

# Rights to Remain after Brexit

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## Introduction

This paper is concerned with the possibility of a post-Brexit right to remain for those residing in the United Kingdom under EU law on the free movement of persons.<sup>1</sup> It focuses on the question: who should have a right to remain, both in the negotiations at the EU level, and at the domestic level? It also considers the status and further rights that should go with such a right to remain.

## Rights of residence in EU law

The main source of rights of residence in EU law is the Citizens Directive of 2004.<sup>2</sup> It provides for rights of residence for EU citizens, as follows.

- There is an initial right of residence for up to three months, subject to possession of a passport or identity card, without substantive qualifying conditions.
- There is a right to remain as a job-seeker with a “genuine chance of being engaged”.<sup>3</sup>
- An extended right of residence is obtained through economic activity as a worker or as a self-employed person.
- There is also an extended right of residence for self-sufficient persons, including students. The requirements for this right are “sufficient resources ... not to become a burden on the social assistance system” and “comprehensive sickness insurance”.
- A right of permanent residence arises after five years’ extended residence, at any time. Special provision is made for the accelerated acquisition of the right by specific categories of former employees and self-employed persons. This right is lost “only through absence from the host Member State for a period exceeding two consecutive years”.

Under the Citizens Directive, family members, irrespective of nationality, of EU citizens covered by these rights have parallel rights of residence. The rights of residence of family members may be retained – subject to qualifying conditions - in the event of the EU citizen’s death or departure, or the termination of a marriage or civil partnership.

The following persons qualify automatically as family members:

- the spouse or civil partner of the EU citizen

- the descendants of the qualifying EU citizen or the spouse/ civil partner, if they are under 21 or dependent on them
- dependent relatives in the ascending line of the qualifying EU citizen or their spouse/ civil partner.

Certain other family members are entitled to have their residence “facilitated”.

Separately from the Citizens Directive, two ‘derivative’ rights of residence have been recognised.

- EU Regulation 492/2011 includes an ongoing right of residence for a child of a migrant worker, and their primary carer, so that the child may complete their education in a member state.<sup>4</sup>
- The right of EU citizens “to move and reside freely within the territory of the Member States”, in Article 21 of the Treaty on the Functioning of the European Union (TFEU) implies a right of residence for the primary carer of an EU citizen child, if that is necessary to prevent the child being forced to leave the European Union.<sup>5</sup>

Under the 1992 Agreement for a European Economic Area (as amended), nationals of Iceland, Liechtenstein, Norway have the same rights of residence as EU citizens, apart from those based solely on Article 21 TFEU.<sup>6</sup> Swiss nationals benefit from the somewhat less developed provisions of the 2002 EU-Swiss Free Movement of Persons Agreement.<sup>7</sup>

In the United Kingdom, both the rights set out in the Directive and these ‘derivative’ rights are implemented by the Immigration (European Economic Area) Regulations 2016.<sup>8</sup> These Regulations apply equally to the nationals of the EU-27 states, the three other EEA states and Switzerland. The nationals of these 31 states are therefore referred to here as ‘EEA+ nationals’ when discussing UK implementation.

A final point is that British citizens, and their family members who do not qualify in their own right, do not generally have rights of residence under EU free movement law in the United Kingdom. One exception is where a British citizen has previously exercised free movement rights in another member state before returning to the United Kingdom.<sup>9</sup> There is also an open question whether some dual British/ EEA+ nationals may rely upon free movement rights.<sup>10</sup>

## **Why a right to remain?**

The core reason to protect the right to remain of existing residents is fairness. EEA+ nationals and their family members who live in the United Kingdom will typically have substantial family, personal and work connections here. They will have built their lives in Britain in the reasonable expectation that their residence was protected by EU law, and that it would continue to be so. In the case of nationals of EU-27 states, moreover, they will have resided in the United Kingdom on the basis that they were exercising a core right of EU citizenship.

There are also pragmatic economic arguments for protection. The most recent data show that there were 2.3 million EU-27 nationals in employment in 2016, who made up 7.1% of the employed work force.<sup>11</sup> It would risk severe problems in the labour market if any significant part of this group were removed from the workforce through restrictions on their right of residence or their right to engage in economic activity. Beyond that, existing EU residents of working age or

younger offer a pool of workers for future employment. Protecting their rights of residence and economic activity would offset some of the negative effects of Brexit on labour supply.

The significant pressures expected upon the Home Office due to Brexit are a third reason to adopt a generous approach towards existing residents. Official estimates are that there were 3.2 million EEA+ residents in the United Kingdom in 2015, who made up 5.0% of the population.<sup>12</sup> By comparison, only 28,731 residence documents were issued to EEA+ nationals in the third quarter of 2016.<sup>13</sup> At that rate, roughly 1% of EEA+ residents will obtain a document each quarter, and it would take around 25 years to deal with all cases. It is therefore unlikely that the Home Office has the capacity to process applications one by one in an acceptable timescale. In order to avoid a chaotic situation as Brexit occurs, policies should be adopted which reduce the decision-making burden.

## **A negotiated approach**

Since the June 2016 referendum, the Government has broadly recognised the fairness and economic arguments for protecting existing EEA+ residents. Despite that, its approach has been to avoid unilateral commitments concerning their position. Instead, protection of existing residents is to be a matter for negotiation with the EU-27 member states - and presumably the other EEA+ states - with a view to obtaining reciprocal commitments concerning British citizens living in those states.

There are some grounds for optimism as to the achievability of a generous agreement. The UK Government has stated that “we fully expect that the legal status of EU nationals living in the UK, and of UK nationals in EU member states, will be properly protected.”<sup>14</sup> On the other side, the EU Commission, the European Parliament and the EU-27 states can be expected to favour a generous settlement for EU citizens, and their family members, who have relied upon free movement rights. Moreover, the available evidence shows that there are far more EU-27 citizens resident in the United Kingdom (3.2 million) than British residents in the EU-27 (0.9 million).<sup>15</sup> This numerical difference also points to support on the EU side for a protective agreement.

There is though a risk of protracted delay in reaching an agreement. While the Government has indicated that it favours an early agreement on this subject within the Article 50 ‘exit’ negotiations, there can be no guarantee of such an outcome. The possibility of a ‘transitional’ phase, between the date of withdrawal and the emergence of a ‘future’ EU-UK relationship, is a further possible source of delay. Even at this stage, the case remains for the United Kingdom to unilaterally guarantee the rights of EU-27 and EEA+ residents and their family members.

## **The content of an agreement**

In the negotiations concerning pre-Brexit residents, it is likely that the focus will be above all on rights guaranteed by EU law itself. The following is offered as a sketch of a desirable outcome.

- As the central issue is entitlement to stay long-term in the United Kingdom or the EU-27 states, the starting-point should be a right to remain for EU citizens and their family members who *already have* a right of permanent residence in EU law. It seems especially unfair that such a ‘permanent’ right could be removed by Brexit. It might also turn out to be unlawful in the EU-27 states which would continue to be governed by EU law.

- A focus on the right to remain implies protection for other residence which *leads to* a right of permanent residence in EU law. That would mean protection for those with rights of residence through economic activity, or as self-sufficient persons, or as family members. These persons should be permitted to continue their residence, to obtain permanent residence at a later date. The United Kingdom may wish to set a cut-off date before which residence must have commenced, to avoid a rush of ‘late arrivals’. On principle – and to avoid unfairness to genuine late arrivals – the date of Brexit itself should be the default position in negotiations.
- Rights of residence which *do not* lead to a right of permanent residence in EU law present a more complex challenge. The categories affected are: persons with an initial right of residence for three months, job-seekers, those with derivative rights, and qualifying family members of persons in those categories. The position of those with these rights could be left – as now – for the domestic level to resolve. As these are EU rights, the EU-level agreement could however contain a standstill clause, to the effect that the residence position of these other groups should not be worsened after Brexit.

Out of fairness to current residents, there should be a presumption in favour of the *status quo* in relation to the entitlements of persons with a right to remain. This general principle may however require adjustment in several respects:

- *Residence documents.* When the free movement of persons regime comes to an end, EU citizens with a right to remain will require residence documents, for checks at borders, by employers, by landlords, etc. The agreement ought therefore to provide for residence documentation to be obtained quickly and cheaply. In particular, the current six months deadline for member states to issue documents ought to be revised downwards.
- *Residence in the EU-27 states.* For British citizens who qualify for a ‘right to remain’ in one EU-27 state, will that right be exercisable solely in that state, or will it permit residence in other EU-27 states as well? Preservation of the *status quo* would suggest that it should be the latter.
- *Sponsorship of family members.* There is a case for allowing member states to introduce a limit – such as 20 years – on the period within which new family relationships count for this purpose. Otherwise, rights to sponsor new family members will continue for a long time into the future.

Finally, provision should be made for individuals to have the legal means to enforce their continuing rights. For British citizens in EU-27 states, the agreement concerning existing residents will be part of EU law, which will lead to a role both for the Court of Justice and for domestic courts. It is more difficult to identify a mechanism to ensure compliance by the United Kingdom, given the Government’s opposition to any continuing role for the Court of Justice. A potential solution would be for the agreement to require that the rights it provides should be legally enforceable at the domestic level in the United Kingdom.

In order to prevent disputes arising, it would also be desirable to provide clarification of unresolved points in the exit agreement. A major example is the question whether access to the National Health Service by EEA+ nationals and their family members counts for the purposes of the ‘comprehensive sickness insurance’ requirement. The Commission considers that it does.<sup>16</sup> The, United Kingdom authorities, however, have so far prevented EEA+ residents who meet all other requirements from having a right of residence, if this is their only source of healthcare.

## Decisions at the United Kingdom level

Even if there is a generous EU-level agreement concerning existing residents, it will still be necessary to address a number of matters at the United Kingdom level. In approaching these matters, fairness to existing residents suggests that the *status quo* should be respected as far as possible, so that any rights previously recognised in EU law or British law for EEA+ nationals should be protected..

The following more specific proposals may be made.

- If any of the points proposed in the previous section are not covered by an EU-level agreement concerning existing residents, they should be addressed at the domestic level.
- Rights of residence recognised in British law should be maintained, where these go beyond the requirements of EU law. An example is that periods spent within the initial three-month period of residence, and residence as a job-seeker, count towards permanent residence in the United Kingdom. A second is that formal statuses acquired by same-sex couples outside the EEA+ count as ‘civil partnership’ in the United Kingdom. A third is that the right of permanent residence applies Swiss nationals and their family members, which is not required by the agreement with Switzerland.
- If any EU law-based rights of residence do not lead to a right to remain at the EU level, should they do so in the United Kingdom? In this regard, there is a strong case for protection of the derivative rights of residence referred to above, as these can last for lengthy periods of time, and in the British system give access to indefinite leave to remain after ten years’ residence.
- There should be distinct statuses for those with rights to remain. This would avoid the conflation of this category with holders of indefinite leave and limited leave in the domestic immigration system. Moreover, if the agreement concerning existing residents does not provide for post-Brexit statuses to be acquired automatically, that should be done at the domestic level, so as to reduce the administrative burden upon the Home Office.
- The procedure to be followed to assert a right to remain, including the evidence to be provided, will need to be simplified.<sup>17</sup>
- It is uncertain when an agreement concerning existing residents would be negotiated as between the United Kingdom and Iceland, Liechtenstein, Norway and Switzerland. As the Government intends that nationals of these countries and their family members should be protected, that may need to be done at the domestic level in the first instance.

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<sup>1</sup> Any doubt as to whether the free movement of persons would come to an end was removed by Theresa May’s confirmation that the UK Government would not seek membership of the single market: ‘The government’s negotiating objectives for exiting the EU: PM speech’, 17 January 2017, <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>. This was reaffirmed at point 5.3 of the Government White Paper ‘The UK’s exit from and new partnership with the EU’ published 2 February 2017, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf)

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<sup>2</sup> Directive 2004/ 38 on the right of EU citizens and their family members to move and reside freely within the member states, OJ 2004 L 158/77.

<sup>3</sup> While Article 14 of Directive 2004/ 38 protects job-seekers (and their family members) against expulsion, United Kingdom implementation confers a ‘right of residence’ upon them.

<sup>4</sup> Regulation 492/2011 on freedom of movement for workers within the Union, [2011] OJ L 141/1, Art. 10.

<sup>5</sup> *Ruiz Zambrano*, Case C-34/09, [2011] ECR I-01177.

<sup>6</sup> This is by virtue of Annex V of the EEA Agreement (as amended) available at <http://www.efta.int/legal-texts/eea/annexes-to-the-agreement>.

<sup>7</sup> [http://eeas.europa.eu/archives/docs/switzerland/docs/freedom\\_movement.pdf](http://eeas.europa.eu/archives/docs/switzerland/docs/freedom_movement.pdf).

<sup>8</sup> SI 2016 No. 1052.

<sup>9</sup> This principle was first recognised by the Court of Justice in Case C-370/90 *Surinder Singh* [1992] ECR 4265.

<sup>10</sup> This issue is currently before the Court of Justice in Case C-165/16 *Lounes*.

<sup>11</sup> Office for National Statistics, *Employment by country of birth and nationality*, available from <https://www.ons.gov.uk/>, for the third quarter of 2016.

<sup>12</sup> Office for National Statistics, *Population by Country of Birth and Nationality: Underlying datasheets*, available from <https://www.ons.gov.uk/>.

<sup>13</sup> Office for National Statistics, *Immigration Statistics*, Table ee02, available from <https://www.gov.uk/government/statistics/>. This figure covers both residence and permanent residence documents.

<sup>14</sup> See the statement concerning ‘the status of EU nationals in the UK’, published on the Cabinet Office website on 11 July: <https://www.gov.uk/government/news/statement-the-status-of-eu-nationals-in-the-uk>.

<sup>15</sup> Office for National Statistics, *What Information is there on British Migrants Living in Europe?* (27 January 2017).

<sup>16</sup> In April 2012, the Commission initiated an infringement procedure against the United Kingdom challenging that interpretation, but has not as yet taken the matter forward.

<sup>17</sup> This question is addressed in the separate paper on by Matthew Evans. See also Colin Yeo, ‘Eight changes the UK Government could make right now to simplify permanent residence applications’, *Free Movement* blog, 17 January 2017, at <https://www.freemovement.org.uk/eight-changes-uk-government-make-right-now-simplify-permanent-residence-applications/>.

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