# ILPA Evidence for the House of Lords' Select Committee on the European Union for its enquiry into the possible consequences of Brexit on EU rights

## Executive Summary

i. We consider the international law doctrine of acquired rights. We concur with the experts who have given evidence to the Committee that the "pure" doctrine of acquired rights is not in point as far as free movement rights and rights under the common European asylum system, the subject of our response, are concerned.

ii. We consider the availability of alternative legal avenues to protect not only acquired rights but the rights EEA nationals and third country nationals currently enjoy relevant to free movement and to migration whether voluntary or forced. We envisage that the Council of Europe Convention on Establishment and the European Convention on Human Rights will be the two main sources of protection for EEA nationals and their family members not benefiting from any Brexit settlement. We consider these. We consider that the UN Convention relating to the Status of Refugees and the European Convention on Human Rights will be the two main sources of protection for persons in need of international protection when the UK is no longer part of the Common European Asylum System. We consider these. We also consider the Council of Europe Convention on Action against Trafficking in Human Beings, the 1954 UN Convention on the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness, the UN Convention against Torture and the UN Convention on the Rights of Child..

iii. We have dealt in more detail with the rights of Irish citizens and of persons on the island of Ireland in our submission to the House of Lords' Select Committee on the European Union for its enquiry into the impact of Brexit on the relationship between the United Kingdom and Ireland We summarise that response.

iv. We highlight the central role of legal aid in protecting rights and current problems.

v. We address in detail the extent to which the withdrawal agreement between the UK and EU can safeguard free movement rights and rights under the Common European Asylum Policy. We consider the rights of British citizens in the EU at the time of withdrawal and explain that, save for those in Ireland and Denmark, there is some certainty for them because of the common European immigration policy. We explain that because of this policy, negotiations on their rights and those of their their family members will be conducted at EU level and are likely to have to encompass all third country nationals in the EEA.

vi. We consider the rights of EEA nationals in the UK at the time of Brexit and make recommendations for a standstill as of the date the UK leaves the EU. We identify the possibility of different settlements in different parts of the UK and the importance of clarifying what is within the competence of the devolved administrations. We identify that logistics and practical problems may shape any settlement.

vii. We consider asylum. We identify that it is unlikely that the UK would be permitted to participate in the 'Dublin III' system post Brexit and that a new consolidated European asylum system may have implications for what the UK can negotiate, including with States currently opted out, including Ireland.

viii. Finally we consider the rights of British nationals and EEA nationals moving post Brexit and what it might be possible to negotiate given the context of the common European immigration policy.

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1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

2. Prior to the referendum, ILPA commissioned a series of position papers on the implications of the EU Referendum for free movement rights and rights currently protected in the Common European Asylum System. These are available on our website together with work subsequent to the vote on both current problems with EEA applications in the UK and the rights of EEA nationals post Brexit.[1]

3. This evidence responds to the questions the Committee wishes to address in terms of the implications for the rights of EEA nationals and third country nationals in the UK, including rights of free movement and rights under the common European asylum system, and the rights of British citizens elsewhere in the European Union.

## 1. Whether and to what extent rights of free movement and rights under the Common European Asylum Policy might continue to operate and/or be enforceable under the international law doctrine of acquired rights

4. We have considered the evidence of Professor Vaughan Lowe QC to this inquiry, which he summarized as:

> *The short point is that I think it very unlikely that the international law doctrine of acquired rights will play a significant role in the legal processes arising from the implementation of Brexit.*
>
> *…There is, …general agreement that the category of 'acquired rights' does not extend beyond property rights and certain contractual rights. Rights to live, work, receive medical care and retire in an EU Member State other than one's own (or for companies, the right of establishment) would not be included within that category.*
>
> *In any event, cases based on the rights in international law of individuals or companies are much more likely to be pursued under the European Convention on Human Rights or an investment protection treaty.*[2]

[1] Available at http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html.

[2] AQR002 , 14 September 2016, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/38137.pdf

5. We have also considered the written evidence of Professor Sionaidh Douglas-Scott[3] and the oral evidence both persons provided to the Committee[4]. Professor Lowe further commented

> *As I have said in my written comments, the substantive protection given by the international law doctrine of acquired rights is pretty well eclipsed by the protection given by the European Convention on Human Rights, for example. There is no obvious reason why anyone would try to rely on the acquired rights doctrine, rather than rely on the European convention.*[5]

6. These analyses chime with the 14 April 2016 comments of Tim Eicke QC which are specifically concerned with free movement rights[6] and we concur with all three experts in thinking that the "pure" doctrine of acquired rights is not in point as far as free movement rights and rights under the common European asylum system, the subject of this response, ae concerned.

## 2. The availability of alternative legal avenues to protect acquired rights, such as the European Convention on Human Rights

7. In the light of our answer to question 1, we have not limited our response to this question to acquired rights, but have looked at the rights EEA nationals and third country nationals currently enjoy which are relevant to free movement and to migration whether voluntary or forced. In the time available to us, we have not created a comprehensive list.

### Free movement and migration

8. We envisage that the Council of Europe Convention on Establishment[7] and the European Convention on Human Rights will be the two main sources of protection for EEA nationals and their family members not benefiting from any Brexit settlement. To avoid the time and expense of unnecessary litigation to protect rights under these instruments it is vital that a Brexit settlement make adequate provision for EEA nationals and their family members. In particular we recommend that:
   i) Rights to reside be afforded to those EEA nationals and their family members who have lived in the UK for a certain period, for example five years.
   ii) Rights to reside be afforded to those who would be given rights as persons who have exercised EEA rights of free movement but for failing to fulfil requirements as to comprehensive sickness insurance. This group includes, in particular, many spouses of British citizens.

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[3] AQR001, 14 September 2016, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/37921.pdf

[4] 13 September 2016, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/oral/38196.html

[5] AQR002, *op.cit.*

[6] *Could EU citizens living in the UK claim acquired rights if there is a full Brexit? Interview with Lexis PSL*, available at https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2016/04/Could-EU-citizens-living-in-the-UK-claim-acquired-rights-if-there-is-a-full-Brexit.pdf

[7] CETS 019, 13 December 1955.

9. We expand upon these points in answer to the third question below.

***Council of Europe European Convention on Establishment***

10. The Council of Europe European Convention on Establishment[8] protects those who have been lawfully resident in a member State for 10 years or more and will thus afford protection to EEA nationals and their third country national family members who have been lawfully resident in the UK for more than ten years. This is the origin of the long residence rule in the Immigration Rules.[9]

***European Convention on Human Rights***

11. Beneficiaries of free movement rights also enjoy the protection of rights under the European Convention on Human Rights, which benefit everyone within the jurisdiction. Of particular relevance is Article 8, the right to respect for private and family life.

12. Article 8, the courts have held[10], posits five questions that must be answered in turn in order to determine whether there is a breach of the obligation it creates.

- Firstly, has private or family life been established?
- Secondly, has there been an interference with the right to respect for such private or family life?
- Thirdly, is any such interference is in accordance with the law?
- Fourthly, is any such interference necessary in a democratic society as being in the interests of one of the legitimate aims set out in Article 8's 2nd paragraph ( immigration control is accepted as being such an aim, so absent a case of bad faith, it is difficult to see this question ever being answered in favour of an immigrant).
- Fifthly, are the means chosen necessary in a democratic society (i.e. proportionate to the ends sought – the "proportionality" question).

13. The right to respect for family life will not protect those who could enjoy family life elsewhere. There is no interference with right to family life if the family can be together in other country. There may, however, be interference with the private lives of members of the family. The right to private life can encompass the right to establish and develop relationships with other human beings[11] and the physical[12] and psychological[13] integrity of a person as well as those features which are integral to a person's identity[14] or ability to function socially as a person[15].

14. In general the approach, as summarised by the courts in different cases, will be:

(1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

[8] CETS 019, 1
[9] HC 395, paragraph 276B.
[10] See in particular *Razgar* [2004] UKHL 27, per Lord Bingham.
[11] *Niemietz v. Germany*, Appl. 1370/88, European Court of Human Rights judgment of 16 December 1992.
[12] *Storck v Germany*, European Court of Human Rights, App. No.61603/00.
[13] *Bensaid v UK*, European Court of Human Rights, Appl. No. 44958/98.
[14] *Dudgeon v UK*, European Court of Human Rights, Appl. No.7525/76.
[15] *McFeeley et ors v UK*, European Court of Human Rights, Appl. No. 8317/78.

(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.

(3) Removal or exclusion of one family member from a State where other members are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if it is not reasonable to expect the other members of the family to follow that member expelled.

(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on

(i) the facts of the particular case and
(ii) the circumstances prevailing in the State whose action is impugned.

15. In practice, the Article 8 rights of a broad and diverse group of persons may be affected by a person's being required to leave the UK. One example is the divorcé(e) with children from a previous relationship. The child is usually faced with separation from one parent or the other if one parent moves abroad. Where a couple remain together, nonetheless separation from elderly parents or other, dependent, relatives may constitute unlawful interference with the right to family life.

16. The Immigration Act 2014 s 19, inserting new sections 117A to D into the Nationality, Immigration and Asylum Act 2002, codified the circumstances in which a person would be granted leave to remain under the immigration rules because of a risk of a breach of their rights under Article 8.

17. Part 5(A) of the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014, requires a court or tribunal to consider the "public interest" when determining a decision respecting private and family life under Article 8 and whether the decision is unlawful under section 6 of the Human Rights Act 1998.

18. When considering the 'public interest question', the way in which the provisions refer to Article 8(2) of the European Convention on Human Rights, in carrying out the balancing exercise between the rights of the individual and what is necessary in a democratic society for the reasons set out in Article 8(2), the court or tribunal must have regard to considerations listed in section 117B of the Nationality Immigration and Asylum Act 2002 in all cases and, in cases concerning the deportation of 'foreign criminals' as defined, to the considerations listed in section 117C

19. This 'public interest' question goes to the question of proportionality when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the European Convention on Human Rights.

20. Given that Article 8 has been used to protect physical and psychological integrity it may be used, in this regard, and more generally, to substitute for protection currently afforded by Article 1 of the Charter of Fundamental Rights of the European Union, which protects human dignity.

21. Article 8 also provides procedural protection. The case of *R (On the Application Of Kiarie) v The Secretary of State for the Home Department* [2015] EWCA Civ 1020, currently under appeal to the Supreme Court where it is to be heard in September 2017, is concerned with the extent to which it makes unlawful the "deport first; appeal later" regime introduced by the Immigration Act 2014 under which a person can be removed from the UK while their appeal is pending and can return only if they win. This is to be generalized to all non-protection cases as a "remove first; appeal later regime by the Immigration Act 2016 when s63 of that Act comes into force.

22. In *Kiarie* it was argued that an out of country appeal would result in unfairness in some cases because of the difficulties of obtaining evidence, preparing the appeal and presenting it. It was also argued that the process would create the appearance of unfairness. The Court of Appeal did not accept these arguments. It was accepted that an out of country appeal was not as good as an in-country appeal, but held that Article 8 did not demand access to the best possible appeal but to a procedure meeting the essential requirements of fairness and effectiveness.

23. The equivalent of the deport first appeal later regime for EEA cases is contained in Regulation 24AA of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Under this regulation a person can be removed from the UK while their appeal is pending but may return to the UK to be present at their appeal. Article 31(4) of the free movement Directive (2004/38/EC) states that,

> *Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.*

24. Regulation 29AA establishes a process whereby a person who has lodged an appeal against a removal decision and who has been removed from the UK may apply from outside the UK for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at his or her appeal hearing. The May 2016 Home Office guidance *Regulation 24AA of the Immigration (European Economic Area) Regulations 2006*[16] provides more detail. The case of *Kiare* will establish if, and if so when, such a procedure may be required outside the framework of EEA law.

[16] Version 4 , May 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521818/Regulation_24AA_guidance-v4.pdf

25. The case of *R (Osman Omar) v SSHD* [2012] EWHC 3448 (Admin) confirmed that there will be cases where not to waive a fee would be to breach an applicant's human rights (in that case under Article 8 of the European Convention on Human Rights.[17]

## Asylum and international protection

**26.** We envisage that the 1951 UN Convention relating to the Status of Refugees and the European Convention on Human Rights will be the two main sources of protection for persons in need of international protection when the UK is no longer part of the Common European Asylum System. While both deal with the right to be granted international protection and the content of the protection granted, neither replicate the explicit right to seek asylum protected by Article 18 of the Charter of Fundamental Rights of the European Union. Rights of appeal under Part V of the Nationality, Immigration and Asylum Act 2002 can be used to vindicate rights to international protection, although the right to a remedy set out at Article 13 was not incorporated into UK law by the Human Rights Act 1998.

27. Protocol 24 to the consolidated version of the Treaty on the Functioning of the European Union, on asylum for nationals of Member States of the European Union[18], the so-called "Spanish Protocol" provides a mechanism for declaring applications for asylum from nationals of other EU member States inadmissible. It does so in the light of the framework of EU law, as set out in the preambular paragraphs: the recognition of the rights, freedoms and principles set out in the Charter of Fundamental Rights, Articles 2, Article 6(3) and 7 of the Treaty on European Union and the justiciability of Article 6 before the Court of Justice of the European Union, and rights of free movement.

28. The UK did not initially give effect to this protocol but Immigration Rules were introduced on 19 November 2015[19] to allow claims from EU nationals to be treated as inadmissible whilst providing a mechanism to consider claims where exceptional circumstances are raised.

29. The compatibility of the Spanish Protocol with the 1951 Refugee Convention is dubitable, but it is clear that given the way in which it is framed the rule changes would not survive Brexit and we consider that the UK would be in breach of its obligations under the 1951 UN Convention on the Status of Refugees if it refused to entertain applications from EU nationals with a well-founded fear of persecution in their country of origin. Such persons might also be protected by Article 3 of the European Convention on Human Rights and in cases of a 'flagrant (*Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) Appellant)*[2004 UKHL 26) breach of other rights, which also entail a prohibition on *refoulement.*

[17] Other cases on fees are *Carter v Secretary of State for the Home Department* [2014] EWHC 2603 and *Williams vs Secretary of State for the Home Department* [2015] 1268. The case of *Williams* is to be heard by the Court of Appeal in January 2017.
[18] *Official Journal* 115 , 09/05/2008 P. 0305 – 0306.
[19] HC 535 of 29 October 2015.

## Trafficked persons

30. The UK will remain a party to the Council of Europe Convention on Action against Trafficking in Human Beings[20] even when it is no longer bound by the EU Directive 20011/36/EU *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.* It will be necessary to ensure that the equivalent of the specific protection afforded trafficked persons by the Directive is retained. The Directive sets out criteria for issuing a residence permit to trafficked victims of trafficking. The residence permit envisaged falls somewhere between the reflection periods and residence permits for which provision is made in the Council of Europe Convention. The Directive provides that the permit is to be issued for at least six months. It provides that trafficked persons should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. Member States must provide trafficked people with subsistence, access to emergency medical treatment and attend to the special needs of those most 'vulnerable' during a reflection period. Those holding a residence permit should be authorised to access the labour market, vocational training and education according to rules set out by national governments.

31. Article 4 of the European Convention on Human Rights will continue to provide protection to trafficked and enslaved persons and has, in particular, been recognized as a source of positive obligations toward them[21].

## Stateless persons

32. The UK is also bound by the 1954 UN Convention on the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness. There are stateless persons from within the EU for example Roma from the former Yugoslavia and ethnic Russians from the Baltic states. Part 14 of the UK Immigration Rules makes provision for such persons to be recognised as stateless and to be afforded leave and we would expect some of them to benefit under this instrument.

## Persons on the island of Ireland

33. We have dealt in more detail with the rights of Irish citizens and of persons on the island of Ireland in our submission to the House of Lords' Select Committee on the European Union for its enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union[22], prepared in parallel to this submission.

34. The third preamble of the 1998 Belfast ("Good Friday") agreement states

    *The British and Irish governments*

[20] CETS 197.
[21] *Silladin v France* European Court of Human Rights 73316/01; *Rantsev v Cyprus and Russia,* European Court of Human Rights, 25965/04.
[22] 30 September 2016.

…

*Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union;"*

35. There are thus questions as to the status of the agreement post Brexit. The implications of the loss of the framework of EU law, of the protection of the EU Charter of Fundamental Rights and Freedoms, and of the supervisory jurisdiction of the Court of Justice of the European Union for the peace process and the human rights of persons there are extensive.

36. Insofar as the Good Friday agreement survives in its current form, it recognises the right of the people of Ireland to self-determination. The parties to the agreement recognise human rights and in particular affirm the right freely to choose one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity. The incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule assembly legislation is also protected by the agreement. The beneficiaries of these provisions are not limited to Irish or British citizens but anyone within the jurisdiction.

37. The parties to the Good Friday agreement recognise "the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose" and that such persons have the "right to hold both British and Irish citizenship is accepted by both Governments." Section 2(1) of the Ireland Act 1949 provides that "the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK". Immigration law appears to make its own provision for Ireland, separately from the 1949 Act, see for example the Commonwealth Immigrants Act of 1962 and the Immigration Act 1971.

38. The agreement commits the UK government to the

> "… complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."

39. The parties to the agreement affirm their commitment to the mutual respect for the civil rights and the religious liberties of everyone in the community and affirm their commitments to certain rights in particular. The agreement also makes provision for laws to promote equality of opportunity.

## Other sources of protection

40. There are other legal sources of protection which will benefit particular groups of migrants and former EEA nationals. For example the UN Convention Against Torture[23], especially if the UK were to agree to accept the right of individual petition under it

[23] 1465 UNTS 85.

against the UK[24] thereunder may benefit survivors of torture in circumstances where they should otherwise have qualified for subsidiary protection under the EU Qualification Directive[25]. The courts in immigration and asylum cases have made frequent reference to the UN Convention on the Rights of Child[26], see for example *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, particularly in the context of elaborating on the protection afforded by Article 8 of the European Convention on Human Rights. The Convention has also been relied upon in extradition cases, see *HH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent)* [2012] UKSC 25.

## Appeal rights

41. The Immigration (European Economic Area) Amendment Regulation 2015 (SI 2015/694) implemented changes to the EEA appeals regime as of 6 April 2015, timed to coincide with changes to the immigration and asylum appeals regime effected by the Immigration Act 2014. The only persons subject to the regime created by the Act and the regulations who continue to enjoy rights of appeal are those who have made a protection (broadly an asylum) or human rights (for example on the basis of Article 8, the right to private and family life) claim as defined, which the Secretary of State has "decided to refuse" , whose leave granted for protection reasons (recognition as a refugee, humanitarian protection) has been revoked or those who assert that a decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom. The result of Brexit will be that these appeal rights will no longer exist and henceforth only refugee or human rights claims will carry a right of appeal, with all other cases subject either to no review (curtailment of leave) or to a right to a (charged) internal review by the Home Office.

42. The supervisory jurisdiction of the Court of Justice of the European Union extends to free movement cases and to cases under the instruments that make up the Common European Asylum System. With the loss of this supervisory jurisdiction, the only international court to which it will be possible to have recourse in immigration and asylum cases will be the European Court of Human Rights, although applications may be made to an international body where the UK has accepted the right of individual petition.

## Legal aid

43. The extent to which the legal avenues described above can be relied upon to protect rights is affected by the availability of legal aid. With effect from 6 April 2013 and the coming into force of the relevant provisions of the Legal Aid, Sentencing and Punishment

[24] See HL Written Question 1327, answered 28 July 2016 by Lord Faulks. See http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-07-21/HL1327

[25] Directive 2004/83/EC, of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[26] 1577 UNTS, 3.

of Offenders Act 2012[27], there ceased to be legal aid for immigration cases. Provision made for exceptional case funding was held by the courts to be inadequate *Gudanaviciene, et ors v The Director of Legal Aid Casework and the Lord Chancellor (Appellants) [2014] EWCA Civ 1622*. One of the bases for exceptional case funding is that to deny it would breach EU law, including the procedural protection afforded by Article 8.

44. In *R(Public Law Project) v The Lord Chancellor* [2016] UKSC 39 the proposed residence test for legal aid, which had been approved by the House of Commons but withdrawn before it could be considered by the House of Lords, was ruled *ultra vires* the enabling legislation. This would have made those without lawful leave in the UK at the date of application for legal aid, and who had not held lawful leave for at least 12 months prior to the date of application, ineligible for legal aid. Those outside the jurisdiction would not have been eligible for legal aid. In particular the change would have had the effect of removing legal aid for judicial review, still available in some, although not all, legal aid cases[28].

## 3. The extent to which the withdrawal agreement between the UK and the EU can safeguard free movement rights and rights under the Common European Asylum Policy, and the likelihood of its doing so.

### Free movement

#### *Rights of British citizens in the EU at the time of withdrawal*

45. There is much more certainty for British citizens and their family members living in other EU states than for EEA nationals and their family members in the UK because of the EU common immigration policy. Unless this is renegotiated, EU law principles of non-discrimination would appear to preclude departure from it for the UK alone. Thus British citizens in other EU states, save for Ireland and Denmark which have opt-outs, have a higher degree of certainty about certain elements of their status. Given this existing legal framework, we see little scope for the withdrawal agreement to affect the rights of British nationals exercising rights of free movement elsewhere in the EU and their family members insofar as these are covered by the common immigration policy. If this becomes an issue in withdrawal negotiations, the UK would be negotiating for rights in the EEA (with the exception of Ireland and Denmark) as a whole. Given the principle of non-discrimination in EU law, we consider that the UK would have to negotiate for third country nationals as a whole and not just for its own nationals.

46. The common immigration policy is limited in its reach however and is a much less comprehensive system than the common European asylum system. It includes rules on rights of third country nationals to work or study in an EU country; rules allowing citizens of countries outside the EU who are lawfully staying in an EU country to bring their families to live with them and to become long-term residents, shared visa policies that enable certain third country nationals to travel freely for up to three months within

[27] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013, SI 2013/453 (c.19).
[28] The Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 19.

the Schengen zone. Decisions on the total number of third country nationals to be admitted to the State to look for work, final decisions on individual applications and rules on visas for more than three months, as well as the circumstances in which third country nationals can obtain residence and work permits where no EU-wide rules have been adopted, are matters for individual member States.

47. Because some of the rights of British nationals and their family members in other EU States will be governed by existing EU law, under the supervisory jurisdiction of the European Court of Justice, the UK will not be negotiating on the basis of reciprocity. Because of the common immigration policy it will not be negotiating with other member States. This is not to say that the rights of EEA nationals, or of nationals of a particular EU state, could not, as a matter of politics, be used as "bargaining chips" in negotiations on Brexit, but they could be traded against any other measures, not just movement rights of EEA nationals. There have been many protests[29] at the notion of the rights of individuals to live and work in the UK being thrown into the negotiating pot in this way. It is the case, however, that rights under immigration law are not infrequently included in broader agreements between States. The provisions of the EU-Turkey deal[30] as to the immigration rights of Turkish nationals is one example, another are the UK's deals with China, making provision for visit visas.

48. The common travel area with Ireland is recognized in EU law but predates it. See the paper by Professor Bernard Ryan[31] in ILPA's EU Referendum position paper series and see ILPA's response to the House of Lords' EU Select Committee enquiry into the impact on the relationship between the United Kingdom and Ireland following the vote by UK citizens to leave the European Union, prepared in parallel with this paper[32].

*49.* We consider that there is scope for a withdrawal agreement to make provision for the common travel area and the attendant rights for those within it although given that both the UK and Ireland have opted out of the common immigration policy the details of any such safeguards are likely to be negotiated between the two States. Given, however, that this would involve the EU in accepting a porous international land border it would no doubt want to be satisfied as to controls on entry into the common travel area, now and for the future. The Protocol on the Common Travel Area, Protocol 20 to the Treaty of Lisbon, states that the United Kingdom and Ireland "…may continue to make arrangements between themselves relating to the movement of persons between their territories".

50. An agreement acceptable to the EU could entail the UK's giving undertakings as to the way in which it would control its own borders as these are the points of entry to the common travel area. It would be sanguine, therefore, to assume that the Protocol will not become the subject of Brexit negotiations[33]. Ireland and the UK joined the EU on

[29] See e.g. the House of Commons Debate EEA nationals in the UK, 6 July 2016, vol 612.
[30] 18 March 2016, see http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/
[31] *EU Referendum position paper 8: The implications of UK withdrawal for immigration policy and nationality law: Irish aspects*, Bernard Ryan, Professor of Law, University of Leicester, 18 May 2016, available at http://www.ilpa.org.uk/resource/32154/eu-referendum-position-paper-8-the-implications-of-uk-withdrawal-for-immigration-policy-and-national
[32] 30 September 2016.
[33] See HM Government *Alternatives to membership: possible models for the UK outside the EU,* March 2016.

the same date[34] therefore the question of the land border between the two States being an external border of the EU has never arisen. It is not the case, however, that all parts of the common travel area are already fully within the EU: this is not the case for Jersey, Guernsey and the Isle of Man. All three islands have their own immigration laws and their own relationship with the EU.

***Rights of EU nationals in the UK at the time of withdrawal***

***Devolution***

51. We are aware that there will continue to be debates about independence and the independence of parts of the UK so that they could remain within the EU. Short of such settlement, certain matters pertaining to EU citizens resident in the devolved administrations are within the competence of their parliaments. As Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper for ILPA[35] while immigration is a reserved matter, for example. welfare entitlements are devolved in Scotland and thus EEA nationals' access to services in Scotland could be protected by clarifying which matters are within the competence of the Scottish parliament or require the legislative consent of the Scottish Parliament prior to enactment. Ongoing political and inter-governmental cooperation between Holyrood and Westminster would be needed to achieve this. Devolved matters on which there is immigration legislation in Northern Ireland include[36]:
    - health and social services
    - education
    - employment and skills
    - social security
    - housing

52. Further devolution could bring aspects of the rights of EU/EEA nationals within the legislative competence of devolved administrations to allow them to reach their own settlement.

53. Habitual residence within the common travel area, including in Ireland, makes a person eligible for non-contributory benefits to which an habitual residence test is applied, anywhere in the UK. An Irish citizen habitually resident in the Republic of Ireland and present in the UK is thus eligible for these benefits and for homelessness assistance.

54. There is a potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations. This, or the framework for this, could be set out in the withdrawal agreement. We consider it likely that the withdrawal agreement will need to make express reference to devolution for the reasons set out in the ILPA papers on Scotland and Northern Ireland.

[34] 1 January 1973,

[35]

[36] Cabinet Office and Northern Ireland Office, *Devolution settlement: Northern Ireland*, 20 February 2013.

***Rights of EEA nationals***

55. A withdrawal agreement could protect the rights of EEA nationals and their family members in the UK. The likelihood of these matters being addressed in detail in a withdrawal agreement may ultimately turn on questions of logistics, but the instrument could provide a framework. Given the focus on rights of free movement (and the confusion with immigration) in the debates on Brexit, and the public expressions of concern for the rights of EEA nationals we consider it highly likely that reference will be made to these rights in a withdrawal agreement. We consider however that is necessary to make provision for EEA nationals prior to the drawing up and signing of any withdrawal agreement.

56. There appears not to be political opposition to making provision for certain EU nationals as soon as possible. The then Minister for Immigration said in the 6 July 2016 debate:

> *The Government fully appreciate the importance of giving certainty to EU citizens when the UK exits from the European Union. Addressing this issue is a priority that we intend to deal with as soon as possible.*[37]

57. There are practical challenges because of the volume of applications which would potentially need to be processed. These arguably make it inevitable that, as with EEA free movement law, documentation given to individuals would evidence rights, rather than be the means by which such rights were granted them. Logistics and practical problems may be determinative of which solution is adopted.

58. There are various models.

59. The need for certainty means that it is desirable to set out minimum, but not minimal, guarantees in UK law as soon as possible. These can be built upon to give rights to more people, or enhanced rights to beneficiaries of an initial settlement, in future. Agreements reached at the date of the signing of the withdrawal agreement should be encapsulated in it, together with a framework under which further guarantees could be provided.

60. ILPA recommends a standstill clause and that the relevant date for the application of any protection should be the date of leaving the EU. A model for this is what often happens when changes are made to the Immigration Rules affecting, *inter alia*, persons on the route to settlement (see e.g. the pre and post November 2014 Tier 1 (Investor) changes; Part 8 of the Immigration Rules and its replacement by Appendix FM to those rules etc.).

61. As to the date of any standstill, we recommend the date of the UK's leaving the EU. For as long as the Government remains silent, everyone who was in the UK on 23 June 2016 or arrived subsequently is in the same position. Any date earlier than the date of leaving would be arbitrary.

62. One simple measure would be to provide that all those who have permanent residence at the cut-off date should retain the equivalent of their rights as a permanent resident.

[37] *Ibid*. Col 948.

Those who do not yet have permanent residence should, at the very minimum, be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law (i.e. preserve this basis of qualification in separate provisions).

63. Beneficiaries of a standstill provision should include all EEA (not only EU) citizens and Swiss and their qualifying non-EEA family members, including persons exercising derived rights. Account must be taken of Articles 21, 45 *(*workers*)* and 49 (establishment) and 56 (services) (and predecessor provisions) to cover all free movement of persons. Articles 49 & 56 include legal persons as well as natural persons and it will be necessary to specify natural persons if it is desired to exclude rights of legal persons e.g. companies providing cross-border services. The Minister said in the 6 July 2016 debate:

> *This issue is not simply about the immigration status of an individual. Under free movement law, EU citizens' rights are far broader than just the right to reside in the UK. There are employment rights, entitlements to benefits and pensions, rights of access to public services, and rights to run a business, which is so closely aligned with the right to provide cross-border services, as well as the ability to be joined by family members and extended family members, in some cases from countries outside the EU. Of course, under current arrangements these rights extend to European economic area and Swiss nationals, who are not in the EU. They all need to be considered, and we must remember that people do not have to register with the UK authorities to enjoy basic EU rights to reside. We will need to work out how we identify fairly and properly the people who are affected.*[38]

64. There should be equal treatment of all beneficiaries, while not closing off the possibility of special arrangements in the future in the event of particular difficulties (e.g. in Irish cross-border cases).

65. Adequately to protect rights, provision would need to be made for particular cases.

66. It will be necessary to make provision for persons who may subsequently become part of the family unit, including after the signature of a withdrawal agreement: e.g. babies born to a couple benefiting from protection.

67. Consideration should be given, for simplicity's sake to giving rights of permanent residence to persons with a certain number of year's residence, e.g. five, without looking at detail within that period. This would be administratively more convenient. Qualification under either the Immigration (European Economic Area) Regulations 2006/1003 or the Citizens Directive (Directive 2004/38/EC) should be sufficient. Either/ or is the current legal position, and there are some differences. For example, the Regulations are broader than the Directive, in that they fully cover civil partners. Qualification under articles 21, 45 *(*workers*)* and 49 (establishment) and 56 (services) (and predecessor provisions) should also suffice, to cover all free movement of persons and derived rights of residence.

68. Provision should be made for *de facto* EU residents, e.g. the economically inactive partners of British citizens who do not have comprehensive sickness insurance and are thus not treated as exercising treaty rights as self-sufficient persons, but who have built

[38] CoI 951.

lives and families here. For this group and to avoid other complications we strongly suggest that rights of access to the NHS be treated as comprehensive sickness insurance cover.

69. British citizens returning from periods of residence as a qualified person in other EU members may be treated as exercising EU rights on return. One effect of this is that they have been able to bring to the UK third country national family members in situations where those family members would not meet the requirements of the immigration rules. Those family members may have been resident for considerable periods, and children born in the UK etc. Provision should be made for them.

70. Provision should be made for persons with rights acquired through residence which includes residence in the Channel Islands / Isle of Man. Residence in these areas is counted in calculating whether a person has acquired permanent residence.

71. Provision should be made for persons exercising derived ("derivative") rights of residence to continue to exercise such rights for as long as the conditions currently pertaining to such exercise are met.

72. Persons with rights of permanent residence but who are outside the UK on the cut-off date (e.g. those studying outside the UK on that date) should benefit. A possible model would be the Immigration Act 1971 section 34(3) "shall be treated as having an indefinite leave, if he is not at the coming into force of this Act subject to a condition limiting his stay in the United Kingdom."

73. Those who do not yet have permanent residence should be allowed to qualify for permanent residence once they meet the current conditions for permanent residence set out in EU law (i.e. preserve this basis of qualification in separate provisions as described above).

74. The EU's social security coordination rules (Regulations (EC) No 883/2004 and 987/2009 on the coordination of social security systems) apply currently to 32 countries, including EEA countries and Switzerland. Switzerland applies the rules by virtue of an annex to its bilateral agreement with the EU on the free movement of persons. It is suggested that the simplest approach would be for the UK government to continue to apply the EU social security coordination rules. This would also be to the advantage of UK citizens – particularly UK pensioners – currently residing in other EU countries.
75. The EU's social security rules operate largely independently of the provisions on the free movement of persons and could work equally in conjunction with any possible new system of residence and work permits for EU citizens in the UK. As regards the question concerning which healthcare and welfare benefits EU nationals should be afforded,

76. Application of the EU's social security coordination rules would imply that EU citizens habitually resident in the UK would continue to enjoy the same benefits and be subject to the same obligations with regard to the specific sorts of benefits within the scope of these Regulations. Healthcare is covered by these rules. Housing Benefit is not. The rules work around a concept of "insured persons". Non-active persons, including self-sufficient persons, are generally covered by the rules, as are family members.

77. We draw particular attention to retained rights, which provide important protection in situations where people are at particular risk, including because of protected characteristics under UK equality law. Persons involuntarily unemployed due to sickness, injury or redundancy can retain their status as workers. For example, family members who have resided as such with the qualified person in the UK can retain a right of residence in certain circumstances. Broadly speaking, they step into the shoes of the qualified person and thus, to retain rights prior to the acquisition of permanent residence must themselves have been in the Member State for at least a year and be employed, self-employment or self-sufficient or a student (in the latter cases they must have comprehensive sickness insurance) or be the 'family member' of such a person and will not become an unreasonable burden on the social assistance system of the UK. Where these conditions are met, rights can be retained following:
    - Divorce/annulment of marriage/dissolution of a civil partnership (spouse and children; marriage must have lasted three years and couple lived in the UK for one year or spouse/partner has custody of the child of the qualified person/rights of access to that child/relationship or the retained right is justified by 'particularly difficult circumstances', such as domestic violence within the relationship )
    - Death/ departure of EEA national or their leaving the country (all family members)

78. The Citizens Directive 2004/38/EC offers greater protection from deportation for EU nationals than that afforded to other third country nationals, increasing with length of residence. We propose replicating this but it may be felt that the question of losing rights is separate to that of accruing them.

79. As to practical considerations, ILPA considers that there should be a special post-EU status, set out in a separate set of UK rules, separate from current leave under the immigration rules (e.g. the rules on indefinite leave to remain).

80. Increasingly, immigration officers, employers, landlords etc., have to know who has a right to reside and who does not, and evidence is needed to prove this. We suggest that it will therefore be necessary to have residence documents confirming the rights to the new status. We are acutely aware, however, of the logistical problems this would entail. The Home Office has a strong interest in not having to make individual decisions on a large number of cases in a short time frame. For the scale of the task see the Migration Observatory's 3 August 2016 post *Here today, gone tomorrow? The status of EU citizens already living in the UK.*[39]

81. Reliance cannot be placed on National Insurance Numbers alone to come up with a system of registration. As the Migration Observatory comments

> *While some commentators have suggested that a registration process for EU citizens could take as the main criterion whether someone had registered for a National Insurance Number (NiNo) before a given cut-off date, relying on NiNos would be complicated by the fact that many people with UK NiNos are no longer living in the UK, while some people who do live here may not need one - for example, students or self-sufficient people who are not working*

[39] http://www.migrationobservatory.ox.ac.uk/commentary/here-today-gone-tomorrow-status-eu-citizens-already-living-uk

82. Appeals need to be addressed. There should be in-country rights of appeal and a mechanism which operates in a manner equivalent to s 3C of the Immigration Act 1971 (where leave continues on original terms and conditions until an application is determined, during the time in which an appeal can be brought and while an appeal is pending). What will a legal remedy look like for persons refused recognition of permanent residence or an alternative immigration status post the UK's departure (possibly for technical reasons)? We consider that appeal rights are properly the subject of a withdrawal agreement since without them persons may struggle to vindicate their rights.

83. In determining these cases we recommend that the interpretation of EU law pertaining to free movement rights (as to other matters) by the Court of Justice in existing and in future cases, should be treated as authoritative, or at the very least, only to be departed from with good reason, even if the UK is no longer a member of the EU. This should be encapsulated in a withdrawal agreement.

84. There are good reasons of fairness, administrative convenience and cost for having a simpler system that the current system under the immigration rules and a simpler system than, for example, the current 85 page (non-mandatory) application form for recognition of permanent residence under EU law. The status of persons benefiting from these provisions should be easy to understand and applications should be quick to make and to process. The current immigration rules are extremely complex and no one would want to replicate such a system.

85. Given the relevance of immigration status to all aspects of life and the volume of applications needing to be processed, people need to be able to convert their current status simply and easily. There needs to be a right to be issued with the relevant documentation within a reasonable time and persons must be protected pending the issuing of official documentation. UK Visas and Immigration must be resourced so that documents are issued without delay.

**Asylum**

86. The UK would no longer be a party to the Common European Asylum System if it left the EU. There is nothing to prevent its continuing to operate a system ressembling the Common European Asylum System within the UK, insofar as this is compatible with the UK's obligations under1951 UN Convention relating to the status of Refugees, which is as much an issue as a matter of law now as it will be post Brexit and with the UK's obligations under international human rights law, again, as much an issue now as it will be post Brexit.

87. What will be lost is the supervisory role of the Court of Justice of the European Union in interpreting refugee law. While UNHCR is the guardian of the 1951 Convention Relating to the Status of Refugees, there is no international court specifically charged with adjudicating on the claims of refugees who say their rights under the Convention have not been respected. Judgments of the Court may continue to have persuasive

force in the UK courts, but no more than, for example, the judgments of the High Court of Australia.

88. The UK will cease to be a party to the Dublin III Regulation, whereby responsibility for refugees is divided up between member States, on leaving the European Union. The UK could designate European States as "safe third countries" and attempt to negotiate an agreement with the EU (given the Common European Asylum Policy we do not consider that it could negotiate such an agreement with other member States). As Professor Guild explains in her paper for ILPA[40], at the moment the UK is a substantial net beneficiary of the Dublin system, sending a lot more requests to other Member States to take back asylum seekers than it receives.

89. Professor Guild reminds readers of her paper that the European Commission announced in April 2016 that it would be proposing a new consolidated instrument on asylum bringing all the common European asylum system measures into one Directive. It has also proposed substantial changes to the system with a view to creating a more regulated and coherent asylum system across the continent. States currently opted out of some of the common European asylum system measures, Denmark and Ireland, may decide to opt into any new instrument to preserve access to the Dublin system, which both are in at the moment. This may have implications for what the UK can negotiate with them. This is likely to be of particular relevance where Ireland is concerned because of the land border between the two States.

90. We recommend that the judgments of the Court of Justice in asylum cases should be treated as persuasive, rather than binding, in asylum cases following Brexit and that this should be incorporated into any withdrawal agreement.

***Rights of British citizens and EU nationals moving post Brexit***

91. We have dealt above with EEA nationals resident in the UK and UK nationals resident elsewhere in the EEA. It will be necessary to address matters of movement, visa waiver etc. (e.g. for tourism) and carriers liability for those who have yet to move.

92. We suggest that minimal standards ought to be included in a withdrawal agreement, including for the benefit of UK nationals.

93. Ideally the withdrawal agreement will be phrased so that the guarantees make reference to the common immigration policy and can grow as it develops, securing for EEA nationals in the UK rights and we suggest that minimal standards ought to be included in a withdrawal agreement, including for the benefit of UK nationals. The UK could offer EEA nationals rights equivalent to those offered UK nationals as third country nationals under the common immigration policy.

94. Insofar as not covered by the common immigration policy, and allowing for its development, it will be necessary to ensure that business visits, including visits to provide services, including as so-called "posted workers", and visits to seek work are

[40] EU Referendum Position Paper 10 - The UK Referendum on the EU and the Common European Asylum System, 29 April 2016, available at http://www.ilpa.org.uk/resource/32101/eu-referendum-position-paper-10-the-uk-referendum-on-the-eu-and-the-common-european-asylum-system-29

encompassed in a withdrawal agreement. Provision should be made for intra-company transfers as it is in the immigration rules.

95. Other matters for which provision could be made in the field of work include the right of entry to seek employment and the right to work, self-employment and establishment insofar as compatible with the common immigration policy. More generally, rights equivalent to those in that policy for permanent residence and to be accompanied by family members as well as protection against expulsion.

96. EU Regulation 883/2004 protects access to social security, based on work and contributions and affects pensions and incapacity payments. The UK could make equivalent provision. That regulation also protects access to health benefits in kind.

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