



Brexit and Loss of EU Citizenship: Cases, Options, Perceptions

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INTRODUCTION

Following the referendum on 23 June 2016, which yielded a narrow victory for the 'Leave' party,¹ much ink has been spilt on the legal consequences of Britain's vote to leave the European Union. Particular attention has been paid to the residence status of the millions of UK nationals residing elsewhere in the EU and EU citizens living and working in the UK. Yet, whilst the right to reside has been much discussed,² a topic that deserves further discussion is the consequences of 'Brexit' for European citizenship. This paper's aim is to consider the effect of Brexit upon the loss of EU citizenship as a status, both in terms of its practical effect and theoretical side effects.

Whilst free movement has strong ties to the market rationale of the EU and the movement of workers, European citizenship exemplifies other aspects of the EU integration project, such as the political one. As put by Shuibhne, it is the "complex machinery around the EU that make it a *polity*" that allows EU citizenship to be a viable concept where World Trade Organisation (WTO) or European Economic Area (EEA) citizenship would be 'absurd'.³ It encompasses not only free movement,⁴ but political rights for municipal and European Parliament elections,⁵ the right to consular protection in third countries,⁶ the right to participate in European Citizens' Initiatives,⁷ and the right to access the EU institutions.⁸ As a shadow of nationality,⁹ European citizenship is held by all citizens of a Member State, through birthright, marriage to a national of a Member State and acquisition of the citizenship of that state, or upon the accession of a state to the EU. Thus, it bestows numerous rights upon a vast number of people. Yet, whilst the acquisition of European Citizenship is common, Brexit will be the first time that a Member State has left the European Union and hence the first time that loss of citizenship must be considered in the context of withdrawal.

This paper focuses on three groups of current European citizens who are most at risk of a loss or 'downgrading'¹⁰ of citizenship rights following Brexit. First, UK nationals currently residing in another Member State; second, EU nationals currently residing in the UK; and, third, UK nationals living in the UK.

UK nationals currently residing in another Member State risk losing, along with EU citizenship, the right to remain in their country of residence. Those who have European citizen family members can, to some extent, rely on the Citizenship Directive, but those who do not may have to seek a TCN (third country national) long-term residence permit.¹¹

EU nationals resident in the UK, as has been amply considered in political and legal debates, will find themselves with an uncertain status in following Brexit. However, a specific group of them faces particularly harsh consequences from the perspective of loss of citizenship - those among them whose Member State of

¹ 52 per cent of voters voted to leave the European Union, whilst 48 per cent voted to remain a member.

² See, for example: G Marrero González, 'BREXIT, Consequences for Citizenship of the Union and Residence Rights' (2016) 23 MJ 5; F De Witte, R Bauböck and J Shaw, 'Freedom of movement under attack: Is it worth defending as the core of EU citizenship?' (EU Working Paper, RSCAS 2016/69); and J Shaw, 'Citizenship, Migration and Free Movement in Brexit Britain' (2016) 17 Ger. Law J 99.

³ N Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLR 1597.

⁴ Article 21 TFEU.

⁵ Article 22 TFEU.

⁶ Article 23 TFEU.

⁷ Article 24 TFEU, Article 11 TEU.

⁸ Article 24 TFEU.

⁹ Article 20 TFEU endows '[e]very person holding the nationality of a Member State' with European Citizenship.

¹⁰ D Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' (LSE 'Europe in Question' Discussion Paper Series, 2016).

¹¹ G Marrero González, 'BREXIT, Consequences for Citizenship of the Union and Residence Rights' (2016) 23 MJ 5.

origin does not allow dual nationality. Should they wish to remain in the UK long term, they may be forced to naturalise absent adequate safeguards in the Withdrawal Agreement. This would entail giving up their initial nationality, and with it their European citizenship and the associated rights.

Whilst the position of UK nationals resident in the EU and EU nationals resident in the UK is explicitly considered in the current Brexit negotiations and has been the subject of tailored proposals on both the UK and EU side,¹² the position of ‘static’ UK nationals is a secondary issue that will be dealt with in the second stage of the negotiations. Yet the perspective of their citizenship loss cannot be disregarded. ‘Static’ UK nationals will not only lose political rights, such as participation in local and EU elections and the right to participate in Citizens’ Initiatives, but will also lose the *choice* of whether to become mobile.¹³ An example of a particularly affected category of ‘static’ UK nationals is UK nationals under the age of 18, who were unable to vote in the referendum (despite some political pressure to lower the voting age)¹⁴ and are unlikely to have had the opportunity to exercise their European citizenship rights. These rights are now due to be taken from them without their participation in the decision.

The situations of individuals falling within these three categories are particularly troubling as they stand to lose not only their rights, but the very status of European citizenship as a result of Brexit. This paper intends to explore the options available to them.

Following a summary of our findings, the next section lays out the methodology and approach used in researching and writing this paper. The main body of the paper is then split into two sections. Part 1 presents the options potentially available to the aforementioned at-risk citizens. First, it lays out the policy options proposed outside the formal negotiations, with particular attention given to the ‘Associate Citizenship’ proposal and proposals presented as European Citizens’ Initiatives. Second, it presents international law options that might be relied on by those deprived of EU citizenship rights through the Vienna Convention on the Law of Treaties and the European Convention of Human Rights. The viability of these options is analysed. Third, potential Brexit-inspired reforms of EU citizenship as an institution are presented, with a focus on the decoupling of EU citizenship and Member State nationality. Finally, the current proposals from both the EU and UK side of the negotiations are laid out. Part 2 of the paper presents the findings of two sets of interviews with policy makers and stakeholders. It is intended to mirror Part 1, so follows a similar structure. First, the perspectives on the policy options proposed outside the formal negotiations are discussed. Second, the opinions of the interviewees on the options of UK nationals are presented. Third, the perspectives on potential reforms to EU citizenship are discussed. Fourth, the views of our interviewees on the current proposals from both sides are presented. Finally, other ideas relating to eased access to citizenship and the focus of the negotiations that emerged in our interviews are explained.

SUMMARY OF FINDINGS

Part 1 of this report is based on desk research and focuses on the options available to three particular groups of EU citizens most at risk of losing EU citizenship and the rights attached. These are: UK nationals living in

¹² European Commission, ‘Essential Principles on Citizens’ Rights’ (12 June 2017); Department for Exiting the European Union, ‘The United Kingdom’s exit from the European Union: Safeguarding the Position of EU Citizens living in the UK and UK nationals living in the EU’ (26 June 2017).

¹³ R Ziegler, ‘UK Citizens as Former EU Citizens: Predicaments and Remedies’ in F De Witte, R Bauböck and J Shaw, ‘Freedom of movement under attack: Is it worth defending as the core of EU citizenship?’ (EU Working Paper, RSCAS 2016/69).

¹⁴ H Furness, ‘Lower voting age to 16 across UK, campaigners urge’ *The Telegraph* (11 October 2012), <<http://www.telegraph.co.uk/>> accessed 19 August 2017.

another EU Member State; nationals of other EU Member States living in the UK, in particular those whose Member State of origin does not allow dual nationality; and 'static' UK nationals. Part 2 of this report presents perspectives of experts and stakeholders interviewed in relation to the proposals from Part 1.

Part 1 Key Points

- **Associate Citizenship is an important option for the post-Brexit status of UK nationals.** It aims at allowing UK nationals to hold certain EU citizenship rights in return for a fee of a yet unspecified amount.
- **Certain European Citizens' Initiatives show support for UK nationals retaining EU Citizenship.** 'Flock Brexit' and 'Retaining European Citizenship' aim at decoupling EU citizenship from nationality, whilst the 'Choose Freedom' initiative aims at giving UK nationals EU passports. All three are a long way from the required number of signatures for them to be considered by the European Commission.
- **Options under international law are limited at best.** Despite some disagreement, the Vienna Convention on the Law of Treaties does not protect EU citizenship as it regulates on the situation of States, not individuals. The extent to which the European Court of Human Rights (ECHR) can provide protection is limited by interpretation and by the fact that ECHR and EU citizenship rights have little overlap.
- **Only if the derivative character of EU Citizenship is revisited,** a decoupling of EU citizenship from nationality could prevent the en masse stripping of EU citizenship following withdrawal from the EU.

Part 2 Key Findings

- **EU Citizenship is important to many UK Nationals.** Some see EU citizenship as a significant part of their identity. Those who do not may, nonetheless, unknowingly use EU citizenship rights. There is likely to be a lack of awareness about the rights entailed.
- **Associate Citizenship is generally viewed positively.** The concerns that were expressed related either to the 'fee for rights' aspect, particularly that it may be divisive for those of different financial statuses, or to the potential for undermining the referendum result by allowing UK nationals to keep EU citizenship.
- **The decoupling of EU citizenship and nationality is a contentious issue,** and opinions varied greatly. Some interviewees argued that Member State nationality is only necessary for acquisition of EU citizenship and, once acquired, the attached rights cannot be lost. Others argued that Member State nationality is a necessary basis of EU citizenship, thus EU citizenship cannot be possible once a state is no longer a member of the EU.
- **The current UK proposals are too restrictive.** In particular, many expressed concern that the UK proposal includes the revocation of 'settled status' should a holder stay abroad for longer than two years. However, the UK has now suggested that it will be more flexible on this matter depending on an individual's "strong ties" to the UK.¹⁵
- **Brexit negotiations are focusing excessively on mobile citizens.** 'Static' UK nationals should also be considered, and human rights should be the central focus.

¹⁵ Department for Exiting the European Union, 'Joint technical note on the comparison of EU – UK positions on citizens' rights' (28 September 2017). Available < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/648148/September_-_Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens__rights.pdf > accessed 5th October.

- **The Brexit Agreement should be safeguarded by a judicial body.** Some argue that the Court of Justice of the European Union (CJEU) is suitable, whilst others believe that an alternative judicial body should be created to avoid jurisdictional issues.

Additional Suggestions from Interviewees

1. **‘Fast-track’ nationality of another EU Member State for UK nationals post-Brexit**, to allow UK nationals to obtain dual nationality and thus retain their EU citizenship
2. **Allowing UK nationals to retain EU citizenship but not bestowing it upon those born post-Brexit.** This would mean that those who have EU citizenship do not ‘lose’ rights, but is contentious as it may be divisive for those who do and do not have EU citizenship.
3. **Consultation of UK nationals** on which rights they wish to keep. This consultation should be fully informed to avoid a repeat of the misinformation given prior to the referendum.

METHODOLOGY AND APPROACH

As explained above, parts 1 and 2 of this paper are designed to mirror each other, with Part 1 discussing the options for at-risk citizens and Part 2 presenting the perceptions of policy-makers and stakeholders on these options.

Part 1

Part 1 relies on desk research. Three literature reviews were conducted over the course of three months. The first focused on the literature on EU citizenship post-Brexit. The second literature review was on the topic of ‘acquired rights’, in particular whether the rights attached to EU citizenship are capable of being taken away once given. The third literature review was a selective review of 30 years of literature on the link between European citizenship and nationality, and in particular on the implications of the derivative character of European citizenship.

In addition to the literature reviews, research was conducted into potential options for EU citizenship post-Brexit. This part of the research covered proposals emerging in the political debate surrounding the Brexit negotiation as well as in policy initiatives such as European Citizens’ Initiatives. It also considered possible theoretical models that could inform a post-Brexit citizenship status.

Part 2

Part 2 relies on the qualitative data obtained through two sets of semi-structured interviews. A first set included expert interviews with members of EU institutions, other policy-makers, and academics. They included: a representative from an EU institution, three legal practitioners, two representatives of ECIs, two petitioners to the European Parliament, one professor and one legal researcher. A second set included stakeholder interviews: three EU citizens (excluding the UK nationals), eight UK nationals and two dual citizens.

These interviewees were in part selected from a list of contacts identified by the European Citizen Action Service. The interviews took place face-to-face in Brussels, via Skype or over the phone. Alternatively, there was an option to provide written responses, in which case open-ended questionnaires were used. The interviews took place between July and September 2017.

The questions were selected based on eight different topics covered by the desk research for Part 1 of the paper. These are: loss of EU citizenship, the EU's offer and the UK's counter-offer for the post-Brexit status of migrant UK and EU nationals, UK nationals' rights post Brexit, the decoupling of Member State nationality and EU citizenship, EU citizenship-based ECIs, Associate Citizenship and 'citizenship-by-investment' programmes. Specific questions were tailored to take into account each interviewee's role, background and level of expertise.

Interviewee Identification and Ethical Approval

Expert interviewees are identified in the paper where they have agreed to disclosure of their name. Stakeholder interviewees are not identified. The research conducted for this paper has been reviewed and approved via the University of Sheffield School of Law Ethical Approval Procedure.

PART 1: OPTIONS ON THE TABLE

i. Policy Options Proposed Outside the Formal Negotiations

Since before the start of the negotiations in 2017, various options have been put forward to deal with the specific situation of the European citizens who stand to lose not only rights, but the very status of European citizenship as a result of Brexit. The *bona fide* negotiations relating to European citizenship have shown recognition on the part of both the EU and the UK government of the 'symbolic value' of European citizenship as a political and ideological tool of integration.¹⁶ The proposals considered thus far are discussed in this section, and could benefit any of the three groups of at-risk citizens laid out above.

Associate Citizenship

One arrangement much discussed in the context of ongoing negotiations is 'Associate Citizenship.' This idea, first proposed in November 2016 by Charles Goerens,¹⁷ involves giving UK nationals, for an unspecified fee, a form of European citizenship. Goerens was responsible for amendment number 882 to a draft European Parliament Report¹⁸ on Brexit negotiations, which now states as follows:

AMENDMENT 882¹⁹

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

¹⁶ *Ibid.*

¹⁷ MEP in the Alliance of Liberals and Democrats for Europe (ALDE) Parliamentary Group.

¹⁸ European Parliament Committee on Constitutional Affairs, 'Draft Report on possible evolutions of and adjustments to the current institutional set-up of the European Union' (July 2016, Draft Report, 2014/2248(INI)).

¹⁹ European Parliament Committee on Constitutional Affairs, 'Amendments 686 – 1039, Possible evolutions of and adjustments to the current institutional set-up of the European Union' (November 2016, Draft Report, 2014/2248(INI)).

Associate citizenship would likely include at least the freedom to live, work and travel within the EU and to vote in European elections. Given that the benefits would be non-reciprocal, the fee paid would most likely be directed to the EU budget.²⁰ It has been suggested that employers who benefit from their employees having the right to work and travel all over the EU may incentivise or pay for their employees' Associate Citizenship.²¹ This idea of paying for EU citizenship is not as novel as one might be forgiven for thinking. It is likely, at least in part, to be inspired by the 'citizenship-by-investment' programmes that already exist in certain EU countries, such as Malta, Spain and the Netherlands. Investing a large amount of money in these countries can mean that an individual is entitled to automatic citizenship, or at least a fast-tracked route thereto. Perhaps ironically given the attention paid to the Associate Citizenship idea, the 'citizenship-by-investment' practice is not encouraged by the European Commission.²²

The proposal for Associate Citizenship has received significant political attention. Since December 2016, it has been championed by Guy Verhofstadt, leader of the ALDE group and lead Brexit negotiator for the European Parliament, who stated that Associate Citizenship has "become a very important issue that cannot await treaty change".²³ In March 2017, a draft resolution from the European Parliament acknowledged that it "takes note that many citizens in the United Kingdom have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 TFEU; [and] proposes that the EU-27 examine how to mitigate this within the limits of Union primary law".²⁴ Additional support is found outside the EU institutions, from various campaigns such as the 'European Movement'²⁵ and 'Pan-European'²⁶ associations. These organisations call upon the UK government to ensure potential retention of EU citizenship through Associate Citizenship, whilst others suggest retained EU citizenship for UK remain voters.²⁷

As with any controversial proposal, Associate Citizenship could give rise to complications. For one thing, amendment 882 refers to "those who feel and wish to be part of the European project", but this would be difficult to gauge. Goerens theorised that prospective applicants could sign some form of statement, but suggested that we ought not get too caught up in the details.²⁸ Additionally, political issues have surfaced, with Conservative MP Andrew Bridgen calling the proposal "an attempt to divide the British people into two classes and undermine the result of the referendum".²⁹ Goerens' response was to highlight that Associate Citizenship

²⁰ C Goerens, 'European Associate Citizenship' (charlesgoerens.eu blog, 2017) < <http://www.charlesgoerens.eu/blog-charles/european-associate-citizenship/> > accessed 19 August 2017.

²¹ Personnel Today, 'Could "associate EU citizenship" become a worthwhile employee perk?' *Personnel Today* (2017) < <http://www.personneltoday.com/> > accessed 19 August 2017.

²² A Manuel, 'Four Ways to Retain EU Citizenship After Brexit' *The Huffington Post* (2016) < <http://www.huffingtonpost.co.uk/> > accessed 19 August 2017.

²³ J Watts, 'Brexit: Theresa May would consider 'associate European citizenship' for British people' *The Independent* (2016) < www.independent.co.uk/ > accessed 19 August 2017.

²⁴ European Parliament, 'European Parliament resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union' (European Parliament Resolution, 2017/2593 (RSP)), Principle 27.

²⁵ The European Movement, < www.europeancitizenship.co.uk/ > accessed 19 August 2017.

²⁶ The Pan-European association has created a change.org petition to this aim. Available < <https://www.change.org/p/do-you-want-personal-eu-citizenship-send-a-message-to-the-european-parliament> > accessed 19 August 2017.

²⁷ See, for example: 'Associate Citizenship for those who voted to remain', available < <https://you.38degrees.org.uk/petitions/associate-citizenship-of-the-eu-for-those-who-voted-to-remain> > accessed 19 August 2017, and 'EU – Offer European Citizenship to UK citizens', available < <https://www.change.org/p/eu-offer-european-citizenship-to-uk-citizens> > accessed 19 August 2017.

²⁸ M Muller, 'Luxembourg MEP: Associate citizenship for Brits is 'an offer, not an obligation'' *Euractiv* (2017) < <http://www.euractiv.com/> > accessed 19 August 2017.

²⁹ *Ibid.*

would be “merely an offer, not an obligation.”³⁰ On a practical note, all Member States would need to agree to this proposal, which may be a difficult task in the current political climate. We must also ask whether the UK government would endorse this idea if pursuing a ‘hard Brexit’. Despite these potential issues, a report commissioned by UK MEP Jill Evans concluded that the retention of citizenship is possible.³¹ The report’s key points were that:

1. Associate citizenship is possible in European and international law;
2. This can be achieved through EU legislation and the EU/UK Withdrawal Agreement;
3. No revision of the EU’s founding treaties is necessary to achieve this;
4. UK citizenship law is flexible and accepts the principle that people should not be stripped of citizenship against their will.

Thus, Associate Citizenship is an idea that could be worthy of attention during the negotiations.

Proposals Presented as European Citizens’ Initiatives

Associate citizenship is not the sole policy proposal on the table. Three European Citizens’ Initiatives aimed at allowing UK nationals to retain EU citizenship have been introduced.³² One such initiative is ‘EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis’, handily termed ‘Flock Brexit’.³³ The stated aim of this initiative is as follows:

“We will convince the European Commission and the European Parliament to pass a regulation and/or decision that will allow UK nationals to keep their EU citizenship regardless of Brexit negotiations. With enough public pressure, we will also force the UK to reciprocate these rights by taking our case to the Court of Justice of the European Union (CJEU) before withdrawal negotiations are finalized.”

From a legal perspective, the initiative aims at the separation of nationality from EU citizenship (a topic which will be discussed in more detail later in this paper).

A similar initiative is ‘Retaining European Citizenship’, the aim of which appears orientated towards the same goal of separating nationality from citizenship, but not only in the context of Brexit.³⁴

“Our Committee is formed from residents of Ireland, France, Belgium, Greece, Germany, Italy and the United Kingdom who have come together in an effort to protect the current and future citizenship rights of all European citizens.

This initiative is vital in the context of 'Brexit' and an ever-changing political dynamic across Europe.”

³⁰ *Ibid.*

³¹ V Roeben, J Snell, P Telles, P Minnerop and K Bush, ‘The Feasibility of Associate EU Citizenship for UK Citizens post-Brexit’ (Study for Jill Evans MEP, Swansea University, 2017).

³² A European Citizens’ Initiative allows European citizens to call upon the European Commission to legislate in a certain area by forming a ‘Citizens Committee’. This committee must be composed of at least one million EU citizens from at least 7 Member States. If this number is achieved, the Commission must give a response to the proposal and reasons for rejection if it is not adopted. For more see: European Commission, ‘European Citizens’ Initiative Basic Facts’ (2017) <<http://ec.europa.eu/citizens-initiative/public/basic-facts>> accessed 28 September 2017.

³³ ‘EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis’ <<http://www.flockbrexit.eu/>> accessed 19 August 2017.

³⁴ Retaining European Citizenship <<https://www.ecitizen2017.org/>> accessed 19 August 2017.

At the time of writing, the ‘Flock Brexit’ initiative has reached 7,693 signatures,³⁵ and ‘Retaining European Citizenship’ has 8,777.³⁶ Both are a far cry from the one million signatures needed for consideration by the European Commission. Nonetheless, the response to the two initiatives does show some support for allowing UK citizens to retain full EU citizenship following Brexit.

A third ECI has proposed a different solution to the loss of European citizenship following Brexit. The ‘European Free Movement Instrument’, informally known as the ‘Choose Freedom’ initiative, suggests that UK nationals should be issued with EU passports following Brexit. Although nationality is a Member State competence, the EU is empowered to issue passports to which the rights of citizenship are attached.³⁷ These are most commonly provided to officials and diplomats in an action known as ‘laissez-passer’, yet the ‘Choose Freedom’ initiative suggests extending this to UK nationals post-Brexit. At 20,373 signatures, this initiative has a long way to go to reach the European Commission.

ii. Options for UK Nationals under International Law

Although there are promising options on the table, it is possible that negotiations may not go so favourably. Hence, the aim of this section is to address the legal arguments under international law which could be invoked by individuals against the revocation of their European citizenship rights. This section is particularly relevant for UK nationals. In particular, the options presented here are relevant for UK nationals who have actually exercised their EU citizenship rights, hence mostly UK nationals living elsewhere in the EU. Given that Brexit is a novel situation, the flexibility of legal arrangements means that there is leeway for certain rights to be protected in the context of withdrawal.³⁸ Nevertheless, our research into this area has made one thing clear: the extent to which international law can protect EU citizenship is limited at best.

The arguments that do exist relate to ‘acquired rights’, meaning rights bestowed upon UK citizens by virtue of their European citizenship, which cannot now be arbitrarily taken away. As put by Professor Lowe QC in his evidence to the House of Lords, whilst an acquired right “cannot simply be ignored”, “the duty to respect ‘acquired rights’ is simply the duty to treat them in accordance with international law.” So where might the rights acquired by UK citizens find protection under international law?

The Vienna Convention on the Law of Treaties

It was suggested by the Leave Alliance that UK nationals living abroad or hoping to do so have “nothing to fear”³⁹ from Brexit as European citizenship rights would be protected under the Vienna Convention on the Law of Treaties (VCLT). Article 70(1)(b) VCLT provides that the termination of an international treaty “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”,⁴⁰ which was said to mean that EU citizenship rights were irrevocable.⁴¹ However, many

³⁵ For up to date figure see: <<https://ec.europa.eu/citizens-initiative/30/public/index.do>> accessed 19 August 2017.

³⁶ For up to date figure see: <<https://ec.europa.eu/citizens-initiative/31/public/index.do>> accessed 19 August 2017.

³⁷ Council Regulation (EC) 1417/2013 of 17 December 2013 laying down the form of the laissez-passer issued by the European Union [2013] OJ 353.

³⁸ *Supra*, n.10.

³⁹ Leave HQ, ‘Expats have nothing to fear from Brexit’ (The Leave Alliance, 2016) <www.leavehq.com> accessed 19 August 2017.

⁴⁰ Article 70(1)(b) Vienna Convention on the Law of Treaties (1969).

⁴¹ Although the Vienna Convention is generally only applicable to agreements between states, the *Racke* case stated that the EU must respect customary international law, so the Convention’s customary content would still be applicable. See Case C-162/96 A

academics have now concluded that the Convention's reference to 'the parties' means the state parties and not individuals.⁴² Hence, individual rights find no protection under the VCLT. This interpretation of the provision is supported by the Commentary of the International Law Commission on the identically worded draft Article, where it was said that the drafting intentions "make it clear that paragraph 1(b) relates only to the right, obligation or legal situation of States parties to the treaties...and is not in any way concerned with the question of the "vested interests" of individuals".⁴³ Additionally, Article 43 VCLT clarifies that termination of a treaty "shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty".⁴⁴ Professor Lowe explains that the convention thus relates to state obligations alone, and upon termination of a treaty it no longer regulates "the legal situation of individuals and companies who were previously affected by the treaty."⁴⁵

Although citizenship rights were protected under the VCLT when Greenland withdrew from the European Economic Community, the European Commission's considerations related to "the specific circumstances of that territory, including its status as a constituent part of the territory of Denmark, a continuing EU Member State."⁴⁶ Thus, although the VCLT does not negate the *possibility* of acquired rights, it does not provide support for European citizenship rights in itself or in the context of Brexit.

Protection under the European Convention on Human Rights (ECHR)

Certain citizenship rights may be protected as acquired rights by the European Court of Human Rights (ECtHR). However, whilst EU and ECHR rights do overlap, the full range of European citizenship rights are not covered by the ECHR. Where there is no overlap, the ECtHR will not be competent to protect relevant European citizenship rights. This is the case for many rights, such as the right to work, to retire, to study, and to access healthcare within the EU.

There are three provisions of the ECHR through which individuals may find limited redress. First, the right to peaceful enjoyment of one's own possessions under Article 1 of the first Protocol (A1P1). This right may mean that under international law, property rights that would be interfered with as a result of Brexit, such as property owned in another Member State, could be protected as acquired rights by the ECtHR. Additionally, legitimate expectations, such as the giving of planning permission, have been protected by the ECtHR under A1P1.⁴⁸ Without resorting to speculation, this does provide "considerable potential for flexible and innovative application" post-Brexit.⁴⁹

Secondly, the right to respect for family life under Article 8 ECHR could be relevant in preventing the deportation of UK nationals living abroad and EU citizens living in the UK where this could affect family ties,

Racke GmbH & Co. v Hauptzollamt Mainz [1998] ECR. Also see A Fernández Tomás and D López Garrido, 'The Impact and Consequences of Brexit on 'Vested' Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27' (Research Paper, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 583.135, 2017).

⁴² S Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' (UK Constitutional Law Association Blog, 2016) <<https://ukconstitutionallaw.org/2016/>> accessed 19th August 2017; Herbert Smith Freehills, 'Brexit: Charting a New Course' (Briefing, 2016); European Union Committee, *Brexit: acquired rights* (HL 2016-17, 82).

⁴³ International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' (Yearbook of the International Law Commission, vol II, 1966), Draft Article 66, Commentary para 3.

⁴⁴ Article 43 Vienna Convention on the Law of Treaties (1969).

⁴⁵ European Union Committee, *Brexit: acquired rights* (HL 2016-17, 82), Ev AQR0002 (Professor V Lowe QC).

⁴⁶ Herbert Smith Freehills, 'Brexit: Charting a New Course' (Briefing, 2016).

⁴⁷ For these considerations see: Bulletin of the European Commission, 'Status of Greenland' (Supplement 1/83, Commission opinion, 2 February 1983) Annex A.

⁴⁸ *Pine Valley Developments Ltd and Ors v Ireland* [1991] 14 EHRR 319.

⁴⁹ European Union Committee, *Brexit: acquired rights* (HL 2016-17, 82), Ev AQR0002 (Professor V Lowe QC).

through the *Kurić* doctrine.⁵⁰ In *Kurić*, the ECtHR ruled that Slovenia had breached Article 8 ECHR by denying residence rights to those legally resident in Slovenia at the time it seceded from the Socialist Federal Republic of Yugoslavia. Marrero González, amongst others, suggests that if an individual is lawfully resident at the moment the UK leaves the EU, the ECtHR may be able to protect their residence status following its own jurisprudence. As put by Gordon and Moffatt, “[e]ach case would turn on its own particular facts (clearly, long residence and strong family connections would have the best prospects of success)”.⁵¹ Susie Alegre has suggested that Article 8 may actually allow retention of European citizenship in its entirety, as it is such “a core part of the social identity of many British nationals” that depriving them of EU citizenship could breach Article 8.⁵² She references *Genovese v Malta*, where the “impact [of loss of citizenship] on the applicant’s social identity was such as to bring it within the general scope and ambit of that article.”⁵³ Yet the relevance of this case is questionable as it relates to national citizenship, which remains a status distinct from European citizenship.

Thirdly, and perhaps most tenuously, it has been suggested that an argument under the Article 14 prohibition of discrimination could be made. Alegre argues that because the UK allows for dual nationality, UK nationals who only have UK nationality would lose their EU citizenship while any UK nationals who hold a second EU nationality would not. If the right to EU citizenship is protected under Art 8 ECHR, then differentiating on grounds of nationality in this way would be a breach of Article 14.⁵⁴ From a second perspective, discrimination could occur between EU citizens and third country nationals (TCNs). While the former, even if they have been resident in the UK for more than five years, could in theory lose every right to remain after Brexit, the latter, if they have been resident for five years, are able to apply for leave to remain in the UK indefinitely. This too could be seen as unlawful discrimination, although this type of discrimination is less likely to materialise in light of the terms of the UK position paper on EU nationals issued in July.⁵⁵

Although international law may be a shining beacon of hope for those who risk loss of property or deportation away from family members, it must nonetheless be concluded that the protection is limited both in terms of scope – the range of individuals covered – and in terms of depth of protection. Only where EU rights are protected by the ECHR will they find protection, and even then the extent of protection is contingent upon interpretation of Articles A1P1, 8 and 14, and upon the severity of harm suffered by the claiming European citizen.

iii. Potential Brexit-Inspired Reforms of EU Citizenship as an Institution: The Decoupling of European Citizenship from Nationality

According to the EU Treaties, EU citizenship is a derivation of Member State nationality, as “[e]very person holding the nationality of a Member State shall be a citizen of the Union.”⁵⁶ Nationality has always been a Member State competence, but despite this the European Court of Justice (ECJ) has, in some cases, introduced a growing number of constraints to the way in which Member States administer nationality rules in order to

⁵⁰ S Douglas-Scott, ‘What Happens to ‘Acquired Rights’ in the Event of a Brexit?’ (UK Constitutional Law Association Blog, 2016) <<https://ukconstitutionallaw.org/2016/>> accessed 19th August 2017.

⁵¹ R Gordon QC and R Moffatt, *Brexit: The Immediate Legal Consequences* (The Constitution Society, 2016).

⁵² European Union Committee, *Brexit: acquired rights* (HL 2016-17, 82), Ev AQR0007 (S Alegre).

⁵³ *Genovese v Malta* (2011) 58 EHRR 25, para 33.

⁵⁴ *Supra*. n.47.

⁵⁵ European Union Committee, *Brexit: acquired rights* (HL 2016-17, 82), Ev Q32 P1 (A Speaight QC).

⁵⁶ Article 20 Treaty on the Functioning of the European Union.

protect EU citizenship rights. In *Micheletti*, the court stated that Member States must have “due regard to Community Law” in nationality decisions.⁵⁷ In *Rottmann*, the ECJ prescribed a proportionality assessment for any decision on nationality resulting in the loss of EU citizenship rights. And in *Ruiz Zambrano*, the ECJ went as far as to extend derivative rights to third country nationals even in a situation not involving free movement as a means of protecting the substance of EU citizenship rights.⁵⁸

The literature on this topic has yielded various proposals to de-link nationality from EU citizenship over time. For example, in 2009 Kochenov posited that “[n]ationality is the legal category of demarcating nationals from aliens [...] while citizenship, on the contrary, is a set of entitlements conferred or denied often irrespective of nationality”.⁵⁹ The two are, therefore, not inextricably linked. Yet whilst the derivative citizenship debate had experienced a relatively dormant period of late, it has been somewhat resuscitated by Brexit because it is the first time that the stripping of EU citizenship en masse is likely to occur. The debates surrounding UK citizens’ loss of EU citizenship, such as those discussed in the previous sections of this paper, inevitably lead us to question whether EU citizenship should remain so rigidly connected to nationality and, therefore, so easily lost.

Dawson and Augenstein argue convincingly that now *is* the time to decouple European citizenship from nationality. The authors suggest that any decision to grant EU citizenship would remain with Member States, but the decision to lose it would rest with the individual.⁶⁰ Noting that Advocate General Maduro saw EU citizenship as “a legal and political concept independent of that of nationality”,⁶¹ decoupling could “make better sense” of this vision.⁶² The ‘Flock Brexit’ and ‘Retaining European Citizenship’ initiatives mentioned above aim to provoke treaty change prior to the UK’s withdrawal from the Union, but an overwhelming amount of support would likely be needed to do this, so it is more likely to be an option tabled in the future.

Decoupling could take many forms, for example allowing long-term resident TCNs to gain European citizenship, or abolishing birthright citizenship in Member States and “establishing it instead as the basic principle for determining EU citizenship”.⁶³ Both of these reforms were presented by Bauböck in 2014, yet he saw them as drastic and problematic. Nevertheless, in light of Brexit, the suggestions are thought-provoking in the least. The debate surrounding the derivative character of EU citizenship might be reinforced in light of the en masse stripping of citizenship that withdrawal would cause.

iv. UK and EU Positions in the Current Negotiations

Having examined the options available to the at-risk citizens mentioned in our introduction from an academic perspective, it is now appropriate to present the actual offers in relation to the post-Brexit status of UK nationals in the EU and EU nationals in the UK. At the time of writing, there are two offers put forward in the Brexit negotiations, one by the European Commission, and a counter offer by the UK.

⁵⁷ Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* (1992) ECR I-04239. Para 10.

⁵⁸ The *Ruiz Zambrano* rationale has been reiterated in more recent cases. See: C-304/14 *CS*; C-165/14 *Rendón Marín*; Case C-133/15 *Chávez-Vilchez and Others*.

⁵⁹ D Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’ (2009) 15:2 CJEL 169.

⁶⁰ *Supra*. n.60.

⁶¹ Case C-135/08 *Janko Rottman v Freistaat Bayern* [2009] ECR I-01449, Opinion of AG Maduro, para 23.

⁶² *Supra*. n.60.

⁶³ R Bauböck, ‘The Three Levels of Citizenship in the European Union’ [2014] 15 Ger Law J 751.

The European Commission's offer was published in May 2017.⁶⁴ It points out that the Withdrawal Agreement resulting from the Brexit negotiations should ensure lifetime protection of rights of the individuals who have exercised free movement prior to the UK's withdrawal. This includes EU citizens in the UK, UK nationals in the EU Member States, and their family members, regardless of their nationality. The Commission purports that the level of protection should be the same as that held by EU citizens under EU law. Yet the EU position currently states that UK nationals shall only have their rights protected in the Member State in which they are resident on the date of the UK's withdrawal.⁶⁵

The UK's counter-proposal was published in June 2017.⁶⁶ It offers a new status to EU citizens in the UK post-Brexit, termed the "settled status". Settled status holders would be subject to UK immigration law, but would have the right to live and work in Britain, access public funds and apply for British citizenship. This status would thus replace the current permanent residence status extended to EU citizens who have resided in the UK for five years, in compliance with EU law. An EU citizen who has been residing in the UK for five years on the date of the UK's withdrawal would be automatically eligible, and a two-year "grace period"⁶⁷ would apply to EU citizens who have resided for less than five years in order to allow them to reach the required minimum five years. Those who would not reach the five year requirement within the two-year grace period would have to apply for a temporary residence permit to cover the gap period, and could then apply for settled status upon completing five years of continuous residence. The rights offered by the UK settled status would be similar to the EU citizens' rights under EU law.⁶⁸ Originally, the UK had stated that settled status rights would be lost after two years of absence from the UK. However, the government has now claimed that it is prepared to make exceptions based on the concept of "strong ties" to the UK, and to offer a guaranteed right of return for those who have obtained permanent residence.⁶⁹

Additional points of disagreement between the two parties include the voting rights of UK nationals. Whilst the EU states that each Member State is entitled to choose whether to give voting rights to third country nationals, the UK wants the Withdrawal Agreement to explicitly protect the right of UK and EU citizens to vote and stand for election in their host State. Furthermore, the EU wishes to preserve the rights of family members joining EU citizens resident in the UK post-Brexit, or children born after the UK's withdrawal. The UK, on the other hand, proposes that future family members will be subject to the same rules as non-EU nationals or EU nationals immigrating to the UK post-Brexit.⁷⁰

⁶⁴ European commission, 'Essential Principles on Citizens' Rights' (*European Commission*, 12 June 2017) <https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_0.pdf> accessed 21 July 2017

⁶⁵ Department for Exiting the European Union, 'Joint technical note on the comparison of EU – UK positions on citizens' rights' (28 September 2017). Available <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/648148/September_-_Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens__rights.pdf> accessed 5th October.

⁶⁶ HM Government, 'Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU' (26 June 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf> accessed 21 July 2017 .

⁶⁷ Two years of a transitional period post the UK's exit.

⁶⁸ For example the right to pension, in-work benefits, public services, education and funding and recognition of diplomas and professional qualifications.

⁶⁹ *Supra*. n.68.

⁷⁰ *Supra*. n.68.

PART 2: STAKEHOLDER AND EXPERT PERSPECTIVES ON THE CONSIDERED OPTIONS

This Part will present the perspectives of various experts and stakeholders involved in the discussions surrounding Brexit, who have been interviewed in relation to the options discussed in Part 1.

i. Perspectives on the Considered Options

Associate Citizenship

Both groups of respondents (the experts and stakeholders) generally favoured Associate Citizenship over ‘citizenship-by-investment’ programmes, regardless of the fact that both systems entail a form of money-for-rights exchange. This section will consider the pros and cons of Associate Citizenship in the context of Brexit, as well as an opinion on ‘citizenship-by-investment’ programmes.

Pros of Associate Citizenship

Anthony Simpson,⁷¹ an initiator of the ‘Retaining European Citizenship’ initiative, argued in favour of Associate Citizenship, stating that it would be a practical way of finding a balance between the interests of those who do and do not want to keep EU citizenship, as it would give UK citizens a choice. The main concerns expressed in relation to Associate Citizenship include how difficult and expensive it would be to obtain. However, the retention of EU citizenship-based rights seems to be in the overall interest of UK nationals. Anthony Simpson noted that this is evidenced by the fact that many UK nationals have gone to the effort of acquiring dual nationality with another EU Member State in order to keep EU citizenship and, hence, the attached rights.

Moreover, many UK nationals interviewed responded rather favourably towards the idea of a fee in exchange for rights. The general consensus was that it would be perfectly reasonable and justifiable given that the UK, will no longer be a part of the EU. In fact, any opportunity to continue benefiting from EU citizenship related rights would be appreciated.

Cons of Associate Citizenship

On the other hand, Professor Dimitry Kochenov⁷² views Associate Citizenship as a form of unjustified preferential treatment of (certain) UK nationals. He does not believe that it is appropriate to offer Associate Citizenship to UK citizens, who have voted to leave the EU, whilst no such offer is made to other non-EU countries that maintain a friendly relationship with the EU. Additionally, he believes that economic problems could occur considering the unspecified fee involved.

Another argument against Associate Citizenship was put forward by Eduardo Alvarado,⁷³ an initiator of the ‘Flock Brexit’ ECI. He argues that it is unacceptable to sell “*watered down*” European citizenship rights, as these

⁷¹ Interviewed on the 11th August 2017.

⁷² Professor of EU Constitutional Law in the Department of European and Economic Law at the University of Groningen. Interviewed on the 2nd August 2017.

⁷³ Interviewed on the 7th August 2017.

rights should already be free and guaranteed without any payment; an opinion in keeping with the aim of his ECI.

The biggest concern for many of those interviewed was the cost associated with Associate Citizenship. Leona Bashow⁷⁴, a UK national, international lawyer and a second petitioner to the European Parliament, agreed that it would be understandable to have a fee attached to the rights since the UK will no longer be a part of the EU. Nevertheless, the amount is of significant importance. High fees should be prevented, as it would be undesirable to prevent low earners from retaining their rights whilst those in a better financial situation are easily able to do so.

An Opinion on ‘Citizenship-by-Investment’ Programmes

Dr Guayasén Marrero González,⁷⁵ expert in nationality law and European law, argued that any kind of fee-for-rights arrangement can prove to be risky. If each EU Member State has discretion in establishing its own fees, there is a danger of inequality, as not all citizens have access to the same funding and hence not all citizens can have access to the more expensive programmes. Furthermore, ‘citizenship-by-investment’ programmes often involve large sums of money, so are only realistic for wealthier individuals. This can lead to what Marrero González termed an “*elite of nationals*”. The usual naturalisation process involving five years of residence is justifiable, as it ensures that an individual has a connection with the country, for example knowledge of a language and years of residence. Yet when a monetary price is placed on EU citizenship it is transformed into a commodity and its acquisition is less justified. This is even more problematic with EU citizenship than would be the case with citizenship of a country, as EU citizenship allows access to 28 different countries.

The Proposed European Citizens’ Initiatives

With regard to the three ECI proposals described in Part 1, opinions that emerged in the interviews mostly focused on two themes: side-effects for other possible withdrawing countries and strategies to distribute European citizenship rights.

Side-effects for Other Possible Withdrawing Countries

First, the interviewees noted that the ECIs attempting to separate nationality from EU citizenship (‘Flock Brexit’ and ‘Retaining European Citizenship’), if successful, could encourage other EU Member States to withdraw from the EU. The knowledge that the rights of their nationals would be safeguarded without the need for EU membership could be an incentive for Member States considering withdrawal to lean towards the invocation of Article 50.

Eduardo Alvarado did not believe that allowing UK nationals to keep EU citizenship would be likely to encourage other Member States to leave the EU. Nonetheless, he noted that if this was to be the case, it would not be an undesirable outcome. This is because EU citizens would be able to keep their rights regardless of the political outcomes in their country of nationality. This would be a huge step towards a “*world citizenship*”, which would be very practical in today’s globalised world.

Strategies to Distribute European Citizenship Rights

⁷⁴ Interviewed on the 31st July 2017.

⁷⁵ Maastricht University law researcher and expert in nationality law, private international law, public international law and European law. Interviewed on the 6th August 2017.

There was no specific consensus as to how the rights agreed upon in the potential negotiations on a form of Associate Citizenship should be distributed – i.e. whether they should be distributed collectively to all, or whether they should be given on an opt-in basis. One of the main problems is how to find a balance between satisfying the interests of two groups of UK nationals: those who would like to continue holding EU citizenship and those who do not want to retain any link with the EU. This can perhaps more simply be suggested to be the 48% remain voters and 52% leave voters. Anthony Simpson suggested that, in order to find a balance between these two groups with such different interests, a practical solution would be for those UK nationals living in the EU and EU citizens living in the UK to be given the rights attached to European citizenship collectively, whereas the ‘static’ citizens would be given the opportunity to opt-in to keep these rights.

Another suggestion derived from the interviews was that some rights are more suitable to work on an opt-in basis, whereas others are more appropriate to be distributed collectively. For example, the right of free movement can work on an opt-in basis, as not everybody would choose to exercise it, whereas non-discrimination, healthcare rights and political rights are more universal, and thus could more effectively be distributed on a collective basis.

ii. Perspectives on Options for UK nationals

This section will explore how the interviewed UK nationals view their EU citizenship, the impact of loss of EU citizenship upon the interviewees, the general awareness of citizens as to their rights deriving from EU citizenship, and which rights are most valued.

EU Citizenship as Part of One’s Identity

The vast majority of the interviewed UK nationals felt that EU citizenship was an inseparable part of their personal identity, regardless of where they currently live. This was also the main argument in Susie Alegre’s⁷⁶ written evidence to the House of Lords.⁷⁷ Some of the interviewees went as far as to say that they feel more European than British, and that Brexit has led them to distance themselves from their own country. Often, the respondents who expressed a desire to keep the rights attached to European citizenship were those whose career involves, or may eventually involve, travelling. Interestingly, even those UK nationals interviewed who were in favour of losing EU citizenship seemed, nonetheless, to aspire to retain their right to free movement.

Loss of EU Citizenship and its Impact on UK nationals

Susie Alegre said that people who view themselves as ‘international British’ are likely to be affected to a greater extent by Brexit than those who do not identify as such. This is because they will be limited when it comes to an expression of their European identity post-Brexit, owing to their inability to exercise rights attached to EU citizenship such as free movement and the ability to work across borders or for EU institutions. She also argued that Brexit will still have a notable negative impact on the next generations, as their opportunities in the international arena are likely to be restricted, whether by ease of access to education or work abroad, or cultural and social diversity.

Citizens’ Awareness of EU Rights

⁷⁶ An international human rights barrister.

⁷⁷ Susie Alegre, 'Written Evidence (AQR0007)' (*Parliament UK*, 7 November 2016) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/42760.pdf>> accessed 26 July 2017.

Eduardo Alvarado suggested that whilst an individual may answer ‘no’ to the question of whether they want European citizenship, they might instead answer ‘yes’ if asked about the retention of a specific right, such as free movement. This is reflective of a recurring theme throughout the interviews, namely that there is a great lack of comprehension amongst UK citizens, as to what specific rights and benefits derive from EU membership. Thus, many people exercise European citizenship rights without realising that they are doing so, which makes it particularly easy to disregard what the EU offers its citizens. What has been pointed out by many is that there is a great need to educate EU citizens, as to what aspects of their day to day life are provided for or affected by the EU.

The specific European citizenship rights that the UK nationals interviewed wanted to retain tended to include free movement rights. Other rights included the right to reside, the right to work, the right of establishment, and access to the Court of Justice of the European Union.

iii. Perspectives on Potential Reforms and the Decoupling of European Citizenship from Nationality

This section considers opinions and reasoning as to the possibility and desirability of having EU citizenship standing independently of Member State nationality. The opinions of interviewees relating to the question of whether European Citizenship ought to be detached from Member State nationality varied considerably.

An Opinion in Favour of Decoupling of European Citizenship from Nationality

An opinion in favour of UK nationals being able to keep EU citizenship rights post Brexit comes from Anne Wilkinson’s petition to the European Parliament.⁷⁸ Anne Wilkinson worked as a lawyer for the European Commission between 1988 and 2004 inter alia in the International Relations, Information Technology and Telecommunications. In her petition, she distinguishes between EU citizenship and the rights that flow from it, and argues that the latter “*cannot be revoked and are therefore non-negotiable*”. Anne Wilkinson argues that nationality of an EU Member State is necessary for the acquisition of EU citizenship, however once acquired, the rights that flow from it should be inalienable. She suggests that there should be a possibility of possession of European citizenship independent of one’s country of nationality (decoupling of EU citizenship from nationality), and that this should be the ultimate destination for the future of EU citizenship. In her petition, she also adds that conditions and limitations can be placed only on the exercise of European citizenship rights, not their existence. Therefore, her suggestion is that once an individual acquires EU citizenship, the rights deriving from it flow from the Treaty, without the intervention of the State of which they are nationals and that, therefore, they cannot be extinguished by that state’s withdrawal from the EU⁷⁹.

Opinions Against Decoupling of European Citizenship from Nationality

Dr Guayasán Marrero González, on the other hand, argued that Member State nationality is a crucial basis for EU citizenship. Consequently, once a state withdraws from the EU, an individual is not able to continue holding EU citizenship. Professor Dimitry Kochenov shared this view, and reiterated our conclusion in Part 1 that under the current law it is impossible to allow nationals of a non-EU Member State to hold EU citizenship. In his interview he added that:

⁷⁸ Anne Wilkinson, Petition No 0132/2017 by Anne Wilkinson (British) on the inalienability of EU citizens' rights' (*European Parliament*) <<https://petiport.secure.europarl.europa.eu/petitions/en/petition/content/0132%252F2017/html/Petition-No-0132%252F2017-by-Anne-Wilkinson-%2528British%2529-on-the-inalienability-of-EU-citizens%2527-rights>> accessed 20 July 2017.

⁷⁹ Ibid.

“the EU needs to respect the national democratic outcomes in the EU Member States. The major idea of Brexit is cutting the ties with the EU. EU citizenship is the only personal tie.”

The “*democratic outcome*” in question is, of course, the Brexit referendum. Allowing UK nationals to retain EU citizenship post Brexit could be a way of undermining national democracy “*which is impossible to justify under the current law under the treaties.*” This opinion does depend on one’s definition and perception of democracy – a discussion beyond the scope of this paper – but is nonetheless an interesting perspective on why European citizenship should remain tied to nationality.

iv. Perspectives on the UK and EU Positions in the Current Negotiations

Individuals interviewed generally responded more favourably to the current EU Commission proposal than to the UK Government one. The main concern of Dr Guayasén Marrero González with regard to the UK proposal was the grace period of two years post withdrawal. The proposal lacks information as to how the grace period would work in practice, meaning that the UK authorities would have a lot of discretion in their regulation. Marrero González argued that in order to ensure adherence to the two-year period it would be crucial for the Court of Justice of the European Union to have jurisdiction over the Brexit Agreement, in order to ensure protection of EU citizens’ rights in the UK post Brexit.

Susie Alegre found the negotiations on citizens’ rights particularly concerning, as:

“...they [the UK and the EU] don’t seem to understand mobility..., it is all about settlement, which the freedom of movement is not about, at all.”

She also pointed to the joint technical note stating the positions of the UK and the EU in the negotiations.⁸⁰ In this note, the EU proposes that UK nationals’ rights will only be protected in the EU Member State in which they reside, and will not be protected if the UK citizen moves to another EU Member State or travels around the EU.

From the stakeholders’ perspective, a concern shared by many EU citizens interviewed was the UK proposal that the ‘settled status’ would be lost after two years of absence from the UK. The UK has now suggested that it will be more flexible in this matter depending on the individual’s “strong ties” to the UK.⁸¹ Nevertheless, according to a Polish national⁸² living in the UK, any such limitation would make the UK rather unattractive for many highly-skilled EU citizens. Many jobs involve frequent travelling for long periods of time; therefore, the lack of flexibility is a huge disadvantage for both professionals and employers.

Jonathan Peel⁸³, a business and trade consultant and member of the European Economic and Social Committee, expressed a similar concern in relation to the flow of students and workers between the UK and EU Member States post-Brexit. There are many world class companies and universities in the UK that rely on having fluidity of workers coming in from elsewhere in the EU. Having any restrictions put on travelling is

⁸⁰ Department for Exiting the European Union, 'Joint technical note on the comparison of EU-UK positions on citizens' rights' (*European Commission*, 20 July 2017) <https://ec.europa.eu/commission/sites/beta-political/files/eu-uk_table_cr.pdf> accessed 28 August 2017.

⁸¹ *Supra*. n.15.

⁸² Interviewed on the 17th July 2017.

⁸³ Interviewed on the 21st August 2017.

problematic because it may make the UK appear rather closed and isolated for foreign traders. Additionally, it may negatively impact the younger generations among UK nationals, as previously mentioned, in terms of their professional opportunities and cultural development.

Suggestions relating to the Focus of the Negotiations

The main focus of the negotiations so far has been on those individuals who have already exercised their right to free movement. Yet, as was outlined in the introduction of this paper, there are various categories of individuals who are at risk of losing rights, and ‘static’ UK nationals belong to these categories. Arguments below include reasoning as to why ‘static’ UK nationals should also be prioritised in the negotiations, as well as arguments to the contrary, suggestions as to other groups of individuals who should be included in the negotiations, and, finally, the human rights perspective.

‘Static’ UK Nationals

Many of the UK nationals interviewed expressed the view that the negotiations should take those UK nationals who have not yet exercised their right to free movement into account. Leona Bashow argued that despite not having exercised freedom of movement, many ‘static’ UK nationals still view their EU citizenship as a part of their identity, and Brexit is leading to an involuntary loss of this identity.

Additionally, Susie Alegre suggested that many citizens find themselves in situations in-between the ‘static’ and ‘active’ when it comes to free movement, and that these citizens should also be taken into consideration. For example, those who have spent a large portion of their life abroad as a result of their career, but are temporarily residing in the UK. For those people, it is absolutely crucial to be able to travel freely to compete in the international job market.

One of the interviewees⁸⁴ shared his personal story, demonstrating how being a part of the EU has affected his life. He came from a less affluent town in the North of England, where people were rather closed in their own community. The very first time he travelled abroad was when he took part in a language school exchange programme. After this experience, he has travelled abroad for education and work purposes, and graduated with a degree in three foreign languages. Presently, he speaks four languages fluently, is open to working abroad and identifies strongly as an EU citizen. Yet this interviewee, like others, does not currently reside in another EU Member State and his situation is therefore somewhat sidelined during the negotiations.

Other Suggestions

On the other hand, Dr Guayasén Marrero González stated that the most critical situation is that of UK citizens living in another EU Member State and EU citizens in the UK. He suggested that “*all our personal development is based on residence*”. Hence, if negotiations are to prioritise a certain category of citizens, it should be those residing outside of their state of nationality.

It is not just ‘static’ UK nationals who those interviewed felt should be considered in negotiations. Other suggestions raised by interviewees included children, students and people who have moved very recently, as all of these individuals are in a rather delicate position.

Lastly, one of the aspects pointed to by Dr Guayasén Marrero González was the human rights perspective. In his opinion, when it comes to negotiating citizens’ rights, the starting point and the minimum offered should

⁸⁴ Interviewed on the 4th August 2017.

be human rights. This is to ensure things such as prevention of discrimination, and protection of families from being broken down in the process of Brexit.

v. Other Emerging Ideas for Retention and/or Eased Access to EU Citizenship

Fast-Track Nationality

An interesting alternative to the options mentioned above was put forward by Susie Alegre. She suggested that it may be possible to implement a fast-track naturalisation process in the context of Brexit, allowing those UK nationals interested in keeping their EU citizenship to acquire another EU Member State's nationality. This would allow them to hold (in most cases) dual nationality and, therefore, keep their UK nationality and EU citizenship, as no suggestion has been made during negotiations that the rights of dual nationals will be restricted post-Brexit.

The success of such an idea would depend on the reciprocal benefits given to the Member State allowing the naturalisation. Additionally, if there were concerns about a sudden influx of UK nationals, Member States could continue to apply additional requirements, similar to most naturalisation programmes. These could include knowledge of a language (that of the Member State or any foreign language) and some residency requirements, yet these would most likely need to be less demanding than the requirements usually applied in naturalisation processes. The opportunity for this fast-track naturalisation could also be time-bound and directly linked to the UK leaving the EU. This would ensure that only those individuals who feel European would be able to reach the threshold. Those individuals are likely to integrate with ease and they could be of greater benefit to the accepting state.

Limited Continuation of Rights Post-Brexit

Another idea was put forward by Leona Bashow. She argued that many UK nationals feel strongly attached to their EU citizenship and thought that it would be practical and fair to allow all current UK nationals to continue to hold EU citizenship. However, children born post-Brexit would not have EU citizenship or the attached rights. Those born after Brexit would not experience a loss of rights, as they would never have had those rights in the first place. This idea is somewhat similar to Bauböck's suggestion, mentioned in Part 1,⁸⁵ that it might be possible to abolish birthright citizenship in Member States and establish it instead "*as the basic principle for determining EU citizenship*".⁸⁶ If this was the case, then, as Leona Bashow suggests, current UK nationals who were born in the UK when it was part of the EU would retain EU citizenship, but those born in the UK once it has withdrawn from the EU would not be eligible for EU citizenship. This suggestion provoked multiple differences of opinion when presented to interviewees.

Some argued that this would be a way of punishing the children for an outcome decided before they were born, thus without their participation. Additionally, it was argued to be a way of allowing the generation who voted to leave to bear no consequence of their choice, and pass these consequences to the next generation. Another opinion was that this would cause a massive division between those who have and do not have EU citizenship; a problem exacerbated by the previous issue that those who do have EU citizenship made the decision on behalf of those who do not. In summary, whilst this solution seems to solve the problem of loss of EU citizenship rights, it may nonetheless be a temporary solution that presents more issues than it solves in the future.

⁸⁵ *Supra.* n.64.

Consultation

A third suggestion put forward in interviews was that UK nationals should be consulted on how to proceed with Brexit. Opinions on this varied. The majority of UK nationals interviewed viewed it as a rather necessary thing to do, whereas the group of expert interviewees doubted that a similar consultation could bring any fruitful outcomes. This section focuses on two problems pointed out in relation to such a consultation, as well as two suggestions: one on how to improve a consultation process, and the second relating to whether such a consultation would be democratic.

Problems with the Consultation Idea

Professor Dimitry Kochenov disagrees with the idea of a consultation in this specific context. He posited that it could lead to a repetition of the Brexit referendum, where the majority of the population, who do not make use of their EU citizenship rights, were able to deprive the minority of the population of their ability to use these rights. It could, therefore, lead to majority rule, which is not an ideal scenario in the UK considering that it currently appears rather divided.

Additionally, a further consultation would only help if the individuals involved were well-informed, as their decisions could significantly impact the UK and its relations with the EU. At present in the UK, there is no specific mechanism ensuring that people taking part in a consultation would be adequately informed.

Suggestions for the Effectiveness of any Proposed Consultation

An important aspect of a consultation, as pointed out by Eduardo Alvarado, would be the participation of UK nationals living abroad. Many of these individuals were unable to take part in the Brexit referendum, perhaps ironically considering that they are now placed at the centre of the negotiations given the significant impact Brexit may have on their lives. Eduardo Alvarado suggested that any consultation should be a forum for opinion rather than legally binding, and that this should be made clear to participants.

Another concern raised in the interviews was that we must take care not to undermine the result of the Brexit referendum, as this would severely undermine the democratic system and risk provoking social unrest.

Safeguarding Rights under the Brexit Agreement

Many EU-based interviewees expressed concern about how the Brexit Agreement is to be safeguarded in the event that it is successfully reached. It was widely agreed that there should be a judicial body to safeguard the Agreement, monitor its implementation and provide interpretation for both parties involved. Some suggested that the Court of Justice of the European Union (CJEU) is an appropriate judicial body to have jurisdiction over such matters, yet others disagreed.

Multiple interviewees, including Jonathan Peel and various UK nationals, believed that it would not be appropriate for the CJEU to have jurisdiction over cases that could arise in the UK, regardless of whether the cases involve EU citizens. Instead, it was suggested that a separate judicial body should be established. This argument centres around the suggestion that if EU citizens choose to stay in the UK post-Brexit, they should be subject to the jurisdiction of the UK courts. It would perhaps be unfair to subject the UK to the continued jurisdiction of the CJEU once it has withdrawn from the EU.

As well as unfairness, issues may arise relating to the jurisdiction of the EU over the Agreement itself. Dr Guayasén Marrero González suggested that this could be solved by extending the CJEU's competences to

agreements with former Member States. The jurisdiction of the CJEU could also be established by specific mention in the Brexit Agreement itself.

However, due to the recent suggestions in the positions of the UK and the EU⁸⁷, the European Commission might be the body monitoring the compliance of the EU and the UK with the potential Brexit Agreement. While the UK is keen on the European Commission monitoring the compliance of EU Member States, it would prefer to establish an independent body in the UK to monitor its own compliance. The question is whether the citizens concerned should be satisfied with such a solution, as this means that both the UK and EU would have their own internal bodies safeguarding their own compliance with the Agreement, which might be seen as a rather arbitrary solution.

CONCLUSION

This paper has explored the options available to those most at risk of losing EU citizenship rights and status, and the perceptions of experts and stakeholders in relation to these options.

Associate Citizenship is an idea potentially beneficial to UK nationals who wish to retain EU citizenship. However, it is not clear how much room there is for this in the ongoing negotiations. The interviews conducted demonstrated that the rights attached to EU citizenship are important to UK nationals, whether or not they are aware that these rights stem from EU membership. Nonetheless, the interviewees were clear that with any proposition involving a fee for rights, the amount paid is of paramount importance. Too little and other states may be encouraged to leave to obtain the same deal, too much and those with less income are unable to reap the benefits.

European Citizens' Initiatives show some support for allowing UK nationals to keep their EU citizenship, yet those discussed are a far cry from the number of signatures required for consideration by the European Commission. Even so, the idea contained within these proposals is of decoupling EU citizenship from Member State nationality. The en masse stripping of rights may be prevented if nationality irrelevant to the retention of EU citizenship. This topic was controversial in interviews, with some viewing nationality as a crucial and continuing basis for EU citizenship. Yet now may be the time for re-opening the debate on whether this *should* be the case.

Despite some on the 'leave' side of the debate suggesting that international law, in particular the VCLT, would be the saving grace for European Citizenship rights,⁸⁸ international law offers limited protection. The VCLT has various Articles making it clear that it protects only the rights of state parties, and does not regulate the situations of individuals. Additionally, the extent to which ECHR and EU citizenship rights overlap is limited, and the level of protection provided depends on an interpretation of the provisions and tenuous links. However, this is not to say that no successful cases will be brought to the ECtHR post-Brexit, as the flexibility of certain provisions (such as the protection of legitimate expectations under A1P1) has scope to be interpreted favourably as well as unfavourably.

In relation to the current negotiations, there appears to be too little focus on 'static' UK nationals. This category is greatly affected by Brexit as they lose the choice of whether or not to become mobile in the future. Even proposals that are currently agreed upon by both the EU and UK, for example the personal scope of healthcare,

⁸⁷ *Supra.* n.68.

⁸⁸ *Supra.* n.40.

refer to “[p]ersons whose competent state is the UK and are in the EU27 on exit day (and vice versa)”.⁸⁹ Those who may become mobile in the future are, therefore, sidelined and unprotected.

Interviewees made various other suggestions, such as fast-tracked dual nationality for UK nationals, continuation of rights for those born before the withdrawal date, and consultation of UK nationals. Whilst these ideas present various issues, a suggestion widely agreed upon was that the Brexit Agreement must be safeguarded. The appropriate body for this task is as yet unclear, with the CJEU perhaps hindered from fulfilling this task by jurisdictional issues.

With international law being of little help to at-risk citizens and potential reforms to the derivative character of EU citizenship being a matter for consideration post-Brexit, the Brexit Agreement is likely to be the most important source of protection for the three groups of citizens most at risk. UK nationals living in another EU state, nationals of other EU Member States living in the UK, in particular those whose Member State of origin does not allow dual nationality and ‘static’ UK nationals must be protected in the Agreement, which likely necessitates a shift away from a focus on residence at the time of withdrawal. Whilst the eventual outcome is in the hands of the negotiators on both the EU and UK side, some thought-provoking conclusions have hopefully been drawn by this paper.

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