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Brexit: Citizens' Rights and the Withdrawal Agreement

Angus Evans and Iain McIver

EU law gives all those who hold the nationality of an EU Member State (EU citizens) the right to move and reside freely in other EU Member States (known as free movement). This briefing outlines the impact Brexit will have on free movement for EU citizens currently living in the UK and UK citizens currently living in other EU Member States (i.e. citizens' rights). It includes a summary of the EU and UK's proposals as well as a number of case studies aimed at highlighting some of the main issues for individuals.



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Contents

Executive Summary	3
Context	4
Free movement in the EU	5
Impact of Brexit on Free Movement	10
Council negotiating position	11
European Commission paper	12
UK Government position on citizens' rights	14
Scottish Government position on citizens' rights	17
The Negotiations	19
General comparison of EU and UK positions on citizens' rights	23
No deal between UK and EU	25
Bibliography	26

Executive Summary

1. EU law gives nationals of EU Member States (EU citizens) the right to move and reside freely in other EU Member States (this is known as free movement)
2. EU citizens who reside legally in another Member State for a continuous period of five years automatically acquire the right to permanent residence. This gives them enhanced protection against expulsion from the host Member State
3. The rules also cover certain family members whether EU citizens or not, allowing them to join EU citizens who have moved to another Member State
4. EU rules also coordinate social security and pension payments so that citizens do not lose entitlements by working/living elsewhere in the EU
5. Brexit will mean that free movement rules will no longer apply to:
 - a. EU citizens currently living in the UK (around 3.2 million); and
 - b. UK citizens currently living in EU Member States (around 1.2 million)
6. There is a question as to what will happen to these existing rights (known as citizens' rights) after Brexit.
7. There is also a question as to what future immigration rules will apply to those moving between the UK and the EU (and vice versa) after Brexit
8. The UK and EU are currently negotiating the issue of citizens' rights as a priority as part of the Withdrawal Agreement for Brexit
9. As of August 2017, the EU and UK have agreed on certain parameters for dealing with citizens' rights. For example, both agree that there should be life-long protection for the holder of the rights guaranteed by the Withdrawal Agreement. They also agree that the agreement should ensure that there is a "lifetime export of uprated pensions"
10. There are, however, significant areas of divergence, including:
 - a. The rights of future family members of EU citizens
 - b. The procedures which need to be followed for EU citizens to establish rights in the UK
 - c. The role of the Court of Justice of the European Union
 - d. The rights of UK nationals to move between EU Member States

Context

The negotiations between the United Kingdom (UK) and the European Union (EU) on the terms of the UK's exit from the EU are currently focused on three key issues:

- Citizens' rights
- A financial settlement covering the UK's existing obligations/liabilities towards the EU
- The impact of Brexit on the island of Ireland

The phrase "citizens' rights" refers to the impact which Brexit will have on the existing free movement rights of:

- EU citizens currently living in the UK; and
- UK citizens currently living in other EU Member States.

This short SPICe briefing, prepared for the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee, provides information about citizens' rights including: the current EU rules on freedom of movement, the EU and UK's proposals for addressing citizens' rights in the Withdrawal Agreement and a comparison of the two positions. There is also a short summary of the Scottish Government's proposals for citizens' rights following Brexit.

The briefing also includes a number of case studies with practical examples of the possible effects of Brexit on the free movement rights of EU citizens in the UK and UK citizens in the EU. These are aimed at highlighting some of the main issues for individuals.

The briefing is intended as a very brief summary of some of the main issues. It should not be seen as an exhaustive overview of what is a complex area, which will be subject to change based on negotiations between the UK and EU. It also does not deal in detail with any agreements on migration rules which might apply to those moving between the UK and the EU after Brexit (the focus is on the rights of those who have exercised free movement rights before Brexit occurs). Similarly, it does not deal with the specific impact of Brexit on free movement within the island of Ireland or on the existing Common Travel Area between Ireland and the UK.

Free movement in the EU

The 1957 Treaty of Rome, which set up the EU's precursor the European Economic Community (EEC), guaranteed the free movement of persons in the EEC (i.e. rights of EEC nationals to work, establish themselves and provide services in other Member States). These rights were complemented by the Maastricht Treaty, and subsequent legislation, which introduced the concept of EU citizenship and extended free movement to certain non-economically active persons (students and those able to support themselves).

¹

Currently, as a result of the EU treaties and EU legislation, all EU citizens (i.e. those who hold the nationality of an EU Member State) have the right to move and reside freely in other Member States.ⁱ

The right of free movement applies without any conditions in the first three months, other than the need to hold a valid identity card or passport, thus allowing EU citizens unconditionally to enter other Member States, for example to look for work or to go on holiday.

In order to have the right to reside after this three month period, EU citizens have to fall within one of the following categories of people:

- workers and the self-employed
- job-seekers
- self-sufficient persons
- students
- family members accompanying or joining an EU citizen who fits into one of the above categories

After three months, Member States can apply certain limited conditions to the right of residence, depending on the status of the EU citizen (i.e. worker, job-seeker, student etc.).

² For example, Member States may require those seeking work to prove that they are still looking for a job and have a genuine chance of finding one. Similarly, economically independent EU citizens, such as pensioners, students and self-sufficient individuals (e.g. the self-employed) must have sufficient resources for themselves and any family so as not to be a burden on a Member State's welfare system. They must also have comprehensive health insurance.³

Rules also exist to coordinate social security payments so that citizens do not lose entitlements by working elsewhere in the EU. There are also rules which are designed to ensure that pensions are payable to pensioners residing in another Member State; that the pension is indexed; and that health care expenses are charged to the Member State of origin.³

ⁱ The right is also enjoyed by non-EU citizens who hold Swiss citizenship or citizenship of an EEA state (i.e. Iceland, Norway or Liechtenstein)

Under EU law, EU citizens who reside legally in another Member State for a continuous period of five years automatically acquire the right to permanent residence in that country. Once acquired, permanent residence gives EU citizens enhanced protection against expulsion from the host Member State. Permanent residence can, however, be lost if an EU citizen is absent from the host Member State for a period exceeding two consecutive years.

Although free movement does not provide unlimited rights to live in another Member State, the rules are typically more liberal than national immigration laws which Member States (including the UK) apply to non-EU citizens. In this regard, [the House of Commons Library's briefing on Brexit and free movement](#)² indicates that the UK immigration rules for non-EU citizens are significantly more restrictive than EU free movement rules. It explains at page 8 that:

“ opportunities for non-EU citizens to come to work in the UK under the points-based system are generally restricted to skilled migrants who already have a job offer. To secure a visa, non-EU citizen spouses of British citizens must satisfy various eligibility criteria, including a requirement their British partner has an annual income of at least £18,600 (or a higher amount in savings). Most non-EU visa categories require that applicants have some proficiency in the English language, and initially grant only a temporary permission to stay in the UK”

See below for more details on the current EU legislative framework.

Key Treaty Articles relevant to free movement

- Article 18 of the Treaty on the Functioning of the European Union (TFEU) prohibits any discrimination on the grounds of nationality and authorises the European Parliament and Council to adopt rules designed to prohibit such discrimination.
- Article 21 TFEU on free movement of citizens states that, "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States". This right is subject to certain limitations and conditions.
- Article 45 TFEU on free movement of workers provides that workers can move freely around the EU to work, and abolishes discrimination, "based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Article 45(3) provides that EU nationals can stay in a Member State, "for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action". This means that workers originating in another Member State are entitled to the same conditions as a worker of that Member State. The only limitations permitted are those which are strictly justified on grounds of public policy, public security or public health.
- Article 48 TFEU provides the legislative basis for the adoption of measures in the field of social security intended to support workers exercising their freedom of movement rights by ensuring workers and dependants have the right to receive welfare benefits in the same way home workers have in a Member State.
- Article 49 TFEU on the "right of establishment" provides that self-employed workers shall have the, "right to take up and pursue activities as self-employed persons" and to set up and manage businesses in other Member States. It also prohibits national restrictions on the setting-up of agencies, branches or subsidiaries by nationals of other Member States.
- Article 56 TFEU on the freedom to provide services allows Member State nationals to provide their services in other Member States on a temporary basis while remaining in their country of origin (this allows a service provider to cross borders in person and also to post workers to other Member States).

Key EU Directives and Regulations

The provisions in the TFEU are implemented in EU legislation through a number of Directives and Regulations which, in the case of Directives, are given effect in the UK by UK legislation. Some of the key pieces of EU legislation are outlined below.

[Directive 2004/38](#) ⁴ on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, sets out ⁵ :

- the conditions for the right of free movement and residence (both temporary and permanent) for EU citizens and their family members (for instance, the spouse, a partner in a registered partnership with an EU citizen and direct descendants under the age of 21.)
- the limits to those rights on grounds of public policy, public security or public health

- the status of people who are employed, self-employed, students or not working for payment.

The Directive ensures that EU citizens and their family members may enter another EU Member State without the requirement of an entry visa. In addition, it allows EU citizens to reside in another Member State for up to 3 months without conditions or formalities.

The Directive also lays down the conditions mentioned above for EU citizens wishing to stay beyond 3 months. It also provides that the host country is not required to pay benefits to EU citizens not working for payment during the first 3 months of their stay.

As indicated, the Directive provides the right for EU citizens and their family members to permanent residence if they have lived legally in the host Member State for a continuous period of 5 years.

The Directive also permits that family members may, under certain conditions, retain the right to live in the country concerned if the EU citizen dies or leaves the country.

[Regulation 492/2011](#) on freedom of movement for workers within the Union, seeks to ensure that the principle of free movement enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU) is respected in practice (in simple terms by limiting obstacles to free movement and discriminatory practices in the labour market).

[Regulation 883/2004](#) on the coordination of social security systems, lays down common rules to protect social security rights when moving within the EU. The Regulation recognises that EU countries decide on aspects such as the beneficiaries of their social security systems, levels of benefits and eligibility conditions, but ensures a Member State government cannot discriminate against a claimant based on nationality if they meet the other criteria.

The EUR-Lex guide ⁶ to EU legislation explains that the scope of the Regulation covers all the traditional branches of social security, namely:

- sickness
- maternity and paternity
- old-age pensions
- pre-retirement and invalidity pensions
- survivors' benefits and death grants
- unemployment
- family benefits
- accidents at work and occupational illness.

The Regulation also sets out who will benefit from the provisions, with a guarantee, "that their benefits will be paid, that they will be covered for healthcare and that they will receive family benefits even if they move to another EU country" (this is often referred to as the ability to "export" benefits, including pensions, to another Member State). The beneficiaries include all EU nationals (and their families) who are covered by the social security

legislation of an EU country. The rules apply to employees and self-employed people, civil servants, students and pensioners, but also to people who are unemployed, not yet working or no longer working. The rules also apply to non-EU nationals and their family members who reside legally in the EU.

[Regulation 987/2009](#) lays down the procedure for implementing Regulation 883/2004 on the coordination of social security systems.

For further details on EU social security rules and free movement see the [European Parliament's factsheet on Social Security cover in other Member States](#).⁷

Impact of Brexit on Free Movement

Brexit will have two main areas of impact on free movement and citizens' rights.

First, since Brexit means that the UK will no longer be bound by the EU rules on free movement, it will affect EU citizens in the UK. It raises questions as to whether their rights to remain in the UK should continue (and if so, for how long), as well as what rules should apply to other aspects of free movement, such as the payment of social security benefits and pensions. It will also impact on EU citizens wishing to move to the UK in the future as this will no longer be possible without fulfilling UK immigration rules.

Second, since EU citizenship rules will no longer apply to the UK, there will be an impact on UK citizens in EU Member States. One aspect of this is simply the mirror image of the situation in the UK for EU citizens - in other words whether UK citizens will retain existing rights to remain in the Member State where they live, and if so, under what conditions. However, there is also an important question as to whether UK citizens currently living in the EU will retain the right to move freely between EU Member States, or whether this will be constrained by national immigration laws.

There is little clarity at this stage as to the precise impact of Brexit on free movement. Much will depend on the outcome of the negotiations on the Withdrawal Agreement. In addition, at least from the UK perspective the scope of the forthcoming Immigration Bill is likely to be relevant as, although there is currently little detail on the contents of the Bill, it does aim to repeal the current EU law on free movement, which would otherwise be saved and converted into UK law by the Repeal Bill.⁸

What, however, is clear is that the issue has the potential to affect a large number of individuals. In this regard [the House of Commons Library's briefing on Brexit and free movement](#)² (page 5) indicates that there were around 1.2 million UK citizens living in other EU countries in 2015 and around 3.2 million EU citizens living in the UK.² Based on figures from [the SPICe Briefing "EU nationals in Scotland"](#), there were an estimated 181,000 EU nationals living in Scotland in 2015; the majority of whom (119,000 or 66%) were from EU accession nations (the briefing also includes a more detailed analysis of the characteristics of EU nationals living in Scotland, including their economic contribution to Scotland).⁹

The number of people involved, and the potential impact of Brexit on a personal and economic level, is one of the reasons that the issue of citizens' rights is being dealt with as a priority in the negotiations on the Withdrawal Agreement.

Council negotiating position

On 22 May 2017, the Council of the European Union, meeting in its EU27 format for the purposes of the Brexit process, adopted a decision authorising the opening of Brexit negotiations with the UK and formally nominated the Commission as EU negotiator. The Council also adopted a set of negotiating directives¹⁰ for the talks.

The basic position taken by the Council in its negotiating directives was that the current framework of citizens' rights should be preserved for all EU citizens currently exercising them (including for UK citizens living in EU Member States). The cut-off date for persons qualifying would be the date of Brexit itself, although this would still allow existing rights not yet exercised to be covered (such as pensions), as well as the possibility for other rights which started before Brexit (such as permanent residence) to be acquired after Brexit.

The Council also expressed the aim that the rights in question should be preserved for the lifetimes of those affected and, in line with the general principles of the negotiating directives, that enforcement should be through the Court of Justice of the European Union (Court of Justice).

The negotiating directives also outlined what should be included in the final agreement, noting that it should be non-discriminatory in relation to other nationals and include at least the following elements¹⁰:

1. **A definition of the persons to be covered** - the scope should be the same as in Directives 2004/38 and 883/2004 (i.e. both economically active persons, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date. The scope should also cover frontier workers and family members irrespective of their place of residence.
2. **A definition of the rights to be protected** - the scope should mirror existing rights, in other words:
 - a. residence rights and rights of free movement derived from the TFEU and Directive 2004/38
 - b. the rights and obligations set out in Regulation 883/2004 on the coordination of social security systems and in the implementing Regulation 883/2004
 - c. the rights set out in Regulation 492/2011 on freedom of movement for workers (e.g. access to the labour market, to pursue an activity, social and tax advantages, training, housing, collective rights as well as rights of workers' family members to be admitted to general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State)
 - d. the right to take up and pursue self-employment derived from Article 49 of the TFEU

European Commission paper

On 29 May 2017, the European Commission's Brexit taskforce published a position paper on the "[Essential Principles on Citizens' Rights](#)." ¹¹

The paper set out a number of essential principles and closely mirrored the objectives outlined in the Council's negotiating directives mentioned above - in particular, on the aim to have the date of Brexit as a cut-off date . It stated that:

“ The Withdrawal Agreement should protect the rights of EU27 citizens, UK nationals and their family members who, at the date of entry into force of the Withdrawal Agreement, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date [for example pension rights].”

European Commission, 2017¹¹

The essential principles included the requirement that there should be equal treatment in the UK of EU citizens as compared to UK nationals and equal treatment in the EU of UK nationals as compared to EU citizens.

It also included a statement that all EU nationals legally residing in the UK, and all UK nationals legally residing in the EU on the date of Brexit, should be considered legally resident whether or not they have a document to prove their residence. The Commission's position therefore takes the view that:

- The rules on citizens' rights should not be restricted due to administrative formalities set up by the UK
- The rights should exist up until Brexit has actually happened (so not, for example, at an earlier date, such as when the UK triggered the Article 50 withdrawal process)

The position paper also argued that the **personal scope of the Withdrawal Agreement** should cover:

- EU citizens who reside or have resided in the UK at the date of entry into force of the Withdrawal Agreement
- UK nationals who reside or have resided in EU at the date of entry into force of the Withdrawal Agreement
- Family members of the above, regardless of nationality, as covered by Directive 2004/38 who have joined or will join the holder of the right at any point in time after the date of entry into force of the Withdrawal Agreement (i.e. current and future family members)
- Frontier workers - i.e. those who live in the UK and work in an EU Member State or vice versa (including family members and those who have been family members)
- EU citizens and UK nationals and their family members covered by Regulation 883/2004 on the coordination of social security systems (i.e. those who have left the UK or EU and have built up periods for the calculation of relevant benefits, or those who are already exporting such benefits to the UK/EU as applicable). This would, for example,

cover those who have moved to/from the UK/EU and who are drawing pensions as well as such individuals with the right to pensions in the future.

The paper also set out the Commission's position on **the material scope of the Withdrawal Agreement** (i.e. what areas of law should be covered). It reaffirmed the position in the Council's negotiating directives that the Withdrawal Agreement should cover **all the rights set out in the EU Treaties and EU legislation** specifically referring to each piece of legislation. In essence, the Commission's view is that the full ambit of free movement law should be covered, including the rules on benefits, non-discrimination and recognition of professional qualifications.

Importantly, the position paper stated that the rights outlined above and the derived rights of family members should be **protected for life**, as long as the conditions set out in EU law continue to be met.

In addition, the position paper suggested that EU and UK nationals should be able to, "continue to change status and to accumulate periods leading to rights pursuant to Union law during the period of protection of the Withdrawal Agreement". The Commission Working Group provided a number of examples of how this would work in practice:

" an in-active citizen can become a worker and still be covered by EU rules and a person who resided legally in the UK for less than five years by the date of the entry into force of the Withdrawal Agreement can continue to accumulate the necessary five years residence giving access to permanent residence rights]. ¹¹ "

Finally, the position paper addressed the issue of enforcement and dispute settlement. It argued that the Commission should have a monitoring role. It also indicated that the Court of Justice should be responsible for enforcing the rights agreed in the Withdrawal Agreement and that UK Courts should be able to continue to seek a preliminary reference from the Court of Justice on citizens' rights issues. On this issue, the position paper states:

" The Commission should have full powers for the monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal agreement. Citizens should thus be able to enforce their rights granted by the Withdrawal Agreement in accordance with the same ordinary rules as set out in the Union Treaties on cooperation between national courts and the Court of Justice, i.e. including a mechanism analogous to Article 267 TFEU for preliminary reference from UK courts to the Court of Justice of the European Union. ¹¹ "

UK Government position on citizens' rights

On 26 June 2017, the UK Government published a position paper on [Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU](#).¹²

The UK Government's proposal outlines a series of principles which it wishes to apply to EU citizens in the UK. It also indicates that the UK's position is based on the expectation that the EU will offer reciprocal treatment for UK nationals resident in EU Member States.

The main principles are outlined below. However, one of the key aspects of the position paper is that, in contrast to the EU's view, the UK wishes to provide protection through new UK rights and procedures enforceable in UK courts/international law rather than relying on existing EU law/procedures and the Court of Justice. On this point, the proposal indicates that:

“ after we leave the EU, we will create new rights in UK law for qualifying EU citizens resident here before our exit. Those rights will be enforceable in the UK legal system and will provide legal guarantees for these EU citizens. Furthermore, we are also ready to make commitments in the Withdrawal Agreement which will have the status of international law. The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK.”

UK Government, 2017¹²

Another key aspect of the UK proposal is that qualifying EU citizens will have to apply for their new residence status. Unlike the current system, the right to reside in the UK for EU citizens will no longer be automatic. Instead, the system will work on the basis of a new scheme whereby qualifying EU citizens will need to apply for so-called **"settled status" following five years continuous residence in the UK** (only those people currently residing in the UK will be able to apply). This will be equivalent to indefinite leave to remain under the current immigration rules for non-EU citizens. According to the proposal, this means that EU citizens will be:

“ free to reside in any capacity and undertake any lawful activity, to access public funds and services and to apply for British citizenship.”¹²

The proposal also states that all qualifying EU citizens will be given adequate time to apply for their new residence status after Brexit, noting that, "there will be no cliff-edge at the point of the UK's withdrawal from the EU." It also indicates that the administrative procedures for the new scheme will be, "modernised and kept as smooth and as simple as possible."

There is of course a question as to when the rights of EU citizens under the new system start to accrue. On that point the proposal simply states that to qualify for settled status, EU citizens must have been resident in the UK before a "specified date". The proposal does, however, not state what the specified date is, although it suggests it will be no earlier than 29 March 2017, when the UK triggered Article 50, and no later than the actual date the UK leaves the EU. The actual cut-off date will therefore be subject to negotiation with the EU.

The proposal also deals with the issue of those who arrive before the cut-off date but aren't able to accrue five years' continuous residence at the time of the UK's departure from the EU. It states that a **temporary status** will be introduced for such people allowing them to remain resident in the UK until they have accumulated five years residence, after which they will be eligible to apply for settled status.

For EU citizens who arrive after the cut-off date, the UK Government's proposal provides no guarantees. It simply states that such people:

“ Will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – but this group should have no expectation of guaranteed settled status. ¹² ”

Case study - a date for citizens' rights

A Spanish citizen moved to the UK in June 2017 to take up work at an IT start-up linked to the University of Dundee. Based on the EU's proposals the person in question has moved to the UK before Brexit and so would benefit from the rules on citizens' rights, in particular, the possibility of gaining permanent residency after five years continuous residence in the UK. However, since the UK has not yet taken a final position on the relevant cut-off date it is not clear what rights the person would have under its proposals. If the UK follows the EU's approach (i.e. Brexit as the cut-off date) the person in question would be covered by the rules on "temporary status" mentioned above. In contrast, if the UK takes March 29 2017 as the cut-off date, the Spanish citizen would not have any guaranteed rights under the Withdrawal Agreement.

The UK Government's proposal would also give rights to family dependants of EU citizens who move to the UK before Brexit. It states that:

“ Family dependants who join a qualifying EU citizen in the UK before the UK's exit will be able to apply for settled status after five years (including where the five years falls after our exit), irrespective of the specified date. ¹² ”

However, according to the proposal, family members joining after Brexit will be subject to the same rules as those joining UK citizens or, alternatively, to the post Brexit immigration arrangements for EU citizens who arrive after the specified date.

Depending on the future approach taken, the new system could therefore limit the ability of family dependants to join such EU citizens in the UK. For example, as [outlined above](#), non-EU citizen spouses of British citizens currently have to satisfy various eligibility criteria in order to be able to move to the UK, including a requirement that their British partner has an annual income above a certain amount. If the existing immigration rules were applied it may not necessarily be straightforward for EU spouses and other dependants to join their husbands/wives who are already working in the UK (see text box below)

Case study - family reunion

A Polish citizen has been working in the construction industry in Glasgow since 2008. He would appear to have settled status under the UK proposals and so can remain in the UK. However, after Brexit he marries a Polish citizen who is resident in Poland. Under the UK proposals, whether his spouse can move to the UK will depend on future UK immigration law, which may or may not provide new rules for EU citizens. In contrast, under the EU's proposals this matter would be governed by the existing EU rules in Directive 2004/38.

The UK Government paper also includes proposals on the rights of EU nationals in relation to benefits, pensions, healthcare, and economic and other rights.

The proposal's executive summary states in particular that:

- EU citizens with settled status will continue to have access to UK benefits on the same basis as a comparable UK national under domestic law
- EU citizens arriving before the specified date who do not have five years' residence at the time of the UK's exit but who remain legally in the UK on a pathway to settled status will continue to be able to access the same benefits that they can access now – (broadly, equal access for workers/the self-employed and limited access for those not working). If these individuals go on to acquire settled status, they will then be able to access benefits on the same terms as comparable UK residents
- Existing rules on the rights of EU citizens and UK nationals to export UK benefits to the EU will be protected for those who are exporting such UK benefits on the specified date, including child benefit, subject to on-going entitlement to the benefit
- The UK will continue to export and uprate the UK State Pension within the EU.
- the UK will seek to protect the healthcare arrangements currently set out in EU social security coordination regulations and domestic UK law for EU citizens who arrive in the UK before the specified date and for UK nationals living in the EU before the specified date

For further details on the proposals on benefits, pensions, healthcare, and economic and other rights see pages 5-6 and paragraphs 40-57 of the UK Government paper.

The final statement in the summary of the UK's proposal on citizens' rights refers to the ending of free movement of persons. It states that:

“ After the UK leaves the EU, free movement will end but migration between the UK and the EU will continue. We will continue to welcome the contribution EU citizens bring to our economy and society; the UK will remain a hub for international talent. The Government is carefully considering a range of options as to how EU migration will work for new arrivals post-exit and will publish proposals as soon as possible, allowing businesses and individuals enough time to plan and prepare. ¹² ”

Scottish Government position on citizens' rights

On 17 July 2017, the Scottish Government published a response to the UK Government's proposals on citizens' rights entitled "[Rights of EU Citizens](#)". Publishing the paper, Michael Russell, the Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe, noted that:

“ EU citizens make a vital contribution to Scotland and to our economy, society and culture. They must have clarity about their future rights and what Brexit will mean for them and their families. As negotiations get underway again today in Brussels it is important that this issue be concluded as soon as possible. Were Scotland part of the negotiating team, as we have suggested, we would be doing our best to help the UK resolve the matter and any thoughts we offer are given in that spirit. It is of course disappointing that it has taken the UK Government a year to set out their plans but with good will on both sides the issues could be settled in the next few days. This issue is also of course about protecting the existing rights of Scots and other UK citizens living in other EU countries, who also continue to face uncertainty over their future. They are also owed an early conclusion.”

Scottish Government News Release, 2017¹³

The Scottish Government's paper began by reiterating the Scottish Government's previous calls (as set out in [Scotland's Place in Europe](#)) for the UK to retain membership of the single market and a commitment to the free movement of persons.

On the UK Government's proposals, the Scottish Government wrote:

“ We are concerned that the UK Government's paper leaves open a large number of very important questions that will have a direct impact on EU citizens and their families. These are not abstract issues, but real concerns that affect people's lives. We urge the UK Government to immediately clarify these points in order to ensure that all EU citizens have the certainty about their future to which they are entitled. People must never be used as bargaining chips in negotiations.”

Scottish Government, 2017¹⁴

The Scottish Government's paper highlighted a number of issues which it said the UK Government needed to clarify immediately. These included how the rights of EU citizens will be protected and enforced, both in the Withdrawal Agreement and in future, under UK settled status.

The Scottish Government also sought more clarity on the cut-off date (the so-called 'specified date'), before which EU citizens already in the UK will be on a path to 'settled status', whereas EU citizens who arrive afterwards will not, and will instead be subject to UK immigration rules after Brexit. The Scottish Government stated that it believes the cut-off date should be the date of the UK's exit from the EU.

On the status of family members of EU citizens, the Scottish Government wrote:

“ We welcome the commitment that the family members of EU citizens will continue to be able to move to and reside in the UK on the basis of their existing rights under EU law, until the point of the UK's exit from the EU. That is crucial to the continued enjoyment of the right to family life. However, we have concerns about the rights of family members, particularly those who come from non-EU countries, after the UK's exit from the EU. We urge the UK Government to clarify these rights immediately, particularly with regards to children, including those born in the UK to parents with settled status who will automatically acquire British citizenship, which might not in all cases be compatible with the nationality and citizenship rules of other EU countries. We also call on the UK Government to provide further details about the nature and rights that flow from ‘settled status’ for family members, as well as the criteria and process for applying for ‘leave to remain’ during the grace period, and the rights that family members will have in that period, before acquiring settled status. ¹⁴ ”

The Scottish Government welcomed the UK Government commitment to improve the application process for EU citizens wishing to gain permanent residence in the UK.

In conclusion the Scottish Government wrote:

“ The Scottish Government welcomes that EU citizens, and their families, residing in the UK, will now have some clarity about the UK Government position on safeguarding their future rights and status. It is unacceptable that it has taken so long for the UK Government to set this out. However, there are a large number of issues that remain unclear and which must be resolved immediately in order to provide EU citizens with the comfort and security to which they are entitled. These include the details of the different statuses applicable to EU citizens and their family members and the associated rights, as well as the process and costs of applying for these statuses, the mechanism for resolving disputes about the application and interpretation of the Withdrawal Agreement, and the crucial issue of the cut-off date. It is deeply disappointing that the UK Government paper does not go as far as the European Commission's position. The European Commission seek to guarantee the same level of ongoing protection for all EU citizens as set out in EU law at the date of withdrawal, and include a clear mechanism to resolve disputes about the application and interpretation of the Withdrawal Agreement – using the experience and expertise of the European Court of Justice. ¹⁴ ”

Finally, the Scottish Government called for greater engagement with the Devolved Administrations through intergovernmental procedures such as the Joint Ministerial Committee on European Negotiations.

The Negotiations

On Monday 17 July 2017, the second round of negotiations between the UK and EU began. These negotiations featured discussions on citizens' rights centred on the position papers published by the Commission and the UK Government.

Speaking at a press conference after the second round of negotiations, the Commission's Chief Negotiator, Michel Barnier, suggested that there was a sticking point as regards the enforcement of citizens' rights. Unlike the UK, the EU considered that these rights should fall under the ambit of the Court of Justice on the basis that they were based on EU law.¹⁵ In this regard, Michel Barnier noted (in French) that:

“ Et évidemment, toute référence aux droits européens implique son contrôle par la Cour de justice de l'Union européenne.”

(Informal English translation of Michel Barnier's quote - "And obviously, every reference to European law entails oversight by the Court of Justice of the European Union.")

Michel Barnier also noted that other areas of divergence included the rights of future family members and the export of certain social security benefits.

In his update following the negotiations, the Secretary of State for Exiting the European Union, David Davis, said:

“ Since the first round of negotiations, the UK has published its approach to citizens' rights. The talks this week have demonstrated that this was both a fair and serious offer. I am pleased by the progress we have made. We have looked at each other's proposals in depth and identified many concrete areas where we agree as well as areas where there will be further discussion, which will be a priority for the next round as Michel has said. We have also agreed to publishing a joint paper today that sets out the many areas of convergence in our proposals, and the areas we need to prioritise for future discussion in our future rounds.¹⁶ ”

The [joint paper on citizens' rights](#) mentioned by David Davis summarises and compares the UK and EU positions following the second round of Article 50 negotiations¹⁷. The paper uses a traffic light system to indicate where there are areas of agreement (marked in green), areas of divergence (marked in red) and areas where more work still needs to be done (marked in yellow).

Areas where there is currently divergence include the following:

- **The rights of future family members of EU citizens** - The EU's view is that this relates to preserving rights under EU law and is not an issue of equal treatment with UK citizens. In contrast, the UK position is that this a question of equal treatment between EU and UK citizens . The UK argues that future family members should be subject to the same rules that apply to non-EU nationals joining UK citizens, or alternatively to new post-exit immigration arrangements for EU citizens who arrive after the specified date

- **The Court of Justice** - Although there is divergence, the parties' specific positions are not noted. The joint paper indicates that the issue is to be discussed in the Governance Group
- **Monitoring and oversight** - The EU takes the position that this role should fall to the Commission, whereas the UK's view is that there should be an independent monitoring body
- **Administrative procedures/documentation** - The EU position is that Directive 2004/38 does not require documentation for free movement rights to exist. In contrast the UK's view is that documentation will be necessary in order to prove the existence of the rights in question
- **Current holders of permanent residence certificates in the UK** - The EU's view is that EU citizens shall be considered legally resident in the UK even if they do not hold a document evidencing that right. The UK position is that holders of permanent residence certificates need to reapply for settled status under the new system proposed
- **Rights of UK nationals to move between EU Member States** - The EU position is that UK citizens should only have protected rights in the state(s) in which they have residence rights on the date of Brexit (the result being that current free movement rights would lapse for such citizens). In contrast, the UK's view is that UK citizens should be able to continue to move between Member States as per Directive 2004/38 (i.e. on the basis of existing EU law)
- **Posted workers** - Posted workers are workers who are sent by their employer to carry out a service in another EU Member State on a temporary basis.¹⁸ The EU's view is that posted workers should not be covered by the citizens' rights provisions in the Withdrawal Agreement as posted workers are linked to the provision of cross-border services. In contrast, the UK position is that posted workers at the cut-off date should fall within the scope of the Withdrawal Agreement
- **Criminality and deportation post Brexit** - The EU argues that the existing EU rules should remain for EU citizens (i.e. that deportation should only be due to public security, policy or health matters as per Directive 2004/38). The UK's view is that deportation should be assessed based on UK immigration rules, post Brexit
- **Voting rights** - The EU position is that the Withdrawal Agreement should not cover UK citizens' rights to vote and/or stand in local elections in the EU as this arises from EU citizenship rights which will lapse. The UK position is that the existing rights of UK/EU citizens to vote and/or stand in local elections in their host state should be guaranteed in the Withdrawal Agreement

As regards areas of agreement, it is worth noting that both the UK and EU seem to agree that there should be life-long protection for the holder of the rights guaranteed by the Withdrawal Agreement. In particular, the EU and UK agree that the agreement should ensure that there a "lifetime export of uprated pensions".

In addition, both appear to agree that permanent residence status should be lost after a period of 2 years absence from the Member State in question (this follows the existing EU rule in Article 16(4) of Directive 2004/38). The UK has, however, indicated that it wishes to be more flexible on this two year period as regards citizens with strong ties in the UK (e.g.

students studying outside the UK for more than two years, or non-UK citizens on long overseas work postings). The UK has indicated that it is looking for similar flexibility from the EU on this point.

As regards timing, the EU retains the view that the cut-off date for the application of citizens' rights should be the date of Brexit. The UK, however, has yet to take a final view on the cut-off date and still takes the position that it should be somewhere between 29 March 2017 when Article 50 was triggered and the actual date of Brexit. The joint paper indicates that the UK has been asked to clarify this point.

Further details of areas of agreement, as well as areas where more work is needed, can be found in the joint paper.

Case study - UK citizens' rights to continuing free movement in other Member States

A UK citizen, who is originally from Inverness, has been working as a self-employed architect in Berlin since 2007. She is married to an Iranian citizen. She automatically has permanent residence rights in Germany, but after Brexit wishes to move to Austria with her husband to set up practice there. Under the UK's proposals this would appear possible in principle as the existing rules in Directive 2004/38 would continue to apply. However, under the EU's proposals, UK citizens' rights would only be protected in the Member State(s) in which individuals have residence rights on the date of Brexit (in this case Germany). Based on the EU's proposals, whether the architect and her husband can move to Austria would therefore seem to depend on how Austrian immigration law treats UK citizens (and dependants) post Brexit.

David Davis provided a further update on the second round of negotiations in a letter to the House of Lords Exiting the EU Committee on 9 August. Specifically in relation to the negotiations on citizens' rights, the Secretary of State wrote:

“ We have achieved a high degree of convergence on the scope of our proposals on residence and social security; our interpretation and definition of key concepts such as what is meant by ‘permanent residence/settled status’ and ‘continuous residence’; the eligibility criteria that we propose applying for residence applications; the rights of current family members; and a shared commitment to make the application process as efficient and streamlined as possible. Of course there are other, previously known, areas of disagreement which we didn't expect to resolve in July. For example, we will need to have further discussions on the specified cut-off date, future family reunion and the broader issue of compliance on enforcement. On this latter issue, we have made clear that we are entering into an international agreement with the EU27 which will create binding obligations on us and which we will implement in UK law. Consequently EU citizens in the UK will have legal redress and be able to enforce their rights. But we recognise that these issues will require further analysis and discussion by both sides. During the negotiating round it also emerged that the EU would not be maintaining the existing voting rights for UK nationals living in the EU. We have made it clear that we stand ready to protect the rights of EU nationals living in the UK to stand and vote in municipal elections. The European Parliament was clearly mistaken on this point in its recent letter published in all Member States. A number of other issues in the EU offer also emerged that will need further consideration. For example, posted workers were excluded from the scope of their offer whereas we stand ready to protect their rights in the Withdrawal Agreement. The EU has also confirmed that their offer only guarantees residence rights in the Member State in which a British national was resident at the point of our exit from the EU. It does not guarantee the holder of those residence rights any right to onward movement within the EU, for example to work or study in a neighbouring Member State. We have questioned whether this is consistent with the principle of reciprocity, and also with the Commission's desire to protect rights currently enjoyed under EU law. This will be the subject of further discussion in due course. We have also made clear that we are prepared to commit in the international agreement to going further in some respects than the requirements of the free movement directive, for example as regards the position of those, such as students, who may have been absent for longer than two years at the point of our exit. The EU has not as yet been able to commit to matching those proposals.”

UK Parliament House of Lords Exiting the European Union Committee, 2017¹⁹

Case study - loss of permanent residence rights after two years

A Dutch citizen has worked in finance in Edinburgh since 2003. He has permanent residence rights in the UK, but is unwilling to apply for a UK passport as, under Dutch law, he would not be eligible for dual nationality and risks losing his Dutch nationality were he to become a UK citizen.²⁰ After Brexit, he is posted to Amsterdam where he resides for a period of three years. Based on the current proposals agreed on by the UK and the EU, he would not be able to rely on his right to UK permanent residence if he wishes to return to the UK after this three year period. He may, however, be able to return if the EU accepts the UK's additional proposal that citizens with strong ties to a country should be allowed to retain permanent residency after more than two years of absence.

General comparison of EU and UK positions on citizens' rights

A short summary follows of some of the main ways in which the UK and EU's positions on citizen's rights currently diverge.

In the first place, one of the key conceptual differences between the EU and UK proposals is that the EU's proposal works on the basis that the rights which EU citizens have in the UK should continue in their current form. In contrast, the UK approach focuses on ensuring equal treatment with UK nationals post Brexit.

Professor Steve Peers from the University of Essex, has described this difference on his EU Law Analysis Blog as follows:

“ There is a basic choice to be made whether the position of UK and EU citizens after Brexit is based on the ‘acquired rights’ approach (ie retaining their status under EU law) or an approach based on equality with nationals. As we will see, the EU takes the former approach, while the UK takes the latter.”

Peers, 2017²¹

There is also a large gap between the views of the UK and the EU as regards the treatment of UK citizens in the EU. As indicated, the UK proposal wishes UK citizens in the EU to retain their current rights of free movement between Member States. In contrast, the current EU proposal only appears to grant UK citizens protected rights in those Member State(s) in which they have residence rights on Brexit day, thus limiting free movement for UK citizens in the EU post Brexit. This proposal has been the subject of widespread critique from UK citizens in the EU. For example, Jane Golding, chair of British in Europe, an organisation campaign for UK citizens' rights post-Brexit indicated in the Guardian ²² that:

“ It would be “a huge loss” if British citizens could not have the right to live, work and study in more than one EU country after Brexit .”

and that

“ It would be extremely important for some people who work in several countries or people who live in one country and commute to another”

There is also a major difference as regards the cut-off date with the EU arguing that the UK and EU citizens' rights should be protected if they exercised their right to free movement up to Brexit day, whereas the UK is still suggesting the possibility of an earlier cut-off date (e.g. 29 March 2017 when Article 50 was triggered).

As outlined previously there is also an important issue in relation to the treatment of future family members. In his evidence submitted to the Culture, Tourism, Europe and External Relations Committee's inquiry on Article 50, Dr Tobias Lock of the University of Edinburgh explains the contrasting UK and EU positions as follows:

“ This concerns in particular the status of future family members. Under current rules, family members – mainly spouses, but also children under 21 and direct dependents, in particular parents in need of care - of an EU citizen, who has exercised their right to free movement, may join them in the UK regardless of their nationality (i.e. they could be from a non-EU country). Family members acquire similar rights to EU citizens, in particular a right to work and a right to equal treatment. The EU's position is somewhat maximalist in this regard in that it aims to protect not only family members of EU citizens already resident in the UK, but also future family members. It appears that this would be a right exercisable indefinitely. In an extreme case, e.g. of an EU citizen born in the UK on the date of Brexit, this could mean that many decades from now that person could continue to exercise the right to be joined by a future spouse or a child born abroad. By contrast the UK's position is that future family members will be treated the same as non-EU nationals joining British citizens or – supposedly if they are themselves EU nationals – to any special post-exit immigration agreement for EU citizens, should such an arrangement be made.”

Lock, 2017²³

The positions on enforcement mechanisms differ substantially. The UK wishes to rely on UK law and international law, whereas the EU wishes citizens' rights to be subject to the jurisdiction of the Court of Justice with the provisions in the agreement directly enforceable in the UK legal order and the legal orders of the Member States.

On 23 August, the UK Government published a paper on enforcement and dispute resolution.²⁴ The paper confirms that the UK does not wish individuals in the UK to be able to enforce their rights through the Court of Justice. It notes at paragraph 22 that:

“ where the Withdrawal Agreement or future relationship agreements between the UK and the EU are intended to give rise to rights or obligations for individuals and businesses operating within the UK then, where appropriate, these will be given effect in UK law. Those rights or obligations will be enforced by the UK courts and ultimately by the UK Supreme Court.ⁱⁱ UK individuals and businesses operating within the EU should similarly be provided with means to enforce their rights and obligations within the EU's legal order and through the courts of the remaining 27 Member States. ”

The paper does, however, accept that there will be a need for a new dispute resolution system at the level of international law to deal with potential disputes between the EU and the UK. The paper provides various options for dispute resolution, but does not come to any firm conclusions. It does, however, mention existing systems (for example under the EEA Agreement and EFTA Court) which require account to be taken of future Court of Justice decisions when interpreting provisions which replicate EU law. The suggestion is that such arrangements can be useful when there is a shared interest in reducing or eliminating future divergence between the EU and third countries, for example where "continued close cooperation with EU agencies" is needed (see paras 46 and 51). The paper also refers to other international agreements (e.g. the EEA Agreement) which allow references to be made to the Court of Justice for binding rulings on the interpretation of EU law concepts.

In summary, the general thrust of the paper is to deny the Court of Justice a role in UK cases brought by individuals, whilst proposing various international dispute resolution systems, some of which might be used to maintain some aspects of EU law (or EU law concepts) post Brexit.

ii The paper notes that in the case of Scottish criminal cases the High Court of Justiciary is the final court of appeal

No deal between UK and EU

As a final point, it is important to note that if no agreement can be reached by the UK and EU, it would be unclear how, and on what basis, the rights of UK and EU citizens would be protected in the EU and UK respectively. Post Brexit it would appear that any protection would be dependent on unilateral action at a national level, as well as possible human rights protection at international level and in national constitutions.

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