because the UK retains the right to check people at its borders, and can apply its own law to the large majority of non-EU citizens, who make up the majority of net migrants to the EU.<sup>i</sup> Furthermore, although the free movement of EU citizens is generous compared to ordinary immigration law, it is not unlimited.

### Rights of entry and residence

The free movement rights of EU citizens and the limitations upon these rights are set out in the EU Treaties and legislation. Among these sources, the main rules on the free movement of EU citizens are set out in an EU law known in practice as the '[Citizens' Directive](#)'. That Directive provides that EU citizens and their family members can move to another member state initially for a period of three months, without any conditions other than having a passport or identity card (Article 6).<sup>ii</sup> However, during this time, the EU citizen does not have any right to social assistance benefits (Article 24(2)). The question of subsequent access to benefits (including in-work benefits) is set out in another paper in this collection.

After three months, the Citizens' Directive says that EU citizens and their family members can stay subject to further conditions: they are either workers or self-employed; or have 'sufficient resources' not to burden the social assistance system, along with health insurance; or are students in a post-secondary institution, if they have health insurance and declare that they will not be a burden to the social assistance system (Article 7(1)). Jobseekers can stay after three months and look for work, as long as they 'can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged' (Article 14(4)(b)).

EU citizens have the right to be joined by their family members: defined as a spouse or (subject to conditions) civil partner, children under 21 or dependent, or dependent ascending or descending relatives of the EU citizen or that citizen's spouse. Member States must also

'facilitate' the admission of a broader category of family members, who do not however have an unlimited right to enter and stay (unmarried partners, and other dependent relatives). There is no income threshold requirement (besides the underlying obligation for the EU citizen sponsor to qualify under the terms of the Citizens' Directive in the first place), and no requirement of 'prior lawful residence' in the UK or another Member State.

In principle EU free movement law does not apply to UK citizens in the UK who seek to be joined by their non-EU family members. Those UK citizens are subject to the much stricter UK rules on family reunion instead. However, according to the [Surinder Singh](#) judgment (as subsequently confirmed and clarified by the CJEU), UK citizens can move to another Member State, spend some time there with a non-EU family member, and then return to the UK.

It is important to be aware that the UK renegotiation deal agreed by the UK government and the EU on 20 February 2016 would allow the UK to impose extra constraints upon EU citizens who have third-country national family members ([Annex VII to the EU summit conclusions of February 2016](#)). EU law will be changed to show that non-EU family members would have to show 'prior lawful residence' in a Member State before they can join an EU citizen who has moved to another Member State. The EU Commission will also issue guidance to suggest to Member States that it might be easier to restrict family members from joining a citizen on the return to his or her own Member State.

After five years' legal stay on the basis of the Citizens' Directive, EU citizens and their family members can obtain permanent residence status, meaning that they no longer have restricted access to social benefits and no longer are required to meet the conditions mentioned above for an extended right of residence (Articles 16-21). If a marriage ends before that date, the family members of an EU citizen can still stay in the country, subject to certain conditions (such as a prior period of residence, to make sure that the marriage is genuine; see Articles 12 and 13). Separate rules also state that where an EU citizen was a worker and left the country, his or her children can stay, as can the non-EU parent that looks after them (see, for instance, the judgments in [Teixeira](#) and [Ibrahim](#)).

## **Exclusion and expulsion**

As for EU citizens or their family members who may be a threat to security, the Citizens' Directive allows for expulsion, entry bans or refusal of entry for those who are a threat to 'public policy, public security or public health' (Articles 27-33). These limits are discussed in a separate paper in this collection, but it should be noted that it is possible to apply an entry ban at the UK border (Article 32), and all EU citizens who seek to come to the UK are checked at the border before entry. Restrictions must be proportionate and 'based exclusively on the personal conduct of the individual concerned'. People cannot be excluded on general preventive grounds, but on 'personal conduct' which 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(1)). British authorities can check on an individual's police record after entry (Article 27(2)). For those who are in the territory, there is greater protection against expulsion over time, but there is never any absolute ban on expulsion (Articles 27(2) and 32). By way of example, the Court of Justice of the European Union (CJEU) has accepted that [drug traffickers](#) and [child abusers](#) can be expelled, no matter how long they have resided on a country's territory.

It is also possible to expel EU citizens on grounds that they rely on social assistance, but they cannot be expelled automatically because of an application for such assistance, and workers, self-employed people and jobseekers with a genuine chance of finding work cannot be expelled on such grounds either (Article 14(3) and (4)). Nor can people be expelled purely because their passport or identity card expired (Article 15(2)). Anyone expelled on such

'economic grounds' has the same procedural rights as people expelled for non-economic reasons, and cannot be subject to an entry ban (Article 15(1) and (3)).

## Citizenship

What about dual citizens? An EU citizen who is also the citizen of a non-Member State can always rely on the EU citizenship to invoke free movement rights, even if they acquired that nationality recently (CJEU judgment in [Micheletti](#)). However, people who are citizens of two Member States can generally only invoke EU free movement law if they have moved between Member States (CJEU judgment in [McCarthy](#)). So, in that case, a dual citizen of the UK and Ireland who had always lived in the UK could not invoke her Irish nationality to bring her non-EU husband to the UK on the basis of EU free movement law.

According to the CJEU judgment in [Kaur](#), EU law does not affect the UK rules on different categories of national citizenship. While there are no EU-wide rules on how non-EU citizens resident in the EU can obtain citizenship, it should be noted that Member States usually make the grant of citizenship to non-national residents subject to a condition of lawful residence,<sup>iii</sup> and deny citizenship status to those convicted of crimes. Indeed, even lawful residents can lose their right to reside if they are convicted for a serious crime.

However, the CJEU's [Rottmann](#) judgment made clear that EU law can affect the loss of national citizenship: in that case Member States must justify the grounds (fraud) on which citizenship might be lost, and also put procedural protection in place. The thinking behind the [Rottmann](#) case is that it should not be possible to easily lose the citizenship of the EU. In the judgment in [Ruiz Zambrano](#), the CJEU went further, deciding that the 'effective enjoyment' of EU citizenship meant that the non-EU parent of an EU citizen could not simply be deported or denied a work permit—because this would effectively result in the EU citizen having to leave the territory of the EU. The CJEU has not yet clarified what happens if the other parent (who might often be a citizen of that Member State) is still able to look after the child concerned. Nor has it yet clarified the limits on expelling a non-EU parent of a UK child on criminal grounds (the parent in [Ruiz Zambrano](#) was an irregular migrant, but not a convicted criminal). Cases pending before the CJEU (*CS* and *Chavez-Vilchez*) should clarify these issues.

## Future enlargement

Finally, what about future EU enlargements? It should be noted that no further enlargement is likely for a number of years—least of all with Turkey, which has only agreed one out of 35 negotiating chapters in over ten years of negotiations. The last three enlargements have been subject to seven year waiting periods for citizens of most of the new Member States (in relation to seeking employment). Although the UK decided not to apply the waiting period in full for the Member States which joined in 2004, it applied such a waiting period for the later enlargements and could do so again in future. In fact, since EU enlargement is subject to the unanimous consent of each government and approval by national parliaments, the UK could insist on a longer transitional period before full free movement of new Member States, or even rule out enlargement or free movement from the new Member State altogether.

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<sup>i</sup> Office of National Statistics, *Migration Statistics Quarterly Report*, Feb. 2016.

<sup>ii</sup> Directive 2004/38 (OJ 2004 L 158/77).

<sup>iii</sup> See Art 6 of the Council of Europe's European Convention on Nationality (ETS 166), which 12 Member States have ratified.