



## **Arrangements for citizens residing in the UK and outside the UK in another EU country**

### **1. Introduction**

1.1. On 1st March 2017 the House of Lords rejected the Article 50 TEU Bill, supporting a Labour party amendment calling on MPs to bring forward proposals to protect Europeans resident in Britain within three months of Article 50 TEU being triggered.<sup>1</sup> The amendment, immediately and unilaterally guaranteeing the residency rights of EU citizens already living in the UK, now passed back to the House of Commons.<sup>2</sup> This has become a main contentious point of the Brexit issue, considering the uncertainty surrounding the status of the 3 million Europeans living in Britain and the 1.2 million UK citizens living in the EU outside of the UK.

1.2. Citizenship of the EU, as established by the Maastricht Treaty, confers upon nationals of the Member States: the right to move and reside freely in the territory of the Member State; the right to vote and stand as a candidate in elections to the EP in Member States in which he resides (under the same conditions as nationals of that state); the right to diplomatic protection by the diplomatic or consular authorities of any Member State in the territory of a third country in which the Member State of which he is a national is not represented; and, the right to petition the European Parliament.<sup>3</sup> After the leave date, those who do not hold the nationality of the Member State cannot invoke the enjoyment of the EU citizenship status. The question of whether these rights are transferrable after Brexit will also need to be addressed.

1.3. Categories of people that the Government should take into account:

1. EEA nationals living in the UK;
2. EEA nationals married to a British citizen;
3. UK citizens and their family members (including non-EEA/third country nationals) living in the EU outside the UK;
4. Parents or careers of those with a right of residence in the UK;
5. Spouses or partners of UK servicemen or servicewomen being posted in the EU;
6. Non-EEA family members of EEA nationals in the UK;
7. Unemployed EEA nationals living in the UK.

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<sup>1</sup> Anushka Asthana, Heather Stewart and Peter Walker: 'Theresa May faces likely defeat in Lords over rights of EU citizens' The Guardian (1 March 2017) <[https://www.theguardian.com/politics/2017/feb/28/theresa-may-faces-defeat-in-lords-over-rights-of-eu-citizens?utm\\_source=esp&utm\\_medium=Email&utm\\_campaign=GU+Today+main+NEW+H+categories&utm\\_term=215414&subid=18960740&CMP=EMCNEWEML6619I2](https://www.theguardian.com/politics/2017/feb/28/theresa-may-faces-defeat-in-lords-over-rights-of-eu-citizens?utm_source=esp&utm_medium=Email&utm_campaign=GU+Today+main+NEW+H+categories&utm_term=215414&subid=18960740&CMP=EMCNEWEML6619I2)>

<sup>2</sup> 'Guaranteeing the rights of EU citizens in Britain', Financial Times (2 March 2017) <<https://www.ft.com/content/979dac50-ff68-11e6-8d8e-a5e3738f9ae4>>

<sup>3</sup> Gonzalez, G M, 'Brexit: Consequences for Citizenship of the Union and Residence Rights', (2015) 23 Maastricht Journal of European and Comparative Law 796, 796.



## 2. Current laws and rights of EEA citizens

2.1 EU membership guarantees the bloc's citizens the right of admission into EU Member States, stemming from the Citizen's Directive.<sup>4</sup> However, EU citizenship only allows for the right to reside for up to three months without any conditions or formalities other than holding a valid identity card or passport.<sup>5</sup>

2.2. The EEA national will have a right to reside for longer than three months if they fall under the following categories:<sup>6</sup>

1. If they are a worker;
2. If they are self-employed;
3. If they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state, and, have comprehensive sickness insurance. That includes retired EEA nationals.
4. If they are enrolled in an educational establishment and have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state, and, have comprehensive sickness insurance.

An EEA national will have acquired a right to permanent residence after residing for continuous period of five years in that EU Member State.<sup>7</sup> EEA nationals and their family members may also secure British citizenship. However, acquiring permanent residence is a precondition to naturalisation.<sup>8</sup>

### 2.2. EEA nationals with an Indefinite Leave to Remain

2.2.1. When an individual has evidence of an indefinite leave to remain (ILR) (through a family member who is established in the UK or through EEA national status) and it has not been lost through being absent from the UK for 2 years, then that person is free from immigration restrictions. EEA nationals are not required to obtain ILR in the UK, but once you have an ILR stamp, this means the individual has settled status. However, it seems as though the Home Office is getting these mixed up.<sup>9</sup>

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<sup>4</sup> Directive 2004/38/EC.

<sup>5</sup> *ibid* Art 6.

<sup>6</sup> (n 4) Art 7.

<sup>7</sup> (n 4) Art 16.

<sup>8</sup> Matthew Evans, 'Brexit Briefing: Securing EEA Nationals' Residence Rights', 21 February 2017

<<https://www.freemovement.org.uk/brexit-briefing-securing-eea-nationals-residence-rights/>>

<sup>9</sup> *ibid*



2.2.2. It is possible that EEA citizens would be offered a domestic UK law immigration status, such as ILR. It has been suggested that the Government could grant EEA nationals existing status of ILR while waiving both the usual charges and the requirement to comply with any eligibility criteria other than that they were EU citizens resident in the UK. This would avoid establishing discriminatory status and category of rights between EU citizens and other non-UK nationals permanently resident in the UK post-Brexit.<sup>10</sup> If this were to replace their current rights, EEA residents would lose their EU pension rights, family reunion, non-discrimination, protection against deportation and other rights in EU law.<sup>11</sup> In relation to pension, it is important to stress that EEA citizens would still be entitled to a UK pension if they are working lawfully in the UK and are lawfully residing in the UK.

### *2.3. The creation of a new residency status for EEA residents in the UK*

2.3.1. As regards EEA nationals resident in the UK, it has been recognised that there are many EEA residents, who have never actually acquired rights of residence for various reasons.<sup>12</sup> If they do apply for permanent residence now, it has been stated that it will be basically impossible for the Home Office to process applications for permanent residence or ILR for the 3 million EEA citizens resident in the EU within the two years after Article 50 TEU has been triggered. Even if it were manageable, it has been submitted that EU citizens would be left with far fewer rights than they currently enjoy if they ended up being offered ILR.<sup>13</sup>

2.3.2. With this in mind, the House of Lords report suggested that it would be impractical to require EU nationals resident in the UK to apply for ILR under the UK's immigration laws and that a new status of permanent residence should be created post-Brexit.<sup>14</sup> That said, they would still have to go through some sort of registration process for the 3 million EU nationals living in the UK.

### *2.4. EEA National married to a UK citizen living in the UK*

2.4.1. EEA nationals married to UK citizens do not automatically have a right to citizenship. EEA nationals need to secure permanent residence (in the four methods mentioned above) and only then can they have the right to be joined by other family members, to claim welfare benefits, and eventually, gain a right to citizenship.

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<sup>10</sup> House of Lords, European Union Committee Report, 'Brexit: acquired rights' 10th Report of Session 2016-17. Published 14 December 2016. Chapter 8, para 122. (Hereafter 'House of Lords Committee Report').

<sup>11</sup> Colin Yeo, 'Briefing: the legal status of EU citizens in the UK', 27th February 2017 <<https://www.freemovement.org.uk/briefing-legal-status-eu-citizens-uk/>>

<sup>12</sup> House of Lords Committee Report, Chapter 2, para 21.

<sup>13</sup> Colin Yeo, 'Parliamentary report recommends continuation of EU law for existing residents' 14 December <<https://www.freemovement.org.uk/parliamentary-report-recommends-continuation-eu-law-existing-residents/>>

<sup>14</sup> House of Lords Committee Report, Chapter 8, para 122.



2.4.2. The two stumbling blocks that stand out when it comes to EEA nationals in the UK and acquiring permanent residency rights are that they may not qualify as being self-sufficient and may not have comprehensive sickness insurance. However, there is ambiguity on whether the income of a spouse or household income can be taken into account to show self-sufficiency and this will need to be clarified.<sup>15</sup> As mentioned below, many EEA nationals may be without comprehensive sickness insurance simply due to lack of knowledge of such a requirement to establish permanent residency. There is also a lack of knowledge that the NHS does not count and that they actually have to get private insurance.<sup>16</sup>

### *2.5. Children of EEA Nationals born in the UK*

2.5.1. The current position of the Home Office is that an EU citizen resident in the UK but without permanent residence, is not 'settled' or free of immigration time restrictions for the purpose of the British Nationality Act 1981. Under s 1(1) of the British Nationality Act 1983, an EU citizen must possess permanent residence in order to be considered 'settled'. A child born in the UK to an EU citizen parent is not born British unless the EU citizen has permanent residence and the child is born on or after 30 April 2006.<sup>17</sup> Prior to 30th April 2006, for children born in the UK between 2 October 2000 and 29 April 2006, one of the child's parents must have been issued with an official document by the Home Office confirming their permanent residence status in the UK dated before the child was born. For children born in the UK before 2 October 2000, you need to show evidence that at least one of the child's European parents was exercising Treaty rights in the UK at the time of the child's birth.<sup>18</sup> However, this has never been tested in the courts and such a situation will be perhaps needed to be clarified.<sup>19</sup>

### *2.6 Non-EEA family members and the right of residence*

2.6.1. In the UK, the **Immigration (European Economic Area) Regulations 2016** sets out the rights of nationals of the EEA and Switzerland, and their family members to enter and reside in the UK. Brexit raises a number of questions as regards to EEA nationals living in the UK and their circumstances. For example, if an EEA national marries, what rights would their partner enjoy and would nationality matter? Could they bring their extended family into the country?

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<sup>15</sup> Colin Yeo, 'What is the position of EU spouses of British citizens following Brexit?' 24th January 2017

<<https://www.freemovement.org.uk/position-eu-spouses-british-citizens-following-brexit/>>

<sup>16</sup> Colin Yeo, 'Comprehensive Sickness Insurance: what is it, and who needs it?' 23rd January 2017

<<https://www.freemovement.org.uk/comprehensive-sickness-insurance-what-is-it-and-who-needs-it/>>

<sup>17</sup> Jessica Jim, 'Brexit and the position of children born to European nationals living in the UK', 24 August 2016

<https://www.kingsleynapley.co.uk/comment/blogs/brexit-blog/brexit-and-the-position-of-children-born-to-european-nationals-living-in-the-uk>

<sup>18</sup> *Ibid.*

<sup>19</sup> Colin Yeo (n 11).



2.6.2. In order to first enter the UK, the non-EEA family member of a sponsoring EEA national must apply for an EEA family permit, which is valid for a period of 6 months.<sup>20</sup> However, this requirement does not apply where the non-EEA family member holds a qualifying EEA State residence card issued in Germany or Estonia, or already holds a residence or permanent residence card. With Brexit looming, that status of non-EEA family members without permanent residence, but who are granted residency rights through their relationship with an EEA national, is uncertain.<sup>21</sup>

2.6.3. At the moment, the **Immigration Regulations 2016** allows EEA nationals family members that are from outside the EEA to retain their right of residence in the UK if:

- The EEA national is **deceased**:<sup>22</sup> if the sponsoring EEA national has died, their non-EEA family members may retain a rights of residence, but only in specific circumstances listed in section 10(2).
- The EEA national **leaves** the UK:<sup>23</sup> A non-EEA national spouse or civil partner will lose their right of residence if the sponsoring EEA-national leaves the UK while they are still married or in a civil partnership. Where this happens, the non-EEA national will need to demonstrate that they fall instead under one of the provisions of section 10.
- The EEA national is the **parent of a child who retains the right of residence**:<sup>24</sup> A non-EEA family member who is the parent of a child or children of an EEA national may retain a right of residence until the child reaches the age of 21. It may be possible for the non-EEA family member to continue their residence beyond the child's 21st birthday if the child has, for instance, a severe physical or mental disability. Such a situation will certainly need to be addressed when considering such rights post-Brexit.
- The EEA national **divorces their spouse/dissolves their civil partnership**:<sup>25</sup> Where there has been a separation, the non-EEA national will continue to be a family member with the right to reside in the UK, as long as the sponsoring EEA national continues to exercise free movement rights in the UK or has acquired permanent residence. However, this right of residence continues until the divorce is finalised and a decree absolute is issued, the marriage is annulled, or the civil partnership is dissolved. The non-EEA national's right of residence will then come to an end.

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<sup>20</sup> Home Office 'Extended family members of EEA nationals', September 2016  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/554777/Extended\\_family\\_members\\_of\\_EEA\\_national\\_s\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554777/Extended_family_members_of_EEA_national_s_v3.pdf)

<sup>21</sup> Carla Thomas, 'Brexit: Retained Rights of Residence' Thomas Chase Immigration, 13 October 2016  
<<http://www.lexology.com/library/detail.aspx?g=6f4180cf-f926-4350-8f11-24700cd3e50a>>

<sup>22</sup> Immigration (European Economic Area) Regulations 2016, section 10(2).

<sup>23</sup> *ibid*, section 10(3).

<sup>24</sup> Immigration (European Economic Area) Regulations 2016, section 10(4).

<sup>25</sup> *ibid*, section 10(5).



2.6.4. Evidently, while the rights of residency of non-EEA nationals dependent on EEA nationals may be weak in certain situations, there are other circumstances where a right should survive. The Government will have to take into account the rights of non-EEA nationals dependent on EEA nationals in the UK when considering this issue.

### *2.7. EEA National married to a UK serviceman or woman*

2.7.1. This is an issue where the UK citizen and their EEA spouse has not been living in the UK. For example, one reported situation was that of an Italian woman who reportedly said she feared she would not qualify for permanent residence in the UK because she spent most of her married life in Italy where her husband was posted. She would not have proof have residency in the UK required to meet the five year test should they decide to move back to the UK.<sup>26</sup> Considering this issue, it has been suggested that specific rights for EEA family members of UK servicemen and women would need to be considered.<sup>27</sup>

### *2.8. UK citizens living in the EU outside the UK and their family members*

2.8.1. The UK will become a third country for the purposes of EU law on withdrawal from the EU, raising concerns for the **1.2 million UK nationals** living in other EU Member States.<sup>28</sup> Thus, everything discussed above applies in the reverse. UK nationals in other EU Member States may be subject to common EU immigration rules for third country nationals, as well as the national immigration law of each Member State becoming third country nationals.

2.8.2. The main questions that will need to be answered considering this category is whether they would continue to be able to live abroad or would they need to apply for residency? Will different rules apply to those registered as resident in another EU country to those who are not? Will holders of permanent residency be considered to have acquired rights?<sup>29</sup>

2.8.3. It seems as though UK citizens (who are not EEA nationals) who have resided for more than 5 years in an EU Member State could apply for long-term residence status (as third country nationals) under EU law.<sup>30</sup> However, such status carries fewer benefits and British citizens may often have to satisfy 'integration' rules such as a requirement to speak the language of the host country, before getting such a status. They may also

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<sup>26</sup> Lisa O'Carroll, 'Spanish UK resident feared insurance rule would force her to leave' The Guardian, 30 December 2016 <<https://www.theguardian.com/uk-news/2016/dec/30/spanish-uk-resident-fears-insurance-loophole-will-force-her-to-leave>>.

<sup>27</sup> Lisa O'Carroll, 'Scrap insurance rule for stay-at-home parents from EU, says Tory MP' 30 December 2016 <<https://www.theguardian.com/uk-news/2016/dec/30/scrap-insurance-rule-stay-at-home-parents-eu-tory-mp-sarah-wollaston>>.

<sup>28</sup> House of Lords Committee Report, Chapter 5, para 50.

<sup>29</sup> *ibid*, Chapter 5, para 51.

<sup>30</sup> Directive 109/2009/EC.



be subject to far stricter family reunion rules than at present.<sup>31</sup> Professor Barnard raised the initiative of the **Blue Card Directive** for highly skilled migrants as reference to third-country national rights in front of the House of Lords.<sup>32</sup> While this has not been used much, such a scheme may be worth considering to secure rights of UK nationals in EU Member States when they become third country nationals. Furthermore, on this issue Gonzalez questions what the status of those British citizens which have already acquired the right of permanent residence in another EU Member State would be and whether the change of status to a non-EEA national would confer automatic long-term residence permit. It is submitted that a citizen of the EU whom acquired the right of permanent residence in the territory of an EU Member State has already fulfilled the requirement to acquire a long-term residence permit as a non-EEA national.<sup>33</sup>

2.8.4. Also, would these UK nationals be able to apply for nationality in the relevant EU Member State? If so, would they be able to retain their UK nationality, and therefore have dual nationality?<sup>34</sup>

2.8.5. As well as questioning the rights of a non-EEA national who is dependent for their residency rights on an EEA national in the UK, we also need to question what protection (if any) would there be for non-EEA nationals linked to UK nationals living in the EU. If a former EU citizen and non-EEA national are married, in a relationship or are a relative of an EEA national, then they would fall within the scope of the Citizens Directive. However, if a family tie does not exist, there will be no application of the Citizens Directive. A question which will need to be addressed here is the applicability of the Council Directive concerning the status of third-country nationals who are long-term residents.<sup>35</sup>

2.8.6. Generally, the 2003 Directive on the status of non-EU nationals who are long term residents may save both UK nationals (who are no longer EEA citizens) and non-EEA nationals with family ties to UK nationals. This Directive states that the status of long-term resident should be awarded after a person has lived legally in an EU State for an uninterrupted period of five years. This is dependent on that person having a stable and regular source of income, health insurance, and, when required by the EU State, having complied with integration measures. The applicant must also not constitute a threat to public security or public policy. In compliance with these conditions, the non-EEA national will receive an EU long-term renewable residence permit, and the status of an EU long-term resident. They enjoy the same treatment and rights as nationals in certain areas:

- access to employment and self-employed activity;
- education and vocational training;
- social protection and assistance (at least core benefits);
- access to goods and services.

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<sup>31</sup> House of Lords Committee Report, Chapter 3, paras 28-29.

<sup>32</sup> *ibid*, Chapter 3, para 30.

<sup>33</sup> Gonzalez (n 3), 807-808.

<sup>34</sup> House of Lords Committee Report, Chapter 5, para 51.

<sup>35</sup> Gonzalez (n 3) 806.



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They also benefit from the possibility, under certain conditions, to move from one EU State to another. Although the UK does not come under the Directive, its nationals, as third-country nationals, will benefit from the Directive in EU Member States post-Brexit.<sup>36</sup>

## 2.9. *Unemployed EU nationals living in the UK*

2.9.1 Under the newly updated policy document of the Home Office (Removals and Revocations of EEA Nationals) a person with no right of residence under the Citizens Directive can be removed from the UK. This raises the question of the status of EEA nationals without permanent residence who cease to be a qualified person because they are no longer working in the EU. Such situations will need to be addressed when considering the protection of the rights of EU nationals post-Brexit.

## 3. **Affected rights**

3.1. While no British politician has yet questioned the right to remain of legitimate EEA migrants, residency rights are ‘only one small sliver’ of EU or EEA citizens’ rights.<sup>37</sup>

3.2. The EU-27 want to maintain the full rights that European citizenship currently confers on EEA nationals in the UK post-Brexit. This has similarly been recommended by the House of Lords report.<sup>38</sup> However, it needs to be questioned whether rights such as EU migrants claiming UK child benefits for dependents in the EU would remain appropriate. Furthermore, it has been noted that a full conferral of EU rights would restrict Britain’s ability to deport an EU migrant who has committed crimes after Brexit.<sup>39</sup>

3.3. The issue of **pensions** is yet another point of possible contention. It needs to be questioned whether an EU migrant worker’s pension would be frozen if they decided to leave the UK, though it has been stated that an EU migrant worker’s full UK pension drawn overseas would be uprated each year. Under existing rules, anyone who retires to a country within the EEA has their pension uprated by the ‘triple-lock’, meaning that it rises by the highest of earnings, prices or 2.5% each year. However, it needs to be questioned if, as part of Brexit, the UK will have to negotiate reciprocal arrangements with individual EU countries to maintain the status quo. There is a risk that if no such arrangement is guaranteed, people retiring to those countries could see their state pension payment frozen. If this is so, will it be only in relation to future increases in pension payments? As the rules stand, if you are an EEA national you only have to apply for your state pension in the EU country where you worked before retiring. The pensions offices of all EU Member States will then exchange their information

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<sup>36</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/long-term-residents\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/long-term-residents_en)

<sup>37</sup> Alex Barker, ‘Millions of expats caught in Brexit no man’s land’, Financial Times, 20 February 2017. <<https://www.ft.com/content/0dc4306c-f504-11e6-8758-6876151821a6>>.

<sup>38</sup> House of Lords Committee Report.

<sup>39</sup> Alex Barker (n 37).





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on your employment history within the EU and calculate your full pension based on this data. How will this change in the future? Will this affect EU nationals' pension entitlements up to date?

3.4. As regards **healthcare**, it needs to be questioned whether UK nationals would still be able to use a UK-issued EHIC when travelling as a tourist to other EU Member states. Vice versa, would an EU country-issued EHIC be valid in the UK on holiday? Would a UK national who is a worker in another EU country still be entitled to an EHIC card after Brexit? Would a UK national who is a pensioner in another EU country continue to be able to access free healthcare in their EU country of residence?<sup>40</sup>

3.5. As regards **education**, various concerns have been raised. UK nationals have asked whether their children would still be able to attend European schools. Furthermore, would EEA nationals be able to continue the university studies they had started in the UK and whether studies from other EU countries would be recognised for access to UK universities?<sup>41</sup>

3.6. As regards the **right to work**, would a system of work permits need to be implemented for EEA nationals coming to work in the UK? What form should such work permits take? Furthermore, would UK nationals in EU countries be required to obtain work permits themselves when working in other EU countries? Would the professional educational qualifications of either group be recognised, would there be language requirements, and would those who are currently employed be able to continue with their employment under the same terms and conditions?<sup>42</sup>

3.7. The question of **movement and travel** will also have to be addressed. UK nationals have asked if they would need a visa to visit other EU countries or the Schengen area. Will there be the introduction of a new non-EU UK passport? Would EEA family members of UK nationals be required to obtain a visa when they visit the UK? Would a UK driving license still be valid in the EU or would a EU driving license be valid in the UK?<sup>43</sup>

3.8. Another issue relevant to both EEA nationals resident in the UK and UK nationals resident in the EU is whether those who **owned properties and/or businesses** would be able to continue to own them in the same way. Concern has been expressed surrounding current restrictions on ownership by non-EEA nationals in certain areas.<sup>44</sup>

3.9. Other rights mentioned in the House of Lords report include: the right to vote in local elections in other EU countries, the enforcement of civil judgments across the EU, EU social rights, the rights of prisoners to serve their term in a UK prison after a certain period of time; mutual recognition of professional

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<sup>40</sup> House of Lords Committee Report, Chapter 5, para 51.

<sup>41</sup> *ibid*

<sup>42</sup> House of Lords Committee Report, Chapter 5.

<sup>43</sup> *ibid*

<sup>44</sup> House of Lords Committee Report, Chapter 5, para 51.



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qualifications<sup>45</sup>; the right of exportability of social security status; the right to set up and run a business; the right to rent/buy.<sup>46</sup>

3.10. While ultimately it is a question of which rights are to be preserved and which are to be discarded, the House of Lords report emphasised that EU citizenship rights are indivisible and inherently connected: taken as whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State, but remove one and the quality of all others are affected. The House of Lords report concluded that the full scope of EU citizenship rights should be fully preserved in the withdrawal agreement.<sup>47</sup> Furthermore, it has been suggested that some form of arrangement relating to equal treatment and access to welfare might be possible post-Brexit under the safeguard clauses of the EEA (Articles 112 -113), but this would need to be negotiated and there seems to be little appetite for this amongst the Member States.<sup>48</sup>

3.11. Overall, another big question is how such rights would be preserved or granted? Will EU rights be safeguarded in the withdrawal agreement? Or will rights be dependent on separate bilateral deals between the UK and individual EU Member States? The House of Lords has asserted that the most effective way of protecting rights after Brexit is to safeguard them in the withdrawal agreement concluded under Article 50 TEU, rather than relying on other international conventions or BITs. They further point out that this approach would provide the greatest legal certainty for EEA nationals in the UK and UK nationals in the EU.<sup>49</sup>

#### **4. Reform of the UK's immigration laws and further issues**

##### *4.1. Unnecessary bureaucracy*

4.1.1. The present system has been criticised for involving much unnecessary bureaucracy. The permanent resident form is 85 pages long and the list of documents required (considered excessive) can make the application run into hundreds of pages.<sup>50</sup> This has been considered as an incredibly onerous procedure, due to the copious evidence that applicants are required to produce to prove that they have been living and working continuously in the past five years in the UK, and also to establish their family relations. Currently, applicants must have documented every time they leave the UK, a record which may not always be included in their passports due to the EU's free movement of people. The Home Office also requires a variety of documents spread evenly across the five years to prove employment, including payslips, letters from employers,

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<sup>45</sup> The British Medical Association is particularly concerned that thousands of current staff's qualifications will be made redundant if non-UK qualifications are not recognised post-Brexit.

<sup>46</sup> House of Lords Committee Report, Chapter 8, paras 109 -119.

<sup>47</sup> *ibid*, Chapter 8, para 121.

<sup>48</sup> Jo Shaw, 'Citizenship, Migration and Free Movement in Brexit Britain', *German Law Review (Brexit Supplement)* July 2016, p 103.

<sup>49</sup> House of Lords Committee Report, Chapter 8, para 104.

<sup>50</sup> Matthew Evans (n 8); Joshua Chaffin and Zosia Wasik, 'EU citizens face 85-page 'nightmare' Brexit Britain form' *Financial Times*, 1 March 2017 <<https://www.ft.com/content/2119a554-fce6-11e6-96f8-3700c5664d30>>.



employment contracts (etc). Moreover, there have already been several cases where EU nationals have applied for permanent residence but have had their applications rejected on the basis of not providing a valid ID or passport, despite the provision of a certified copy of the ID or passport (which were eligible).<sup>51</sup> This approach by the Home Office fails to take into account the delays involved in the process and that it may not always be possible to rely on original documents in these applications. Reform of the current system may be something to be taken into consideration, especially considering the vast numbers that will and already are applying for permanent residence as Brexit looms.

#### 4.2. *Comprehensive sickness insurance*

4.2.1. An EEA national who is a student or falls into the self-sufficient category is also required to have **comprehensive health insurance** in order to claim their permanent right of residence. However, this has been criticised as not being sufficiently advertised as requirement to qualify for permanent residency after five years on grounds of EU citizenship.<sup>52</sup> The House of Lords report refers to the ‘common myth’ that simply residing in the UK for five consecutive years leads to a right of permanent residence, noting the relatively unknown nature of the comprehensive sickness insurance requirement.<sup>53</sup> Moreover, the Home Office’s position that access to the NHS **does not qualify as comprehensive sickness insurance** has generated further criticism.<sup>54</sup>

#### 4.3. *The relationship between the EU and the UK legal systems after Brexit*

4.3.1. This may raise jurisdictional questions. For example, it has been pointed out that the EU may legislate to change rights post-Brexit and EU nationals may want to challenge Britain’s application of their rights if it does not mirror the changes the EU has introduced. The questions that arise are as to what courts such challenges would be brought (i.e. in UK or European courts) and whose interpretation of EU law would be applicable. Considering the Brexit agenda of escaping the jurisdiction of the CJEU, it is assumed that it would not be favourable for the European courts to have a role in the UK courts’ interpretation of law. However, there may need to be some sort of consistency with changes in EU citizenship and how the UK applies a post-Brexit regime for EEA nationals.<sup>55</sup>

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<sup>51</sup> Lisa O’Carroll, ‘Dutch woman with two British children told to leave UK after 24 years’ *The Guardian*, 28 December 2016 <<https://www.theguardian.com/politics/2016/dec/28/dutch-woman-with-two-british-children-told-to-leave-uk-after-24-years>>, Lisa O’Carroll, ‘German neuroscientist also told to leave the UK after residency rejection’ *The Guardian*, 29 December 2016 <<https://www.theguardian.com/uk-news/2016/dec/29/german-neuroscientist-told-to-leave-uk-residency-application-rejected-monique-hawkins>>, Lisa O’Carroll, ‘Spanish UK resident feared insurance rule would force her to leave’ *The Guardian*, 30 December 2016 <<https://www.theguardian.com/uk-news/2016/dec/30/spanish-uk-resident-fears-insurance-loophole-will-force-her-to-leave>>.

<sup>52</sup> Colin Yeo (n 16).

<sup>53</sup> House of Lords Committee Report, Chapter 2, para 19.

<sup>54</sup> <https://www.the3million.org.uk/>

<sup>55</sup> Alex Barker (n 37).



#### *4.4. Question of dual citizenship*

4.4.1. EEA nationals with permanent residence applying for naturalisation need to be aware that the UK Government says that family members of dual citizens cannot benefit from EU free movement law. This issue is currently before the CJEU in *R (Lounes) v Secretary of State of the Home Office*. Thus, any non-EEA family members would, at the moment lose their rights of residence in the UK if their EEA family member naturalises as a British citizen. Securing the rights of non-EEA nationals whose EEA family members become British citizens will be an important issue, especially considering that with Brexit many EEA nationals who are eligible will be applying for British citizenship.<sup>56</sup>

#### *4.5. Cut-off points and the eligibility date*

4.5.1. The issue of future rights, and how they may be delimited, will need to be considered. Various cut-off points for the exercise of rights have been suggested. For example, a rights regime granted by the Government to current EEA nationals living in the UK and their family members may be limited to the lifetime of those eligible under a new regime, may be limited by a period of time (e.g. five or ten years), or may last up until the point at which the EEA national surrenders their enhanced rights by moving country.<sup>57</sup>

4.5.2. Furthermore, a question that is presently raising considerable tension is that of the date from which EEA nationals living in the UK would be eligible for protection. Three possible dates have been identified: the date of the referendum, the date that Article 50 TEU is triggered, or the date that the EU leaves the UK. This is a contentious decision considering that Prime Minister May wishes to set that date before the UK leaves in 2019, to avoid an influx of EEA migrants into Britain in the meantime. However, the EU-27 sees the date of departure as the eligibility cut-off-point, considering that EU rights and obligations will be applicable up until that point.<sup>58</sup>

4.5.3. Finally, it will need to be seriously considered what will happen if the UK leaves without reaching a deal on the protection of EEA migrants in the UK (and vice versa). In such a situation, migrants would be at the mercy of national governments. However, EU law does cover safeguard rights for some third-country nationals, as discussed above.<sup>59</sup> Some have even suggested that former UK bilateral agreements with European countries on welfare may be revived.<sup>60</sup>

#### *4.6. Increased burden on the UK immigration system*

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<sup>56</sup> Matthew Evans (n 8).

<sup>57</sup> Alex Barker (n 37).

<sup>58</sup> Alan Travis, Daniel Boffey and Peter Walker, 'Article 50 day won't be cut-off-date for EU migrants, No 10 suggests.' *The Guardian*, 27 February 2017 <<https://www.theguardian.com/politics/2017/feb/27/article-50-day-wont-be-cut-off-date-for-eu-migrants-no-10-suggests>>.

<sup>59</sup> Gonzalez (n 3) 796.

<sup>60</sup> Joshua Chaffin and Zosia Wasik (n 50).



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4.6.1. Consensus states that the question is not whether there will be controls on EU immigration but ‘how much’ control there will be.<sup>61</sup> Practically, we need to ask whether **a points-based system** to all incoming immigrants will be introduced. Will this mean an expansion of the existing system currently used by non-EU migrants?<sup>62</sup> Needless to say there will be an increased burden on the UK immigration system, which will need to be anticipated.

4.6.2. There is a risk of litigation if the new immigration policy is not dealt with properly. The challenges concerning immigration are overwhelming the courts at present, and Brexit will almost inevitably lead to further legal challenges. In terms of EU citizens already here on ‘Brexit day’, the government will either have to: (a) have an immigration amnesty; or (b) draw a line between those EU citizens who get to stay in the UK and those who do not. The former is probably unlikely, but if the latter option is preferred, it means that people who are on the wrong side of the ‘line’ will inevitably litigate. The UK’s judicial review system is simply not equipped to deal with this possibility at the moment.

#### *4.7. Lack of systematic register*

4.7.1. There is no systematic register of when expats arrived in their current place of residence. Some EU officials think that it is not feasible to create a comprehensive one before the expected Brexit date of 2019.<sup>63</sup> This is something that the Government needs to consider immediately in order to fully understand the situation.

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**13 March 2017**

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<sup>61</sup> Will Somerville, ‘When the Dust Settles: Migration Policy After Brexit’ Migration Policy Institute, June 2016 <<http://www.migrationpolicy.org/news/when-dust-settles-migration-policy-after-brexit>>.

<sup>62</sup> *ibid*

<sup>63</sup> Alex Barker (n 37).