ILPA BRIEFING FOR HOUSE OF LORDS COMMITTEE STAGE DEBATES ON THE EUROPEAN UNION (NOTIFICATION OF WITHDRAWAL BILL) AMENDMENTS PERTAINING TO RIGHTS OF FREE MOVEMENT AND RELATED MATTERS

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. ILPA has submitted evidence to select committees examining leaving the EU, including the House of Lords EU Select Committee; the House of Lords Committee on Economic Affairs, the Justice Select Committee and the Joint Committee on Human Rights.[1]

For further information or for assistance with amendments and briefings please get in touch with Alison Harvey, Legal Director, ILPA Alison.Harvey@ILPA.org.uk or Zoe Harper, Legal Officer, Zoe.Harper@ilpa.org.uk or on 020072518383

This briefing considers all amendments pertaining to EEA nationals and third country family members on the order paper as of 23 February 2017. We first set out our understanding of how each amendment works, and make a brief comment on it. We then (at page 9ff) provide a briefing on the issues raised by the amendments. It covers:

- Persons under consideration (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)
- Current rights (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)
  Comprehensive sickness insurance (Amendment 7)
- Cut off dates and cohorts (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)
- Practicalities (Amendment 7)
- Sources of rights (all)
- British citizens in other EEA States and in Switzerland (Amendments 7, 26, 38, 40)
- Devolution (Amendments 8 and 20)
- Trafficked Persons (Amendment 33)
- Health service and the UK's need for EEA and Swiss nationals and their family members (Amendment 42)

The amendments we address are

- **Amendment 7** to Clause 1, page 1, line 3, in the names of Lord Oates, Baroness Kennedy Of The Shaws, Lord Cromwell;
- **Amendment 8** to Clause 1, page 1, line 3, in the names of Lord Warner and Lord Oates;
- **Amendment 19**, after Clause 1, New Clause *EU and EEA nationals resident in the United Kingdom* in the names of Baroness Hayter Of Kentish Town, Lord Hannay Of Chiswick, Lord Bowness and Baroness Ludford;
- **Amendment 25**, after Clause 1, New Clause *Rights of EU citizens resident in the United Kingdom* in the names of Baroness Hamwee, Lord Woolf, Baroness Lawrence Of Clarendon, Lord Kerslake;

[1] All available at http://www.ilpa.org.uk/pages/non-parliamentary-briefings-submissions-and-responses.html

- **Amendment 26,** after Clause 1, New Clause *Effect of notification of withdrawal: EU citizens in the UK and UK citizens in the EU* in the names of Lord Newby, Baroness Ludford, Lord Paddick and Lord Oates;
- **Amendment 33,** after Clause 1 New clause *Women's rights and equality* in the name of Baroness Drake;
- **Amendment 37,** after Clause 1 ,New Clause "EU Nationals in the United Kingdom in the name of Lord Wigley;
- **Amendment 38,** after Clause 1, New Clause *United Kingdom citizens in the EEA and EEA citizens in the UK* in the names of Lord Oates, Baroness Kennedy Of The Shaws, Baroness Janke;
- **Amendment 40,** after Clause 1, New Clause *United Kingdom citizens in the European Union and EU citizens in the UK* in the name of Lord Green of Deddington;
- **Amendment 41,** after Clause 1, New Clause *Rights of EU and EEA citizens resident in the UK* in the names of Baroness Ludford and Baroness Hamwee;
- **Amendment 42,** after Clause 1, *EU and EEA nationals working in the National Health Service in the name of Lord Clark of Windemere.*

AMENDMENTS: PRESUMED PURPOSE AND COMMENT

Amendment 7 to Clause 1, page 1, line 3, in the names of Lord Oates, Baroness Kennedy Of The Shaws, Lord Cromwell

Presumed purpose
This amendment would make publication of a report on the on the position of EEA and Swiss nationals and their family members a necessary precondition for issuing a notification of withdrawal from the European Union

The report must (sub clause a) make provision for a fast track procedure for all EEA and Swiss nationals to gain permanent residence. The term 'EEA nationals' includes UK nationals. While the focus is on other EEA nationals since what is at issue are their rights when in the UK, the third country national family members of British citizens exercising rights of free movement in the UK (when returning from another member State) can be protected. The cohort will be those 'currently' without further definition this would appear to mean at the date of the coming into force of the section) 'living' (not defined) in the United Kingdom. The term would appear to exclude visitors. The cohort is not limited to persons exercising rights under EU law but see below for limitations which can be imposed.

The report must (sub clause b) set out the requirements under the procedure. It can make provision for a cut-off date, for documentation that persons can be required to produce and for any other procedures. Thus it could be limited, for example, to those with permanent residence under EU law, or who are recognised to be qualified persons, or certain types of qualified person (workers and/or students and/or self-employed and/or self-sufficient for example).

The report must (sub clause b) address questions of rights, including entitlements to use public services.

Imposing a requirement that the person have comprehensive sickness insurance, as the self-sufficient and students are required to do under EU law to be recognised as qualified persons, is specifically prohibited.

It is proposed that the report form the basis for reciprocal rights to be granted to British citizens in EEA States and Switzerland. This establishes the UK government's position as one of reciprocity although it can impose no obligations on the EU (or on Denmark and the Republic of Ireland, which have opted out of the Common Immigration Policy) to agree to reciprocal arrangements.

Comment
The amendment has the advantage of addressing all EEA and Swiss nationals, and their family members, including British citizens exercising EU free movement rights and their family members. If the term 'currently' is intended to limit the cohort, at the very least, to those resident in the UK on the date on which this Bill is passed, then we consider that the cohort is too restricted, for the reasons set out below. We consider that it is helpful not to limit the cohort to persons exercising rights under EU law because of the problems with comprehensive sickness insurance discussed below.

The call for a fast track procedure focuses attention on the lengthy (and, when not 'immediately' for an EEA national and within a six month long stop for a family member, unlawful) delays to obtain residence documentation, rising as demands for documents, in the hope that they will do so good post withdrawal, rises. It also focuses attention on the enormous scale of the task of providing documentation to all EEA nationals and their family members currently in the UK. Such persons are not currently required to hold documents evidencing their status. As the 'hostile environment' encroaches on more aspects of life: work, benefits, bank accounts, private rental agreements, driving licences, health, evidence of status post withdrawal will be essential.

We consider that it is helpful that the report appear before notification of withdrawal is given, so that all can understand their position and the potential consequences of their actions, and that it is helpful to persons affected to establish and publish a negotiating position, but that overall that the requirement of a report is a weak one as it does not bind the government, other than in establishing a negotiating positon.

Amendment 8 to Clause 1, page 1, line 3, in the names of Lord Warner and Lord Oates

Presumed purpose
Like amendment 7 this amendment makes provision for a report, but in this case one to be prepared after a notification has been given, within nine months and a year of the debate. While the approval of parliament for the report must be sought, no consequences flow from its not being approved. *Inter alia* the report must describe progress on rights of movement for both EU citizens 'and UK citizens', although at the time when the report is laid, the term 'EU citizens' will continue to encompass UK citizens. Unlike amendment 7, this amendment does not encompass EEA but non-EU nationals or Swiss nationals. It makes no reference to family members, so their rights would have to be expressed by reference to the rights of the EU national principal. The scope of the report is large enough to cover both EU and UK nationals who have already moved and those who might move in future. There may be immigration implications of other parts of the report, such as on trade and on the devolved administrations.

Comment
A progress report may be a helpful tool with which to hold the government to account but on its own it does not provide protection. We consider that a report before notification is given is

to be preferred. We should wish to see consideration of rights of free movement expressly extended to cover family members, as well as EEA non-EU, and Swiss, nationals and their family members but does not provide protection. We commend the amendment for situating free movement within its wider context, and consider this to be desirable to understand the full implications of curtailing free movement, for the economy and for devolution.

Amendment 19, after Clause 1, New Clause *EU and EEA nationals resident in the United Kingdom* in the names of Baroness Hayter Of Kentish Town, Lord Hannay Of Chiswick, Lord Bowness and Baroness Ludford

Presumed purpose

This amendment binds Ministers of the Crown to a particular negotiating position. They are to ensure that citizens of an EEA State other than the UK, and their family members, legally resident in the UK on the day this Act is passed, continue to enjoy such rights as they currently enjoy under EU law (not limited to EU free movement law). They are also to continue to have all the potential to acquire residency rights under EU law that they have on the day before the Act is passed. This appears broad enough to encompass the person who travels to the UK on the day the Act is passed and is exercising their right to come to the UK for an initial period of three months. It would be interesting to hear the government's view on whether it is broad enough to encompass, for example, the French wife of a British citizen who has never worked or studied in the UK, and does not hold comprehensive sickness insurance. There is no mention in the amendment of Swiss nationals and their family members.

Comment

We consider that the date this Act is passed is to early a cut-off date for the rights described. Persons exercising their rights of free movement in the next two years should also have the potential to acquire protection. We consider it helpful that the amendment looks to a person continuing to acquire residency rights in future. The amendment provides an opportunity to debate the vexed question of comprehensive sickness insurance, discussed below and to understand the Government's attitude toward those whom it does not (now) consider to be exercising rights of free movement. It is helpful to debate residence rights more broadly than just the context of Directive 2004/38/EC as this allows rights under the Treaties to be included. In respect of rights that are also enjoyed by British citizens, such as employment rights, implementation of the amendment would throw up anomalies whereby EU national residents enjoyed greater protection than British citizens. We should wish to see Swiss nationals included in the amendment.

Amendment 25, after Clause 1, New Clause *Rights of EU citizens resident in the United Kingdom* in the names of Baroness Hamwee, Lord Woolf, Baroness Lawrence Of Clarendon, Lord Kerslake

Presumed purpose.

This protects the rights of all those EU nationals lawfully resident in the UK on 23 June 2016 because they were exercising rights of free movement under the free movement Directive 2004/38/EC on that date. It does not protect EEA nationals who are not EU citizens, or Swiss nationals. It does protection British citizens exercising free movement rights. It would only protect family members of EU citizens insofar as their rights of residence were held to be part of the parcel of rights enjoyed by the EU national principal under the Directive.

This appears broad enough to encompass the person who travelled to the UK on 23 June 2016 and is exercising their right to come to the UK for an initial period of three months. It would be interesting to hear the government's view on whether it is broad enough to encompass, for example, the French wife of a British citizen who has never worked or studied in the UK, and does not hold comprehensive sickness insurance. There is no mention in the amendment of Swiss nationals and their family members.
The amendment does not protect those exercising rights of free movement which derive directly from the treaties.

Comment
We consider this amendment too narrow in its ambit. The date of 23 June 2016 is an early date to use as a cut-off date, when persons continue and will continue to come lawfully to the UK, exercise their rights and put down roots, long after that. We consider the restriction to EU citizens to be too narrow. It omits EEA non-EU nationals and although we are pleased that is wide enough to cover British citizens, British citizens require such rights only for the protection of their third country family members and they are not expressly covered.

Amendment 26, after Clause 1, New Clause *Effect of notification of withdrawal: EU citizens in the UK and UK citizens in the EU* in the names of Lord Newby, Baroness Ludford, Lord Paddick and Lord Oates

Presumed purpose.
This amendment provides that nothing in this Act shall affect the 'continuation' of rights of residence 'and other rights' enjoyed by EU citizens lawfully resident in the United Kingdom and UK citizens lawfully resident in the EU on the date of withdrawal after withdrawal. The new clause thus encompasses but is not limited to residence rights and extends across the full swathe of residence rights, not only those under Directive 2004/36/EU. The reference to 'pursuant to EU law' is understood to refer back to the right to residence. It would appear to protect the rights of EU nationals lawfully resident in the UK which derive from, for example, EU employment law, even though UK nationals would not continue to enjoy such protection. There may be questions as to the protective function of a right: is a particular employment law provision protective of an employer, or of other employees, or to the disadvantage of an employee for example.

The amendment does not protect EEA nationals who are not EU citizens, or Swiss nationals. It would only protect family members of EU citizens insofar as their rights of residence were held to be part of the parcel of rights enjoyed by the EU national principal under the Directive.

This appears broad enough to encompass the person who travelled to the UK on 23 June 2016 and is exercising their right to come to the UK for an initial period of three months. It would be interesting to hear the government's view on whether it is broad enough to encompass, for example, the French wife of a British citizen who has never worked or studied in the UK, and does not hold comprehensive sickness insurance. There is no mention in the amendment of Swiss nationals and their family members.

It appears broad enough to protect the EU national who travels to the UK on the eve of withdrawal and is exercising their initial three month right to reside, but the quality of the protection is less clear. Does that right disappear on withdrawal, not as a consequence of this Act, but of withdrawal? If not, is it nonetheless limited to the initial three month right to reside,

or would the person be able to progress during those three months to being a qualified person and, subsequently, a permanent resident. Is it intended that the rights of the person's family members are encompassed by the amendment?

While the he proposed new clause purports to protect the rights of UK nationals elsewhere in the EU it offers no protection to those in the EEA or Switzerland.

The new clause purports to protect the rights of UK nationals elsewhere in the EU (but not the EEA or Switzerland).

Comment
We consider that the cut-off date of leaving the EU is appropriate for the identification of the cohort which will continue to enjoy free movement rights. It is in line with the usual approach to the cohort protection when the immigration rules change as discussed below. We consider that a strength of the amendment is that extends protection more broadly than to those exercising rights under Directive 2004/38/EC although we regret the omission of EEA non-EU nationals and Swiss citizens, and the lack of any express reference to family members.

It is helpful to debate residence rights more broadly than just in the context of Directive 2004/38/EC as this allows rights under the Treaties to be included. In respect of rights that are also enjoyed by British citizens, such as employment rights, implementation of the amendment would throw up anomalies whereby EU national residents enjoyed greater protection than British citizens.

While the proposed new clause purports to protect the rights of UK nationals elsewhere in the EU (but not the EEA or Switzerland) but must be regarded as defective in this respect since such protection is not within the gift of the UK parliament. The EU Common Immigration Policy protects some rights, other than in Denmark and Ireland, which have opted out. It provides an opportunity to debate these questions.

Amendment 33, after Clause 1 New clause *Women's rights and equality* in the name of Baroness Drake

Presumed purpose
Requires the Prime Minister, before issuing a notification of withdrawal, to give an undertaking to have regard to the public interest in the protection of certain rights post withdrawal. We focus on the question of ensuring that cooperation with the European Union to end human trafficking will continue unaffected.

Comment
It is helpful that the amendment focuses (inter alia) on ensuring that efforts to end human trafficking will continue unaffected because we consider that no assurance in this regard can be given. For the reasons set out below efforts to end human trafficking will be affected profoundly.

Amendment 37, after Clause 1 ,New Clause "EU Nationals in the United Kingdom in the name of Lord Wigley

Presumed Purpose
The amendment prevents the Prime Minster from giving notification of withdrawal until she is satisfied that arrangements are in place to ensure that everyone resident in the UK pursuant to any right derived from EU law on the date on which the Act comes into force can continue to reside on terms no less favourable than those that they enjoyed pre-withdrawal.

Comment
This elegant amendment protects EEA nationals and Swiss nationals and their family members, including family members of British citizens exercising rights of free movement. It demands that the Prime Minister be 'satisfied' that protection on the terms described can be given before notification of withdrawal can be given. It turns upon the subjective state of the Prime Minister, although this would be subject to a test of reasonableness and that of which she must be satisfied has many objective features. The amendment encompasses all free movement rights. In guaranteeing residence on terms no less favourable it protects the right to progress to permanent residence, including for those exercising their initial three month right to reside on the date of the Act's being commenced. It protects rights to be joined by family members (or persons who might become family members, such as babies not yet born) insofar as these can be construed as rights of the principal who enjoys the protection of the amendment.

While the amendment may take the prize for drafting, our quarrel with it is with its early cut-off date. Persons will continue to arrive, exercising their rights, until the UK leaves the EU and we suggest that that would be a preferred cut-off date.

Amendment 38, after Clause 1, New Clause *United Kingdom citizens in the EEA and EEA citizens in the UK* in the names **of Lord Oates, Baroness Kennedy Of The Shaws, Baroness Janke**

Presumed purpose
The amendment prevents the Government from giving notification of withdrawal until it has given an undertaking that arrangements are in place to ensure that everyone resident in the UK pursuant to any right derived from EU law on the date of withdrawal can continue to reside on terms no less favourable than those that they enjoyed pre-withdrawal.

The amendment imposes upon the Government a negotiating priority: 'confirming the existing rights' of British citizens and their families resident in the EEA (there is no mention of Switzerland). The wording is a little unclear but we read it to mean that existing rights and entitlements should continue.

Th amendment goes further, having negotiated no Minister can reach agreement unless the arrangements on the table permit and support the continuance after the UK's withdrawal from the EU of the existing rights of EEA citizens and their families resident in the United Kingdom; and the existing rights of United Kingdom citizens and their families resident in the European Union and the EEA. There is no mention of Swiss nationals or of Switzerland. It is unclear whether 'existing' means as of the date of the coming into force of the Clause or the date of withdrawal. It is also unclear that those rights would be understood to encompass. For example, would a person exercising their initial three months right of residence have a right to

continue to exercise those rights for three months, or to progress to being a qualified person or to permanent residence? Could they be joined by family members not already in the UK, perhaps not already in existence?

Comment
We prefer the cut-off date of the date of withdrawal in this amendment to the earlier cut-off date of the Act's coming into force for which provision is made is amendment 37. What sort of undertaking would be required? The word of a Minister? Or a commitment to bring forward an Act of parliament?

There is no more that can be done for British citizens abroad than to make their position a negotiating priority and to refuse to agree to any settlement that does not make provision for them and this amendment does. It sets a standard for that provision, as it does for the provision to be made for EEA (but not Swiss) nationals and their family members in the UK. While under the amendment, however, no Minister can agree to anything less than the preservation of 'existing' rights; if the result of that is that agreement cannot be reached, because other States do not agree to British citizens preserving their rights, then will the result be a 'hard Brexit': withdrawal with no agreement and thus all rights and entitlements under EU law falling away on the date the UK leaves, save where alternative provision has been made.

Amendment 40, after Clause 1, New Clause *United Kingdom citizens in the European Union and EU citizens in the UK* in the name of Lord Green of Deddington

Presumed purpose
The amendment is in very similar terms to the second and third parts of amendment 39, see above. It omits the requirement to give an undertaking prior to giving an Article 50 negotiation. The only other difference is that it defines 'existing' rights as being those at the date of withdrawal.

Comment
See comments on Amendment 39 above. The clarification that rights are those existing at the date of withdrawal tightens the drafting of that part of the amendment and that part is to be preferred. The omission of the requirement to give an undertaking to ensure that the rights of EEA nationals in the UK will continue post withdrawal makes this the weaker amendment. Those rights are entirely within the UK government's gift and do not in any way depend on the terms of withdrawal.

Amendment 41 after Clause 1, New Clause *Rights of EU and EEA citizens resident in the UK* in the names of Baroness Ludford and Baroness Hamwee

Presumed purpose
To ensure that EU and EEA citizens and their family members lawfully resident, whether under EU law or not, on the day on which the Act is passed, will not be affected by anything 'consequent on the notification' of withdrawal. This is broader than residence rights and covers all rights. It is unclear whether the amendment is designed to probe wheeler rights will be protected up to withdrawal, or beyond. Swiss nationals and family members are not covered. It would be interesting to hear the government's view on whether it considers that the term 'lawfully resident' is broad enough to encompass, for example, the French wife of a British

citizen who has never worked or studied in the UK, and does not hold comprehensive sickness insurance. There is no mention in the amendment of Swiss nationals and their family members.

Comment
The date on which the Act is passed will be more than two years before withdrawal. Persons may come, in the exercise of their lawful rights, to the UK during that period. We consider that the date of withdrawal would be a preferable cut-off date. As draft the amendment protects all British citizens and their third country nationals lawfully resident on the cut-off date, whether there is a nexus with EU law or not.

Amendment 42, after Clause 1, *EU and EEA nationals working in the National Health Service in the name of Lord Clark of Windemere*

Presumed purpose
The amendment enjoins upon Ministers to 'resolve to ensure' that citizens of another European Union or European Economic Area country, who are legally resident in the United Kingdom on the day on which this Act is passed, in particular those citizens who work in the National Health Service, are not disadvantaged in relation to their right to reside and work in the United Kingdom or their potential to acquire such rights in the future. This language suggests that a person could progress along an 'EEA' route to a status equivalent to permanent residence post withdrawal. It does not appear to place any legal obligation on the government. There is no mention of Swiss nationals.

Comment
It is arguable that the specific mention of those who work in the National Health Service is, in technical terms, superfluous, but it les at the heart of amendment which puts the focus firmly on the UK's need of EEA nationals and their family members as on the EEA families need for certainty. Again, we consider that the day the Act is passed is too early a cut of date: efforts will be made to recruit EEA nationals and their family members to jobs in the NHS over the next wo years and it will be describable to tell them that they will be able to stay. It is helpful that the amendment looks forward to the future acquisition of rights.

BRIEFING

Persons under consideration (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)

The European Economic Area encompasses the member States of the European Union, Norway, Iceland and Lichtenstein. Since June 2002 the rights of free movement have been extended by agreement to citizens of Switzerland. Rights of free movement also extend to the family members of EEA and Swiss nationals, who may be from outside the EEA and Switzerland.

Many rights of free movement are found in Directive 2004/38/EU, but others derive from the treaties. A settlement needs to encompass all EEA (not only EU) citizens and Swiss and their qualifying non-EEA family members exercising rights of free movement, including persons exercising derived rights. Account must be taken of Articles 21, 45 *(*workers*)* and 49 (establishment) and 56 (services) (and predecessor provisions) pf the Treaty on the Functioning of the European Union to cover all free movement of persons.

Documents may evidence rights under EU law but they are not constitutive of the right which arises as a matter of law.

Current rights (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)

An initial right of residence; to travel to the UK and to remain for up to three months without further ado, accrues to EEA or Swiss nationals and family members accompanying or joining them.

Rights to residence and to treatment largely on a par with nationals for a qualified person: an EEA or Swiss national exercising Treaty rights after the first three months. Qualified persons are

- Workers (including those temporarily unfit through illness or accident and those involuntarily unemployed);
- Job seekers;
- Self-employed persons and service providers;
- Students;
- Retired and economically self-sufficient persons.

Comprehensive sickness insurance (Amendment 7)

Students and self-sufficient persons are required to have comprehensive sickness insurance to be treated as qualified persons. The UK, contrary to the views of the European Commission, does not treat access to the NHS as 'comprehensive sickness insurance' for these purposes. The result is that many persons applying for permanent residence documentation are being told that they do not have permanent residence and indeed that they are not residing in the UK in accordance with EU law. Many are partners of British citizens, for example women who have spent periods at home to bring up children (beyond maternity leave) and thus have never been workers for long enough to have acquired permanent residence.

Permanent residence is acquired after five continuous years of being a qualified person. It is not lost unless a person remains outside the UK for two years.

There are powers to expel or exclude EEA and Swiss nationals and their family members on 'public policy' grounds.

An EEA or Swiss national exercising rights of free movement may be joined by family members: a spouse or civil partner, children up to the age of 21 years (and older if still dependent), parents and parents-in-law and others in the ascending line. For students, children must be dependent and there is no provision for dependants in the ascending line. Other (in the language of UK law 'extended') family members may apply to join an EEA or Swiss national but have no automatic right so to do. If admitted as a family member, however, they are for most purposes treated as other family members.

There are circumstances in which family members retain rights at the end of the relationship with the EEA or Swiss national, for example on divorce, death or the departure of the EEA or Swiss national. 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.

British citizens returning from periods of residence as a qualified person in other EEA States or I Switzerland 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.

Certain persons 'derive' rights from those of an EU national. UK law calls these 'derivative', EU law 'derived' rights. For example a third country national parent can be given leave to stay to care for a child who would be incapable of enjoying their rights as an EU national without such assistance.

The current UK regulations giving effect to the rights set out in the free movement Directive 2004/38/EC are the Immigration (European Economic Area) Regulations 2016. Where these conflict with EU law, EU law currently prevails. ILPA considers that the regulations conflict in a number of important respects with EU law, raising the spectre of EEA nationals and their family members purportedly retaining their EU rights post withdrawal but not in practice doing so if the UK's restrictive or erroneous interpretation of EU law cannot be challenged before the courts.

Cut off dates and cohorts (Amendments 7, 8, 19, 25, 26, 37, 38, 40, 41, 42)

ILPA recommends 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.). Everyone who was in the UK on 23 June 2016 or arrived subsequently, exercising their rights of free movement, is in the same position. Any date earlier than the date of leaving would be arbitrary.

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. 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).

Beneficiaries of a standstill provision should include all EEA citizens and Swiss and their qualifying non-EEA family members, including persons exercising derived rights and those exercising rights of free movement under the treaties.

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

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. 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.

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. without looking at detail within that period. This would lessen the administrative burden on the Home Office and provide for a fast(er) track (**see Amendment 7**) be administratively more convenient.

Rights of access to the NHS should be treated as comprehensive sickness insurance cover.

Provisin should be made for family members of British citizens returning from periods of residence as a qualified person elsewhere in the EEA and Switzerland who have brought with them 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.

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.

Provision should be made for persons exercising derived ("derivative") rights of residence to continue to exercise such rights for as long as the conditions pertaining to such exercise (e.g. caring for a minor child) are met.

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."

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

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 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. 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 Healthcare is covered by these rules. Housing Benefit is not. The rules work around a concept of "insured persons". Inactive persons, including self-sufficient persons, are generally covered by the rules, as are family members.

In is of particular importance to protect retained rights, which arise in situations where people are at particular risk, including because of protected characteristics under UK equality law. Those who enjoy retained rights include, for example workers involuntarily unemployed because of sickness, redundancy and those who relationship has broken down because of domestic violence.

Practicalities (Amendment 7)

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.

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.

The practical challenges are immense. 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. There must be transitional protection or persons will find themselves unable to work or rent a flat while it waits for the Home Office to deal with the immense task of issuing documents to all those who status will change. 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.*[2]

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. 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

To avoid the time and expense of unnecessary litigation, with persons having to rely on rights to private and family life, it is vital that a settlement make adequate provision for EEA and Swiss nationals and their family members.

EU law provides considerable procedural protection and this must be preserved if rights are to be real and effective and not theoretical and illusory. Those exercising rights of free movement, with the exception of certain extended family members, enjoy a right of appeal to the Tribunal against a Home Office decision refusing to recognise their rights. Where an EEA or Swiss national is required to leave the country before an appeal has been heard[3] EU law gives them the right to

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

[3] Nationality, Immigration and Asylum Act 2002, s 94B

return to give evidence at the hearing. Rights must be preserved until challenges are resolved or else, in the hostile environment, persons will have no choice but to leave the UK. 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.

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.

Sources of rights (all)

We envisage that the Council of Europe Convention on Establishment[4] and the European Convention on Human Rights will be the two main sources of protection for EEA and Swiss nationals and their family members in the UK not benefiting from any settlement. The Council of Europe European Convention on Establishment[5] 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.[6]

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. 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.

British citizens in other EEA States and in Switzerland (Amendments 7, 26, 38, 40)

There is more certainty for British citizens and their family members living in other EU and EEA States and in Switzerland than for EEA nationals and their family members in the UK because of the EU common immigration policy which applies in all States save for Ireland and Denmark which have opt-outs. The common immigration policy is limited in its reach however. 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 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

[4] CETS 019, 13 December 1955.
[5] CETS 019, 1
[6] HC 395, paragraph 276B.

third country nationals can obtain residence and work permits where no EU-wide rules have been adopted, are matters for individual member States. [7]

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.

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

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.

Devolution (Amendments 8 and 20)

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 that 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[8] 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[9] health and social services; education; employment and skills; social security and housing. 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.

See *Brexit UK-Irish relations,* the report of House of Lords EU Select Committee[10]. See further ILPA's evidence to it.[11]

[7] See further the paper of Professor Elspeth Guild at ***

[8] 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

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

[10] Sixth report of session 2016-2017, HL Paper 76 at http://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/76/76.pdf

[11] ILPA Evidence for 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, 30 September 2016, at http://www.ilpa.org.uk/resources.php/32543/ilpa-evidence-for-the-house-of-lords-select-committee-on-the-european-union-for-its-enquiry-into-the

Trafficked Persons (Amendment 33)

The UK will remain a party to the Council of Europe Convention on Action against Trafficking in Human Beings[12] 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.* When the UK exercised its opt-out from the Directive, the Home Office argued[13] that the provisions of the Directive did not add to the protection of trafficked persons in the UK. When the UK decided to opt in however,[14] it identified that it would need to amend existing trafficking offences *inter alia* 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.[15] The UK was already 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 were not mandatory in UK law, suggesting that without the Directive they are again vulnerable to repeal.

The terms of the Directive emphasise the importance of protecting trafficked persons and put this on an equal footing with the implementation of criminal measures. It sets out criteria for issuing a residence permit to trafficked persons. 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

The UK's ability to identify and punish traffickers and to protect trafficked and enslaved persons risks being compromised in that it may longer enjoy direct access to the Europol database, Eurodac data or to the same intelligence sharing. Professor Valsamis Mitsilegas in his paper for ILPA[16] describes how EU law has developed an extensive mechanism of exchange of information on criminal records of EU citizens, which should enable national authorities to have a full picture of the criminal record status of EU citizens who enter their territory.

In one of his papers in the ILPA series,[17] Professor Bernard Ryan discusses another element of information sharing, the Schengen Information System. (Its current version is known as 'SIS II'.) He explains that this is this is an inter-state database containing information about persons and property of interest to state authorities. The reasons for entering information relate primarily to policing and criminal justice matters, including extradition, missing persons, surveillance and the seizure of property.[18]

[12] CETS 197.
[13] 19 June 2012.
[14] *Hansard* HC 12 Mar 2011: column 53WS.
[15] See the First annual report of the Inter-Departmental Ministerial Group on Human Trafficking, HM Government, the Scottish Government, the Department of Justice Northern Ireland, Cm 8421, October 2012. and see the AIRE Centre, Monitoring Report on the Implementation by the United Kingdom of EU Directive 2011/36 on preventing and combating trafficking in human beings, July 2012.
[16] EU Referendum position paper 7: Criminality Free Movement and Criminal Law, 19 May 2016.
[17] EU Referendum position paper 7: Criminality Free Movement and Criminal Law.
[18] Schengen Implementing Convention, Articles 95 and 97-100

Health service and the UK's need for EEA and Swiss nationals and their family members (Amendment 42)

The Office for National Statistics data from January 2017 identifies difficulties in recruit to vacancies in retail and wholesale, manufacturing, health and accommodation and food services.[19]

EU nationals can fill vacancies quickly because there is no pre-registration of the employer as a sponsor, or visa system for the individual worker and circular migration is an option: the ability to come and go from the UK, knowing that leaving does not reduce the likelihood of being of being able to return. Current approaches to migration of third country nationals do not encourage or support circular migration, the advantages of which are that it is a way to a way to build understanding and goodwill and to facilitate trade and relationships between different countries. Another advantage, although one for other countries, not the UK, is that counter it can help to the brain drain from countries from which the UK takes students or borrows skilled workers. Circular migration also functions to limit permanent migration.

There is much in the current debate that is reminiscent of the 1960s and the passage of two Commonwealth Immigrant Acts to put an end to circular migration, in that case of British citizens, then called 'Citizens of the UK and Colonies', who were born outside the UK.[20] It is arguable that those who would reduce immigration are repeating the decisions of their counterparts in the 1960s. Like a Citizen of the UK and Colonies before the 1960s, an EEA national can come to the UK and then leave, safe in the knowledge, until the referendum in the case of the latter, that they could return at any time. This produces 'migrants' rather than 'immigrants'; people who can come, and then can go rather than people who come and then stay.

Propinquity is also relevant to the speed with which EEA nationals can take up jobs: it is possible to start work in the UK and wrap up affairs at home, or keep a home going elsewhere in the EU, at the same time. An inability rapidly to fill jobs risks having an impact on the labour market and on the health service.

[19] https://www.cipd.co.uk/about/media/press/100217-eu-labour-supply-shortages
[20] Commonwealth Immigrants Act 1962, Commonwealth Immigrants Act 1968.