

## The situation and rights of EU citizens in the UK

### Prepared remarks by Jonathan Portes to the European Parliament joint committee hearing, Thursday 11 May

1. The current mess was entirely predictable and frequently predicted. I and others pointed out during the referendum campaign itself that the assurances from Vote Leave that EU citizens living in the UK and Brits living elsewhere in the UK had nothing to worry about was either ignorant, deceptive or both; and shortly after the referendum I set out why resolving this issue would be both legally and administratively complex.
2. In particular, I noted the huge administrative difficulties associated with verifying rights to residence for EU citizens in the UK, regardless of whatever cut-off date and qualifying period is chosen; and I pointed in particular at the complexities around the issue of “family rights” (in particular, the right to be joined by spouse and some family members).
3. Unfortunately, since then not only have the UK and the EU-27 done little or nothing to resolve these issues, leaving those affected and their families in limbo, they have in some respects positively made things worse. The EU-27, (for broader political reasons) refused to either make a clear, high-level political declaration or to engage in technical discussions, even informally; either would have at least conveyed a sense of purpose and urgency.
4. Moreover, the EU-27’s refusal to engage gave the UK cover to claim that it could do nothing until negotiations began. This claim was disingenuous at best; in fact it was a convenient excuse to avoid addressing either the administrative complexities or the difficult political questions, not of whether EU nationals would be allowed to remain in the UK, but on what terms and with what rights.
5. Still worse, the unconscionable treatment of some EEA nationals who sought to register their right to permanent residence has, understandably, greatly exacerbated the concerns of this group as a whole (for example, the unrealistic and legally questionable requirement for some groups to demonstrate that they held comprehensive sickness insurance during their period of qualifying residence). There is absolutely no reason to believe that this is a deliberate strategy with respect to EEA nationals in particular, or specifically related to Brexit; non-EEA nationals who come into contact with the UK immigration system have long reported similar experiences.
6. This reflects a very long-standing “refusal” culture, where it is regarded as a positive result to find technical excuses to refuse meritorious applications, exacerbated by

political pressure over recent years to reduce immigration by any legal means, as well as Home Office under-resourcing. Moreover, the recommitment by the UK government to an arbitrary target for net migration – including both non-EEA and EEA nationals from outside the UK – means there is little reason to expect change in the near future. This has undoubtedly poisoned the atmosphere, and ensured that there is, with good reason, very little trust on the part of EEA nationals in the UK, the Commission, or EU-27 governments in the UK government’s willingness to deliver on any promises made.

7. Given all this, the Commission’s negotiating guidelines, assuming they are approved by the Council, are a welcome positive step, and offer an opportunity to press the “reset” button on this dossier. In particular, they call the UK government’s bluff, by putting forward a detailed set of propositions that would broadly guarantee all existing rights to EU-27 nationals and UK residents in the rest of the EU (presumably whatever agreement is reached would also be extended to the EEA and Switzerland). This, of course, is precisely what Boris Johnson and Vote Leave promised.
8. In particular, the EU proposals would mean that all those resident before Brexit Day would have their existing rights guaranteed indefinitely. This would cover, inter alia the right to permanent residence (for those with 5 years residence; those with less would presumably retain the right to reside and would qualify for permanent residence when they had attained 5 years), the rights to benefits as now, access to healthcare, and family rights. At the same time all sides would agree to streamline and improve their administrative processes. Crucially, these rights would be protected indefinitely (that is, for the lifetime of those resident at Brexit Day) by continuing ECJ jurisdiction. It should be noted that although this proposal is far more specific than previous statements on either side, it still leaves a number of issues open, in particular with respect to those with interrupted periods of residence.
9. The UK’s position remains unclear. The UK has consistently stated that it wants to guarantee residence rights “on reciprocal basis”, but has been vague at best on the question of when any cut-off date should be, and on the legal guarantees attached to other rights, especially family rights. It appears to want a political commitment to residence rights, and perhaps to access to healthcare, on a reciprocal basis of reciprocity, but with little or no detail on other important rights, and no ongoing enforcement mechanism beyond domestic law.
10. In my view, the EU-27’s proposals represent a good starting point. However, it would be sensible for the EU-27 to recognise the UK’s legitimate concerns in two areas.
  - First, at present EEA nationals have more rights than UK nationals as regards marriage to non-EEA spouses; they are not subject to the “income threshold” (as well as some other requirements) that makes it very difficult for some UK nationals to secure a spousal visa. It will be very difficult for the UK government to explain why, post-Brexit, EEA nationals continue to have more rights than UK

ones. While this could be resolved easily, of course, by levelling up the rights of UK nationals, the UK government is unlikely to be attracted to this.

- Second, continuing the indefinite jurisdiction of the ECJ over the UK is unlikely to be acceptable. For the reasons set out above, the desire of EU-27 governments for some “adult supervision” of the UK system is entirely understandable. However, allowing a court in which the UK is not represented to continue to make important elements of domestic law for several million people for an indefinite period - possibly up to 100 years for children born to EEA national parents in the next two years - does not appear reasonable.

11. Resolving this issue will require both immediate action from both sides, and a constructive approach to detailed negotiations. I suggest the following immediate actions to be taken when negotiations begin:

- an immediate joint political declaration, making clear that any new system will enable, at a minimum, all EU citizens resident in UK on Article 50 Day and all UK citizens in EU to eventually acquire permanent residence; that neither EU nor UK countries will impose complex, bureaucratic restrictions; and that all existing rights will be guaranteed for an extended period post-Brexit. Without prejudging the eventual agreement, this would represent compromise on both sides, build confidence, reassure citizens, and create a constructive atmosphere for the detailed negotiations.
- Decoupling of this dossier from the other elements of the withdrawal agreement, in particular the issue of the UK’s financial obligations to the EU. This would not undermine the EU’s position that the principles of the withdrawal agreement need to be agreed before commencing talks on the future relationship, but would ensure that citizens’ rights were not held hostage to disputes over financial issues.
- The UK should, unilaterally, suspend the current process for permanent residence. It should set a target date for the introduction of a new system, which would use pre-populated administrative data as far as possible (for example, from HMRC systems), and then allocate necessary resources. It should announce that new criteria will not include the current burdensome and legally questionable requirements for comprehensive sickness insurance, will not require applicants to surrender their passports, and will shift the burden of proof as regards continuous residence from residents to the Home Office

12. Resolving the detailed issues described above will take time and will require goodwill and compromise. However, I believe that the outline of a possible deal acceptable to both sides already exists;

- All those resident on Brexit day who have at least 2 years of permanent residence (that is since Article 50 day) should be offered a new status under domestic immigration law. The qualifying criteria would be interpreted

liberally; that is, normally it would be sufficient simply to establish that the EEA national had entered the country to exercise their free movement rights at some point before Article 50 day, and was also resident on Brexit day – full evidence demonstrating continuous residence would not be required.

- All those with this new status would have all rights under EU law preserved for (say) 5 years after Brexit Day. At least for the UK, an independent enforcement mechanism, with representatives both of the EU-27 and UK legal systems, which would follow existing EU law and ECJ jurisprudence, but would be able to interpret the Article 50 agreement in relation to the specific issues covered.
- After the defined period, those with this status who were still resident (again, interpreted as above) would have the choice of acquiring citizenship of the country in which they were resident, in which case they would be treated identically to other citizens in all respects; or, permanent residence under domestic law on (at least) the same basis as other third country nationals, including at a minimum unrestricted work rights.
- All EEA states and the UK would commit (initially, at a political level) to eventual full recognition of dual citizenship with no adverse impacts (in some Member States this would require changes to domestic law); that is, no dual national would lose any rights in respect of their original citizenship as a result of acquiring citizenship of another country in the EEA or UK.

13. In conclusion, the EU-27 and the UK have a responsibility to citizens who in good faith chose to exercise their free movement rights. So far, they have lamentably failed. The start of the negotiations offers a chance to remedy that, but it will require good will and compromise on both sides, and a determination to put people before politics.

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