

RECENT CHALLENGES OF PUBLIC ADMINISTRATION 4

Papers presented at the conference of
'4th Contemporary Issues of Public Administration'
on 10th December 2021

LECTIONES JURIDICAE
29



The background picture of the online conference.

Prepared at the University of Szeged
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Head of Institute:
Zsolt SZOMORA
Professor

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ON 10TH DECEMBER 2021

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ERZSÉBET CSATLÓS

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IMOLA SCHIFFNER, PHD

Senior lecturer

Department of International and European Law

University of Szeged, Faculty of Law and Political Sciences

Schiffner.Imola@juris.u-szeged.hu

NEW RESIDENCE SCHEMES IN THE EUROPEAN UNION AFTER THE BREXIT

I. Introduction

On 31 January 2020, the UK left the European Union on the basis of conditions agreed in the Withdrawal Agreement.¹ *The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (the Withdrawal Agreement or the Agreement), setting out the terms of the UK's withdrawal from the EU, was signed by the Parties on 24 January 2020. The Agreement was then ratified on 30 January 2020 and came into force on 31 January, the day the UK left the European Union.

When the UK left the EU several million citizens of other Member States lived in the UK, and probably around a million UK citizens lived elsewhere in the EU.

What happened to their rights when they suddenly ceased to be living in the EU or to be a Union citizen? This was one of the three 'divorce' issues that were addressed in the first phase of Brexit negotiations.

II. Citizen's rights in the Withdrawal Agreement

The Agreement contains a range of provisions concerning the post-Brexit UK-EU relationship, including about citizens' rights in Part Two.²

"The Citizen's Right" part of the Withdrawal Agreement gives these people continuity of many of the rights they enjoyed in EU law, both parties guarantee the citizens and family members of the other party the preservation of the rights they have before the Brexit.

Withdrawal Agreement determines a period until the end of the *transitional period*, (until 31 December 2020), when both parties to the Withdrawal Agreement fully apply the EU law, and UK citizens could still enjoy free movement rights to the EU27, and vice versa.³

The 'Citizens Rights' provisions of the Withdrawal Agreement will be applied after the end of the transition period.

¹ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 XT/21054/2019/INIT OJ C 384 I, 12.11.2019, 1–177.

² The citizens' rights section of the Withdrawal Agreement, Part Two, Title II., Rights and obligations, Chapter 1. Rights related to residence, residence documents, Article 13–23.

³ Withdrawal Agreement, Article 126.

The provisions of the Agreement guarantee equal treatment rights with the nationals of that State for the related citizens and their family members.⁴ Nevertheless, according to the Withdrawal Agreement in a period from 1 January 2021, there will be restrictions in free movement of persons (workers) between the UK and the EU, but the residence and labour rights, as well as social security rights that were established before the end of the transitional period, are preserved.

II.1. Key points in the Withdrawal Agreement

The citizens' rights section of the Withdrawal Agreement (Part Two) sets out the framework for British/EU citizens' continued legal residence in an EU state/the UK.

The first point to note is that citizens' rights are reciprocal: they will cover both EU27 citizens in the UK and UK citizens in the EU27.⁵

The provisions of the agreement do not cover all of their citizens, but only those who have "exercised free movement rights by the specified date".⁶ The personal scope of the agreement will be those who reside legally on the territory by Brexit Day and their family members, who are defined by the EU citizens' Directive.⁷ Especially those who are workers or self-employed; or have sufficient resources and sickness insurance, (a retired person or a student) are close family members of another person who meets these conditions; or have already acquired the right of permanent residence.⁸

The Withdrawal Agreement also protects the family members that are granted rights under EU law (current spouses and registered partners, parents, grandparents, children, grandchildren and a person in an existing durable relationship), who do not yet live in the same host state as the Union citizen or the UK national, to join them in the future.

Nevertheless, the rules on family reunion rights are more limited, will only apply where the family relationship existed before the end of the transition period, or the family member was legally resident in the same State then.⁹ If the citizens commit a criminal offence after the end of the transition period, national rules on expulsions will apply.¹⁰

Children will be protected by the Withdrawal Agreement, wherever they are born before or after the United Kingdom's withdrawal, or whether they are born inside or outside the host state where the EU citizen or the UK national resides. The only exception is if they are born after the United Kingdom's withdrawal and for which a parent not covered by the Withdrawal Agreement has sole custody under the applicable family law.¹¹

Some categories of people currently covered by EU law (such as UK citizens returning to the UK with non-EU family members, or UK children in the sole care of one non-EU

⁴ Withdrawal Agreement, Article 23.

⁵ Withdrawal Agreement, Preamble.

⁶ Withdrawal Agreement, Preamble and Article 10.

⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, 77–123, Article 2(2).

⁸ Withdrawal Agreement, Preamble, Article 10.

⁹ Withdrawal Agreement, Article 10,e.

¹⁰ Withdrawal Agreement, Article 20(2).

¹¹ Withdrawal Agreement, Article 24.

parent) will not be covered by the Withdrawal Agreement, so their position will be up to UK/EU27 law.¹²

Nevertheless, the Withdrawal Agreement retains all the rights of UK citizens and their family members arising from it even after the end of the transitional period, until the end of their lives, provided that they continue to meet the conditions set out in the Withdrawal Agreement, see Article 39 of the Withdrawal Agreement.

II.2. What remains? – Free movement rights in the Withdrawal Agreement

The Withdrawal Agreement included provision for a transition period, whereby free movement of people would continue from 1 February to 31 December 2020. From the end of that period, the free movement of people between the UK and EU Member States ceased.¹³ So, the Withdrawal Agreement ends free movement between the UK and EU and between the Member States for UK citizens in the EU27.

UK citizen lawfully resident in one EU Member State, even if he or she has been granted permanent residence in that Member State, is not entitled under the Withdrawal Agreement to move to another EU Member State after 2020. UK citizens after the transition period only retain these rights with respect to the Member State in which they already lived or worked. It is required to fulfil certain conditions if they want to move to another EU Member State.¹⁴

British citizens are eligible for visa-free travel to the Schengen area for short stays (90 days in any 180 days). This means they can travel throughout the Schengen States for up to 90 days in any 180-day period. Visas for visits exceeding that period, or for other purposes (e.g. work or study) would depend on Member States' national provisions.¹⁵

The EU intends to introduce a *European Travel Information and Authorisation System* (ETIAS) from late 2022. This means that visitors from the UK will have to get authorisation (an ETIAS visa waiver) to visit the Schengen area.¹⁶ The ETIAS visa waiver will last for three years or until the holder's passport expires. The ETIAS-waiver will be for visits for periods of up to 90 days. Visits for longer periods (e.g. for work or study) will require a separate visa.¹⁷

The *UK-EU Trade and Cooperation Agreement* (TCA) includes some commitments to facilitate travel for certain specified purposes. It provides arrangements for short-term business visitors; business visitors for establishment purposes; intra-corporate transferees; contractual service suppliers; and independent professionals.¹⁸ The TCA also provides for a continuation of

¹² PEERS, Steve: The Brexit Withdrawal Agreement: Overview and First Observations. *EULaw Analysis. Expert insight into EU law developments*. Thursday, 22 November 2018. <http://eulawanalysis.blogspot.com/2018/11/the-brexit-withdrawal-agreement.html> (31.01.2022.)

¹³ Withdrawal Agreement, Article 13(1).

¹⁴ Withdrawal Agreement, Article 14 (1).

¹⁵ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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, PE/50/2018/REV/1, OJ L 303, 28.11.2018, 39–58.

¹⁶ This is similar to the ESTA system for travel to the USA, where visitors pay a one-off fee for a travel authorisation which lasts for a set period of time.

¹⁷ GOWER, Melanie – JOZEPKA, Ilse – FELLA, Stefano: After Brexit: Visiting, working, and living in the EU. *Briefing Paper*, Number 9157, 5 March 2021., 10. <https://researchbriefings.files.parliament.uk/documents/CBP-9157/CBP-9157.pdf> (01.31.2022.)

¹⁸ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021,

necessary health care cover for British visitors to the EU, similar to previous EHIC arrangements.¹⁹ But various reservations and exemptions apply. National immigration regulations, rules on work permits and employment regulations of the respective EU Member State must be observed. As a result, from 1 January 2021, UK business travellers are subject to the different regulatory regimes of each Member State. Likewise, EU business travellers are subject to the visa requirements specified in the UK's immigration rules.²⁰

UK nationals and their family members (whether UK or TCNs) who arrive in the EU Member States *after 1 January 2021* do not fall under the Withdrawal Agreement. Instead, they are subject to the regular national immigration rules applicable to any TCN. UK nationals will have to follow the same procedures as any other TCN, they are no longer entitled to long-term residency, work, retirement, education or sponsoring of family members.²¹

II.3. Residence rights after Brexit

The Withdrawal Agreement provides for the following principle concerning rights of residence: Until 31 December 2020, the end of the transition period, rights of residence will be treated as if the United Kingdom were still an EU Member State.²² Thus, during this period, there will be no change with regard to the rights of residence of UK nationals and their family members or their right to work in EU27. But once the transition period ends, individuals who took advantage of free movement before that date will occupy a unique position in the Member State of residence under the Withdrawal Agreement.

Article 15 of the Withdrawal Agreement confirms that EU/UK nationals and their family members acquire rights of *permanent residence* after accumulating five years continuous lawful residence in accordance with EU law, or the period specified in Directive 2004/38/EC (the 'Citizens' Directive), before or after the end of the transition period.

Article 16 Withdrawal Agreement allows those who have not yet resided in their host state for five years to acquire permanent residence under Article 15 when they meet those requirements.

So from 1 January 2021, persons who were entitled to live or work in one of the EU Member States until that date and who also exercised that right will have the same residence rights as they had before the withdrawal.²³

The conditions for lawful residence are determined in the Withdrawal Agreement.²⁴ Generally, individuals meet these conditions if they are in one of the following categories by the end of the transition period:

- are workers or self-employed;

10–2539,140 cikk.

¹⁹ Gower–Jozepa–Fella, 2021.

²⁰ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, 10–2539,142.cikk

²¹ ACOSTA, Diego: After Brexit: Could bilateral agreements facilitate the free movement of persons? *Discussion Paper, European Migration And Diversity Programme*, 7 September 2021, https://www.epc.eu/content/PDF/2021/Post-Brexit_agreements_DP.pdf. 6 (01.31.2022.)

²² Withdrawal Agreement, Preamble

²³ Withdrawal Agreement, Article 13(4).

²⁴ Withdrawal Agreement, Article 15(1).

New Residence Schemes in the European Union after the Brexit

- are not workers or self-employed, but have sufficient resources and comprehensive sickness insurance, for example, a retired person or a student;
- are close family members of another person who meets these conditions; or
- have already acquired the right of permanent residence.²⁵

UK citizens who have not moved to a Member State before the end of the transition, will not be eligible for permanent residence under the Withdrawal Agreement, they will be considered third-country nationals and are under national immigration rules.²⁶ Unless otherwise negotiated, after the transitional period UK nationals and their family members have access to short-term stays of up to 90 days in any 180-day period, the European Union has adopted a regulation under which UK nationals will be exempt from the visa requirement if EU citizens are also exempted from the visa requirement in the United Kingdom.²⁷

Residence rights under Article 13 of the Agreement apply to only one Member State. Therefore, it is not possible to apply for residence rights in one Member State on the basis of residence rights in another Member State.²⁸

Article 18(1) of the Agreement allows the Member States and the UK to require citizens of the other party to the Agreement and their family members residing in its territory who wish to continue to reside there, to apply for a *new settled status* under the Agreement. By contrast, paragraph 4 of this Article allows citizens of both parties to require the host State to issue a certification document, which manifests this status. UK required all EU citizens to apply for settled status after Brexit.

III. Application process for a new residence status

The application process for post-Brexit residence permits (*Article 50 residence permits*) or *residence registration* options for UK nationals residing in the EU Member States before December 31. 2020, and their non-EU national family members, varies considerably between the EU Member States.

The Withdrawal Agreement offers Member States two possibilities, two different ways to require UK citizens to obtain permanent residence.

The 27 EU Member States may decide whether they require EU/UK citizens to apply for their new residency status (known as a *constitutive* system), or simply register (known as a *declaratory* system).²⁹

Those member states have a declaratory residence system, where residence status is given directly to those in the scope of the Withdrawal Agreement by operation of the law and is not dependent upon completing administrative procedures. Those eligible for status have the right to receive a residence document confirming this and there may be an obligation under national law to register for a residence document, which evidences the status.³⁰

²⁵ Withdrawal Agreement, Article 10.

²⁶ Following of the Withdrawal Agreement, Article 10.

²⁷ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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, PE/50/2018/REV/1, OJ L 303, 28.11.2018, 39–58.

²⁸ Withdrawal Agreement, Article 14.

²⁹ House of Lords European Affairs Committee: Citizens' Rights, 1st Report of Session 2021–22. 23 July 2021. <https://publications.parliament.uk/pa/ld5802/ldselect/ldeuaff/46/46.pdf>, 9. (01.31.2022.)

³⁰ House of Lords, 2021.9.

The constitutive system means, that those in the scope of the Withdrawal Agreement only gain a residence status if they submit an application for a new residence status and the application is granted by the host state. Individuals who fail to apply by the deadline for applications will lose the protections afforded by the Withdrawal Agreement to their residence rights.³¹

The first group of thirteen countries are operating a *constitutive* system and setting deadlines. This means that UK citizens need to formally apply for their new permanent residence status – much as EU citizens need to apply here and are required to issue a document certifying this status.³²

Article 18(1) of the Withdrawal Agreement sets out the criteria for the issuance of residence documents under a constitutive system. Article 18(1)(e) states: “The host State shall ensure that any administrative procedures for applications are smooth, transparent and simple and that any unnecessary administrative burdens are avoided.”

The process typically requires the submission of documents such as one’s passport and evidence of legal residence before the end of the transition period.³³ They will hold called a *Withdrawal Agreement residence permit*,³⁴ the document that represents their legal right to reside in the Member States.

The application procedure cannot be onerous or costly. States should also give individuals a minimum of 6 months after transition to make such an application.³⁵ So the deadline set by the Withdrawal Agreement for applications was 30 June 2021, to allow a six month *grace period* following the end of the transition period.³⁶

The following EU Member States have adopted a stringent constitutive approach, meaning late applicants risk losing their status: France, Latvia, Malta, Luxembourg, Austria, Belgium, Denmark, Finland, France, Hungary, Netherland, Romania, Slovenia and Sweden. (32% of UK citizens)³⁷

Ten countries are offering longer grace periods until either 30 September, 1 October or 31 December 2021. Failure to apply by the deadline will lead to an individual losing their right to reside in that country.³⁸

The three countries which operated the 30 June deadline are France, Latvia, and Malta. The Netherlands and Luxembourg were originally operating to that deadline but extended it to 1 October and 31 December respectively.³⁹

France, for example, had a deadline for applying of 30 June 2021, but UK nationals are only required to hold a residence permit from 1 October 2021. France will also allow late applications if applicants can give a reason for why they are submitting late.⁴⁰

³¹ House of Lords, 2021.9.

³² Foreign commonwealth development office: Specialised Committee on Citizens’ Rights: third joint report on the implementation of residence rights under Part 2 of the Withdrawal Agreement, Published 28 May 2021, <https://www.gov.uk/government/publications/residence-rights-implementation-of-the-withdrawal-agreement-part-2-citizens-rights-third-joint-report-april-2021/specialised-committee-on-citizens-rights-third-joint-report-on-the-implementation-of-residence-rights-under-part-2-of-the-withdrawal-agreement> (01.31.2022.)

³³ RELAND, Joël: UK citizens in the EU: what you need to know. *UK in a changing Europe, The authoritative source for independent research on UK-EU relations*, 27 Apr 2021. <https://ukandeu.ac.uk/explainers/uk-citizens-in-the-eu-what-you-need-to-know/> (01.31.2022.)

³⁴ European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (01.31.2022.)

³⁵ RELAND, 2021.

³⁶ RELAND, 2021.

³⁷ House of Lords, 2021.10.

³⁸ RELAND, 2021.

³⁹ House of Lords, 2021.9.

⁴⁰ RELAND, 2021.

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The second group of fourteen countries – including Spain, Germany, Cyprus, Portugal and Italy – are operating a *declaratory system*.⁴¹ Under this system, individuals who were legally resident in the country before the end of the transition period are automatically entitled to a new residence status. They do not lose their residency status if they miss the application deadline.

UK citizens may register for a residence card as proof of that status.

So there isn't registration obligation and issue, but if citizens request the host State has to issue a certification document, a residence document expressly identifying them as beneficiaries of the Agreement under Article 18(4).⁴² (68% of UK citizens)⁴³ the Member States could require that individuals relying on free movement rights register and provide evidence that they have a job or sufficient means to support themselves. Those who already have a documented form of permanent residence will get the new national status free of charge, subject only to a security and criminality check, and verification of identity and residence.

Under declaratory systems, in some cases, there are deadlines for UK citizens to register their new residence status (for example 30 June 2021 in Slovakia). However missing the deadline can result only in a fine, and not in the loss of the rights which an individual has under the Withdrawal Agreement.

States with larger resident populations of UK citizens (including Spain, Germany and Italy) have generally the declaratory system, although there are exceptions to this rule, such as France and the Netherlands.⁴⁴ The precise requirements and processes vary country by country. For example, in Poland, there is no obligation for UK citizens to obtain a new residence status or document. In Spain, UK nationals can use existing residence documents until they expire, at which point they will need to obtain a new kind. British citizens in Germany without the necessary residence document are expected to notify the authorities by 30 June 2021.⁴⁵

In practice, however, many UK nationals will still need a new residence document to access their rights. That means they will have to submit an application proving they were residents before 31 December 2020, albeit without the risk of losing one's rights permanently if an application deadline is missed.

While EU guidance says that under constitutive systems “failure to apply in time may lead to a loss of any entitlement under the Withdrawal Agreement”⁴⁶ in practice will depend on how individual countries operating constitutive systems choose to enforce their rules, including any appeal systems. The so-called *late application policy*⁴⁷ allows making an application for settled status after the deadline. Those individuals who make a late application must have a “good reason” for

⁴¹ House of Lords, 2021,9.

⁴² Index questions for UK nationals and their family members residing in Spain, Ministerio de Política Territorial y Función Pública, 2021.3. https://www.mptfp.gob.es/dam/es/portal/delegaciones_gobierno/delegaciones/catalunya/servicios/extranjeria/guia_tramites/GUIA_BREXIT_ENG.pdf.pdf (31.01.2022.)

⁴³ House of Lords, 2021.9.

⁴⁴ UK Parliament: Implementing the Withdrawal Agreement: citizens' rights contents, 20 October 2020. <https://publications.parliament.uk/pa/cm5801/cmselect/cmexeu/849/84905.htm> (01.31.2022.)

⁴⁵ RELAND, 2021.

⁴⁶ European Commission: Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020, 24 January 2020, Brussels. https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_104. (01.31.2022.)

⁴⁷ European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (01.31.2022.)

applying late to the scheme. If an individual does not have a good reason, then the late application will be refused.⁴⁸

The examination by the Member State immigration authorities shall be carried out on a case-by-case basis and will be made upon an assessment of all the relevant circumstances and reasons for not respecting the deadline. This assessment will be done flexibly and pragmatically.⁴⁹

In both constitutive and declaratory systems, UK nationals have a right to appeal if their application for a permanent residence status is rejected. They maintain their right to the residence until a final decision is made on their appeal unless they are considered a threat to public security.⁵⁰

The European Commission will monitor the application of citizens' rights provisions in the EU to make sure they are consistent with the EU's treaties – of which the European Court of Justice is the ultimate arbiter.⁵¹

IV. The EU Settlement Scheme in the UK

The UK is implementing the citizens' rights provisions of the Withdrawal Agreement through the EU Settlement Scheme (EUSS). The EUSS is a *constitutive* system. This means individuals must successfully apply to the EUSS to have the protections set out in the Agreement.

With the deadline of 30 June 2021 could the EU citizens in the UK apply to the EU Settlement Scheme (EUSS), under which they are permitted to stay in the UK after the Brexit.⁵² This is a national, separate legal scheme in the UK, the legal requirements of the EUSS are set out in full in Appendix EU of the Immigration Rules.⁵³

The general closing date for making applications is over, the Home Office will only consider late applications in certain circumstances.

To get this status, “the EU citizen must have been resident in the UK before a specified date”, only those EEA citizens are entitled who were residents in the UK before 1 January 2021, and who could demonstrate this was able to make an application under the EU Settlement Scheme.⁵⁴

The so-called *settled* and *pre-settled* status⁵⁵ enables EEA citizens and their family members to continue to live, work and study in the UK. They will have the same access as they currently do to healthcare, pensions and other benefits in the UK too.

EU citizens and any of their non-EU family members who arrived before 31 December 2020, and have been continuously resident in the UK for five years by the time of their application, will be eligible for *settled status* enabling them to stay indefinitely. (officially called *Indefinite Leave to Remain* (ILR).⁵⁶

⁴⁸ European Londoners Hub: Late applications to the EU Settlement Scheme, 15 December 2021. <https://www.london.gov.uk/what-we-do/communities/european-londoners-hub/late-applications-eu-settlement-scheme> (01.31.2022.)

⁴⁹ European Commission: Information about national residence schemes for each EU country. https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/citizens-rights/information-about-national-residence-schemes-each-eu-country_en (31.01.2022.)

⁵⁰ RELAND, 2021.

⁵¹ European Commission, 2020.

⁵² Home Office: Immigration Rules, 25 February 2016., <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu> (01.31.2022.)

⁵³ Home Office, 2016.

⁵⁴ Immigration Rules,2016,EU2.EU11, EU12.

⁵⁵ House of Lords, 2021.17.

⁵⁶ Immigration Rules, 2016, EU11.

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EU Citizens, who not yet have been continuously resident here for five years by the time of their application, will be eligible for temporary status to remain resident in the UK until they have accumulated five years. The so-called *pre-settled status* allows them to stay until they have reached the five-year stay.⁵⁷ They can then also apply for settled status.

Those who have settled status/ILR can apply to naturalise as British citizens after demonstrating that they have been free from immigration restrictions for 12 months.⁵⁸

Family members, any *family dependants* of a qualifying EU citizen in the UK before Brexit will be able to apply for settled status after five years, irrespective of the specified date.⁵⁹

The EUSS checks three basic requirements: identity, UK residence, and *suitability*.⁶⁰ The suitability requirement covers matters such as criminal conduct or false information provided during an application.⁶¹ There will be an exclusion for those who are serious or persistent criminals and those whom we consider a threat to the UK.

A curiosity that they will no longer require evidence that economically inactive EU citizens have previously held “comprehensive sickness insurance” to be considered continuously resident.⁶²

The settled EU citizens will continue to have access to the same UK benefits on the same basis before the Brexit. If they later get settled status, they will have access to benefits on the same terms as comparable UK residents. These rights and access will implicitly not be offered to those who arrive after the specified date.⁶³

Those EU citizens who arrive after the specified date will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – but this group should not expect guaranteed settled status.⁶⁴

In the case of EU citizens (and their family members) who, as of 31 December 2020, had not met the criteria to be granted the right to reside in the United Kingdom, the *Trade and Cooperation Agreement* between the EU and the United Kingdom forms the basis for access to the labour market, healthcare provision, education and benefits, and for family reunion rights.⁶⁵ From 1 January 2021, anyone wishing to take up residence in the United Kingdom, e.g. to work, study or join their family, generally has to apply for a visa in advance. Set criteria have to be met for a visa to be granted. Family members arriving after Brexit will be subject to the same immigration rules, which are for EU citizens who arrive after the specified date.⁶⁶

⁵⁷ Immigration Rules, 2016, EU14.

⁵⁸ The EU Settlement Scheme: EU Settled and Pre-Settled Status, 2021. <https://www.carterthomas.co.uk/our-work-uk-immigration/personal-immigration/eea-nationals-family/eu-settled-and-pre-settled-status-scheme/> (01.31.2022.)

⁵⁹ Immigration Rules, 2016, EU 12,14A.

⁶⁰ Immigration Rules, 2016, EU15.

⁶¹ House of Lords, 2021.17,56. According to Home Office statistics, of the 55,590 applications refused in the period to 31 March 2021, more than 99% were refused on eligibility grounds and fewer than 1% were refused on suitability grounds. In <https://publications.parliament.uk/pa/cm5801/cmselect/cmxeu/849/84905.htm>, 17. (01.31.2022.)

⁶² PEERS, Steve: The Brexit talks: opening positions on the status of UK and EU citizens. *EU Law Analysis. Expert insight into EU law developments*, 30 June 2017. <http://eulawanalysis.blogspot.com/search?q=Eu+settled> (01.31.2022.)

⁶³ PEERS, 2017.

⁶⁴ PEERS, 2017.

⁶⁵ GOWER-JOZEPKA-FELLA, 2021.

⁶⁶ PEERS, 2017.

V. A better offer for UK citizens – The EU Long Term Residence

EU Directive long-term residence for non-EU citizens could be relevant for some UK citizens living in an EU Member State after Brexit. This Directive⁶⁷ establishes the rights and conditions for granting the *long-term resident status* of third-country nationals who meet several conditions. Persons with this status are entitled to equal treatment as nationals in a range of areas in the Member States. The most important regulation: granted a conditional right to free movement within the EU and allows non-EU citizens to move between the Member States.⁶⁸

The basic rule is that third-country nationals (UK nationals) are entitled to such status after residing “legally and continuously for five years in the territory of the Member State concerned” before they apply for status.⁶⁹

Long-term resident status shall be denied on grounds of insufficient resources or lack of sickness insurance.⁷⁰ Member States may require applicants to fulfil integration conditions, or refuse to grant status on grounds of public policy or public security.⁷¹

The Directive also sets out detailed rules on the procedure for acquisition and withdrawal of long-term residence status. According to the CJEU, a third-country national does not obtain LTR status automatically but has to apply for it.⁷²

The long-term residence status entitles its holders to equal treatment with nationals in several areas: employment and self-employment; education and vocational training; recognition of diplomas; social security, social assistance, and social protection ‘as defined in national law’; tax benefits; access to goods and services; freedom of association; and free access to the territory.⁷³

The most important; this status grants a conditional right to free movement within the EU. A long-term resident shall acquire the right to reside in the territory of an MS other than the one which granted him the long-term residence status, for a period exceeding three months.⁷⁴

There are several restrictions compared to EU free movement law: the Member States can impose labour market tests limiting movement on economic grounds, or an overall quota on the numbers of third-country nationals.⁷⁵

The right of residence can be exercised if the long-term resident is pursuing an economic activity or a non-economic activity, but the “second” Member State can insist on several conditions.

Long-term residents can bring with family members as defined by the EU’s family reunion Directive⁷⁶, but the second Member State retains the option to decide whether to admit other family members.⁷⁷ Sickness insurance and sufficient resources tests can apply.⁷⁸ Admission of

⁶⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44–53)

⁶⁸ SCHIFFNER, Imola: Denizenship-A New Fundamental Status in The EU? *Marmara Journal of European Studies*, Vol. 26, No. 2. 2018. 69–82. https://avrupa.marmara.edu.tr/dosya/avrupa/mjes%20arsiv/vol%202026-2/3_Schiffner.pdf (01.31.2022.)

⁶⁹ Council Directive 2003/109/EC, Article 4(1).

⁷⁰ Council Directive 2003/109/EC, Article 5(1)b.

⁷¹ Council Directive 2003/109/EC, Article 5(2).

⁷² C-40/11 *Yoshikazu Iida kontra Stadt Ulm*, 2012. november 8., EU:C:2012:691.

⁷³ Council Directive 2003/109/EC, Article 11.

⁷⁴ Council Directive 2003/109/EC, Article 14(1).

⁷⁵ Council Directive 2003/109/EC, Article 14(3).

⁷⁶ Council Directive 2003/86/EC, 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, 12. (which is more restrictive than the family reunion rules in EU free movement law)

⁷⁷ Council Directive 2003/109/EC, Article 15.

⁷⁸ Council Directive 2003/109/EC, Article 15(2) b.

long-term residents and their family members can also be refused not only on grounds of public policy and public security but also on public health.⁷⁹

There are also parallel national laws on securing long-term residence for non-EU citizens, which might be more appealing in practice for UK citizens, particular if it's easier to apply under those laws. Nevertheless, it includes limited and stricter provisions on movement to the other Member States. (Not the same as the EU free movement rights but are better than nothing at all.)⁸⁰

The EU rules will be more relevant to those UK citizens who would want to move to another Member State in future, even if there are stricter conditions of doing so as compared to EU free movement law. On the whole, this Directive facilitates the security of residence, equal treatment, and free movement of third-country nationals and so of UK nationals, more than the new settled status provided for.

VI. Conclusion

Brexit. A small word with a potentially big consequence: the end of free movement and residence for UK citizens in the EU Member States. This could have significant consequences for UK citizens who have built their lives in the EU and are now experiencing uncertainty regarding their ability to continue those lives as before. Nevertheless, the Withdrawal Agreement tries to safeguard the right to stay and continue their current activities for over 3 million EU citizens in the United Kingdom, and over 1 million UK nationals in EU countries.

The citizen's right provisions of the Agreement grant a new residence status for the UK citizens and family members.

In relation to the systems operating in the EU Member States to allow UK citizens to access their rights, the picture is currently mixed. There are two systems for UK citizens to have permanent residence, the so-called constitutive system and the declaratory system.

The application deadlines passed in most EU Member States. While the data shows that some EU countries are progressing well with their applications from UK citizens, there are problems in others, including ongoing tensions over the implementation of the system and with communications to UK residents about how those systems work.

Some UK citizens in the EU are more at risk of losing their rights than others, particularly those in vulnerable groups such as the elderly and digitally challenged.

Member States may create or maintain national systems that are more favourable than the rules in Chapter II, but the acquisition of status under such more favourable rules will not confer the right of residence in the other Member States. The so-called EU LTR status will be more appealing for any UK citizen who contemplates moving to another Member State.

Overall, therefore, under the new, post-Brexit rules, thousands of individuals will be affected by, for example, much stricter family reunion rules and the lack of paths for labour mobility, and it would create a dilemma for a UK citizen living in one of Member States in practice. So the mobility and residency of UK citizens have to be part of the ongoing negotiations on future relations between the UK and the EU.

⁷⁹ Council Directive 2003/109/EC, Article 18.

⁸⁰ PEERS, 2018., SCHIFFNER, 2018.

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