

**ILPA SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS: HUMAN RIGHTS IMPLICATIONS OF BREXIT****Executive Summary**

- I. We focus on the right to respect for private and family life and other rights protected under EU law: the protection of human dignity; the right to asylum, and protection against human trafficking. We consider the human rights implications of the loss of EU citizenship for British nationals.
- II. Repeal of the Human Rights Act 1998 remains live in political discourse. It would be easier for the UK to leave the European Convention on Human Rights once it were outside the EU. Any Brexit agreement must guarantee to those within the jurisdiction the full protection of their rights under the Convention, which is of particular importance in the context of the devolution settlements.
- III. The common immigration policy provides some certainty for British citizens and their family members living in other EU states.
- IV. There will be interference with the rights of EEA nationals of other EEA member States and their third country family members if they are not permitted to remain in the UK or if, the conditions imposed on their continuing to reside are such as they not cannot meet. It will be open to individuals to assert a claim that being forced to leave would breach their rights under Article 8 of the European Convention on Human Rights.
- V. Because the UK had opted out of the common European immigration system, those third country nationals whose rights stand to be affected by Brexit are persons in need of international protection and trafficked persons. The UK would no longer be a party to the Common European Asylum System if it left the EU. The supervisory role of the Court of Justice of the European Union in interpreting refugee law and the Directive on trafficking would be lost. The UK would cease to be a party to the Dublin III Regulation. The protective provisions of the Regulation, in particular those making provision for family reunion, especially in the cases of unaccompanied minors, would be lost.
- VI. Article 18 of the Charter of Fundamental Rights of the European Union protects human dignity. There is no direct equivalent under the European Convention on Human Rights although given that Article 8 has been held to protect the physical and psychological integrity of a person as well as those features which are integral to a person's identity or ability to function socially as a person it is the right on which reliance is most likely to be placed in this regard.
- VII. Neither the 1951 UN Convention relating to the Status of Refugees nor the European Convention on Human Rights replicate the explicit right to seek asylum protected by Article 18 of the Charter of Fundamental Rights of the European Union.
- VIII. The UK will remain a party to the Council of Europe Convention on Action against Trafficking in Human Beings post Brexit, but trafficked persons in the UK will no longer be able to rely on EU Directive 2001/1/36/EU. Without the Directive, some measures protecting trafficked persons are vulnerable to repeal.
- IX. There has been speculation as to whether withdrawal from the EU could be challenged on the basis that it would deprive British citizens of their citizenship of the Union. While such arguments are flawed, it is possible to argue that the government must satisfy procedural requirements in the way in which it conducts negotiations are intended to deprive British citizens of citizenship of the Union and all the benefits of it that they currently enjoy.

## **SUBMISSION**

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 EU 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.<sup>1</sup>
3. This evidence responds to the Committee's request to focus in particular on the right to respect for private and family life and also to its question about other rights protected under EU law. We focus in particular on the protection of human dignity, the right to asylum and protection against human trafficking. Finally we consider the human rights implications of the loss of EU citizenship for British nationals.

### **The human rights implications of Brexit: context**

4. The human rights implications of Brexit do not fall to be considered against a stable background. The question of repeal of the Human Rights Act 1998 remains live in political discourse. Membership of the European Union has not only been a source of rights but has protected the European Convention on Human Rights and its status in UK law. That Convention has been a source of protection of human rights for all within the jurisdiction of the UK.
5. Article 6(3) of the Treaty on European Union refers to the European Convention on Human Rights as part of the general principles of EU law and this is reflected in the case law of the Court of Justice of the European Union. The arguments as to whether adherence to the European Convention on Human Rights is a condition of European Union membership are canvassed in the House of Commons' library standard note SN/IA/6577<sup>2</sup> and we do not rehearse them here. It would be easier for the UK to leave the European Convention on Human Rights once it were outside the EU. Any Brexit agreement must guarantee to all those within the jurisdiction the full protection of their rights under the European Convention on Human Rights.

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<sup>1</sup>Available at <http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html>.

<sup>2</sup> 25 March 2014, author: Vaughne Miller.

6. The European Convention on Human rights is of particular importance in the context of the devolution settlements. The Belfast ('Good Friday') agreement<sup>3</sup> 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.*

7. 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. The third preamble of the Good Friday agreement states,

*The British and Irish governments*

...

*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;”*

8. 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 in Northern Ireland are extensive and the other devolution settlements give rise to similar concerns.

### **Privacy and family life**

9. ILPA has provided extensive information on this topic, including to the House of Lords' Select Committee on the European Union for its enquiry into acquired rights.<sup>4</sup> We summarise that evidence here and are happy to provide further information on request.

### **Implications of Brexit for the rights of British citizens elsewhere in the European Union**

10. There is much more certainty for British citizens and their family members living in other EU states than for other 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. It would cover British citizens, as third country nationals, in other EU states, save in Ireland and Denmark which have opt-outs. If the common immigration policy 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 all third country nationals and not just for its own nationals.

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<sup>3</sup> 10 April 1998. See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136652/agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf)

<sup>4</sup> 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, 1 October 2016, at: <http://www.ilpa.org.uk/resources.php/32545/ilpa-evidence-for-the-house-of-lords-select-committee-on-the-european-union-for-its-enquiry-into-the>

11. Of particular importance in the context of private and family life are Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. In particular, the former gives rights to permanent residence, and attendant entitlements, after the five years' residence and the latter gives the right to be reunited with spouse, minor children, and minor children of the spouse, with scope for States to make more expansive provision. In addition, rights to freedom of movement are protected by the Schengen system and there are measures protecting entitlements to work or study elsewhere in the EU,<sup>5</sup> rights engaging the right to respect for private life.
12. The common immigration policy may in time encompass a broader range of measures and British citizens living in other EU states could expect to benefit from these.

***Implications for the rights of EEA nationals of other EEA member States and their third country family members in the UK***

13. There will be interference with the rights of EEA nationals of other EEA member States and their third country family members if they are not permitted to remain in the UK or if, which amounts to the same thing, the conditions imposed on their continuing to reside are such as they not cannot meet. Those potentiality affected include all EEA (not only EU) and Swiss citizens and their qualifying non-EEA family members, including persons exercising derived rights. Account must be taken of persons enjoying rights under Articles 21, 45 (workers) and 49 (establishment) and 56 (services) (and predecessor provisions).
14. Many of those who have been resident for 10 years or more will enjoy the protection of the Council of Europe European Convention on Establishment,<sup>6</sup> the latter being the origin of the long residence rule in the Immigration Rules on which such persons will be able to rely.<sup>7</sup>
15. It will be open to individuals to assert a claim that being forced to leave would breach their rights under Article 8 of the European Convention on Human Rights. They will however have to pay appeal fees of £800<sup>8</sup> to vindicate such rights, unless they qualify for a fee waiver. 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).<sup>9</sup>
16. With effect from 6 April 2013 and the coming into force on that date of the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012<sup>10</sup>, there ceased to be legal aid for immigration, as opposed to asylum, cases. Provision made for exceptional case funding was held by the courts to be inadequate in *Gudanaviciene et ors v*

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<sup>5</sup> Directive (EU) 2016/801 Of The European Parliament Council Of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast).

<sup>6</sup> CETS 019.

<sup>7</sup> HC 395, paragraph 276B.

<sup>8</sup> The First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2016 SI 2016/928 (L.16), paragraph 4(b).

<sup>9</sup> 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.

<sup>10</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order 2013, SI 2013/453 (c.19).

*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, another that to deny it would breach the procedural protection afforded by Article 8.

17. The question is currently before the courts as to whether Article 8 gives individuals the right to be present at a hearing to assert their rights. 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 February 2017, is concerned with the extent to which “deport first; appeal later” regime introduced by the Immigration Act 2014, is compatible with Article 8. Under these provisions 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 s 63 of that Act comes into force. Unlike the equivalent regime for EEA cases, regulation 24AA of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), there is no provision under the ‘deport first; appeal later’ or the ‘removal first; appeal later’ provisions for a person who has lodged an appeal against a removal decision, and who has been removed from the UK, to apply from outside the UK for permission to be admitted temporarily to the UK solely for the purpose of making submissions in person at his or her appeal hearing.<sup>11</sup> The case of *Kiare* will establish if, and if so when, such a procedure may be required outside the framework of EEA law.
18. Not least to avoid extensive litigation under Article 8 ECHR, 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 now 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.). That it happens is due in no small measure to the work the Joint Committee on Human Rights did to highlight those stranded by the rule change pertaining to highly skilled migrants.<sup>12</sup>
19. 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 residents. 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).
20. This would, however, leave certain persons needing to rely on Article 8. In particular the economically inactive EEA 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 lives and families here. For this group, and to avoid similar complications in other cases, we strongly recommend that rights of access to the NHS be treated as comprehensive sickness insurance cover.

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<sup>11</sup> See the Home Office guidance *Regulation 24AA of the Immigration (European Economic Area) Regulations 2006* Version 4, May 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521818/Regulation\\_24AA\\_guidance-v4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521818/Regulation_24AA_guidance-v4.pdf)

<sup>12</sup> Joint Committee on Human Rights *Highly Skilled Migrants: changes to the Immigration Rules*, 20th Report of session 2006-2007, HC 993, HL Paper 173, 9 August 2007.

21. 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. For example the third country national parents of a British child (known as *Zambrano* parents after the case of *Ruis Zambrano*).<sup>13</sup>
22. 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.
23. 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. 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 have to step into the shoes of the qualified person and satisfy a number of conditions. Among other things, to retain rights prior to the acquisition of permanent residence, they must themselves have been in the Member State for at least a year and be employed, self-employment or self-sufficient or a student or be the ‘family member’ of such a person. Where these conditions are met, rights can be retained following:
- Divorce/annulment of marriage/dissolution of a civil partnership. Rights can be retained by spouse and children. The marriage must have lasted three years and couple lived in the UK for at least one year or the spouse/partner has custody of the child of the qualified person, rights of access to that child or a relationship with the child, 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. Rights can be retained by all family members.
24. 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.
25. In determining all these cases we recommend that the interpretation of EU law pertaining to free movement rights and related matters by the Court of Justice of the European Union, in existing and in future cases, should be treated as authoritative, or at the very least, as 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.
26. 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*

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<sup>13</sup> Case C-34/09.

*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.*<sup>14</sup>

27. He also said:

*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.*<sup>15</sup>

28. As regards devolved matters, Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper for ILPA<sup>16</sup> that while immigration is a reserved matter, other matters engaging human rights obligations are devolved. 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<sup>17</sup>:

- health and social services
- education
- employment and skills
- social security
- housing

29. 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.

30. There is heavy reliance on EU law for the protection of economic and social rights which are not protected by the European Convention on Human Rights.

31. 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. The EU's social security rules operate largely independently of the provisions on the free movement of persons and could work

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<sup>14</sup> Col 951.

<sup>15</sup> *Ibid.* Col 948.

<sup>16</sup> ILPA EU Referendum position paper 12: The implications for Scotland of a vote in the EU referendum for the UK to leave the EU, 1 June 2016, at <http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the>

<sup>17</sup> Cabinet Office and Northern Ireland Office, *Devolution settlement: Northern Ireland*, 20 February 2013.

equally in conjunction with any possible new system of residence and work permits for EEA nationals and their family members in the UK.

### ***Implications of Brexit for the rights of third country nationals in the UK***

32. Because the UK had opted out of the common European immigration system, those third country nationals whose rights stand to be affected by Brexit are persons in need of international protection and trafficked persons. We deal with the right to asylum and with trafficked persons separately under 'other rights' below.
33. 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 resembling the Common European Asylum System within the UK, insofar as this is compatible with the UK's obligations under 1951 UN Convention Relating to the Status of Refugees, which is as much an issue now as it will be post Brexit, and insofar as this is compatible with the UK's obligations under international human rights law, again, as much an issue now as it will be post Brexit.
34. 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 assert that their rights under the Convention have not been respected. Judgments of the Court of Justice of the European Union may continue to have persuasive force in the UK courts, but no more than, for example, the judgments of the High Court of Australia.
35. 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.<sup>18</sup> The protective provisions of the Regulation, in particular those making provision for family reunion, especially in the cases of unaccompanied minors, would be lost. The UK could 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 individually). As Professor Guild explains in her paper for ILPA<sup>19</sup>, at the moment the UK sends a lot more requests to other Member States to take back asylum seekers than it receives.
36. 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 an effective remedy set out at Article 13 was not incorporated into UK law by the Human Rights Act 1998.
37. 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.

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<sup>18</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

<sup>19</sup> 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>



## Other rights

### Protection of human dignity

38. Article 18 of the Charter of Fundamental Rights of the European Union protects human dignity. It has been relied upon specifically in immigration, notably in asylum, cases. There is no direct equivalent under the European Convention on Human Rights although given that Article 8 has been held to protect the physical<sup>20</sup> and psychological<sup>21</sup> integrity of a person, as well as those features which are integral to a person's identity<sup>22</sup> or ability to function socially as a person,<sup>23</sup> it is the right on which reliance is most likely to be placed in this regard.

39. In the joined cases of case of AB and C<sup>24</sup> the Court of Justice of the European Union declared incompatible with Article 1, as well as with Article 7 of the Charter, which protects private and family life the methods used to assess the statements and other documentary evidence of persons claiming asylum on the basis of their sexual orientation. The Court said

*65. In relation...to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter.*

40. Case C-179/11 was brought by the French NGOs Cimade and the Groupe d'information et de soutien des immigrés (GISTI). They sought the annulment of the inter-ministerial circular of 3 November 2009 as contrary to the objectives of Directive 2003/9/EC in so far as it excluded asylum seekers who the French government sought to transfer under the Dublin procedures from support. The court held that,

*42. The provisions of Directive 2003/9 must also be interpreted in the light of the general scheme and purpose of the directive and, in accordance with recital 5 in the preamble to that directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter. According to that recital, the directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter.*

...

*50. Accordingly, the answer to the first question is that Directive 2003/9 must be interpreted as meaning that a Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in Directive 2003/9 even to an asylum seeker in respect of whom it decides, under Regulation No 343/2003, to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant.*

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<sup>20</sup> *Storck v Germany*, European Court of Human Rights, App. No.61603/00.

<sup>21</sup> *Bensaid v UK*, European Court of Human Rights, Appl. No. 44958/98.

<sup>22</sup> *Dudgeon v UK*, European Court of Human Rights, Appl. No.7525/76.

<sup>23</sup> *McFeeley et ors v UK*, European Court of Human Rights, Appl. No. 8317/78.

<sup>24</sup> C 148/13, C 149/13 and C 150/13.

41. Article I was also mentioned in case C-571/10, which concerned entitlement to housing benefit for a third country national who was a long term resident, and in the linked UK and Irish cases of N.S. (C-411/10) and M.E. (493/10) on Dublin transfers to Greece. Although ultimately the case was decided on the basis of a breach of Article 4 (prohibition on torture, inhuman and degrading treatment).<sup>25</sup>

### **Right to asylum**

42. While both the 1951 UN Convention relating to the Status of Refugees and the European Convention on Human Rights 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.

43. See the discussion of the *Cimade and GISTI* case above. Article 18 has yet to be the focus of a judgment by the Court of Justice of the European Union but is mentioned in most of the cases on the common European asylum system.<sup>26</sup> It has also been relied upon before national courts, including in a case concerning refugee family reunion<sup>27</sup>.

### **Protection of trafficked and enslaved persons**

44. The UK will remain a party to the Council of Europe Convention on Action against Trafficking in Human Beings<sup>28</sup> post Brexit, but trafficked persons in the UK will no longer be able to rely on EU Directive 2011/36/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.

45. Initially, when the UK exercised its opt-out from the Directive, the Home Office argued<sup>29</sup> that the provisions of the Directive did not add to the protection of trafficked persons in the UK. The Home Office stated that opting in would require the UK to make mandatory provisions at the time discretionary in UK law and that these steps would reduce the scope for professional discretion and flexibility and might divert already limited resources.

46. Announcing the decision to opt in, the then Minister, Damian Green MP said

*The new text still does not contain any measures that would significantly change the way the UK fights trafficking. However, the UK has always been a world leader in fighting trafficking and has a strong international reputation in this field. Applying to opt in to the directive would continue to send a powerful message to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle this crime.*<sup>30</sup>

<sup>25</sup> See paragraphs 113 and 114 of the judgment.

<sup>26</sup> See e.g. C - 4/11 /; C - 528/11 /; C-528/11 /; C-179/11 /; CJEU - Joined Cases C-411/10 and C-493/10 /; C 57/09 and C-101/09 /; CJEU - C 31/09 /, Joined Cases C 175/08, C 176/08, C 178/08 and C 179/08 / ECJ - C-465/07 /, ECJ - C-19/08 / .

<sup>27</sup> France, Conseil d'Etat 371316 and (on family reunion) Hungary / Kfv. II. 37.374/2011/8

<sup>28</sup> CETS 197.

<sup>29</sup> 19 June 2012.

<sup>30</sup> *Hansard* HC 12 Mar 2011: column 53WS.

47. When the UK decided to opt in, the Commission identified that it would need to amend existing trafficking offences to confer extra-territorial jurisdiction over UK nationals who commit trafficking offences anywhere in the world; to make mandatory appointing special representatives to support child witnesses during police investigations and criminal trials and to set out the rights of trafficked persons to assistance and support. At the time, the UK was party to the European Convention on Human Rights and to the Council of Europe Convention on Action against Trafficking in Human Beings, but the measures identified by the Commission had not been made mandatory in UK law, suggesting that without the Directive they are again vulnerable to repeal.
48. The Directive emphasises the importance of protecting trafficked persons and puts this on an equal footing with the implementation of criminal measures. It sets out criteria for issuing a residence permit to trafficked persons. 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. Article 12.2 of the Directive requires member States to ensure that trafficked persons have access 'without delay' to legal counselling, and, to legal representation, including for the purpose of claiming compensation. It requires that legal counselling and legal representation be free of charge where the victim does not have sufficient financial resources.
49. Under the Directive, Member States must provide trafficked persons 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.
50. The supervisory jurisdiction of the Court of Justice of the European Union will be lost and, ILPA recommends that, as for asylum cases, the judgments of the Court of Justice in should be treated as persuasive, in trafficking cases following Brexit and that this should be incorporated into any withdrawal agreement.
51. 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.<sup>31</sup>

### **Loss of citizenship of the Union**

52. Declaration no 2 annexed to the Treaty of Maastricht on nationality of a Member State provides:

*The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information,*

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<sup>31</sup> *Silladin v France* European Court of Human Rights 73316/01; *Rantsev v Cyprus and Russia*, European Court of Human Rights, 25965/04.

*who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration.*

53. There has been speculation as to whether withdrawal from the EU could be challenged on the basis that it would deprive British citizens of their citizenship of the Union, with speculation that the case of *Janko Rottmann v Freistaat Bayern*, Case C-135/08, could be relied upon in this regard. The flaws in such arguments are succinctly dealt with by Professor Gareth Davies of the University of the EU for the *European Law Blog*.<sup>32</sup> Although extremely sceptical, Professor Davies does not wholly rule out the possibility to the challenge of Brexit arrangements on the grounds that means chosen to deprive British nationals of their Union citizenship were not proportionate: a 'drastic' break, the result of 'contested and controversial' negotiations. To turn this around, it is possible to argue that the government satisfy procedural requirements in the way in which it conducts negotiations are intended to deprive British citizens of citizenship of the Union and all the benefits of it that they currently enjoy.

Adrian Berry  
Chair  
IL:PA 17 October 2016

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<sup>32</sup> *Union Citizenship: still Europeans destiny after Brexit?* 7 July 2016 <http://europeanlawblog.eu/?p=3267>