

## Europe and the World: A law review

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### (Not) losing out from Brexit

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# (Not) losing out from Brexit

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Brexit is a personal concern for EU citizens living in the UK and UK citizens living in the EU. They fear their rights will become bargaining chips in the negotiations. This article makes an inventory of what would happen without withdrawal agreement, and looks at the possibilities for securing residence and social security rights post Brexit based on current EU, international and national law. It takes into account how actors other than the negotiating parties might press for guarantees outside the negotiating framework. The article concludes that personal concerns are justified. However, Brexit also inspires non-state actors to secure rights and their activities go beyond the occasional lobbying for a particular outcome in the negotiation process.

## 1. Introduction

British citizens living, working or studying in EU Member States worry about the consequences of Brexit for their daily lives.<sup>1</sup> EU citizens decide to leave the UK or seriously consider doing so.<sup>2</sup> While many fear

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1 See e.g. the website of the organization Expat Citizen Rights in EU <http://www.ecreu.com/index.html>, and reports on the leaked document drawn by the EP legal affairs committee: Daniel Boffey, 'Britons Living in the EU Face Brexit Backlash, Leaked Paper Warns' *The Guardian* (13 February 2017) <https://www.theguardian.com/politics/2017/feb/13/uk-treatment-of-eu-nationals-could-lead-to-backlash-against-britons-living-in-the-eu>.

2 See e.g. 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/>

they will be used as bargaining chips, now that the government has repeatedly refused to offer any guarantee to EU citizens staying in the UK before withdrawal negotiations start,<sup>3</sup> the Scottish government, in its document 'Scotland's Place in Europe'<sup>4</sup> underlines the advantages of free movement of persons for Scotland and wants it to continue.<sup>5</sup>

Brexit is not only a personal concern for EU citizens presently living in the UK or UK citizens presently living in other EU Member States.<sup>6</sup> Social security entitlements of all EU citizens who have worked or lived in the UK and of British citizens who have worked or lived in another Member State may be at risk.<sup>7</sup> Students wonder whether they will be able to afford to study across the Channel.<sup>8</sup> And, looking beyond residence rights, people living in Northern Ireland<sup>9</sup> fear the consequences of Brexit for their daily lives, as do people in Gibraltar.<sup>10</sup> And with good reason as the case of Gibraltar shows: its future became the first dispute of the exit talks, when EU draft negotiation guidelines aroused discussions including the word 'war'.<sup>11</sup>

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dec/28/dutch-woman-with-two-british-children-told-to-leave-uk-after-24-years. The Dutch newspaper *De Volkskrant* reported on 7 January 2017 on Dutch citizens leaving the UK, 14–15.

3 See the February 2017 UK government report *The United Kingdom's Exit from and New Partnership with the European Union* 30 <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

4 Scottish Government, 'Scotland's Place in Europe' (20 December 2016) <http://www.gov.scot/Publications/2016/12/9234>.

5 See e.g. point 68 of the document: 'As an economy, we need the inward flow of people not just to support the growth of our businesses and services, but to provide diversity and vibrancy to our communities.'

6 About 3.5 million EU citizens lived in the UK in the first trimester of 2016; see C Vargas-Silva and Y Markaki, 'EU Migration to and from the UK', Briefing, The Migration Observatory at the University of Oxford (31 October 2016) <http://www.migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>; about 1.2 million British citizens lived in another EU Member State according to UN estimates published by Migration Watch UK. For an overview per State, see <https://www.migrationwatchuk.org/briefing-paper/354>. Both sites indicate how they calculated their estimates.

7 See E Guild, 'Brexit and Social Security in the EU' *CEPS Commentary* (17 November 2016) <https://www.ceps.eu/publications/brexit-and-social-security-eu>.

8 See Daniel Wittenberg, 'Five Ways Theresa May's Brexit Strategy is Terrible for Students' *The Guardian* (18 January 2017) <https://www.theguardian.com/education/2017/jan/18/five-ways-theresa-mays-brexit-strategy-hard-on-young-people-eu-international-students-erasmus>.

9 The preamble of the agreement between the UK and Irish governments, part of the Good Friday Agreement, states: 'Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union.'

10 Brian Reyes, 'Govt's Stark Analysis Highlights Brexit Border Challenge' *Gibraltar Chronicle* (17 January 2017) <http://chronicle.gi/2017/01/govts-stark-analysis-highlights-brexit-border-challenge/>.

11 'Brexit and Gibraltar: May Laughs Off Spain "War" Talk' BBC News (3 April 2017) <http://www.bbc.com/news/uk-politics-39475127>.

It is impossible to predict whether the outcome of the Brexit negotiations will be able to take away these concerns. The UK government has initially ignored the strong recommendation included in the House of Lords European Union Committee report *Brexit: Acquired Rights*<sup>12</sup> to strike a positive note for the start of the negotiations with a unilateral guarantee to safeguard EU citizenship rights of all EU nationals in the UK after the UK withdraws from the EU. The second recommendation from the report, notably agreeing on EU citizenship rights as a preliminary and separate element of the negotiations as soon as Article 50 is triggered, seems off the table as well. Both negotiating parties have indeed confirmed their intention to prioritize citizens' rights in the negotiations,<sup>13</sup> but the EU seems to block the possibility of settling individual items separately.<sup>14</sup>

This article will focus on the important right to work and live in another Member State without losing social security entitlements, a right connected to EU citizenship. The article looks at the possibilities that positive EU, national and international law might offer to secure residence and social security entitlements, and how potential gaps in protection could be remedied regardless of the result of the negotiations on a future relationship between the UK and the EU. At the same time it will look at opportunities that actors other than the negotiating parties have either to influence the negotiating process or to press for guarantees of citizenship rights outside the negotiation process.

A preliminary remark with respect to the doctrine of acquired rights needs to be made. Though Article 70 of the Vienna Convention on the Law of Treaties determines that termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, it has not much to offer to citizens. The provision only refers to the parties of the treaties, and does not guarantee acquired rights of citizens. Neither does international customary law offer much help; not in the scope

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12 House of Lords Committee on the European Union, *Brexit: Acquired Rights* (HL 2016–17, 82) 25–8 (14 December 2016) <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/8202.htm>.

13 See Prime Minister's letter to Donald Tusk triggering Article 50 (29 March 2017) <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> 4, point ii and General Secretariat of the Council, 'Draft Guidelines following the United Kingdom's Notification under Article 50 TEU' (31 March 2017, XT 21001/17) 5, point 8.

14 'Draft Guidelines' (n 13) 3, point 2.

of the concept of ‘acquired rights’ – residence rights are not acquired rights, nor in is there the possibility to enforce acquired rights.<sup>15</sup>

## 2. Residence rights for UK nationals in the EU based on EU primary law

Primary law, in particular Article 20 Treaty on the Functioning of the European Union (TFEU), is unlikely to offer British citizens in the EU a basis for an autonomous residence right post Brexit. They are *ipso facto* no longer EU citizens. Based on the ruling by the European Court of Justice (ECJ) in the *Rottmann* case,<sup>16</sup> the argument can be made that UK citizens are in a position capable of causing them to lose EU citizenship and the rights attached thereto. Such a situation falls ‘by reason of its nature and its consequences, within the ambit of European Union law’.<sup>17</sup> However, the loss will happen simultaneously with the UK’s exit, and puts into practice the will of the people to withdraw as expressed in a referendum. Mindus argues that legally the loss of EU citizenship can be qualified as involuntary when it is not a case of individual renunciation.<sup>18</sup> She continues that loss of EU citizenship could be tested against general principles of EU law, such as proportionality, equality, legitimate expectations and access to court.<sup>19</sup> Even if this were the case,<sup>20</sup> possibilities to challenge the loss of status are limited, and if ever a preliminary question is referred, it is highly unlikely that the ECJ will apply its *Rottmann* doctrine to loss of EU citizenship as a result of Brexit. As Mindus acknowledges, it would imply a decoupling of nationality and EU citizenship, which from a democratic point of view is not a decision for the ECJ to make.<sup>21</sup>

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15 See the conclusions with respect to acquired rights in *Brexit: Acquired Rights* (n 12) 25–8, and J-C Piris, ‘Should the UK Withdraw from the EU: Legal Aspects and Effects of Possible Options’ Foundation Robert Schuman Policy Paper, *European Issues* (5 May 2015) nr. 355.

16 Case C-135/08 *Janko Rottmann v. Freistaat Bayern* ECLI:EU:C:2010:104.

17 *ibid* para 42.

18 See P Mindus, *European Citizenship after Brexit* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842500), 16.

19 See R de Groot, ‘Survey on the Rules on Loss of Nationality in International Treatises and Case Law’ (August 2013) 57 *CEPS Paper in Liberty and Security in Europe* 20.

20 J Vidmar argues that this is too broad a reading of the ECJ’s citizenship doctrine and that the Court in *Rottmann* continued to subordinate EU citizenship to citizenship of a Member State: ‘The Scottish Independence Referendum in an International Context’, (2014) 51 *CYIL* 259–88, 280–1.

21 Mindus (n 18) 20–3.

Beyond the link between EU citizenship and nationality, primary law in its current state might offer protection to UK citizens having children with the nationality of an EU Member State. The *Zambrano*<sup>22</sup> case law might apply in those ‘exceptional cases’ where denial of residence rights to the parents would force the children to leave the territory of the Union.<sup>23</sup> Yet in some Member States, such as the Netherlands, the interpretation of that case law is very restrictive. Dutch authorities presume that the children are not forced to leave the territory of the Union in cases where one of the parents enjoys legal residence in the Netherlands or is Dutch, and can take care of the children – unless it is proven by the claimant that the legally residing or Dutch parent is not capable of taking care of the children.<sup>24</sup> The highest Dutch Court in social security matters, the Centrale Raad van Beroep, referred preliminary questions on the compatibility of the strict Dutch interpretation with Article 20 TFEU.<sup>25</sup>

In sum, EU primary law offers little help in securing residence rights for British citizens in the EU. Those who are family members of an EU national living in the state of nationality will have to rely on national law. Of course Member States are bound by the European Court of Human Rights (ECHR), and Article 8 of the Convention can offer protection, especially where UK citizens have acquired a right of permanent residence based on Article 16 of Directive 2004/38.<sup>26</sup> In the *Kurić* case, the applicants were citizens of the former Socialist Republic of Yugoslavia who lost their permanent residence in Slovenia following the independence of Slovenia. In that case the Court confirmed that decisions ‘in the immigration sphere can in some cases amount to interference with the right to respect for private and family life’ and it ‘must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of private life within the meaning of Article 8’.<sup>27</sup> It is definitely true that this *Kurić* doctrine may offer protection after Brexit. However I doubt whether it helps all persons who have lawfully established residence

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22 Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* ECLI:EU:C:2011:124.

23 See e.g. Case C-256/11 *Murat Dereci* ECLI:EU:C:2011:734, ro 67.

24 *Vreemdelingencirculaire*, B10, Afdeling 2.2.

25 Case C-133/15 *H.C.Chavez-Vilchez e.a.*, pending; Opinion of AG Szpunar of 8 September 2016.

26 Directive (EC) 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77, art 16. See also Piris (n 15) 10.

27 Case *Kurić and Others v Slovenia* (13 July 2010), Application No. 26828/06, paras 351 and 352.

prior to Brexit to retain their residence, as some seem to imply.<sup>28</sup> In the words of Vidmar, the *Kurić* doctrine states that ‘once you have legally established *permanent* residency, you retain the right of residence even if the legal status of either your home or your host state changes, and, as a result of this change, your new citizenship status alone would no longer give you a right to reside’.<sup>29</sup> Thus in any event the doctrine would not apply to those who have not yet acquired the right to permanent residence, and might imply a weaker position for those who recently decided to move abroad, arguably for the most part young people. As the *Kurić* doctrine is not linked to nationality, it will apply to third-country national family members of UK citizens who have acquired the right to permanent residence. The doctrine would freeze existing rights, and its protection is territorially restricted. It does not cover the right of free movement within the EU.

However, other routes to safeguard rights based on former EU citizenship in case of withdrawal are proposed, some of them decoupling citizenship from nationality. In contrast to an ECJ decision decoupling citizenship and nationality, these proposals would show more democratic legitimacy due to the actors putting them forward.

A first proposal to decouple nationality and citizenship seems to be inherent in the ‘European associated citizenship’, guaranteeing post-Brexit residence rights for UK citizens. It is the first proposal included in a formal text, notably in a proposed amendment to a Resolution of the European Parliament on possible evolutions of and adjustments to the current institutional set-up of the European Union. This citizenship would include movement and residence rights, and a right to vote for the European Parliament.<sup>30</sup> The idea seems sympathetic, but several objections can be made, not in the least that such citizenship would be subverting the political autonomy of the UK to exit the EU.<sup>31</sup> In the end, the amendment was withdrawn

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28 See Mindus (n 18) 14; G Marrero González, *Civis Europaeus Sum? Consequences with Regard to Nationality Law and EU Citizenship Status of the Independence of a Devolved Part of an EU Member State* (Wolf Legal Publishers 2016) 206.

29 Vidmar (n 20) 283. My italics.

30 Amendment 882 to the draft Resolution on Possible evolutions of and adjustments to the current institutional set-up of the European Union, AFCD/8/02315, 9 November 2016, is formulated as follows: ‘Advocates to insert in the Treaties a European associate citizenship for those who feel and wish to be part of the European project but are nationals of a former Member State; offers these associate citizens the rights of freedom of movement and to reside on its territory as well as being represented in the Parliament through a vote in the European elections on the European lists.’

31 See e.g. A Yong, ‘The Problems Associated with Associate Citizenship of the EU’ *EUtopiaLaw* (18 November 2016) <https://eutopialaw.com/2016/11/18/the-problems-as-sociated-with-associate-citizenship-of-the-eu/>.

and does not figure in the final text of the Resolution, adopted on 16 February 2017. However, it was back on the table to be included in a Resolution defining the European Parliament's position on the Brexit agreement.<sup>32</sup> The Resolution adopted on 5 April 2017 does indeed refer to 'association' for a future relationship between the EU and the UK, but is less outspoken on citizenship. It proposes that the EU-27 'examine' how to address the concerns of UK citizens that they will lose rights linked to EU citizenship 'within the limits of Union primary law whilst fully respecting the principles of reciprocity, equity, symmetry and non-discrimination'.<sup>33</sup> The concept of 'associated citizenship' has disappeared, but could reappear once negotiations on a future relationship start.

Secondly, emancipating the concept of EU citizenship from the concept of Member State nationality, at least in the event of a Member State withdrawing from the European Union, is also the aim of the citizen's initiative 'EU Citizenship for Europeans', registered by the Commission on 22 March 2017.<sup>34</sup> Surprisingly, the Commission considers the proposal not to fall manifestly outside the scope of the Commission's powers to initiate legislation.<sup>35</sup> However, if one compares the annex to the proposed citizens' initiative with the Commission decision, it turns out the Commission gives a slight twist to the proposal. It considers that there is no legal basis in the treaties empowering EU institutions to adopt a legal act aiming at granting EU citizenship to persons not holding the nationality of a Member State of the Union, but that it may propose a legal act conferring certain similar rights to those linked to EU citizenship on citizens of a State that has withdrawn from the Union.

Thirdly, other non-state actors might try to influence the negotiating process by lobbying the negotiating parties for a guarantee

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32 Jon Stone, 'EU Negotiators Will Offer Brits an Individual Opt-In to Remain EU citizens, Chief Negotiator Confirms' *The Independent* (9 December 2016) <http://www.independent.co.uk/news/uk/politics/brexit-eu-citizenship-keep-freedom-of-movement-guy-verhofstadt-chief-negotiator-opt-in-passports-a7465271.html>.

33 EP Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593 (RSP)), provisional edition, points 22 and 27.

34 Commission Decision of 22 March 2017 on the proposed citizens' initiative entitled 'EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis', C(2017) 2001 final. See also the website of the Commission on the Citizens' Initiative <http://ec.europa.eu/citizens-initiative/public/welcome>.

35 A requirement for registration included in art 4(2)(b) of Regulation 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJEU 2011, L65/1. Registration of another Brexit related citizens' initiative, 'Stop Brexit', inviting the Commission to propose a legal act that should prevent Brexit, has been refused



of residence rights. One could think about the network of major European cities, which influences and works with the EU institutions to respond to ‘common issues that affect the day-to-day lives of Europeans’.<sup>36</sup> As the level of governance closest to the citizens, they are probably well informed about the concerns citizens have about Brexit and are in a good position to raise their concerns with national and EU policy makers.<sup>37</sup> On 17 November 2017, the mayors of the cities in the network published an open letter on ‘rethinking Europe’ in which they stated that they still see a future for UK cities in the network.<sup>38</sup>

### 3. Residence rights for UK nationals in the EU based on secondary EU law

The Citizens’ Rights Directive<sup>39</sup> is in principle not applicable to UK citizens post Brexit, but it can offer protection to those who reside with an EU citizen in a Member State other than that of the nationality of the EU citizen. As a family member of an EU citizen, UK nationals have a derived right of residence. Their position will largely remain the same. However, they will lose some rights under Articles 12 and 13 of the Directive: their right to continue residence in the event of death or departure of the EU citizen, or in the event of divorce or termination of the relationship will require a certain period of residence in the host state with the EU citizen.<sup>40</sup>

The change of status from EU citizen to third-country national (TCN) with a residence right in a Member State based on secondary EU law can have dramatic consequences for daily life. Existing secondary EU law on access and residence for TCNs does not include a general

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for registration because it manifestly falls outside the scope of the Commission’s powers to submit a proposal, Commission Decision of 22 March 2017 on the proposed citizens’ initiative entitled ‘Stop Brexit’, C(2017), 2000 final.

36 Eurocities, ‘About Us’ [http://www.eurocities.eu/eurocities/about\\_us](http://www.eurocities.eu/eurocities/about_us).

37 The city of Amsterdam and Expat Center Amsterdam have created a Brexit information point to help answer questions UK nationals living in the Netherlands might have; see <https://www.iamsterdam.com/en/expatcenter/expats/brexit-info-point>. See also the concerns British citizens in Amsterdam expressed in a meeting with the mayor on 18 July 2016 <http://www.iamsterdam.com/en/expatcenter/expats/brexit-info-point/brexit-meeting-report>.

38 Eurocities, ‘Open Letter: Work with Cities to Rethink Europe’ (17 November 2016) <http://eurocities.eu/eurocities/news/Open-letter-work-with-cities-to-rethink-Europe-WSP0-AFGP9B>.

39 Directive 2004/38 (n 26).

40 At least one year in case of death or departure under art 12(2), and after a relationship of at least three years, including one year in the host state under art 13(2).

rule of residence equal to Directive 2004/38. Hence, access and residence rights vary in conditions according to legal categories (worker, researcher, highly skilled, etc.). Protection of social security rights also varies. Below, the article will address the relevant sectoral directives, but it will start with residence rights based on the Family Reunification Directive<sup>41</sup> and the Long-Term Residents Directive.<sup>42</sup> At first sight these two directives seem to offer better protection to residence rights of UK citizens post Brexit. However, it is questionable whether these TCN residence rights can be applicable at the moment of the UK's exit.

UK citizens forming a family with TCNs might rely on the Family Reunification Directive, notably when the TCN family member has an autonomous right of residence and can act as sponsor for family reunification.<sup>43</sup> Though applications for family reunification shall be submitted and examined when family members reside outside the territory of the state where the sponsor resides, Member States may derogate from that provision 'in appropriate circumstances' and could accept applications for UK family members already residing in the EU.<sup>44</sup> The Directive only applies to sponsors and family members who are TCNs.<sup>45</sup> Thus, applications can only be made post Brexit. Conditions for family reunification differ from those applicable to EU citizens: according to the Directive, Member States may require that the sponsor holds a residence permit with a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence.<sup>46</sup> The sponsor must have appropriate accommodation, sickness insurance and stable and regular resources. Member States may impose integration measures on TCN family members.<sup>47</sup> Integration tests are applicable in a number of Member States, and could form an obstacle for UK nationals when trying to secure residence. However, Member States are free to adopt or maintain more favourable provisions.<sup>48</sup> One might suggest that Member States should refrain from strict conditions on sponsors and integration tests for family members in the case of UK citizens. Granting more

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41 Directive (EC) 2003/86 on the right to family reunification [2003] OJ L 251/12.

42 Directive (EC) 2003/109 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

43 Probably most TCN family members derive their residence rights from UK citizens under the citizens' right Directive (n 26). Post Brexit, they will lose these derived rights of residence.

44 Art 5 para 3.

45 Art 3 para 1.

46 Art 3 para 1. Under art 8 Member States may require the sponsor to have lawfully resided in their territory for a period of two years.

47 Art 7.

48 Art 3 para 5.

favourable treatment to a single category of TCNs seems incompatible with equal protection before the law and a prohibition of discrimination as provided for by various human rights treaties,<sup>49</sup> and should be objectively justified.<sup>50</sup>

UK citizens who have resided five years or longer in an EU host Member State have a right to permanent residence following Directive 2004/38.<sup>51</sup> Loss of EU citizenship includes loss of that residence right. Directive 2003/109 would allow these UK nationals to apply for the permanent long-term resident status and obtain a residence permit with a validity for five years that is automatically renewable, upon application if required.<sup>52</sup> The status can be withdrawn only on grounds of public policy, or in the event of twelve months' absence from the territory of the Union.<sup>53</sup> A long-term resident has rights to equal treatment (notably with respect to access to the labour market), protection against expulsion and under certain conditions a right to reside in other Member States.<sup>54</sup> These rights come close to those of EU citizens residing in another Member State than that of their nationality. Five years of previous legal residence and financial conditions give access to the status, and Member States may – and do – impose integration tests. The Directive precludes a seamless transposition of residence as EU citizen into residence as long-term resident, because only TCNs can apply for the status. In preparation for Brexit, UK nationals can take integration tests, but only post Brexit can they apply for a long-term resident status.<sup>55</sup> Unless measures are taken to remedy this gap, for the short period between application and grant of the status<sup>56</sup> UK nationals will have to rely on national law to secure their residence. As stated above, national law would have to be applied in conformity with the *Kurić* doctrine.

UK nationals who have resided for fewer than five years in another Member State and are not eligible for family reunification might want to rely on several other directives that regulate access to the

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49 E.g. art 26 of the UN Covenant of Civil and Political Rights provides that the law 'shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as (...) national or social origin (...).'

50 One could think of 'closer affinity' or 'closer historical, cultural and spiritual bonds' with the people of the Member State concerned, e.g. arguments justifying preferential naturalization; see e.g. K Hailbronner, 'Nationality in Public International and European Law' in R Bauböck, *Acquisition and Loss of Nationality, Vol I: Comparative Analyses* (Amsterdam University Press 2006) 42–3.

51 Art 16.

52 Art 8 para 2.

53 Art 9 and 12.

54 Arts 11–16.

55 The Directive does not apply to EU citizens, art 2(b) and art 3 para 1.

56 Art 7 para 2 sets the maximum duration of that period at six months.

labour market of Member States and accompanying residence rights: the Blue Card Directive,<sup>57</sup> the Intercorporate Transfer Directive,<sup>58</sup> the Directive for Researchers, Students and Au Pairs,<sup>59</sup> and the Directive for Seasonal Workers.<sup>60</sup> Note should be taken that Article 79(5) TFEU explicitly recognizes the right of Member States to determine volumes of admission of TCNs to their labour market, and all mentioned directives include a similar provision.<sup>61</sup> All directives allow only TCNs to apply for residence based on the respective directive. Again, UK nationals can only apply post Brexit. Not every status granted under the mentioned directives results in the possibility to apply for long-term resident status, because some of them have a validity that is restricted in time (seasonal workers,<sup>62</sup> intracorporate transfers,<sup>63</sup> and in principle also researchers, students, interns and au pairs). Researchers and students have nine months to find a job after completion of research or study,<sup>64</sup> subject to priority for EU citizens or long-term residents residing in the relevant Member State.<sup>65</sup> The residence period of students during their studies only counts for half in the calculation of the five years' legal residence period giving access to long-term residence status.<sup>66</sup> The Blue Card and the Intracorporate Transferee status specifically focus on the highly skilled and include a right of residence for family members under a more relaxed regime than that of the Family Reunification Directive, but Member States may impose integration tests for family members.<sup>67</sup> The Blue Card can be renewed and in itself provides a basis for continuous residence, but the residence status is less secure than that of long-term residents. Blue Card holders that have resided for five years in the EU may apply for long-term resident status.

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57 Directive (EC) 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] L155/17.

58 Directive (EU) 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] L157/1.

59 Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] L 132/21. The Directive must be transposed on 23 May 2018.

60 Directive (EU) 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] L 94/375.

61 Directive 2009/50 art 6, Directive 2014/66 art 6, Directive 2016/801 art 21 para 5, and Directive 2014/36 art 7.

62 Art 14 limits the period of stay to a maximum of nine months in any twelve-month period.

63 Art 12 para 1 limits the duration of residence to a maximum of three years for managers and specialists and one year for trainee employees.

64 Art 25 para 1.

65 Art 21 para 5.

66 Art 4 para 2.

67 Directive 2009/50 art 15, and Directive 2014/66 art 19 and art 5 para 1(d).

UK cross-border workers probably will need permits in two separate Member States post Brexit. A UK national living in Belgium and working in the Netherlands will have to obtain a residence permit in Belgium and access to the labour market in the Netherlands. A UK national living in the Netherlands and working in Belgium will have to obtain a residence permit in the Netherlands and access to the labour market in Belgium. The Long-Term Residents Directive leaves regulation of cross-border work to national law.<sup>68</sup>

In conclusion, secondary EU law offers limited possibilities for transforming residence as EU citizen into a TCN residence status with comparable security of residence, unless UK nationals can derive residence rights as family members of EU citizens. TCN residence status under EU law comes with additional conditions including integration tests. Furthermore, a transposition of residence status cannot be realized from one day to the other, whereas UK nationals will lose their residence rights as EU citizens from one day to the other. To fill the gap, the EU legislature could adopt an amending directive with restricted temporal validity, including a provision that allows UK citizens residing in the EU at a determinate date to apply for a TCN resident status even if they are not (yet) TCNs. In the event no agreement is reached in the Brexit negotiations, EU law as it stands would transform legally residing EU nationals into unlawfully residing TCNs who can only start regularizing their residence post Brexit.

Surprisingly, citizens themselves have found another instrument of secondary legislation that might bring with it residence rights, if slightly amended. The Choose Freedom Campaign, initiated by a British engineering designer, is a citizen's initiative inspired by Regulation 1417/2013, on the basis of which passports are sometimes issued to diplomats and officials, demanding a European passport for all citizens. The European Commission has registered the initiative on 11 January 2017, and the collection of signatures is ongoing. The initiative begs 'the Commission to delineate a method by which all Europeans of good standing may be granted a signal & permanent instrument of their status and of their right to free movement throughout the Union by way of a unified document of *laissez-passer* as permitted by Article (4) of Council Regulation 1417/2013, or by another method'.<sup>69</sup> As has been

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68 Art 14 para 5.

69 European Commission, 'European Free Movement Instrument' <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000001/en?lg=en>.

argued by Garner,<sup>70</sup> Council Regulation 1417/2013 is rather limited in its scope and does not seem to provide a basis for creating a mechanism for free movement, because it limits the possibility to provide passports to ‘members of the institutions of the Union’ and ‘special applicants’ – defined in Annex II of the Regulation as ‘family members’ of a member of an institution. Therefore it seems likely that ‘another method’ has to be used in order to achieve a free movement mechanism, either through amending the scope of the Regulation or through the creation of new legislation providing similar rights as those linked to EU citizenship to citizens of a Member State that has withdrawn. In essence, this initiative contains an invitation to the Commission to propose the same legal act as requested by the citizens’ initiative EU Citizenship for Europeans discussed above.<sup>71</sup>

#### **4. No residence status for EU nationals in the UK based on EU law?**

Needless to say, EU law as such will not offer any residence basis for EU nationals in a post-Brexit UK. Their residence rights might depend on how the UK itself decides to treat EU law post Brexit. The UK government has announced that it will introduce a ‘Great Repeal Bill’ in 2017, that will repeal the European Communities Act 1972 and that this will take effect on the day of the UK’s exit. The Bill will also transfer all EU law currently in force onto the UK statute book.<sup>72</sup> Post Brexit, national law transposing Directive 2004/38, the Immigration (European Economic Area) Regulations 2006 and subsequent changes thereof are amenable to change or repeal. Mention should be made that the UK does not participate in the directives applying to TCNs. Therefore, the Great Repeal Bill will probably not have much influence on UK migration policy with respect to TCNs.

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70 O Garner, *The European Citizens’ Initiative on a European Free Movement Mechanism: a New Hope or a False Start for UK Nationals after Brexit?* (23 February 2017) <http://europeanlawblog.eu/2017/02/23/the-european-citizens-initiative-on-a-european-free-movement-mechanism-a-new-hope-or-a-false-start-for-uk-nationals-after-brexit/>. As Garner signals, the initiative’s use of ‘Europeans of good standing’ is quite ‘opaque and clandestine’.

71 (n 34).

72 See e.g. S Douglas-Scott, ‘The “Great Repeal Bill”: Constitutional Chaos and Constitutional Crisis?’, UK Const L Blog (10 October 2016) <https://ukconstitutionallaw.org/>.

## 5. Residence based on national law

Those who do not want to wait for the result of the negotiations would be well advised to secure their right of residence on the basis of national law, or via naturalization.

Arguably, naturalization offers the best guarantee for security of residence in the future. Many countries require qualified forms of residence, e.g. legal or permanent residence or even a period of residence after acquisition of permanent residence.<sup>73</sup> Many countries impose citizenship tests, and levy sometimes quite high fees. Not all citizens whose residence rights are affected by Brexit would qualify for naturalization. Here, actors on the national level could help to accommodate them. An example can be found in the legislative proposal tabled by the German Green Party to facilitate the naturalization rules for UK citizens residing in Germany.<sup>74</sup> The proposal not only shortens the required period of legal residence, but also enables dual nationality and simplifies the integration test. An example of lobbying for fast-track naturalization is provided by the seven-page memo of November 2016 addressed to the European Commission and sent by a high official of the European Commission asking to put pressure on Member States to facilitate the process of obtaining dual nationality.<sup>75</sup>

Naturalization comes with certain disadvantages as well. UK citizens naturalizing in one of the EU Member States might have to renounce their British nationality, depending on national law. EU citizens who apply for British citizenship can keep their EU Member State nationality according to British law,<sup>76</sup> but might lose it due to the laws of the state of their original nationality.<sup>77</sup> Loss of original nationality can make visits to family in the state of original nationality a little less easy. Visa requirements might be introduced for UK citizens

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73 For an overview, see C Dumbrava, *Nationality, Citizenship and Ethno-Cultural Belonging: Preferential Membership Policies in Europe* (Palgrave Studies in Citizenship Transitions, 2014) 34–6.

74 Gesetzentwurf der Abgeordneten Volcker Beck (Köln), Özcan Mutlu, Luise Amtsberg, Kai Gehring, Katja Keul, Maria Klein-Schmeink, Renate Künast, Monika Lazar, Irene Mihalic, Dr Konstantin von Notz, Claudia Roth (Augsburg), Hans-Christian Ströbele und der Fraktion Bündnis 90/Die Grünen, *Entwurf eines Gesetzes zur Erleichterung der Einbürgerung und zur Ermöglichung der mehrfachen Staatsangehörigkeit*, Deutscher Bundestag, 18. Wahlperiode, Drucksache 18/5631 (23 July 2015).

75 The memo can be accessed via Tara Palmeri, 'Top UK Eurocrat Demands Belgian Citizenship for Brits' (14 November 2016) <http://www.politico.eu/article/jonathan-faull-brexit-task-force-top-uk-eurocrat-demands-belgian-citizenship-for-brits/>.

76 British Nationality Act 1981, s 6 and sch 1.

77 For an overview, see C Dumbrava (n 73) 63–4.

visiting the EU, also for visits shorter than three months.<sup>78</sup> And the other way around, post Brexit the UK might also introduce visa requirements for EU citizens through amendment of Regulation 11 of the Immigration (European Economic Area) Regulations 2006. Loss of original nationality might also have effects in other areas, such as the applicable laws on succession.<sup>79</sup>

Compared to naturalization, acquiring a residence right based on national law in order to secure residence seems less drastic. But here also, countries often require periods of residence, financial guarantees, such as income and housing requirements, and integration tests.

National immigration law is partly determined by EU secondary legislation, as described above. However, the UK does not participate in these instruments. British immigration rules are highly complex. A rudimentary overview in the House of Lords report *Brexit: Acquired Rights*<sup>80</sup> shows how the points based system results in several 'tiers' of visa category, each with sub-categories. The system also results in different requirements for settlement, such as 'accelerated settlement' for investors and entrepreneurs. Persons who have been granted indefinite leave to remain<sup>81</sup> have access to the labour market, education and social security on the same term as UK citizens. At present, EU family members of UK citizens are not eligible for a 'family of a settled person' visa. That might change post Brexit. The visa is valid for two years and six months, and can be renewed. It gives access to work and study in the UK, but no access to social assistance. Furthermore, other routes to settlement exist for partners of UK citizens, and these might include financial and language conditions.

National immigration laws providing purely national permanent residence permits not affected by EU law generally require periods of residence, sufficient means of subsistence, and integration tests – also in case of non-national partners of nationals. As with residence based on EU secondary legislation, it is not always possible for UK citizens to apply for a national residence permit while still being EU citizens, as they have

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78 It depends on the listing of the United Kingdom on annex I or II of Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] L81/1.

79 The Brexit in itself might have few consequences for the application of succession law, because the UK does not participate in Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] L201/107.

80 House of Lords (n 12) 13.

81 For which persons without privileged access can apply after ten years of legal residence.



no direct individual concern in doing so. National authorities might want to reconsider the modes of application of national immigration law to UK citizens, as their individual concern in national residence permits has increased now that Article 50 TEU is triggered.

## 6. Beyond residence: rights to social security

The approach EU secondary legislation takes towards TCNs, according to legal categories as described above, results in fragmented rights of social security. Each directive has its own exceptions concerning the right to equal treatment for social security benefits.<sup>82</sup> Article 11 of the Long-term Resident Directive and Article 12, paragraphs 1 and 4 of the Single Permit Directive<sup>83</sup> provide for equal treatment in employment conditions, such as salary, dismissal, health and safety at work, and education and vocational training. Long-term residents have a right to study and maintenance grants according to national law, while the Single Permit Directive allows member states to exclude workers from these benefits.<sup>84</sup> Long-term residents enjoy social security, social assistance and social protection as defined in national legislation, but in respect of social assistance and social protection Member States may limit equal treatment to 'core benefits'.<sup>85</sup> The Single Permit Directive provides for equal treatment with respect to branches of social security as defined in Regulation 883/2004,<sup>86</sup> with the possibility for Member States to exclude those who have been employed for a period of less than six months.<sup>87</sup> Family benefits are only granted if family members live (with the worker or independently) in the relevant Member State.<sup>88</sup> And the Single Permit Directive provides for equal treatment of exportation of pension rights (so according to the same conditions and tariffs as applicable to nationals), but not with respect to other

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82 For a more extensive analysis of the fragmented rights see H Verschuere, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: an Incomplete Patchwork of Legal Protection' (2016) 18 EJML 373–408.

83 Directive (EU) on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] L343/1. The directive does not regulate residence rights, it regulates the legal position of lawfully residing third-country nationals.

84 Art 12 para 2(a)iii.

85 Art 11 para 4.

86 Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L166/1.

87 Art 12 para 1(e) and para 2(b).

88 Recital 24 of the preamble.

social security rights.<sup>89</sup> The Single Permit Directive is not applicable to long-term residents who therefore enjoy less protection because of the possible limits to equal treatment with respect to the ‘core benefits’ of social assistance and social protection. However, all directives include a clause enabling Member States to introduce or maintain more favourable provisions.<sup>90</sup>

The Blue Card Directive also includes the right to equal treatment in social security, but with possible restrictions on equal treatment in study and maintenance grants and procedures for obtaining housing.<sup>91</sup> The Directive provides for equal treatment of exportation of pension rights.<sup>92</sup> Post Brexit, only national law will apply in the United Kingdom. As mentioned above, the UK does not participate in the TCN migration directives. At present, equal treatment of EU nationals in the field of social security is based on the Social Security (Persons from Abroad) Amendment Regulations that determine that persons residing in the United Kingdom on the basis of Directive 2004/38 are not considered ‘persons from abroad’. Post Brexit, Regulation 883/2004 will only apply if it is transformed into national law under the Great Repeal Bill.<sup>93</sup> The Regulation now ensures equal treatment with respect to social security rights and receipt of pensions for EU citizens in the UK, but also ensures that UK citizens in Spain receive their pensions. If the UK decides not to transform the Regulation into national law, and in absence of an agreement between the EU and the UK, EU citizens will only have access to social security benefits such as incapacity, child and housing benefits if they have indefinite leave to remain.<sup>94</sup> They will receive no child benefit for children not living in the UK. Whether they will continue to receive pension rights they accumulated elsewhere in the EU will depend on the national law of the State in which they acquired these rights. British pensioners living in the EU or EU citizens having acquired a state pension in the UK will receive their state pension on the basis of national law, but it might be frozen.

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89 Art 12 para 4.

90 Verschuere (n 82) 395–6, questions the compatibility of the exclusion of the entitlement to benefits, such as family benefits or even unemployment benefits, with other European and international instruments on the rights of labour migrants or on human rights in general. That question is outside the scope of this article.

91 Art 14.

92 Art 14 para 1(f).

93 It would require an adaptation of the text of the Regulation, that at present applies to persons living in ‘Member States’.

94 For a broader overview see E Guild, ‘Brexit and Social Security in the EU’, CEPS Commentary (17 November 2016) <https://www.ceps.eu/publications/brexit-and-social-security-eu>.

## 7. Final remarks

An inventory of the possibilities for securing residence and social security rights post Brexit based on current law reveals that many people will lose out short of inclusion of their rights in a withdrawal agreement. The Brexit negotiations will turn a substantial number of citizens under EU law into objects of negotiation. However, actors other than the negotiating parties have come forward in an attempt to secure citizens' rights post Brexit. Some of these actors are in a position to lobby the negotiating parties. Organizations defending citizens' rights, such as Expat Citizen Rights in EU, and local governments united in networks such as Eurocities, are well aware of the concerns due to their close contact with citizens. They can voice these concerns and bring them to the attention of the negotiators. Other actors are directing their actions for securing citizens' rights at national level. The proposal to change nationality law tabled by the German Green Party is an example thereof. Furthermore, non-state actors target the European level to take action and protect citizens' rights. The obvious actor here is the European Parliament, and it hints at an 'association' with reciprocal rights for citizens. Its position in Brexit could be influential since the European Parliament has to give its consent to a withdrawal agreement under Article 50 TEU. Citizens themselves, supporting citizens' initiatives under Article 11(4) TEU, have stepped forward in an attempt to protect their rights. The two initiatives discussed above demand the Commission to propose legislation that will give former EU citizens certain rights similar to those of EU citizens. The effectiveness of these initiatives is however questionable, since obtaining the required number of signatures is in itself no guarantee that the Commission will undertake action.

All of the above shows that the concerns people have about losing out from Brexit are not without reason. Furthermore, it shows that the Brexit vote has inspired activities that go beyond the occasional lobbying for a particular outcome of the negotiation process as is a normal phenomenon in foreign relations.<sup>95</sup> Taken together, all these activities seem to show that at least several actors want the EU to take Article 3 TEU seriously and not only offer an area of freedom, security and justice to *its* citizens, but also to 'protect *its* citizens' in its relations with the wider world.<sup>112</sup> European Commission (n 76):

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<sup>95</sup> Examples of lobbying within the UK can be found in a joint open letter from the British Chambers of Commerce and Trade Unions to Prime Minister May, calling on her to make a 'bold unilateral move' and guarantee EU workers a right to remain in the UK post Brexit.