



The Rights of EU Nationals in the UK Post-Brexit

Summary

1. Calls to offer a unilateral guarantee to EU nationals and indeed the House of Lords amendment to the Article 50 Bill only scratch the surface of the issues involved. They also ignore the fact that approximately 85% of the 3.6 million EU citizens now in the UK will have been in the UK for at least five years by the time that the UK leaves the EU and that very large numbers will already have acquired the right to permanent residence by then.

2. However, there are over half a million people already in the UK who will not qualify for permanent residence by March 2019. Legislation will be required to create the legal basis for these people's ongoing residence and for their right to continue to accrue residence time towards permanent residence.

3. EU nationals will also continue to arrive until the UK's departure and perhaps an additional half a million or so might arrive between now and then, including short term migrants. A cut-off point will have to be decided if we are to avoid a pre-exit surge. EU nationals arriving after the cut off date would only be entitled to accrue time towards permanent residence up to the date that we leave the EU, at which point they will not have exercised a treaty right for long enough to be entitled to Permanent Residence. After the UK leaves the EU they would not have the right to continue to accrue rights. The post-Brexit status of these people will have to be decided and a legal basis for their ongoing residence conferred on them through legislation. It is possible that a temporary work permit, valid for perhaps two years, could be issued to those who arrived prior to the UK's departure from the EU but after the cut-off point. This would have the advantage that it would allow time for employers that have become dependent on EU labour to make the necessary adjustments.

Background

4. The decision to leave the European Union has created uncertainty for EU nationals living in the UK and for British citizens living in another member state. The government sought to address the issue but it seems that some EU partners rejected early discussion on the grounds that there could be no negotiations prior to the triggering of Article 50.

5. However, the government has been clear that they want to ‘secure the status of EU citizens who are already living in the UK, and that of UK nationals in other Member States’¹ and that the only circumstances in which this would not be possible would be if the rights of British citizens in other member states were not protected.²

6. Nonetheless, Members of Parliament and Peers in the House of Lords have proposed amendments to the Article 50 Bill currently going through Parliament that would provide greater clarity on the status of EU nationals currently living in the UK. The legislation passed through the House of Commons unamended. However the government was defeated in the House of Lords on an amendment which stipulates that, within three months of triggering Article 50, the government ‘must bring forward proposals to ensure that citizens of another European Union or European Economic Area country and their family members, who are legally resident in the United Kingdom on the day on which this Act is passed, continue to be treated in the same way with regard to their EU derived-rights and, in the case of residency, their potential to acquire such rights in the future’.³

7. The legislation will return to the House of Commons and it is quite likely that the amendment will be removed from the Bill. Ping pong may ensue but it would seem unlikely that Peers would wish to reinsert the amendment as this might be seen by the public as delaying the government’s plan to trigger Article 50 no later than March 2017.

8. Various Parliamentary Committees have also expressed the view that the government should offer a unilateral guarantee to EU nationals currently living in the UK. The House of Lords European Union Justice Sub-Committee has recommended that the government ‘give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK post-Brexit’.⁴ The House of Commons Committee on Exiting the UK has called on the government to ‘make a unilateral decision to safeguard the rights of EU nationals living in the UK’.⁵

9. However, the issue is more complex than merely offering a unilateral guarantee to EU nationals in the UK. For example, should an EU national who arrives the day before the UK leaves the EU be treated the same as someone who arrived before the Prime Minister triggers Article 50? What will be the status of those who do not qualify for permanent residence? And, more important still, what of just under a million British people living in another EU member state who would continue to face uncertainty even if the rights of EU nationals were secured?⁶ In addition, but not covered by this paper, are the issues of healthcare, pensions, and social security rights of those exercising their free movement rights.

1 See Section 6 of the White Paper: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

2 HC Debate, 19 October 2016, Robin Walker, Hansard Col 868, URL: <https://hansard.parliament.uk/commons/2016-10-19/debates/F1337420-EBD9-413C-949B-A4AEA0832B2C/RightsOfEUNationals>

3 Draft Bill, URL: https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0108/lbill_2016-20170108_en_2.htm#l1g1

4 <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf>

5 <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

6 ONS, ‘What information is there on British migrants living in Europe?: Jan 2017’, URL: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatinformationisthereonbritishmigrantslivingineurope/jan2017>

10. These are just some of the many issues that are left unanswered by the amendment and wider calls for a unilateral guarantee. This note is intended to shed some light on the issues involved, focusing on the rights under which EU nationals can come to the UK, how many have done so, their current status and their status in two years' time (the point at which the UK is likely to leave the EU). It looks at some of the legal and practical problems raised by Britain's exit more generally.

The Right of Free Movement

11. EU nationals are allowed to live in the UK (or indeed any other EU country) for an initial period of three months. During this three month period, EU nationals do not have to demonstrate that they are exercising what is known as a 'treaty right'; all they require is a passport or identity card issued by another EU member state.

12. If an EU national wishes to remain in the UK or another EU member state for longer than three months they must show that they are a 'qualified person' or the family member of a 'qualified person'. A 'qualified person' is defined as someone exercising one of the 'treaty rights'. This means someone who is either:

- a Jobseeker
- a Worker
- Self-employed
- Self-sufficient
- a Student

13. After five years of lawful and continuous residence as a 'qualified person', an EU national automatically acquires a right of permanent residence. There is no requirement for them to obtain any documentation affirming this right but many have chosen to apply for certification of permanent residence, especially since the vote to leave the European Union which has led to uncertainty and a consequent surge in applications.

14. After a further year of residence, those who have obtained certification of their permanent residence status can apply for British citizenship. Very few EU citizens have so far taken up citizenship, largely because there has been no need. EU nationals with the right of permanent residence here are treated in much the same way as British citizens with the exception that they cannot vote in a General Election.

15. Irish citizens have rights derived from UK domestic legislation, which gives them the right to live and work in the UK separate from their rights derived from EU law. For most purposes, Irish citizens living in the UK are treated in the same way as British citizens.

The Status of EU Nationals in the UK

16. EU nationals currently living in the UK broadly fall into three groups:

a. Those who already fulfil the requirements for permanent residence in the UK because they have been exercising one of their treaty rights for a continuous period of five years.

b. Those who do not yet fulfil the requirements for permanent residence because they have been exercising a treaty right for a continuous period that falls short of five years but who will qualify by the time the UK withdraws from the European Union (perhaps in March 2019).

c. Those who will not have not fulfilled the requirements for permanent residence because they will not have lived in the UK exercising a treaty right for a continuous period of five years by the time that the UK leaves the EU.

17. The Migration Observatory has estimated the number of those who fall into each of these groups. Labour Force Survey data shows that in Quarter 1 of 2016 there were 3,580,000 nationals of other EU member states living in the UK.

18. Of these, 2,325,000 have lived in UK for five years or longer and would therefore be able to apply for certification of their permanent residence, so long as they were able to fulfil all other requirements and produce evidence that they had been exercising a treaty right for five years. The Migration Observatory has calculated that there are an additional 280,000 EEA nationals born in the UK but who do not have British citizenship, the vast majority of whom are children. It is likely that these will qualify on the basis of their parent/s having exercised a treaty right. These two groups represent 72% of the total population of EU nationals living in the UK.

19. The remaining 28%, or 975,000, are EU migrants who at the time of the survey had lived in the UK for four years or less. However, these people have since then been able to and will continue to be able to accrue residency rights until the UK leaves the EU. In two years time 435,000 of these will have lived in the UK for the five years necessary to automatically qualify them for permanent residence. Thus a total of 3,040,000, or 85%, of EU citizens now in the UK will have completed five years residence by the time the UK leaves the EU.

20. This leaves 526,000 who will not qualify for permanent residence by the time the UK leaves in 2019. The amendment to the Bill would partially address this issue because it would allow EU nationals who arrived prior to the Bill becoming an Act of Parliament to continue to acquire residency rights in the future, even after the UK leaves the Union. However, the legal basis for their presence in the UK will have changed as the EU treaties will no longer apply to the UK and some form of legal status will have to be conferred on them that is short of permanent residence but which will give them the legal right to remain and to continue to accrue time towards permanent residence.

Table 1: Status of EU Nationals in the UK, Quarter 2, 2016. Source: Migration Observatory⁷

Status of EU Nationals Resident in UK	Number
EU nationals living in the UK for 5+ years	2,325,000
EU Nationals born in the UK	280,000
EU Nationals with 5+ years in 2019	435,000
EU Nationals with less than 5 years in 2019	526,000

⁷ <http://www.migrationobservatory.ox.ac.uk/resources/commentaries/today-gone-tomorrow-status-eu-citizens-already-living-uk/>

Future EU Arrivals

21. The amendment would not however address the question of the post-Brexit status of future arrivals, i.e. those EU nationals who arrive after the Bill becomes an Act of Parliament but before the UK departs the EU, because it does not give these people the right to continue to accrue residency rights. Moreover, once the UK leaves the EU the (EU) legal basis for their stay in the UK will have gone. Practically speaking it would be extremely difficult and morally wrong to ask or indeed to compel these people to leave. Some new legal basis for their residence will have to be found and one distinct from that applicable to those who arrived before the Act was passed because this group would not continue to accrue residency rights. One answer would be to grant them temporary work permits giving them the right to remain for two years. This would also provide a little more breathing room for businesses which will be working towards adapting to life post-Brexit.

22. Inflow from the EU is running at around 270,000 a year so some half a million could arrive over the next two years. There will also be a number of short term EU migrants who will be here at the time of our departure. It is hard to know whether there will be a rush to beat the deadline, as is often the case when immigration rules are changed, or whether EU citizens will be discouraged from coming to the UK. Even if these considerations balance out, there could be something like a further half a million or so EU citizens who would be legally present in the UK at the time of our departure but with no ongoing right to remain.

23. The House of Commons Committee on Exiting the EU has considered this issue and notes the issue of EU migrants who arrived before the EU referendum, before the triggering of Article 50, and those who will arrive before the UK leaves the EU but who would not qualify for permanent residence and concludes that 'a decision needs to be taken about whether and how to regularise their status, and, if so, what the cut-off date for arrivals should be.'⁸ They do not however suggest when this cut off date should be. There are three obvious dates that could be considered: first, the date of the referendum; second, the date that the Prime Minister notifies the European Commission of its intention to withdraw from the EU under Article 50; and third, the date that the UK leaves the EU. The first would likely face a successful legal challenge and the third would likely cause a surge in movement to the UK ahead of Brexit. Therefore the date of notification under Article 50 would be the most fair and the most practical date to act as a cut-off point for EU nationals in terms of the right to continue to accrue residency rights towards permanent residency.

Future Legal status of EU citizens

24. Regardless of whether the amendment remains in the Bill that receives Royal Assent, there is a need for future legislation to address the legal status of those people who do not qualify for permanent residence once Britain leaves the bloc. Since their right to live in the UK was predicated on the UK being a member of the European Union, a new basis for their right to remain will have to be set out in law.

25. Future legislation will also have to address the technical issue that permanent residence is a term

8 <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

that exists in EU legislation but not domestic legislation. Permanent residence is loosely akin to indefinite leave to remain (ILR) which is granted to non-EU nationals, but it is distinct because, for example, ILR can be withdrawn (e.g. in certain circumstances where the holder leaves the country for more than two years). Future legislation could continue to recognise the concept of permanent residence for those who have/will have acquired this status by the date of our departure. For those EU nationals who have not by then acquired the right of permanent residence but who have built up at least two years as 'qualified persons', the government may wish to grant some intermediate status.

Practical Problems

26. Even if the legal status of EU residents in the UK can be resolved there remains a practical difficulty associated with identifying EU residents in the UK and their date of arrival. Unlike other EU countries the UK does not have a population register which would identify the resident population in any given year.

27. The requirements for permanent residence are more extensive than simply five years continuous residence. Students and the self-sufficient for example are also required to demonstrate that they have held comprehensive sickness insurance (CSI) throughout their time spent here on that basis. It has been reported that some EU migrants have been unaware of this requirement. However, on a strict liability basis, someone subject to that requirement but who has not held CSI would not qualify for permanent residence. It is not clear whether or not the Home Office will enforce this requirement. The House of Commons Committee on Exiting the European Union has effectively suggested that the requirement for CSI be abandoned. They conclude in their report that 'the government should state that access to the NHS is considered sufficient to fulfil the requirements for CSI, and that it will introduce legislation to that effect if necessary.'⁹

28. Applicants for permanent residence will also have to provide documentation in support of their application for certification to show that they have been exercising a treaty right, i.e. that they have been employed, self-employed, a student, or self-sufficient. For those who have been employed continuously for five years this is less of a problem, however for those who may have had a career break, for those with a continuous absence from the UK of six months or more, those who are working or for part of their time have worked on a self-employed basis or who are or have been low earners then the process will be more complex, and not all will meet the rules.

9 <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1071/1071.pdf>

Implications for British Citizens in other EU Member States

29. Some MPs and Peers in Parliament have expressed their concern that a unilateral guarantee for EU citizens in the UK leaves British citizens vulnerable in the future negotiations. While it is possible that a unilateral guarantee from the UK government to protect the rights of EU nationals could be seen as a gesture of goodwill and could prompt a similar guarantee from the rest of the EU, this is by no means certain. It is also possible that the issue of UK nationals in other member states would slip down the agenda once discussions got going or, worse, British citizens could be used as a bargaining chip by other member states. Given that the UK government is legally responsible for protecting the rights of British citizens around the world its position is entirely understandable.

13th March 2017