Negotiating the Right to Remain after Brexit

Bernard Ryan*

At a glance

The United Kingdom’s expected departure from the free movement of persons of regime requires a resolution of the legal status of prior residents under EU law – ie EU-27 citizens in the United Kingdom, British citizens in EU-27 states, and third-country family members. The future status of these groups is covered by the art 50 TEU exit negotiations which commenced on 19 June 2017. This article will consider the provision for ‘rights to remain’ in an eventual art 50 agreement. The article will show that there is consensus to protect persons with pre-Brexit rights of permanent and extended residence. Beyond that, there are many areas of uncertainty, including the treatment of derivative and temporary rights of residence, and of third-country family members of British citizens in the United Kingdom. There are, in addition, several subjects on which differences of view are manifest, such as the post-Brexit sponsorship of family members, exclusion from residence, and guarantees of compliance. The many differences between the EU’s ambition to fully preserve the status quo ante of ‘acquired rights’, and the United Kingdom’s concern to integrate EU-27 residents and their family members into its domestic immigration law system, mean that it is uncertain whether an art 50 agreement will cover rights to remain.

Introduction

One consequence of the United Kingdom’s notice of withdrawal from the European Union on 29 March 2017 was to put it on course to leave the free movement of persons regime. That outcome had been clear since Theresa May’s 17 January 2017 speech on the United Kingdom Government’s negotiating objectives, which had included the goal of control over EU migration, and had declared that the United Kingdom would not seek membership of the single market.1 It was unaffected by the June 2017 general election, which left the Conservative Government in place with broadly the same orientation concerning Brexit. The position of the Labour opposition too is to accept that Brexit will lead to an end to the free movement of persons in respect of the United Kingdom.2

* I am grateful to Jonathan Kingham for his comments on a draft of this article. The research on which this paper draws was made possible by a British Academy fellowship.


The United Kingdom’s anticipated departure from the free movement of persons regime makes it necessary to address the situation of prior residents affected by Brexit – that is, the nationals of other EU states (the ‘EU-27’) resident in the United Kingdom, and of British citizens resident in the EU-27 states, together with qualifying family members. In the period after the 23 June 2016 referendum, the Conservative Government declined to give a unilateral guarantee to EU-27 citizens and their family members resident in the United Kingdom. Its position was that their situation should be addressed through negotiations with the EU-27, to ensure protection for British citizens resident in those states on a reciprocal basis. The future status of both groups has therefore been included within the exit negotiations under art 50 TEU which commenced on 19 June 2017.

This article will consider the provision for the rights to remain of prior residents in an eventual art 50 agreement.\(^3\) What are the main issues, and what can we expect will be the outcome? The European Union formally set out its approach to the content of the withdrawal agreement, on this and other matters, in negotiating directives approved by the Council of Ministers on 22 May 2017.\(^4\) On 26 June 2017, the United Kingdom Government then outlined its own proposals concerning prior residents.\(^5\) We shall see in this article that there is a basic difference between the two sides in this area. The EU’s declared aim is to preserve the \textit{status quo ante} – or acquired rights – in full. That implies a special protected status for those who have rights of residence under EU free movement law at Brexit. In contrast, the United Kingdom Government is concerned above all to integrate EU-27 residents and their family members into its domestic immigration law system, so that they may be treated in the same way as other long-term residents. We shall see in this article that many consequences flow from this difference of starting-point.

It will be assumed in the discussion that an EU-level agreement will only address rights of residence recognised in EU law. Accordingly, the main focus of the article will be on the rights set out in the 2004 Citizens Directive, with other provisions referred to as they arise.\(^6\) The difficult issues which may arise concerning resident EU-27 and British citizens who do not qualify for a right of residence under EU law will not, therefore, be analysed.\(^7\) Nor will the position of the nationals of the four EFTA states (Iceland, Liechtenstein, Norway and Switzerland) be covered, as those states are not parties to the negotiations.\(^8\)

The body of the article will begin with a summary of the post-referendum political debates in the United Kingdom concerning the protection of prior residents, focusing on the

\(^3\) This article was completed on 3 July 2017. It was written on the assumption that an agreement would not have been reached by the time it was published.

\(^4\) Council of Ministers document XT 21016/17 ADD 1 (22 May 2017).

\(^5\) The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK nationals living in the EU (Cm 9464, 26 June 2017, henceforth, ‘Safeguarding the Position’).


\(^7\) In the United Kingdom, the Government’s announcement that it will not require evidence of comprehensive sickness insurance in post-Brexit applications will considerably reduce the significance of this question: see Safeguarding the Position, para 22, and the further discussion below.

\(^8\) The term ‘EEA+’ is used here, where necessary, to refer to the nationals of the EU-27 and those four states. Nationals of the four states are treated equally with EU citizens in the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) in the United Kingdom. The background is that nationals of Iceland, Liechtenstein and Norway are covered by Annex V of the EEA Agreement ([1994] OJ L1/3), as amended by Decisions 158/2007 and 52/2012 of the EEA Joint Committee ([2008] OJ L124/20 and [2012] OJ L207/32), while Swiss nationals benefit from the EU-Swiss Agreement on the Free Movement of Persons, ([2002] OJ L114/6). There will presumably be negotiations concerning prior residents between the United Kingdom and these states, the outcome of which is likely to follow any arrangements made at the EU level.
Government’s prolonged refusal to give a unilateral commitment to them. The prospects for art 50 negotiations concerning prior residents will then be addressed in general terms: how will the negotiations be structured, and what can be said about the overall negotiating positions of the two sides? The article’s third section will consider the provision in any agreement for what are here termed ‘permanent’ and ‘extended’ rights to remain. A fourth section will examine cases where there must be uncertainty concerning the eventual protection for prior residents: ‘derivative’ rights of children and carers, temporary rights of residence, and third-country family members. The final section will consider a series of possible adjustments to the free movement of persons regime in the light of Brexit. Overall, the article aims to show what an art 50 agreement concerning prior residents might look like, while identifying the main difficulties in the way of such an agreement.9

Towards negotiation

During the 2016 Brexit referendum campaign, little coverage was given to the implications of Brexit for the future status of prior residents under EU free movement law. One reason was probably that, among EU-27 nationals, only those of Cyprus, Ireland and Malta had a vote in the referendum, something which significantly reduced the EU-27 share of voters.10 The future status of prior residents was also widely considered a hypothetical question: even if a ‘leave’ vote materialised, it was expected that the free movement of persons would continue through membership of the single market.11 A further factor was that leading ‘remain’ campaigners were reluctant to address any aspect of immigration policy, as the issue was thought fundamentally unhelpful to their side.12 In the event, the only developed position on the subject came in a Vote Leave campaign statement on 1 June, which declared that there would be ‘no change for EU citizens already lawfully resident in the UK’.13

Soon after the vote to leave in the referendum, the United Kingdom Government set out its position that the future status of EU residents should be negotiated with the EU-27, with a view to ensuring protection for British citizens living there. That approach was outlined by Theresa May, then Home Secretary, in a television interview on 3 July, and was confirmed by the then Immigration Minister, James Brokenshire, in the House of Commons the next day.14 It would be maintained after Theresa May became Prime Minister on 13 July 2016.15 The Government appears to have hoped that there could be separate negotiations on this subject, in advance of formal notification of withdrawal. That was however blocked by opposition

---


10 While published statistics do not permit a breakdown of the United Kingdom population over 18 by nationality, an examination of the total population by nationality is possible, using Office for National Statistics, Population by Country of Birth and Nationality: Underlying Datasheets, available from https://www.ons.gov.uk/. In 2015, Cypriot, Maltese and Irish nationals accounted for 0.6% of the combined British, Commonwealth and Irish population of the United Kingdom. In contrast, EU-27 nationals were 5.0% of the combined British, Commonwealth and EU-27 population.

11 For example, UK Government, Alternatives to Membership: Possible Models for the United Kingdom outside the European Union (March 2016) paras 1.2 and 4.4.


from EU-27 states, who insisted that negotiations could only take place after notification of withdrawal.16

The Government’s choice to proceed by negotiation alone was repeatedly challenged in Parliament, where there was widespread support for a unilateral guarantee for those resident under EU law. On 6 July 2016, by 245 votes to 2, the House of Commons passed a resolution proposed by the Labour Party ‘call[ing] on the Government to commit with urgency to giving EU nationals currently living in the UK the right to remain.’17 On 19 October 2016, 250 MPs then supported an unsuccessful Scottish National Party motion calling on the Government ‘to ensure that all nationals from other countries in the EU who have made the UK their home retain their current rights, including the rights to live and work in the UK, should the UK exit the EU.’18 Thereafter, a unilateral guarantee would continue to be argued for by select committees in both Houses of Parliament.19 The main arguments for such a guarantee were that it was unacceptable for prior residents to face prolonged uncertainty as to their legal position, and that EU residents should not be a ‘bargaining chip’ in the exit negotiations.20 The latter argument was a response to suggestions in Government circles that the protection of prior residents was one of the few concessions the United Kingdom had to offer in the exit negotiations.21

Calls for a unilateral commitment to prior residents were given new impetus by the Supreme Court ruling in Miller on 24 January 2017 which found that the Government required legislative authority to notify Brussels of its intention to withdraw from the EU.22 A series of amendments, concerning prior residents, were proposed unsuccessfully to the subsequent Bill in the House of Commons.23 When the Bill reached the House of Lords, further amendments were put forward, one of which – amendment 9B – was passed.24 It provided that

‘Within three months of exercising the power [to notify] Ministers of the Crown 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 regards to their EU derived-rights and, in the case of residency, their potential to acquire such rights in the future.’25

16 See ‘Call for quick decision over EU citizens in UK’, Financial Times, 9 July 2016 and The United Kingdom’s Exit from and New Partnership with the European Union, p 30.
17 HC Deb, 6 July 2016, cols 937–980.
18 HC Deb, 19 October 2016, col 821. The motion was defeated by 293 votes to 250.
21 The then UK permanent representative to the EU, Ivan Rogers, is reported to have advised the Government to this effect immediately after the referendum: ‘May was warned against migrant guarantees’, Times, 20 August 2016. A similar view was expressed in a speech at the Conservative conference by Liam Fox, Secretary of State for International Trade: ‘Liam Fox refuses to guarantee right of EU citizens to remain in UK’, Guardian, 4 October 2016.
22 R (Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.
23 House of Commons, ‘European Union (Notification of Withdrawal) Bill: Committee of the whole House Amendments as at 8 February 2017’, amendments 17, 45, NC8, NC14, NC27, NC57, NC 135 and NC 146.
24 House of Lords, ‘European Union (Notification of Withdrawal) Bill: Second Marshalled List of Amendments to be moved in Committee of the Whole House’ (27 February 2017). The other proposed amendments concerning prior residents were numbered 16A, 25, 37, 38 and 41.
The Government resisted amendment 9B in the House of Commons, and it was removed from the eventual European Union (Notification of Withdrawal) Act 2017.

In the period between the referendum and notification of withdrawal, the Government did however seek to soften the implications of its insistence upon negotiations in several ways. Firstly, it offered reassurance as to its expectation of the outcome of EU-level negotiations. On 6 July 2016, James Brokenshire declared that ‘we fully expect that the legal status of EU nationals living in the UK, and of UK nationals in EU Member States, will be properly protected.’ Essentially the same words then appeared in a statement concerning ‘the status of EU nationals in the UK’, published on the Cabinet Office website on 11 July 2016. Secondly, the Government argued that an agreement on prior residents could be reached at an ‘early’ stage after notification of withdrawal. That was emphasised by Theresa May in her speech of 17 January 2017: ‘we want to guarantee the rights of EU citizens who are already living in the United Kingdom, and the rights of British nationals in other Member States, as early as we can’. Thirdly, members of the Government insisted on their personal commitment to a protective outcome. For example, on 13 March 2017, when calling for rejection of House of Lords amendment 9B, Secretary of State for Exiting the European Union, David Davis declared that: ‘I take as a moral responsibility the future guarantees of the future of all 4 million citizens — European Union and UK together.

The irony is that, now that negotiations have formally begun, the Government has come to give a unilateral guarantee of the type which it had previously resisted. Safeguarding the Position includes the key statement that: ‘The Government undertakes to treat EU citizens in the UK according to the principles below, in the expectation that the EU will offer reciprocal treatment for UK nationals resident in its member states.’ This statement will presumably have given reassurance to many EU citizens and their family members who are resident in the United Kingdom. Its emergence at this stage probably reflects the United Kingdom Government’s lack of enthusiasm for an agreement concerning prior residents on the terms proposed by the EU.

The EU-level negotiations

Now that negotiations have commenced, two broad issues arise for consideration. How will the structure of the negotiations affect the question of protection for prior residents? And, what can be said about the overall negotiating positions of the two sides?

The structure of the negotiations

The EU- United Kingdom withdrawal negotiations are governed by art 50(2) TEU. It provides that, once a Member State has notified its intention to withdraw, ‘the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. The first step on the EU’s side is for the European Council to set out guidelines for the negotiations, which
it did in relation to Brexit on 29 April 2017. The negotiations with the withdrawing state are then conducted in accordance with art 218(3) TFEU, which governs all EU international agreements. For the EU, that process commences with the making of recommendations by the European Commission to the Council of Ministers. These were duly published on 3 May 2017, together with an Annex setting out proposed negotiating directives, including on what it terms ‘citizens’ rights’. Article 218(3), requires a decision by the Council of Ministers authorising the opening of negotiations, and appointing a negotiator. In the case of Brexit, those decisions were taken by the Council of Ministers on 22 May 2017, when it formally appointed the European Commission as negotiator, and approved its proposals for negotiating directives with minor amendments.

33 Council document XT 21016/17 ADD 1 (22 May 2017).
34 In this case, a ‘super’ qualified majority is required, as the decision to conclude the agreement will not be based on a proposal from the Commission: see art 238(2) TFEU. That requires the support of at least 72% of the EU-27 states (here, 20 states), comprising at least 65% of their population.
35 The Council negotiating directives contemplate withdrawal occurring on ‘30 March 2019 at 00:00 (Brussels time)’: Council document XT 21016/17 ADD 1, para 8. That would be 23:00 on 29 March 2019 in the United Kingdom.
36 See the comments of the European Commission’s lead negotiator, Michel Barnier: ‘UK will have less than 18 months to reach deal, says EU Brexit broker’, Guardian, 6 December 2016.
37 EUCO XT 20004/17, Annex, paras 4 and 8 and Council document XT 21016/17 ADD 1, paras 9–11.
letters that makes absolutely plain what we think the outcomes will be and should be.”38 That approach appears difficult to reconcile with the position of the EU institutions, that all subjects covered by the art 50 negotiations will be agreed together.39 This linking of issues implies that any agreement concerning prior residents will be tied to difficult questions, such as the financial settlement between the United Kingdom and the EU, and the involvement of the Court of Justice (‘CJEU’) in the resolution of post-Brexit disputes. A conceivable consequence will be to prevent even a political resolution in relation to prior residents until towards the end of the expected period of actual negotiation (late 2018 or early 2019). Indeed, it is possible that the linking of issues will itself prevent any agreement at all in relation to prior residents within the art 50 process.

A further question is whether an agreement concerning prior residents might somehow be postponed until after the date of Brexit. That could arise if the EU and the United Kingdom were to agree to transitional arrangements in the art 50 agreement, while their future relationship was being negotiated. One reason why a transitional agreement may emerge is the Commission’s position that the future EU-UK relationship can only be agreed after Brexit, when the United Kingdom is no longer a Member State.40 Another is that there is support within the United Kingdom Government for avoiding a sudden unwinding of single market arrangements (the ‘cliff edge’).41 If a transitional arrangement were to preserve and modify elements of the pre-Brexit status quo, while the future relationship negotiations proceeded, that could in theory lead to the continuation of the free movement of persons regime after Brexit. That solution is thought unlikely to be attractive to the United Kingdom Government, given its orientation to control on immigration from the EU-27.42 The rest of this article will therefore proceed on the basis that the free movement of persons regime will cease on the date of Brexit. If that assumption were to prove incorrect, and the whole of the free movement of persons regime were to survive for a period after Brexit, then the same questions about prior residents would logically arise for resolution at a later date. Alternatively, if only some of the free movement of persons regime were to continue on a transitional basis after Brexit – eg the free movement of workers – a separate resolution would in due course be needed as to the status of persons who exercised free movement rights in the intervening period.

The negotiating positions

There are several factors which point to the EU side of the negotiations being more concerned than the United Kingdom to obtain a generous deal on the protection of prior residents. The first is that, in quantitative terms, the negotiations are much more about EU-27 citizens in the United Kingdom than vice versa. Official estimates show that there were 3.16 million United Kingdom residents with another primary EU nationality in 2015, making up 4.9% of the population.43 That compares to an estimated 0.9 million British citizens resident in EU-27

40 ‘Barnier urges UK to be realistic about trade terms for Brexit’, Financial Times, 6 December 2016.
42 For a discussion of restrictions on the free movement of persons within an interim agreement, see Damian Chalmers and Anand Menon, Getting out quick and playing the long game (Open Europe, July 2016) 9 and 12.
43 Office for National Statistics, Population by Country of Birth and Nationality: Underlying Datasets, available from https://www.ons.gov.uk/. A further 31,000 persons had another EEA+ nationality, so that 3.19 million and 5.0% had an EEA+ nationality. In cases of multiple nationality, only the ‘first’ nationality is recorded in this data. A proportion of those counted as EU/EEA+ nationals will therefore have British citizenship as well, and vice versa.
states in 2011, who made up 0.2% of the resident population of those states. On these figures, approximately 78% of the prior residents affected by the negotiations are therefore EU-27 citizens in the United Kingdom. If we assume that the parties to the negotiations will trade-off commitments with respect to foreign nationals against protection for their own citizens, this pattern suggests that the EU-27 will have a significantly greater interest in an effective agreement than the United Kingdom.

A related consideration is the distribution by EU-27 Member State of their nationals resident in the United Kingdom, relative to British citizens resident in that state. We may expect the governments of EU-27 states with substantial numbers of nationals in the United Kingdom to face domestic political expectations to protect the status of emigrant nationals. Conversely, EU-27 states with substantial numbers of resident British citizens can be expected to be less enthusiastic about a protective settlement. Information on the number of migrants to Britain, and of resident British citizens, is summarised in Table 1 in the Appendix, below. It shows that there are eight EU-27 states – all at the Eastern, Southern or Western boundaries of the EU – the number of whose nationals in the United Kingdom either exceeds 4% of their own resident population, or exceeds the number of British citizens resident in that state by more than 100,000. It is to be expected that these states will favour a generous agreement. There is then a group of 15 states – mostly in Central, Northern or Western Europe – where there is a smaller positive balance, and the number of residents in the United Kingdom is less than 1% of their resident population. These states may be expected to be at least moderately supportive of the protection of prior EU-27 residents. Finally, there are three EU-27 states where the number of resident British citizens exceeds the number of that state’s nationals resident in the United Kingdom. Of these, Malta and Cyprus are unlikely to oppose a generous settlement, as the absolute numbers involved are comparatively small, and these states have a political relationship with the United Kingdom through the Commonwealth. The other is Spain, where the estimated 309,000 British residents compares to 132,000 Spanish citizens resident in the United Kingdom, and which therefore appears to be the only Member State with a clear interest in opposing a generous settlement. The large majority of EU-27 states will therefore have reasons to support a protective deal concerning prior residents.

A third factor on the EU side is the symbolic importance of EU citizenship, and of free movement rights, to the EU project. These considerations are a reason for the EU institutions to give strong support to EU citizens who have previously exercised EU free movement rights. For example, a European Parliament resolution on 5 April 2017 called for ‘the fair treatment’ of prior residents, and for ‘their respective rights and interests’ to be ‘given full priority in the negotiations’. In the same vein, the European Council’s negotiating guidelines of 29 April

44 The total is taken from Office for National Statistics, *What Information is there on British Migrants Living in Europe?* (January 2017). That study was based on Eurostat data which does not count dual nationals whose other nationality is that of the state of residence: ibid pp 3–4. The percentage share is the author’s calculation, based on Eurostat data showing the EU-27 resident population as 444 million in 2011.
45 See the assessment of opinion in the Czech Republic, Hungary, Poland and Slovakia in Ed Turner and Simon Green, *Priorities, Sensitivities, Anxieties German and Central European Perceptions of Brexit* (Aston Centre for Europe, March 2017) 10–11.
46 Luxembourg is not included in this summary, as there is no published information about the number of its nationals resident in the United Kingdom.
47 These are Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Romania and Slovakia.
48 For example, see ‘Poland’s priority for Brexit is to guarantee rights of Poles in Britain: PM’, *Reuters*, 18 January 2017.
49 These are Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, the Netherlands, Slovenia and Sweden.
50 The position of the Spanish Government in relation to prior residents is not known at the time of writing.
2017 declared that: 'The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union.' 52

Given these various factors, it is hardly surprising that the EU’s initial negotiating position concerning prior residents is that the status quo ante should be respected in full. The European Council’s guidelines included the aim of reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom’s withdrawal from the Union. 53 The Council’s negotiating directives of 22 May 2017 reiterate the core principle that a withdrawal agreement ‘should safeguard the status and rights derived from Union law at the withdrawal date’. 54 Moreover, ‘rights which are in the process of being obtained’ – including the right of permanent residence – should continue to be acquired ‘under current conditions after the withdrawal date.’ The thrust of the EU proposals is to create a protected status for prior residents, separate from persons subject to the domestic immigration law of the state in question. That is reflected in the further proposition that the rights of prior residents ‘should be protected as directly enforceable vested rights for the life time of those concerned.’ 55

For the United Kingdom, the calculations are rather different. Given the large number of persons concerned, it must favour some solution which permits the large majority of resident EU citizens and their families to remain. In this regard, one concrete factor is the contribution of EU-27 nationals within the labour market. Labour Force Survey estimates are that there were 2.24 million EU-27 nationals in employment in the United Kingdom in the fourth quarter of 2016, who made up 7.0% of the employed workforce. 56 If any significant share of EU-27 nationals were to lose a right to remain, there would be significant disruption to current employment relationships, and a reduction in the pool of workers for post-Brexit employment. 57 A related factor pointing to protection for current residents is the depth of the connections of many EU citizens in the United Kingdom. It has for example been estimated that, in 2015, 72% of resident EEA+ nationals had either first arrived in the United Kingdom at least five years previously (64%), or were born in the United Kingdom (8%). 58

A further consideration is the administrative burden which the United Kingdom immigration authorities will face in processing those EU citizens and their family members who wish to remain. The scale of the challenge may be seen from Table 2 in the Appendix, which gives information on the number of EU residence documents issued in the period from 2004 to 2016. It shows that a total of 848,710 resident documents were issued over the whole period, which is an average of only 65,285 per annum. The Home Office has responded to the increase in applications since the referendum by issuing these residence documents at a faster rate, and the latest available figures show that, in the first quarter of 2017, some 78,380 applications for

52 EUCO XT 20004/17, Annex, para 8.
53 ibid.
54 Council of Ministers document XT 21016/17 ADD 1, para 20.
55 Council document XT 21016/17 ADD 1, para 20.
The data does not include information on other EEA+ nationals.
57 This is in addition to the expected loss of labour supply through the curtailment of new migration by EU-27 nationals to the United Kingdom. On post-Brexit labour supply in general, see Madeleine Sumption, Labour Immigration after Brexit: Trade-offs and Questions about Policy Design (Migration Observatory, January 2017).
58 Migration Observatory, Here Today, Gone Tomorrow? The Status of EU Citizens Already Living in the UK (August 2016). This amounted to 2.58 million out of 3.58 million on their figures. The percentage figure is likely to be something of an over-estimate, as some EEA+ nationals will have left and returned since their first arrival, or since birth; some will have had periods living in the United Kingdom that do not count towards permanent residence; and, British-born EEA+ nationals under five cannot have obtained a right of permanent residence.
documents were granted.\(^5^9\) Even then, it would still take nearly 10 years (38 quarters) to issue a new document to – for argument’s sake – three million persons. Against this background, the United Kingdom is likely to favour solutions which streamline the processing of individual cases. In particular, they will wish to grant applications to remain in the large majority of cases, to avoid the far greater costs of legal and/or enforcement measures to ensure that those without status leave the United Kingdom.

It is one thing to favour a solution for current residents, however, and another to agree to detailed international commitments with respect to them. From the perspective of the United Kingdom immigration authorities, the large numbers involved may be a reason for reluctance concerning an Art 50 agreement which imposes significant constraints. Far better, in their eyes, to preserve freedom of action to define the position of EU citizens and family members. That is presumably why *Safeguarding the Position* focuses on outlining how EU citizens and their family members who were resident before Brexit could be brought within the British immigration system, rather than setting out a detailed negotiation position with respect to a possible art 50 agreement. This is a fundamentally different starting-point to that of the EU.

**Permanent and extended rights to remain**

If an agreement to protect prior residents is eventually reached, which persons with an EU law right of residence are likely to benefit, and which might not? This section will consider two groups of EU citizens and qualifying family members who are highly likely to be covered from an EU-level agreement concerning rights to remain: persons with a permanent right of residence, and those with what may be termed an ‘extended’ right of residence. More complex cases are considered in the section which follows.

For the purposes of this discussion, the category of ‘qualifying’ family members refers to the definition in the Citizens Directive. That firstly covers certain core family members: an EU citizen’s spouse or registered partner, descendants of either who are under 21 or dependent, and ‘relatives in the ascending line’ who are dependent.\(^6^0\) Member States are also obliged to ‘facilitate’ the entry and residence of the ‘durable’ partner of an EU citizen, and of other family members on grounds of dependency, household membership or serious care needs.\(^6^1\) Family members qualify for entry and residence irrespective of the nationality of the family members concerned.

**Permanent rights**

The essence of a ‘permanent’ right of residence is that a person is permitted to remain in a state, other than that of their nationality, without meeting specific qualifying conditions. A general right of permanent residence is provided in art 16 of the Citizens Directive, for EU citizens who have resided legally for a continuous period of five years in another Member State, and for third-country national family members who have ‘legally resided with’ an EU citizen continuously for five years.\(^6^2\) These general routes to permanent residence are complemented by two further provisions in the Directive. Article 17 confers a right of permanent residence,

\(^{59}\) This figure is based on Office for National Statistics, *Immigration statistics: January to March 2017*, Table ee02.

\(^{60}\) Directive 2004/38, art 2(2). Under the Directive, ‘registered partners’ are only protected in Member States which treat registered partnerships as equivalent to marriage, and only for statuses acquired in a Member State. This is unproblematic for EU-27 citizens with a formal same-sex partnership who are resident the United Kingdom, but may prevent recognition of such statuses for British citizens in some EU-27 states.

\(^{61}\) Directive 2004/38, art 3(2).

\(^{62}\) Directive 2004/38, art 16(1) and (2).
without completion of five years’ residence, upon defined groups of EU citizens who have ceased activity as workers or self-employed persons in the given Member State, and their family members. Article 18 extends the right of permanent residence to third-country nationals who have retained a right of residence under arts 12(2) and 13(2) as the former family member of an EU citizen (see below), if they have resided legally for a continuous period of five years.

The CJEU has held that, in order to count towards permanent residence under art 16, a period of residence must have met the conditions for ‘extended’ rights of residence contained in art 7 of the Directive – ie economic activity, self-sufficiency and current family membership (see further below). It is likely that the same conclusion applies to qualifying periods under arts 17 and 18. The CJEU has also held that the right of permanent residence may be based on qualifying periods at any time, including periods prior to the coming into effect of the Citizens Directive on 30 April 2006, and prior to the accession of the Member State of nationality. For these purposes, continuity of residence is not affected by absences of up to six months a year, or by specified absences for longer periods.

When a person acquires the EU law right of permanent residence, they cease to be subject to the qualifying conditions for extended residence set out in the Directive. The right of permanent resident is lost only through absence from that state for more than two years. One question which remains unresolved is whether, because qualifying conditions no longer apply, an EU citizen with a right of permanent residence, and who is not economically active or self-sufficient, has a right to sponsor new family members. While the CJEU has not yet addressed the question, the EFTA Court has accepted that possibility for nationals of Iceland, Liechtenstein and Norway under the EEA Agreement, and the United Kingdom has done so for all EEA+ nationals. It is uncertain whether such a principle would benefit third-country nationals who acquired a right of permanent residence and who later wished to sponsor family members.

The principled case for protecting rights of permanent residence in an EU-level agreement is that a legal status acquired by an individual, through meeting qualifying conditions over a period of years, should not be lost because the wider political context has changed. A number of European legal principles tend to support this general proposition. Firstly, the status of EU citizenship may benefit British citizens in EU-27 states, as the CJEU has repeatedly stated that it is ‘destined to be the fundamental status of nationals of the Member States’. It has relied upon that proposition to introduce an EU law test of proportionality when a Member State withdraws its nationality, if the consequence is to deprive a person of the benefits of EU citizenship. Following that logic, it may be incompatible with EU law for an EU-27 state to

63 Article 17 covers EU citizens who are former workers or self-employed persons in three circumstances: they are retired or have reached pensionable age; they have ceased work through permanent incapacity; or, they have taken up employment in another Member State, while retaining their residence in the state in question. Family members also obtain rights of permanent residence, in these circumstances, and where an EU worker or self-employed person dies. Article 17 preserves the substance of two earlier instruments: Regulation 1251/70 on the right of workers to remain [1970] OJ L 142/24 and Directive 75/34 concerning the right to remain after self-employment [1975] OJ L 14/10.
64 Ziolkowski and Szeja, Case C-424/10 and C-425/10 [2011] ECR I-14051 at [46–47].
65 Lassal, Case C-162/09 [2010] ECR I-9217 at [40] and Ziolkowski and Szeja at [63].
68 Claunder (E-4/11), 26 July 2011 and Immigration (European Economic Area) Regulations 2016, reg 14(2).
69 That possibility is implicitly rejected in the Immigration (European Economic Area) Regulations 2016, reg 14(2).
71 This was first stated in Grzelczyk, Case C-184/99 [2001] ECR I-6193, at [31].
72 Rottmann, Case C135/08 [2010] ECR I-1449, at [42].
remove ‘permanent’ rights of residence acquired by EU citizens and their family members. Secondly, art 8 ECHR prevents the expulsion of a person with a family or private life in a state, unless that would be in the public interest and proportionate. In the case of a person who is ‘settled’ – including a long-term, lawful resident – that test typically requires evidence of serious criminal conduct. 73 Thirdly, the Council of Europe Convention on Establishment (1957) may be relevant, as it applies to the nationals of the United Kingdom, and of eight EU-27 states, in one another’s territories. 74 It includes a rule that a person who has been lawfully resident for more than ten years may only be expelled for reasons of national security, or other reasons of ‘a particularly serious nature’, and it confers a right to engage in any ‘gainful occupation’ inter alia upon persons who have been ‘admitted to permanent residence’. 75 These various principles, in conjunction with administrative law concepts of legitimate expectations, potentially provide a basis for legal challenges by persons with a right of permanent residence who do not obtain a right to remain after Brexit. These principles are also likely to reinforce the view in the political sphere that Brexit should not lead to the loss of permanent residence status.

While the two sides’ published documents show their willingness to protect pre-Brexit permanent residents, they diverge in crucial ways. The EU’s position flows from the general principle that an exit agreement should protect rights that have been acquired, or that are in process of being so. 76 The concrete implications are that rights of permanent residence at Brexit should continue, and that they should be reflected in an equivalent post-Brexit status. In contrast, the United Kingdom Government’s proposals do not provide for the conversion of pre-Brexit rights of permanent residence into a post-Brexit status. Instead, EU citizens and their family members will be eligible to apply for ‘settled’ status under United Kingdom immigration law, on the basis of residence for a ‘set length of time’, which will probably be five years. 77

One point on which there appears to be agreement between the two sides concerns a possible pre-Brexit ‘cut-off’ for permanent rights to remain. There is no obvious argument for such a cut-off if the free movement of persons regime comes to an end in 2019, as in that case no-one’s five years’ qualifying residence could have begun after the 2016 referendum. 78 It follows that, if there is to be a pre-Brexit cut-off date for ‘extended’ rights of residence (discussed below), that should not apply to periods of qualifying residence for permanent residence completed between then and Brexit. This position is implicit in the EU model of preserving ‘acquired rights’ at Brexit. It has moreover been accepted in the United Kingdom proposals, which would enable settled status to be acquired by those who have five years’ residence at the date of Brexit. 79

A potential difference between the two sides concerns the coverage of any post-Brexit status corresponding to a permanent right to remain. The logic of the EU’s position is that all prior residents who possess the right of permanent residence before Brexit should obtain a post-Brexit

73 The leading statement of the principles applicable in such a case is in Maslov v Austria (2008) 47 EHRR 20, at [68]–[76]. Article 8 ECHR also protects long-term residents without a current right of lawful residence, and treats their previous possession of the nationality of that state as a relevant factor: see Jeunesse v Netherlands (2015) 60 EHRR 17, at [115]. That latter principle may turn out to be relevant to the legal position of EU citizens who lack a current right of residence at Brexit.
74 These are Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands and Sweden. Among other EEA+ states, the Convention also applies to Norway.
75 European Convention on Establishment, arts 3 and 12.
76 Council document XT 21016/17 ADD 1, para. 20 and 21(b)(i).
77 Safeguarding the Position, para 21. Irish citizens are to be exempt from this requirement, for historic reasons: ibid para 5.
78 We may discount the possibility of a person moving to a Member State after the referendum with a view to obtaining permanent residence under art 17 of the Directive.
79 Safeguarding the Position, para 28.
equivalent. By comparison, the United Kingdom’s insistence on applications for settled status risks excluding several categories of persons with rights of permanent residence. In particular:

- persons with a right of permanent residence acquired through less than five years’ residence under art 17 of the Directive may not meet a five-year test;
- non-EU citizens who have acquired their own right of permanent residence, but who are no longer the family members of a qualifying EU citizen, may be ineligible;
- those who previously acquired a right of permanent residence under EU law, and who have not subsequently been absent for more than two years, but who are not resident at the time of Brexit, may be ineligible; and,
- those who fail an ‘assessment of conduct and criminality’ contemplated in the proposals will be excluded.

These potential differences of coverage will presumably have to be resolved if there is to be an art 50 agreement concerning prior residents.

A second potential difference between the two sides concerns the status to be acquired. The EU’s negotiating position that rights should be directly effective is relevant in this context. If that is the case – either because it is stated in an agreement, or because that is the eventual position in EU law – a simple solution would be for the immigration laws of the EU–27 states to treat British citizens and family members with a permanent right to remain as if they were still EU citizens and family members. In the United Kingdom, the closest equivalent would be to create a special status for those with a permanent right to remain. In that regard, one option would be to maintain the existing Immigration (European Economic Area) Regulations in force for this group, and another would be for a bespoke ‘permanent right to remain’ to be created within the domestic immigration system. These options have not, however, found favour in the United Kingdom Government’s proposals. Instead, its solution is that such persons should obtain the domestic immigration status of indefinite leave to remain. Indefinite leave would then be held by two legally distinct groups: those who were previously resident under EU law, and those who have always been resident under domestic immigration law. That approach risks being confusing, both for the individuals concerned, and for immigration officials, employers, landlords and others who need to know their immigration status.

A number of further points may be made concerning the proposed transition from a right of permanent residence to settled status in the United Kingdom. The first concerns the requirement that an EU–27 citizen who is neither economically active, nor the qualifying family member of a migrant EU citizen who is so, should have comprehensive sickness insurance in order to have a right of residence based upon art 7 of the Citizens Directive. In the United Kingdom, all resident EU citizens are in practice eligible for medical treatment within the National Health Service. Despite that, since 2011, the lack of private comprehensive sickness insurance has been used to refuse applications for residence documents by EU citizens, and in particular applications for documents certifying a right of permanent residence. The

80 In support of a ‘bespoke’ status, see Immigration Law Practitioners’ Association, written evidence to the Brexit: Acquired Rights inquiry, para 79.
81 Safeguarding the Position, para 6. For earlier proposals using the language of ‘indefinite leave’, see the Vote Leave statement of 1 June, British Future, Securing the Status of EEA+ Nationals in the UK, p 26 and House of Commons amendments NC 14 and NC 67.
Commission initiated infringement proceedings concerning this interpretation of the rules by the United Kingdom in April 2012, though without taking the matter further.\(^{83}\) After the referendum, there had been calls upon the Government to modify its approach, largely because of the potential unfairness to long-term resident family members of British citizens.\(^{84}\) In *Safeguarding the Position*, the Government has announced that, in processing post-Brexit applications for settled status, the immigration authorities would not require evidence of comprehensive sickness insurance.\(^{85}\) For present purposes, this implies a relaxation of the requirements for a right of permanent stay, relative to the Directive.

A second point is that several types of residence currently count towards permanent residence in the United Kingdom, but not at the EU level. These are: ‘derivative’ residence as a child or primary carer under art 12(3) of the Directive, temporary residence for up to three months, and residence as a job-seeker. (These types of residence are discussed in the next section.) Residence under these headings counts in the United Kingdom because the default position in its implementing legislation is that any residence ‘in accordance with these Regulations’ may be relied upon.\(^{86}\) Will residence under these headings also count towards a permanent post-Brexit status? The Government’s intention on this point is unknown, as its proposals in *Safeguarding the Position* have not indicated which types of lawful residence by EU citizens and their family members would lead to settled status.\(^{87}\)

A final point is that the transition from an EU right of permanent residence to settled status will imply a worsening of the individual’s legal position in relation to absences from the United Kingdom. The statement in the Citizens Directive that the right of permanent residence may be lost *only* through absence from a state’s territory for two years implies that return for *any* purpose will be sufficient to maintain the right in existence. Under the United Kingdom Immigration Rules, however, those who hold indefinite leave are entitled to be re-admitted to the United Kingdom within two years only if their purpose is to continue or to resume *settled residence*.\(^{88}\) The logic of the Government’s plans is that after Brexit that will also become the position for those who previously had EU rights of residence.

**Extended rights**

A right of ‘extended’ residence may be defined as a right to stay in a state for a potentially unlimited period, subject to meeting substantive qualifying conditions.\(^{89}\) In EU free movement law, extended rights arise primarily under art 7 of the Citizens Directive. An EU citizen firstly has a right to reside on the basis of economic activity as an employed worker or a self-employed person, provided their activities are ‘effective and genuine’.\(^{90}\) This right continues in several circumstances after the activity has ceased: where a woman gives up employment or job-seeking in the late stages of pregnancy and after childbirth;\(^{91}\); during temporary incapacity due

85 *Safeguarding the Position*, para 22.
86 *Immigration (European Economic Area) Regulations 2016*, reg 15. This reading of reg 15 was recently endorsed in *GE v Secretary of State for Work and Pensions [2017]* UKUT 145 (AAC).
87 See *Safeguarding the Position*, para 21.
88 Immigration Rules, para 18.
89 The term ‘extended’ is taken from the *Immigration (European Economic Area) Regulations 2016*, reg 14.
91 *Saint Prix*, Case C-507/12 [2015] 1 CMLR 5.
to ‘illness or accident’; during vocational training; and, during involuntary unemployment, having been employed as a worker. Secondly, art 7 confers a right of residence as a self-sufficient person upon an EU citizen who meets two tests: having ‘sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State’, and having ‘comprehensive sickness insurance cover in the host Member State’. These principles apply equally to students, although they are permitted to ‘assure’ the state authorities that they comply with the ‘sufficient resources’ requirement ‘by means of a declaration or by such equivalent means as they may choose’. Thirdly, where an EU citizen has a right of residence through economic activity or self-sufficiency, qualifying family members, irrespective of nationality, acquire a right of residence too.

A second source of extended rights in the Directive is its provision for the retention of rights of residence by third-country family members who have ceased to qualify under art 7. Article 12(2) confers a ‘retained’ right upon third-country family members after the death of the EU citizen through whom they qualified, if the family member had resided as such in that Member State for at least one year. Article 13(2) provides an equivalent right to reside after the termination of a marriage, or registered partnership with an EU citizen, in the following circumstances: if the marriage or registered partnership had lasted at least three years, including at least one year in the host Member State; if the spouse/partner has custody of the EU citizen’s children, or has a right of access to a minor child; and, if there are ‘particularly difficult circumstances’, such as domestic violence. In either case, the retained right of residence depends upon the person in question being a worker, self-employed person, self-sufficient, or the member of a pre-existing family within which another person meets those requirements.

The position taken in the EU negotiating directives is again based on respect for the status quo ante. Persons with extended rights of residence at Brexit should be permitted to acquire a right of permanent residence ‘after a continuous period of five years of legal residence which started before the withdrawal date’.

This position can be broken down into three main elements. Firstly, there should not be a cut-off date, so that those who take up qualifying residence at any point in time before Brexit would be eligible. Secondly, those with extended rights of residence should be permitted to continue to reside in the state in question after Brexit if they meet the qualifying conditions in arts 7, 12(2) and 13(2). Thirdly, after five years' qualifying residence, these persons should be eligible for a permanent right to remain, as before. In the EU-27 states, all three results could be achieved simply by continuing to treat British citizens who resided prior to Brexit as if they were still EU citizens covered by the relevant provisions of the Directive.

The United Kingdom’s proposals are again more cautious, as they leave open the possibility of a cut-off date – which it terms ‘the specified date’ – in extended residence cases. Safeguarding the Position contemplates a range of possibilities, from the date of triggering of art 50 at the earliest, to the date of Brexit at the latest. The pragmatic argument which has been made for such a cut-off is to avoid opportunistic arrivals by those seeking to obtain long-term rights by
take up residence in the period before Brexit. 98 Based upon that argument, in the debate over unilateral guarantees in the United Kingdom, cut-off dates were proposed which were linked to the notification of withdrawal by the United Kingdom. 99 There are though a number of weaknesses with such an approach. Firstly, because legal rights of free movement will continue until Brexit, an early cut-off date would simply leave unresolved the status of those who took up qualifying residence after it. Secondly, if extended rights of residence lead only to an ‘extended’ right to remain, with a permanent right not arising for five years, the pragmatic need for special measures to prevent late arrivals appears weak. If a compromise is required on this point, in order to reach agreement under art 50, one possibility would be to start from the date that that agreement is made known. An alternative would be to work backwards from the date of Brexit, by excluding an EU-level right to remain from those who commenced qualifying residence in the period immediately before it. Three months is an obvious option in this regard, as that is the maximum period of possible ‘initial’ residence without meeting art 7 qualifying conditions (see further below).

The United Kingdom’s intentions are also uncertain in relation to the form and extent of rights to remain for those with less than five years’ qualifying residence at the date of Brexit. The starting-point in Safeguarding the Position is that any person who has been continuously resident since before the specified date will be ‘allowed to stay in the UK until they reach the five year point’, and will then be eligible to apply for settled status. 100 One unresolved question concerns those who require comprehensive sickness insurance for a right of residence under EU free movement law. Will they be lawfully resident in the period from Brexit until they have the requisite five years of continuous residence? A second issue concerns those who will not have reached five years by the end of a planned post-Brexit ‘grace period’ of up to two years. Under the proposals, they will have to apply for ‘permission’ to complete the five-year period, but it is unclear whether significant procedural hurdles or substantive conditions will apply at that stage. It is not therefore certain that all persons who meet the qualifying conditions for extended residence other than comprehensive sickness insurance before Brexit, and who continue to do so, will in fact progress to permanent/settled status after five years’ residence.

Complex cases

Having shown that there is consensus between the two sides to protect those with permanent and extended rights to remain, this section will consider three categories of pre-Brexit rights of residence where the outcome must be considered uncertain: ‘derivative’ rights of residence for children and their carers, rights of ‘temporary’ residence, and the third-country family members of British citizens.

Derivative rights

Four provisions in EU law confer rights of residence upon children and/or their primary carers, irrespective of nationality, beyond the provision for family members in arts 7, 12(2) and 13(2)

---

98 This argument was endorsed by David Davis soon after he became Secretary of State for Exiting the European Union: ‘UK may impose cut-off date on EU migrants, says Brexit minister’, Guardian, 17 July 2016.
99 See British Future, Securing the Status of EEA+ Nationals in the UK, p 25. In the same vein, amendment 9B to the European Union (Notification of Withdrawal) Bill focused on the date of passage of that Act 2017 as the cut-off date for a unilateral guarantee.
100 Safeguarding the Position, para 28.
of the Directive. These rights are often termed ‘derivative rights’, as they are invariably based upon another person’s right of residence.  

- Article 12(3) of the Directive provides for an EU citizen’s child who is in education, after the EU citizen has died or has departed from a Member State. In that situation, a right of residence is conferred upon the child, and the parent who has custody, without meeting other qualifying conditions, until the completion of the child’s studies.

- A derivative right arises from a provision in secondary legislation for the education of the children of EU migrant workers.  

- Where a child who is a migrant EU citizen is considered financially self-sufficient under the Citizens Directive, an implicit right of residence has been held to arise for their primary carer(s).

- The provision for EU citizenship in art 20 TFEU implies a right of residence for the primary carer(s) of an EU citizen child, if that is necessary to ensure that the child can reside in the EU.

The position of persons with derivative rights in any agreement remains unknown. These rights are not specifically mentioned in the EU’s negotiating directives, which focus on persons who are eligible for residence under Directive 2004/38. That would probably protect the first of the cases referred to above, but does not cover any of the others. If the EU’s objective is to maintain the status quo ante in full, it should seek a separate right to remain under this heading, for as long as the qualifying conditions are met. Residence under these headings would not however count towards a ‘permanent’ right to remain. Alternatively, a slightly more ambitious approach could be taken, treating derivative rights together with rights of extended residence, so that a permanent right to remain could arise after five years.

The United Kingdom Government’s proposals do not specifically address these rights either. The current position in United Kingdom law is that residence under art 12(3) of the Directive counts towards a right of permanent residence, but residence in the other three

---

101 That term is used in the United Kingdom implementation in relation to the second, third and fourth categories of derivative right listed in the text: Immigration (European Economic Area) Regulations 2016, reg 16.


103 Echternach and Murriz, Cases 389/87 and 390/87 [1989] ECR 723 and Baumbast and R, Case C-413/99 [2002] ECR I-7091 at [71]-[75]. These rights go further than art 12(3) of the Directive, because they do not depend upon the death or departure of the EU national.

104 Chen, Case C-200/02 [2004] ECR I-9951, at [45]-[47]. This right potentially arises in relation to other types of vulnerable EU citizen as well.

105 See Ruiz Zanbravo, Case C-34/09 [2011] ECR I-0117 at [40]–[45], and Dereci, Case C-256/11) [2011] ECR I-11315 at [64]. This right also potentially arises in relation to other types of vulnerable EU citizen.

106 In line with its position, set out in Zolkowski and Szeja, that permanent residence flows from residence meeting the conditions in Art 7 of the Directive, in Aalape and Tijani, Case C-529/11 [2013] 3 CMLR 38 at [37], the CJEU held that residence based on Regulation 492/2011 did not count towards permanent residence. The same conclusion would presumably be reached in relation to residence on the basis of art 12(3) of the Directive, or art 20 TFEU. In Archpka, Case C-86/12, [2017] 1 CMLR 40 at [24] and [29], the right of residence recognised in the Chen ruling was held not to be based directly on Directive 2004/38, and so presumably does not count towards permanent residence either.

107 Council document XT 21016/17 ADD 1, para 21(a) and 21(b)(i).
categories is expressly excluded. Instead, residence in those three categories counts towards the domestic status of indefinite leave to remain, under the general provision for that to be obtained after ten years' lawful residence. The Government’s position concerning these rights is unknown, because of its failure to specify which types of residence will count towards the post-Brexit settled status it has proposed for EU cases. It is possible that the United Kingdom will permit those with derivative rights to progress to ‘settled status’ after the same period – probably five years – as other prior residents under EU law. Alternatively, it may elect to maintain the status quo ante, by permitting such persons who arrive before Brexit – or any earlier cut-off date for extended rights – both to stay and to obtain indefinite leave after ten years’ lawful residence.

Temporary rights

A right of residence may be considered ‘temporary’ if it permits a person to reside in a state for an inherently limited period. Two provisions of the Citizens Directive provide rights of this type. Firstly, art 6 confers what has been termed an ‘initial’ right of residence in other Member States upon EU citizens, and their third-country family members, for up to three months. Secondly, art 14(4)(b) makes special provision for job-seekers: where an EU citizen has entered a Member State ‘in order to seek employment’, they and their family members ‘may not be expelled’ for as long as the EU citizen ‘can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.’ This entitlement of job-seekers may be treated as a right of residence, both because the heading to art 14 refers to ‘Retention of the right of residence’, and because the CJEU referred to it as such in Alimanovic. Each of these two rights undoubtedly applies in the period after a person arrives in a member state. Articles 6 and 14 are also open to the interpretation that they benefit EU citizens directly after a period of qualifying residence under art 7.

Neither the EU negotiating documents, nor the United Kingdom proposals, specifically addresses the possibility of continuity of residence after Brexit on the basis of these temporary rights. The EU’s orientation to maintenance of the status quo ante should logically lead it to seek a right to remain on the basis of these rights too. Nevertheless, it may have reservations concerning the inclusion of protection for these two temporary rights, given that periods of residence based upon them do not count towards the right of permanent residence under art 16 of the Directive.

The United Kingdom’s position with respect to temporary rights is also uncertain, given the absence of clarity in its proposals as to the types of residence that are to count towards settled status. The current position is that the provision for these rights at the United Kingdom
Negotiating the Right to Remain after Brexit

is somewhat broader than EU law requires. Firstly, as has been mentioned, time spent within these two categories counts towards a right of permanent residence in domestic law. Secondly, in the United Kingdom, the right of residence as a job-seeker arises not only after initial arrival, but also after a period as an economically active or self-sufficient person. These precedents suggest that the United Kingdom could therefore choose to allow continued residence on the basis of temporary rights after Brexit, provided the person arrived before any cut-off date relating to extended rights of residence.

It may be added that the outcome in this area will almost certainly be linked to the question of such a cut-off date. If an early cut-off were to emerge – such as the date of the United Kingdom’s notification, or dates in 2017 – then the question of what to do with temporary rights would essentially disappear. This question will only become a live one if there either is no cut-off date at all, or the date chosen is closer to the date of Brexit – eg in the middle or end of 2018. A further possibility in this area is that the two sides might entirely exclude temporary rights from any agreement, either instead of having a cut-off date, or in addition to one.

Third-country family members of British citizens

After the referendum, there was initially room to doubt whether third-country family members who benefitted from EU free movement law prior to Brexit would be protected by an agreement concerning rights to remain. That was because the United Kingdom Government’s reassuring statements about prior residents – see above – referred exclusively to the protection of nationals of other EU or EEA+ states. The European Council guidelines, and the EU’s negotiating directives, have however included family members, without any indication of a nationality limit. Moreover, the United Kingdom’s proposals in Safeguarding the Position expressly included third-country family members, albeit with the qualification that the person must ‘have been in a genuine relationship with an eligible EU citizen while resident in the UK’.

The uncertainty which remains concerns the third-country family members of British citizens in the United Kingdom. Currently, this group are protected by two aspects of EU law on the free movement of persons. The first is the principle that, where an EU citizen has resided in another Member State under art 7 of the Directive, they and their family members are entitled to the protection of the Directive by ‘analogy’, when the EU citizen returns to their own Member State. The second is the ‘derivative’ right referred to above, which permits a third-country family member to remain in a Member State if their exclusion would make it necessary for a dependent EU citizen to leave the EU as a whole.

To date, there has been no indication by the parties to the negotiations whether the family members of British citizens whose residence depends upon these two rights will be permitted to remain after Brexit. The initial documents on each side have instead focused exclusively on the situation of EU-27 nationals in the United Kingdom, and of British citizens

114 Immigration (European Economic Area) Regulations 2016, reg 6(5).
115 See James Brokenshire’s statement in the House of Commons on 6 July 2016 (‘EU nationals’), the related announcement on the Cabinet Office website on 11 July 2016 (EEA+ nationals), and Theresa May’s speech of 17 January 2017 (‘EU citizens’).
116 EUCO XT 20004/17, Annex, para 8 and Council document XT 21016/17 ADD 1, para 11.
117 Safeguarding the Position, para 29.
118 There is no apparent reason to consider the opposite case of the third-country family members of an EU-27 national in relation to their own EU-27 state.
119 O and B, Case C-456/12, CJEU, 12 March 2014 at [53]–[61]. This principle has its origins in the judgment in Surinder Singh, Case C-370/90 [1992] ECR 4265. It logically applies to EU citizen family members too, though it is unlikely to be necessary for them to invoke it.
in the EU-27 states. A further reason why this group may be vulnerable in the negotiations is that the United Kingdom immigration authorities have long sought to limit British citizens from returning with third-country family members after periods of residence elsewhere. The principle of respect for the status quo ante ought nevertheless to apply to these third-country family members too. Denying protection to them would probably lead to a change the terms of their stay after they have arrived, as well as being discriminatory, if similar restrictions were not applied to family members who were EU citizens.

**Adjustments**

The next question which may be addressed concerns possible adjustments to the free movement of persons regime, to take account of Brexit. A series of topics for such adjustments are identified here: residence documents; spatial and temporal extensions of rights to remain; post-Brexit sponsorship of family members; exclusion on public order grounds; and, mechanisms for ensuring compliance by states with their obligations.

**Residence documents**

The provision of residence documents to persons with rights to remain is a major administrative problem thrown up by Brexit. At present, the Directive provides for four main types of residence document, which relate to rights of permanent residence and extended residence by EU citizens, and rights of permanent residence and extended residence by third-country nationals. A Member State may require residence documents of EU citizens and their family members, but any penalties for non-acquisition should be limited. Moreover, as rights of residence are directly effective, the possession of a residence document does not affect the underlying right of residence. Because of this legal regime, in the United Kingdom, there is no requirement upon EU-27 citizens or their family members to obtain residence documents, and little practical reason for EU-27 citizens to do so.

Brexit will transform the significance of residence documents for EU-27 citizens in the United Kingdom, and for British citizens in the EU-27 states. Persons with protected residence rights in these categories will require residence documents to prove their status, so that they may be distinguished from their co-nationals without such a right. At a minimum, such proof is likely to be needed in all current Member States, to enter its territory, to prove an ongoing right to be present, and to obtain employment. Depending on the state in question, proof of residence status may also be necessary in other contexts, such as when applying for social

---

120 See Council document XT 21016/17 ADD 1, para 11 and the definition of ‘EU citizen’ in the Glossary to Safeguarding the Position.

121 The Immigration (European Economic Area) Regulations 2000 (SI 2000/2326) reg 11(2) denied protection where the British citizen’s purpose in moving to the other Member State was ‘to evade the application of national immigration law’. That approach was rejected in Case C-109/01 Akrich [2003] ECR I-9607 at [55], [56] and [61], and the 2000 Regulations were amended on this point by SI 2005/47. More recently, the Immigration (European Economic Area) Regulations 2006, reg 9, as amended by SI 2013/3032, required that the other Member State had become the British citizen’s ‘centre of life’. That went further than the O and B ruling permitted, and the ‘centre of life’ is now merely a ‘factor’ to be considered: see the Immigration (European Economic Area) Regulations 2016, reg 9 and Sch 5(1).


123 This is stated expressly in Directive 2004/38, in relation to registration certificates for EU citizens (art 8), residence cards for third-country family members (art 9) and permanent residence cards for third-country nationals (art 20). No provision is made for sanctions for EU citizens who do not obtain certificates of permanent residence (art19).

benefits, when renting a residential property, when opening a bank account, and when applying for a drivers’ licence.

Given the practical significance of post-Brexit residence documents, and the number of persons likely to need them – especially in the United Kingdom – there is a strong case for including provision concerning them in an EU-level agreement. The following specific points may be made:

⦁ It could be stated that rights to remain will arise automatically, so that they do not depend on residence documents, at least in a transitional period. Automaticity is likely to be the position for the EU-27 states in any event, as rights to remain will probably be directly effective there. It need not be objectionable to the United Kingdom Government either, as it would give reassurance to EU-27 residents, while assisting the immigration authorities in managing the administrative burden of issuing documents.

⦁ Residence documents issued prior to Brexit, as confirmation of status under the Directive, could be given a transitional period of validity, such as five years. Giving them such a period of validity would ease the administrative pressures on all states, and especially the United Kingdom.

⦁ The provisions of the Directive relating to deadlines could be strengthened. The current position is that the Directive requires that registration certificates for extended residence be issued ‘immediately’ to EU citizens, and that certificates of permanent residence be issued to them ‘as soon as possible’. Each of these provisions is arguably too vague, and a short deadline appears more appropriate. In the case of non-EU family members, the corresponding provisions allow a Member State up to six months to issue residence cards and permanent residence cards. That appears unnecessarily long for a decision, and provision could again be made for a much shorter period.

⦁ Provision could be made to guarantee low levels of application fees. The Directive states that residence documents ‘shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents’.

The desirability of including provision for residence documents in an agreement has been recognised in the EU’s negotiating directives. In its words: ‘any document to be issued in relation to the residence rights … should have a declaratory nature and be issued under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.’ (This passage covers the first, third and fourth suggestions made here.) The United Kingdom’s proposals in contrast aim at creating a break between pre-Brexit and post-Brexit arrangements. They specifically rule out automatic rights of residence, or reliance upon pre-Brexit documents, and all prior residents will in principle be required to have a United Kingdom immigration document after a grace period of up to two

125 That is the maximum period of validity of residence cards issued to third-country family members Directive 2004/38, art 11(1). There is no stated period of validity for the three other types of residence document.
126 Directive 2004/38, arts 8(2) and 19(2).
127 Directive 2004/38, arts 10(1) and 12(1).
129 Council document XT 21016/17 ADD 1, para 21(b)(i).
years. No reference is made to decision-making deadlines, and fees will be set ‘at a reasonable level’, about which particular details will merely be published ‘in due course’.131

Spatial and temporal extensions
The discussion so far has shown how an art 50 agreement may provide for persons with current rights of residence in a particular Member State, at the point when the free movement of persons regime comes to an end. That approach has ‘spatial’ and ‘temporal’ limitations, however, as a result of which refinements may be considered appropriate.

A ‘spatial’ limit to the standard approach is that the pre-Brexit legal position of EU citizens extends to the freedom to live between two or more Member States. That could occur, for example, where a person works in one state, and resides in another, or where they maintain places of work or residence in separate states. If rights to remain are recognised in relation to one state only, these cross-border situations will not be fully protected. It appears illogical to seek to protect a general future right of British citizens and EU-27 residents to engage in as yet indeterminate cross-border living and working arrangements, as that would tend to negate the fact of Brexit. Nevertheless, it would be appropriate to protect such arrangements which exist at the time of Brexit itself.

On this point, the EU’s negotiating directives contemplate protection for ‘frontier workers’ as defined in EU legislation on the co-ordination of social security rights.132 That category includes any person who engages in activity as an employed or self-employed person in one Member State, who resides in another Member State, and who returns there ‘as a rule daily or at least once a week’.133 In addition, a subsequent Commission policy paper stated that there should be protection for all EU-27 citizens who reside in the EU-27 states and work in the United Kingdom, and for all British citizens who reside either in the United Kingdom or in an EU-27 state, and who work in another EU-28 state.134 Even that approach has limitations, however, as it does not protect British citizens or United Kingdom residents who are economically inactive, and who reside simultaneously in more than one member state. The United Kingdom proposals are less engaged with this subject, and the only reference to cross-border residence and economic activity in them stated that: ‘we will … seek to ensure that UK nationals in the EU can continue to provide cross-border services within the EU27’.135 This is an area which merits further consideration in the negotiations.136

A ‘temporal issue’ raised by the standard model concerns the position of EU-27 citizens who previously resided in the United Kingdom, and of British citizens who previously resided in an EU-27 state, but who have lost any right of permanent residence they may once have had. In their case, the status quo ante included the option to resume residence at a later date. That will be lost if the focus of any agreement is exclusively on rights of residence currently held. A possible solution for such persons would for their resumption of residence to be ‘facilitated’ by the state in question, taking into account the length of past residence, and the passage of time

130 Safeguarding the Position, paras 17, 22 and 24–26. One of the purposes of requiring United Kingdom residence documents of everyone appears to be to ensure that biometric information is collected from EU citizens, something which is not done at present: ibid, para 35.
131 Safeguarding the Position, para 36.
132 Council document XT 21016/17 ADD 1, para 21(a).
135 Safeguarding the Position, para 57.
136 The United Kingdom may wish to address this question in particular in order to provide a solution for EU-27 citizens who live in the Republic of Ireland and work in Northern Ireland, or who live in Spain and work in Gibraltar.
since it occurred. Protection of these persons’ position is not though mentioned in either the EU or the United Kingdom Government’s documents.

**Future sponsorship of family members**

A further ‘temporal’ issue concerns the future sponsorship of family members by protected EU citizens in the United Kingdom, and by protected British citizens in EU-27 states. This simultaneously affects the family rights of persons who resided in a state before Brexit, and the immigration status of persons who did not do so. The family members concerned include post-Brexit spouses and partners, and dependent relatives who wish to join protected residents in EU-27 states after Brexit. The category also includes children born to protected prior residents after Brexit. In the case of children, it is significant that British citizenship is acquired automatically by those born in the United Kingdom to parents who are settled there. That means that the main longer-term issues concern children born (a) outside the United Kingdom to an EU-27 parent with a permanent right to remain in the United Kingdom, and (b) children born to British parents with a permanent right to in an EU-27 state which does not confer their nationality automatically upon children born to permanent residents. In the shorter-term, there will also be a gap in respect of children born to parents with extended rights to remain, whether EU-27 citizens in the United Kingdom, or British citizens in EU-27 states, as it does not appear that any Member State extends citizenship automatically in such cases.

There is a fundamental difference between the stated positions of the two sides in this area. As elsewhere, the EU’s negotiating directives seek to guarantee the *status quo ante*, and so include: ‘family members who accompany or join [protected EU-27 or British citizens] at any point in time before or after the withdrawal date’. The result would be that protected EU-27 citizens in the United Kingdom, and British citizens in EU-27 states, would remain free to sponsor the full range of family members referred to in the Citizens Directive. When coupled with the notion that rights are for life, under these arrangements there would be no time-limits upon sponsorship by protected persons.

In contrast, the United Kingdom Government’s position is that the sponsorship of family members by protected EU-27 citizens should be governed by domestic immigration rules. In the words of *Safeguarding the Position*: ‘Future family members … who come to the UK after we leave the EU will be subject to the same rules that apply to non-EU nationals joining British citizens’. This approach implies a significant loss of entitlements, as the provision for sponsorship of family members by British and other settled persons in United Kingdom immigration law is far narrower than under the Directive. The following differences may be highlighted:

- Sponsorship of spouses/partners and children by British citizens is subject to strict minimum income tests. In contrast – as was explained above – under EU free movement law, as applied in the United Kingdom, there are no minimum income tests for the family

---

137 According to Maarten Vink and Gerard-René de Groot, *Birthright Citizenship: Trends and Regulations in Europe* (EUDO Citizenship Observatory, November 2010), Table 4, the Member States that make provision for nationality to be acquired by children born to permanent or long-term residents are Belgium, Germany, Greece, Ireland, Portugal and the United Kingdom.
138 According to the information in Maarten Vink and de Groot (2010), Table 4, no Member State makes such provision as a matter of course. The most liberal rule is in Ireland, which requires parental residence in three of the previous four years.
139 Council document XT 21016/17 ADD 1, para 21(a).
140 *Safeguarding the Position*, para 30.
141 Immigration Rules, Appendix FM, paras E-ECP 3.1, E-LTRP 3.1, E-ECC 2.1 and E-LTRC 2.1.
members of EU citizens with rights of permanent residence.\(^{142}\) (Neither are there income tests for the family members of EU citizens with rights of extended residence through economic activity. The one category to whom a test applies is the family members of economically inactive EU citizens, but that test is the general one of ‘sufficient resources … not to become a burden on the social assistance system’.)

- British immigration policy permits sponsorship of a child only if they are under 18 and not leading an independent life. \(^{143}\) Under EU law, all descendants (children, grandchildren, etc) may be sponsored, provided they are under 21 or dependent upon the sponsor and/or their partner.

- In the British system, children may be admitted to live with one of their parents only if that parent has ‘sole responsibility’, or there are ‘serious and compelling considerations’ to justify admission. \(^{144}\) All children of an EU citizen, or of their spouse or partner, may be sponsored under EU free movement law.

- Spouses and partners who are under the age of 65 must meet an English language requirement in order to reside in the United Kingdom. \(^{145}\) There are no equivalent requirements in EU free movement law.

- In the British system, the possibility to sponsor adult dependent relatives is limited to cases where that person – or if they are the sponsor’s parent or grandparent, their spouse/partner – ‘require[s]’ long-term personal care to perform everyday tasks. \(^{146}\) Under the Citizens Directive, there is no equivalent care requirement for the dependent parents and grandparents of EU citizens, while the entry of other dependants who have been members of their household is required to be ‘facilitated’, without any such requirement.

- The application fees in the British system are far higher than for EU documents, and often prohibitively expensive. \(^{147}\) As of 6 April 2017, the cost of an application for entry clearance to be admitted to the United Kingdom as a spouse or partner or child is £1,464, while the cost of an application as an adult dependent relative is £3,250. Applications for limited leave to remain, including extensions of stay for spouses and partners, cost £2,993 per person, while an eventual application for indefinite leave to remain costs £2,297. In addition, for persons who do not obtain indefinite leave, there is an ‘immigration health surcharge’ of £200 per annum. These may be contrasted with the charge of £65 for an application for an EU residence document, which is the only fee an EU citizen or family member may currently be charged in connection with EU free movement rights.

A further complexity in relation to the future sponsorship of family members is that the United Kingdom proposals do not indicate what the regime would be after Brexit, but before a sponsor acquired settled status. This question arises both in respect of the intended grace period of up to two years, and for those with extended rights of residence who are not eligible for settled status at the end of the grace period.

Given the very different positions of the two sides, the outcome in this area is very difficult to predict. One possible compromise would be a general transitional period within which the pre-Brexit family sponsorship rights of those with a right to remain would be preserved.

\(^{142}\) See the references in n 68, above.

\(^{143}\) Immigration Rules, Appendix FM, paras E-ECC 1.2-1.5 and E-LTR.C 1.2-1.5. Children over 18 may exceptionally be sponsored as ‘adult dependent relatives’, discussed separately.

\(^{144}\) Immigration Rules, Appendix FM, paras E-ECC 1.6 and E-LTRC 1.6.

\(^{145}\) Immigration Rules, Appendix FM, paras E-ECP.4.1 and E-LTRP 4.1.

\(^{146}\) Immigration Rules, Appendix FM, paras E-ECDR 2.4.

\(^{147}\) Immigration and Nationality (Fees) Regulations 2017, SI 2017/515.
Another might be to permit specific categories to be sponsored under the pre-Brexit rules, either indefinitely or for a transitional period. Children born in the Member State in question, and spouses or partners who are already lawfully resident in a Member State, are examples of specific groups that could be exempted in this manner.

**Exclusion on public order grounds**

There may also be significant differences between the two sides in relation to exclusion from residence rights, and deportation, for public order reasons. At present, the basic position is that, where a person has an EU right of residence, they may only be expelled if they: ‘represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.\(^{148}\) Moreover, if a person has a right of permanent residence, they may not be expelled ‘except on serious grounds of public policy or public security’, while an EU citizen who has ‘resided in the host Member State for the previous 10 years’, or who is a minor, may not be expelled other than on ‘imperative grounds of public security’.\(^{149}\) These provisions are significantly more protective of the individual than the legal framework in the United Kingdom. Its Immigration Rules permit applications for residence status to be denied on ‘suitability’ grounds, including that a person has prior criminal convictions, or that their presence in the United Kingdom is otherwise ‘not conducive to the public good’.\(^{150}\) In addition, legislation treats deportation as ‘automatic’ – including for persons with indefinite leave to remain – after a criminal conviction if a person is sentenced to a period of imprisonment of a year or more, or if the offence is otherwise classed as serious.\(^{151}\)

While the EU’s negotiating directives do not refer to exclusion as such, protection of the current rights presumably follows from the overarching commitment to ‘safeguard the status and rights derived from Union law at the withdrawal date’.\(^{152}\) In marked contrast, the policy of the United Kingdom Government objective is to bring EU law residents under its more restrictive domestic regime. This has already been seen in the pre-Brexit period. At the Conservative Party conference in October 2016, the Home Secretary, Amber Rudd, announced plans to ‘make it easier to deport EU criminals, aligning their fortunes more closely with those from outside the EU’.\(^{153}\) That ambition was reflected in a new list of considerations, set out in the United Kingdom implementing regulations, which made expulsion decisions more likely.\(^{154}\) In line with those developments, the Government’s June 2017 proposals state that access to settled status will be subject to ‘an assessment of conduct and criminality, including not being considered a threat to the UK,’ and more generally that it will ‘apply rules to exclude those who are serious or persistent criminals and those whom we consider a threat to the UK.’\(^{155}\)

**Ensuring compliance**

A final set of issues which arise in connection with the art 50 negotiations about prior residents concern compliance with any EU-level agreement. What provision will there be to ensure that

---

149 Directive 2004/38, arts 28(2) and 28(3).
150 See Immigration Rules, paras 322(1C) and (5), and Appendix FM, paras S-ILR 1.3-1.8.
151 UK Borders Act 2007, ss 32 and 33. The principles flowing from art 8 of the European Convention on Human Rights act as a constraint upon expulsion in such cases.
152 Council document XT 21016/17 ADD 1, para 20.
154 See Immigration (European Economic Area) Regulations 2016, reg 27(8) and Sch 1.
155 Safeguarding the Position, paras 21 and 6, respectively.
the EU-27 states and the United Kingdom respect their obligations? While this question does not relate solely to prior residents, their rights are likely to be prominent in any consideration of it.

The EU’s position, set out in its negotiating documents, has several elements. Firstly, citizens’ rights ‘should be protected as directly enforceable vested rights for the life time of those concerned.’ Secondly, transitional provision should be made for proceedings before the Court of Justice, and administrative proceedings before EU institutions (including the Commission): if these are ongoing at the date of Brexit, they should be permitted to continue, and it should also be possible to initiate new proceedings after Brexit in relation to facts that occurred prior to it. Thirdly, there should be effective mechanisms to uphold the withdrawal agreement, including in relation to citizens’ rights. On this point, the negotiating directives specifically provide for the Court of Justice and the European Commission to retain their respective roles over several aspects of the withdrawal agreement, including citizens’ rights. These proposals broadly correspond to the current position for the EU Member States. They also reflect the probable position within EU law with respect to the citizens’ rights provisions of a withdrawal agreement – ie it would ordinarily be treated as part of EU law, with direct effect in the EU-27 states, and would be covered by judicial and administrative proceedings at the EU level.

The EU’s proposals concerning compliance are, however, unlikely to be attractive to the United Kingdom. In the first place, it is difficult to see how direct effect as such can be achieved within the United Kingdom legal order, once it has left the EU. The most that seems possible is a commitment to introduce a legislative guarantee, which would trump any provisions in secondary legislation or the Immigration Rules, and which might offer protection against implied repeal. The United Kingdom Government has hinted at such a solution in Safeguarding the Position, according to which: ‘The arrangements set out above will be enshrined in UK law and enforceable through the UK judicial system, up to and including the Supreme Court.’ The EU will probably have to accept that there is a limit to what can be achieved by way of domestic legal guarantees within the United Kingdom.

Secondly, a continuing role for the Court of Justice in relation to the United Kingdom has been ruled out by the Government. In both Theresa May’s speech on 17 January 2017, and the related white paper in February 2017, it was stated that Brexit would ‘bring an end to the jurisdiction’ of the Court of Justice in the United Kingdom. That has been reiterated in Safeguarding the Position: ‘The Court of Justice of the European Union … will not have jurisdiction in the UK.’ These statements concerning the Court would probably extend to the proposal for the Commission to retain its role under the EU treaties vis-à-vis the United Kingdom. The United Kingdom Government might perhaps be persuaded to agree to a role for one or both of these bodies in relation to pre-Brexit matters. The longer-term role

156 Council document XT 21016/17 ADD 1, para 20.
157 Council document XT 21016/17 ADD 1, para 35.
158 Council document XT 21016/17 ADD 1, paras 41 and 42. The Commission document also provides that: ‘For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union’ (para 42). This does not however appear applicable to citizens’ rights, which presumably do ‘relate to’ EU law.
159 Safeguarding the Position, para 58.
160 Theresa May speech of 17 January 2017, point 2 and The United Kingdom’s Exit from and New Partnership with the European Union, Cm 9417 (February 2017) para 2.3.
161 Safeguarding the Position, para 58.
contemplated in the EU negotiating directives is though unlikely to prove acceptable to it in any circumstances, not least because EU citizens’ rights are proposed to last for a lifetime.

If a compromise is sought in relation to compliance, an alternative model is offered by the arrangements in the EEA Agreement. It provides that, where its provisions are ‘identical in substance’ to corresponding EU rules, these should be ‘interpreted in conformity with’ the rulings of the CJEU prior to the Agreement. After the coming into force of the Agreement, the Joint Committee of the parties is to keep the development of the case law of the CJEU and of the EFTA Court under ‘constant review … so as to preserve the homogeneous interpretation of the Agreement’. Where a difference in the case-law emerges, the Agreement’s dispute resolution provisions may be invoked, which in turn permits the contracting parties to agree to request the CJEU to rule on the interpretation of the rules in question. This model could prove attractive in the EU-UK context, because it promotes homogeneity, without the three EEA states outside the EU being subject to the compulsory jurisdiction of the CJEU.

A weaker alternative would be to follow the EU-Swiss Agreement on the Free Movement of Persons, which does not formally aim at homogeneity of interpretation. Article 16(2) of that Agreement states that ‘account shall be taken’ – apparently by both sides – of pre-Agreement CJEU case-law, rather than that there should be interpretation in conformity with it. The same provision states that post-Agreement case-law of the CJEU is to be ‘brought to Switzerland’s attention’, but there is no specific provision for divergence in case-law to lead to a dispute, or for the CJEU to be involved in the resolution of differences of interpretation. Despite those limitations to the judicial architecture, the Swiss courts have in fact followed key aspects of the CJEU case-law on the free movement of persons. If homogeneity of interpretation between the two sides is not central to an agreement on citizens’ rights, this weaker approach to the CJEU could emerge as a candidate for consideration in the negotiations.

**Conclusion**

At the time of writing, it is far from certain what the outcome of art 50 negotiations concerning the protection of prior residents will be. There is indeed a distinct possibility that, because of the very different starting-points of the two sides, no agreement will in fact be concluded on this subject. The EU’s negotiating documents take a strong position in favour of the respect for the status quo ante of acquired rights. The risk is that, in sticking to that position, the EU may fail to accommodate to the fact that the United Kingdom is in the process of becoming an ex-Member State. Meanwhile, on the evidence of Safeguarding the Position, the United Kingdom Government is concerned above all to incorporate current EU rights holders into its domestic immigration system. That task does not necessitate agreement with the EU-27, and
the United Kingdom authorities may take the view that it can be better achieved without such an agreement. This fundamental difference of approach between the two sides may yet prove unbridgeable.

If an agreement is reached on the right to remain under art 50, some of its content is though apparent. Both sides favour a permanent residence status of some form, for all or most of those who have a right of permanent residence at Brexit. They also each accept that all or most persons with extended rights of residence at Brexit should be permitted to continue their qualifying residence until they obtain a permanent status. Moreover, there is consensus between the EU and the United Kingdom that, irrespective of nationality, family members who have rights of residence at Brexit should be permitted to benefit from post-Brexit rights to remain.

Beyond these areas of agreement lie many details where the outcome is uncertain. On some points, because the public positions of the two sides are not yet fully defined, an agreement may more readily emerge. These include the cut-off date for those with rights of extended residence, the treatment of derivative and temporary rights, the position of family members of British citizens, the treatment of cross-border situations, and the status of any agreement in British law. On some other points, disagreement is not yet manifest, but appears highly likely from the initial positions taken. These include the treatment of post-Brexit absences, fees for post-Brexit applications, and the possibility to exclude individuals on public order grounds. Finally, there are two points so far where there is already overt disagreement, and where a consensus may accordingly prove difficult: the regime governing the future sponsorship of family members, and the role of the Court of Justice in interpreting and applying the agreement.

EU citizenship, and the free movement rights at its core, have justifiably been said to ‘embody[ ] post-national membership in its most elaborate legal form’. In the context of Brexit, where that privileged status is about to be lost by some who have relied upon it, it is legitimate for the EU-27 and the United Kingdom to seek an international agreement to protect the status of their citizens who are resident in the other. The provision of guarantees through such an international agreement is preferable to the alternative of relying upon domestic public opinion in the states of residence, which is not fixed, and over which foreign nationals generally have limited influence. Viewed in that light, the ongoing uncertainty as to the achievement of an agreement covering pre-Brexit residents, and as to the content of any such agreement, has a deeper significance. What has been revealed is that both the concept of EU citizenship, and the norm of security of residence for long-term residents, are more fragile and negotiable than had previously been thought. Depending on the outcome of the negotiations, these two principles may yet be numbered among the longer-term casualties of Brexit.

Bernard Ryan

Professor of Migration Law, University of Leicester

### APPENDIX

Table 1: EU-27 nationals in the United Kingdom and British citizens in EU-27 states

<table>
<thead>
<tr>
<th>EU-27 state</th>
<th>EU-27 in UK</th>
<th>British in EU-27 state</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Population (in thousands)</td>
<td>Population (in thousands)</td>
<td>%</td>
</tr>
<tr>
<td>Poland</td>
<td>38006</td>
<td>916</td>
<td>2.4</td>
</tr>
<tr>
<td>Romania</td>
<td>19871</td>
<td>233</td>
<td>1.2</td>
</tr>
<tr>
<td>Ireland</td>
<td>4629</td>
<td>332</td>
<td>7.2</td>
</tr>
<tr>
<td>Portugal</td>
<td>10375</td>
<td>219</td>
<td>2.1</td>
</tr>
<tr>
<td>Lithuania</td>
<td>2921</td>
<td>170</td>
<td>5.8</td>
</tr>
<tr>
<td>Italy</td>
<td>60796</td>
<td>192</td>
<td>0.3</td>
</tr>
<tr>
<td>Latvia</td>
<td>1986</td>
<td>97</td>
<td>4.9</td>
</tr>
<tr>
<td>Slovakia</td>
<td>2063</td>
<td>93</td>
<td>4.5</td>
</tr>
<tr>
<td>Hungary</td>
<td>9856</td>
<td>82</td>
<td>0.8</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>7202</td>
<td>66</td>
<td>0.9</td>
</tr>
<tr>
<td>Greece</td>
<td>10858</td>
<td>56</td>
<td>0.5</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>10538</td>
<td>45</td>
<td>0.4</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16901</td>
<td>81</td>
<td>0.5</td>
</tr>
<tr>
<td>Germany</td>
<td>81198</td>
<td>135</td>
<td>0.2</td>
</tr>
<tr>
<td>Sweden</td>
<td>9747</td>
<td>34</td>
<td>0.3</td>
</tr>
<tr>
<td>Denmark</td>
<td>5660</td>
<td>30</td>
<td>0.5</td>
</tr>
<tr>
<td>France</td>
<td>66488</td>
<td>165</td>
<td>0.2</td>
</tr>
<tr>
<td>Estonia</td>
<td>1315</td>
<td>8</td>
<td>0.6</td>
</tr>
<tr>
<td>Finland</td>
<td>5472</td>
<td>10</td>
<td>0.2</td>
</tr>
<tr>
<td>Austria</td>
<td>8576</td>
<td>14</td>
<td>0.2</td>
</tr>
<tr>
<td>Croatia</td>
<td>4225</td>
<td>4</td>
<td>0.1</td>
</tr>
<tr>
<td>Slovenia</td>
<td>5421</td>
<td>2</td>
<td>0.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>11237</td>
<td>26</td>
<td>0.2</td>
</tr>
<tr>
<td>Malta</td>
<td>429</td>
<td>5</td>
<td>1.2</td>
</tr>
<tr>
<td>Cyprus</td>
<td>847</td>
<td>13</td>
<td>1.5</td>
</tr>
<tr>
<td>Spain</td>
<td>46450</td>
<td>132</td>
<td>0.3</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>563</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>TOTAL</td>
<td>443066</td>
<td>3,160</td>
<td>0.7</td>
</tr>
</tbody>
</table>

Source: Author’s calculations, based on the following: data concerning resident population for 2015 in Eurostat, Population change: Demographic balance and crude rates at national level; data on EU-27 residents in the United Kingdom for 2015 in Office for National Statistics, Population by Country of Birth and Nationality: Underlying Datasheets; data on British citizens in EU-27 states for 2011 in Office for National Statistics, What Information is there on British Migrants Living in Europe? (2017). No data was available for Luxembourg nationals in the United Kingdom. All figures are in thousands. Percentages are calculated by reference to the resident population of the EU-27 state in question. The EU-27 states have been ranked according to the difference between the number of their citizens resident in the United Kingdom and the number of British citizens resident in that state.
TABLE 2: EU residence documents issued in the United Kingdom, 2004–2016

<table>
<thead>
<tr>
<th>Year</th>
<th>EU-27 permanent residence</th>
<th>Third-country permanent residence</th>
<th>EU-27 other residence</th>
<th>Third-country other residence</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>5312</td>
<td>3279</td>
<td>15440</td>
<td>11257</td>
<td>35288</td>
</tr>
<tr>
<td>2005</td>
<td>6692</td>
<td>3637</td>
<td>25199</td>
<td>14669</td>
<td>50197</td>
</tr>
<tr>
<td>2006</td>
<td>5433</td>
<td>3252</td>
<td>49938</td>
<td>16794</td>
<td>75417</td>
</tr>
<tr>
<td>2007</td>
<td>3944</td>
<td>3638</td>
<td>47783</td>
<td>19518</td>
<td>74883</td>
</tr>
<tr>
<td>2008</td>
<td>1758</td>
<td>2274</td>
<td>25997</td>
<td>10491</td>
<td>40520</td>
</tr>
<tr>
<td>2009</td>
<td>6042</td>
<td>5313</td>
<td>35143</td>
<td>24976</td>
<td>71474</td>
</tr>
<tr>
<td>2010</td>
<td>9449</td>
<td>10765</td>
<td>22190</td>
<td>22173</td>
<td>64577</td>
</tr>
<tr>
<td>2011</td>
<td>11688</td>
<td>9384</td>
<td>20858</td>
<td>26624</td>
<td>68554</td>
</tr>
<tr>
<td>2012</td>
<td>8534</td>
<td>6690</td>
<td>14885</td>
<td>17228</td>
<td>47337</td>
</tr>
<tr>
<td>2013</td>
<td>14481</td>
<td>7928</td>
<td>16104</td>
<td>22535</td>
<td>61048</td>
</tr>
<tr>
<td>2014</td>
<td>9744</td>
<td>9925</td>
<td>15937</td>
<td>26585</td>
<td>62191</td>
</tr>
<tr>
<td>2015</td>
<td>9537</td>
<td>8470</td>
<td>16872</td>
<td>23065</td>
<td>57944</td>
</tr>
<tr>
<td>2016</td>
<td>53298</td>
<td>11702</td>
<td>46760</td>
<td>27520</td>
<td>139280</td>
</tr>
<tr>
<td>2004–2016</td>
<td>145912</td>
<td>86257</td>
<td>353106</td>
<td>263435</td>
<td>848710</td>
</tr>
</tbody>
</table>

Source: Author’s calculations, based on Office for National Statistics, *Immigration statistics: October to December 2016*, available from https://www.ons.gov.uk/, Table ee02. ‘Third-country’ refers to non-EEA+ states. ‘Other’ refers to documents relating to extended and derivative rights of residence.