

Written evidence – British in Europe (DND0035)

Introduction

1. British in Europe is a coalition of 10 core groups¹ of British citizens living in the EU27 with a membership of around 35,000. Other UK citizens' groups in addition to this core group of 10 also collaborate with the coalition.
2. There are approximately 1.2 million British in Europe. An estimated around 20% are over the age of 65. The other 70-80% are of working age and younger, and the majority are economically active across the EU27.
3. This evidence will address the questions raised in relation to the House of Lords' EU Committee Brexit: deal or no deal inquiry with particular reference to the position of these British citizens living in the EU 27 and the guarantee of their existing rights post-Brexit.

Theresa May's Speech in Florence, 22 September 2017 and potential stumbling blocks to a deal on citizens' rights

4. British in Europe was very much looking forward to Theresa May's speech on 22 September 2017 but it did not contain much substantial detail as regards citizens' rights. We hoped that she would take that key opportunity to set out concrete steps on how the UK would guarantee the current rights of EU27 citizens in the UK and UK nationals living in the EU27. We hoped that she would take on board the positions reached in the negotiations so far on this critical topic. And we hoped that she would signal that the UK was prepared to make the changes necessary to its offer of 26 June 2017 that need to be made to protect all of our rights and unlock the Brexit logjam.
5. Theresa May said in her speech:

"It has been, and remains, one of my first goals in this negotiation to ensure that you can carry on living your lives as before."

She then went on to say later in her speech that the citizenship provisions in the Withdrawal Agreement would be given a form of direct effect in UK law.

This latter was a very welcome compromise on the principle of direct effect although to date, following two further rounds of negotiations in September and October, there is still not final agreement between the EU and the UK.

6. However, for this compromise to be meaningful, far more was necessary in order to unlock the stalemate in the EU/UK negotiations. There has not, in fact, been significant or even sufficient progress on citizens' rights. The first step should be to scrap "settled status" and simply confirm current rights of permanent residence, combined with a lifetime right of return, for EU27 nationals. The UK government made a proposal on the latter but did not move its position on the former during round 4 of the negotiations in September. At the same time, the UK should agree to continue to apply the current EU rules on family reunification for the 3million (and for British in Europe returning to the UK) after Brexit. Otherwise, those who have exercised free movement rights while the UK has been a Member State of the EU will find themselves penalised for their life choices made in good faith and based on rights that they assumed they had for life.
7. Without these steps, our rights will continue to be undermined because reciprocity means reciprocity. In particular, this is because negotiations inevitably will lead to haggling and, potentially, restrictions of our rights.

The implications of a no deal for citizens' rights

¹ British in Europe is a coalition of currently 10 UK citizens' groups based across the EU: Bremain in Spain, Brexpats Hear our Voice, BRILL, The British Community Committee of France, British in Germany, British in Italy, ECREU, EuroCitizens, Fair Deal for Expats, RIFT (Remain in France Together)

8. The short answer to the question “What would be the effect of no deal?” is that nobody knows for certain. The worst case scenario is that UK citizens in the EU and EU citizens in the UK would simply lose all of their existing rights as EU citizens living in an EU Member State other than their country of origin. The House of Lords’ EU Committee inquiry on ‘Brexit: acquired rights’ reviewed the evidence from legal experts and concluded that the law provided little protection for citizens’ rights. That view has led British in Europe to support a negotiated solution which would provide certainty and avoid many years of anxiety for UK citizens living in the EU and for EU citizens in the UK. However, if no deal is done, there will undoubtedly be litigation to test the extent to which those of us who have lived and worked on both sides of the Channel sometimes for decades have acquired rights which do not fall away. The answer may well vary from one right to another and from one group to another: protracted litigation to test these issues must be the last thing that anyone, whether government or affected citizen, wants.

The House of Lords’ EU Committee report on Brexit: acquired rights

9. Late last year the House of Lords’ EU Committee Justice Sub-Committee took a substantial amount of evidence from legal experts on what would be the “acquired rights” of UK citizens in the EU and vice-versa post-Brexit. Their report, “Brexit: acquired rights” (14 December 2016), is required reading for those considering whether and if so on what terms Article 50 should be triggered.

“There was much speculation before the referendum that EU rights would somehow be protected as ‘acquired rights’, meaning that they would continue irrespective of the UK’s withdrawal from the EU. The evidence we received shows that this is not the case.... [Having considered the limited protection given by some other means] These alternative means of protecting EU rights post-Brexit must, however, be seen in their proper context. They overlap with only a handful of the thousands of EU rights which derive from the UK’s membership of the EU. As Professor Sionaidh Douglas-Scott told us: “A lot of the rights that are derived from EU law are simply not replicated in other instruments, so there is a real deficit ...There will be many, many rights that simply do not find a home in any of these other instruments.” (Report: Summary, page 3)

10. Accordingly relying on existing legal rights would be wholly inadequate solution and lead to years of practical problems for more than 1.2 million UK citizens in the EU who moved pre-Brexit to other EU countries in good faith and with the legitimate expectation that their EU citizenship rights were irrevocable. EU citizens in the UK would be in a similar position.

11. The solution recommended by the Lords’ Committee and supported by us was:

“The central recommendation of the report—and an inescapable consequence of the evidence we received—is that if certain EU rights are to be safeguarded on the UK’s withdrawal from the EU, they should be safeguarded in the withdrawal agreement itself. The agreement will be binding under international law, and will be given effect, and enforced, in the national legal systems of the UK and the EU Member States. This would be the most certain way of providing effective legal protection. It would also be the most effective way of reducing the level of litigation that would undoubtedly follow a Brexit where these rights were not safeguarded. We conclude that the rights to be safeguarded in the withdrawal agreement should be frozen as at the date of Brexit. We think it likely that the majority of them will be reciprocal with parallel EU rights, and so should be applied consistently with them.” (Report: Summary, page 3)

12. There is no reason to revise these conclusions reached by the House of Lords EU Committee last year. The legal position has not changed. We considered back in December 2016 what the default position would be in the event of no deal and our views, which we set out below from paragraph 15, have not changed.

The interrelated rights of UK citizens in the EU

13. The Committee also found, *“In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU*

Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement.” (para. 121).

14. In very summary form, the interrelated rights which we depend on are rights of residence including rights to bring family from outside the UK or EU, and rights of free movement within the EU27; rights to work as an employee or self-employed person and rights to establish a business; rights to the mutual recognition of professional qualifications; rights to study; healthcare and social security rights; rights to equal treatment.

In the event that no deal were to be reached prior to the withdrawal of the UK from the EU, what law would apply to the continued residence of British citizens in the EU?

Directive 2003/109 and EU common immigration policy applicable in EU 24

15. If the rights to residence and freedom of movement we currently enjoy as EU citizens under Directive 2004/38 cease to apply, we will become “Third Country Nationals”. Directive 2003/109 (“the Long Term Residence Directive”) and other elements of the common EU immigration policy, applicable in all EU Member States other than the UK, Ireland and Denmark, would then be the legislation governing the position of British citizens in other EU countries post-Brexit. However:
- a) It only applies to those who have achieved “long term residence” by being resident for 5+ years and meeting the conditions for such residence.
 - b) Those who had not been resident for 5 years would be wholly excluded and would fall back on the national immigration law of their state of residence: they might have to leave that country.
 - c) Also excluded would be those who had not met the conditions for long term residence, which are more onerous than those for EU “permanent residence”. Some who have achieved “permanent residence” as EU citizens would fall outside the Long Term Residence Directive.
 - d) The acquisition of long-term residence is subject to other conditions, more onerous than those for permanent residence, such as the requirement to have “stable and regular resources” without recourse to social assistance in the Member State of residence and health insurance.
 - e) The categories of people counted as family members of the person with long-term residence are more restricted than they are for EU citizens;
 - f) Even when long-term residence has been achieved, the holder does not have the same unqualified rights as an EU citizen to equal treatment with nationals of the state of residence in relation to employment/self-employment, social security, health care and education.
 - g) EU provisions on mutual recognition of qualifications do not apply to third country nationals as they do to EU citizens.
 - h) The right to free movement attached to long-term residence falls well short of the EU citizens’ right to free movement which many of us depend on in order to be able to continue to work: there can be, for example, quotas restricting the right to work in certain countries.
16. In relation to the Long Term Residence Directive, we note with concern the 2011 EU Commission report into the transposition and implementation of the Directive which described the situation, five years after it entered into force, as “deplorable.” Several of the Member States that are home to the largest communities of UKinEU27 (France, Germany, Italy) were found to be in contravention of key provisions of the directive, including definition of status, refusal of status, giving LTRs the right to choose between a permit under national immigration law or EU law, the cost of applying for a permit, higher fees for tertiary education than are charged to EEA nationals and quotas on work permits for LTRs moving from one EU member state to another².

17. We are aware of the REFIT procedure under way with respect to all the existing Directives on third country national legal migration, including the 2003 LTR Directive, and have sought further information from the Commission on the timetable and likely content of any new proposal to amend this body of legislation that may impact on the default residual position as regards continued free movement rights of UKinEU27 across the territory of the EU post-Brexit³.

Health care and social security

18. Once the UK exits the EU it will no longer be bound by the reciprocal arrangements for health care and social security under Reg. 883/2004. In the “no deal” scenario, this would be catastrophic for many UK citizens in the EU, both of working age and pensioners.

19. Pensioners would be affected in two quite separate ways:

- a) Health⁴: while the UK remains in the EU, UK pensioners are entitled to health treatment in their country of residence on the same terms as nationals of that country. The UK pays the country of residence for such treatment, usually by paying a fixed sum for each UK pensioner in that country. This is a reciprocal system applying both ways. If these reciprocal arrangements are not continued, EU27 states will have to decide what treatment, if any, they are prepared to provide to UK pensioners, and on what terms. If they decide not to provide such treatment then UK pensioners will have to try to get health insurance, but for many this will be prohibitively expensive or indeed impossible if their medical history causes insurance companies to exclude all conditions from which they have previously suffered. Their only course may be to return to live in the UK in order to access the NHS, but they will then face the problem of acquiring somewhere to live in the UK where buying and renting become ever more expensive at a time when property prices in the main EU countries where UK pensioners reside have fallen or are at a standstill, a situation which would only be made worse by many trying to sell at the same time.
- b) Pensions: the UK has a policy of not uprating the state pension for inflation for those not resident within its borders, save [as claimed by the government] where it is bound by international agreement to do otherwise. UK pensioners in Australia, for example, receive no increases. It is a provision of Reg. 883/2004 (Art.7) which prevents the UK from refusing to uprate the state pension for those resident in the EU27. If that were to go (in the event of a no deal), unless the UK makes a unique exception, its pensioners in the EU will no longer receive increases for inflation. On top of the major devaluation in the pension as a result of the fall in the exchange rate, the loss of inflation increases would be enough to make force many UK pensioners to return to the UK, with the same problems as described for health care above.

20. Reg. 883/2004 on social security also governs an important issue for working people. It establishes an integrated EU-wide system of aggregation of pension contributions for those who have worked in more than one country, and a scheme for determining which country pays the pension and how much it should be. How this would unravel in the event of a no deal if it is not replaced is anybody’s guess. There would be no arrangement for future contributions. Those who have made contributions in the past would undoubtedly have a property right to recover something in respect of them, but whether this took the form of a pension or simply the right to a return of contributions with some interest would be a matter for litigation.

Voting

² Report from the Commission to the European Parliament and Council on the Implementation of Directive 2003/109/EC COM (2011) 585 final: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/http%3A//ec.europa.eu/what-we-do/policies/pdf/1_en_act_part1_v62_en.pdf

³ The Legal Migration Fitness Check: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_home_199_fitnesscheck_legal_migration_en.pdf

⁴ Whilst pensioners are the main group affected, certain others, such as people entitled to “exportable benefits” are also covered by this scheme at present.

21. If no deal is done, then UK citizens in the EU would lose their present right to vote in EU Parliamentary elections and whether they could vote in local elections would be a matter for their state of residence.

National law

22. National law. Each EU country will have national rules concerning continuity of rights or acquired rights and legitimate expectation, which vary from country to country, and which may provide different degrees of assistance and security to British citizens who wish to remain in that EU country.

International law

23. It has been argued (and was argued before the Referendum) that the 1969 Vienna Convention on the Law of Treaties is applicable to the acquired rights of British nationals in their countries of residence. However, this is a treaty entered into between states and as such, does not create directly enforceable rights for individuals. In addition, any effect it may have would depend on interpretation and enforcement by legislators and the courts and thus, post-Brexit it would not provide any solid protection for British citizens in other EU countries. Furthermore, not all EU countries (e.g. France) are signatories to the Convention.

European Convention on Human Rights

24. It may be possible to rely on Article 8 on the right to respect for private and family life in relation to continued residence in another EU country. However, this is likely to depend on the length of time spent by any British citizen in the relevant country – for example, a stronger argument could probably be made if a British citizen had been born or lived most of her/his life in the country.

CONCLUSIONS

25. Given all the above, in our view, there is no clear and comprehensive legal solution to the issues faced by British citizens residing in the EU or EU citizens in the UK without a deal between the EU and the UK, agreeing the principles on which the exiting rights of these citizens should be safeguarded, and setting out the detail in the Withdrawal Agreement.
26. Any default position under a mixture of EU, national, European (European Convention on Human Rights) and international law would be an imperfect and patchwork solution and lead to years of practical problems for more than 4.2 million British citizens in the EU and EU citizens in the UK who moved pre-Brexit to other EU countries in good faith and with the legitimate expectation that their EU citizenship rights were irrevocable.
27. Moreover, such a solution would also be impractical and create difficulties for both the UK and other EU countries as regards its implementation, entailing an unsatisfactory piecemeal approach to the position of former EU citizens already resident, sometimes far longer than five years, in their countries.
28. It is the current intention of the EU and the UK at this stage in the negotiations to set out in detail any deal that they reach as regards safeguarding citizens' rights in the Withdrawal Agreement, thus giving these provisions treaty status and force of international law. However, the negotiators need to go further and definitively agree that the provisions of the Withdrawal Agreement would have direct effect in national law, and also agree which international dispute resolution body will have jurisdiction as regards these rights. This could of course be the Court of Justice of the EU (CJEU), given that the rights in question derive from EU law, and to ensure consistency of interpretation of the rights of both groups of citizens in the UK and EU 27 going forward. In the event that it is not the CJEU, a body fulfilling the same conditions should be chosen.
29. "No Deal" is an ambiguous term in connection with citizens' rights. It could mean that the UK and the EU are unable to agree on anything, or it could mean that, whilst they are agreed on

citizens' rights, they have failed to reach agreement on other matters and conclude that there is "no deal". It is essential to ensure that, provided there is an agreement at least on citizens' rights, we are not in a no deal situation. The UK and EU can do this by ensuring that any agreement on citizens' rights is ring-fenced from the rest of the negotiations. Currently, in order to reach sufficient progress in the negotiations, the three priority areas in the negotiations are being linked. This means that matters and compromises that have direct repercussions for the lives of real people are being mixed up with the discussions as regards the financial settlement and the Irish border. There is no way of avoiding the conclusion that citizens and their rights are being used as bargaining chips in these negotiations. Unless and until citizens' rights are ring-fenced from the rest of the negotiations, this position will not change.

30. There is also the concern that citizens' rights may be the only area in which it may be possible to reach sufficient progress by December, the date of the next European Council meeting. In that case, it may be that the negotiators will seek to make compromises that will limit the extent to which existing rights are guaranteed. Conversely, it may simply mean that the bar is lowered and that, even if fundamental issues concerning citizens' rights still remain to be agreed, the UK and EU will conclude that "sufficient progress" on citizens' rights has nonetheless been reached. It would be fundamentally unjust for the 4-5 million people who have relied in good faith on their rights with the legitimate expectation that they were irrevocable if any such compromises were to be made.
31. In conclusion and given what is set out above, on citizens' rights, the repercussions of a no deal are serious – and exclusively negative for the lives of between 4-5 million people who have moved across the Channel in reliance of their existing rights as EU citizens.

26 October 2017