



HOUSE OF LORDS

European Union Committee

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10th Report of Session 2016–17

# Brexit: acquired rights

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### *The European Union Committee*

The European Union Committee is appointed each session “to scrutinise documents deposited in the House by a Minister, and other matters relating to the European Union”.

In practice this means that the Select Committee, along with its Sub-Committees, scrutinises the UK Government’s policies and actions in respect of the EU; considers and seeks to influence the development of policies and draft laws proposed by the EU institutions; and more generally represents the House of Lords in its dealings with the EU institutions and other Member States.

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Evidence is published online at [www.parliament.uk/brexit-acquired-rights-inquiry](http://www.parliament.uk/brexit-acquired-rights-inquiry) and available for inspection at the Parliamentary Archives (020 7129 3074).

Q in footnotes refers to a question in oral evidence.

## SUMMARY

This report considers one of the most pressing issues to have arisen since the referendum result in June—what happens to the EU rights upon which so many of us rely when the UK leaves the EU?

EU citizenship rights feature prominently among those rights, the most fundamental of which is the right of any EU national to live and work in a Member State of their choosing. Millions have chosen to do so. This report largely focuses on those who have chosen to do so in the UK, and those UK nationals who have chosen to do so in other EU Member States. While the report does not consider commercial rights in any detail, many of the legal principles it considers apply as much to companies as to individuals.

There was much speculation before the referendum that EU rights would somehow be protected as ‘acquired rights’, meaning that they would continue irrespective of the UK’s withdrawal from the EU. The evidence we received shows that this is not the case. The doctrine of acquired rights in international law is limited both in scope and enforceability, and is highly unlikely to provide meaningful protection against the loss of EU rights upon Brexit.

The European Convention on Human Rights may provide some protection, particularly against EU nationals being deported from the UK, or UK nationals being deported from EU Member States (should that ever occur). It may also protect against the loss of possessions, be they physical, or intangible, such as certain commercial rights, which are currently protected under EU law. Similarly, Bilateral Investment Treaties may provide limited safeguards for investors from losing EU rights, when to do so does not clash with principles of EU law.

These alternative means of protecting EU rights post-Brexit must, however, be seen in their proper context. They overlap with only a handful of the thousands of EU rights which derive from the UK’s membership of the EU. As Professor Sionaidh Douglas-Scott told us: “A lot of the rights that are derived from EU law are simply not replicated in other instruments, so there is a real deficit ... There will be many, many rights that simply do not find a home in any of these other instruments.”

The central recommendation of the report—and an inescapable consequence of the evidence we received—is that if certain EU rights are to be safeguarded on the UK’s withdrawal from the EU, they should be safeguarded in the withdrawal agreement itself. The agreement will be binding under international law, and will be given effect, and enforced, in the national legal systems of the UK and the EU Member States. This would be the most certain way of providing effective legal protection. It would also be the most effective way of reducing the level of litigation that would undoubtedly follow a Brexit where these rights were not safeguarded.

We conclude that the rights to be safeguarded in the withdrawal agreement should be frozen as at the date of Brexit. We think it likely that the majority of them will be reciprocal with parallel EU rights, and so should be applied consistently with them. In other words, there will need to be a level playing field. As the parallel EU rights evolve over time, so it is likely that UK law will have to evolve with them. Accordingly, we recommend that a mechanism be established

to ensure that UK law can take account of relevant developments in EU law, and, importantly, that EU law can take account of relevant developments in UK law. We draw attention to a mechanism under an extradition agreement between the EU, Norway and Iceland designed to achieve similar ends.

The case for all EU citizenship rights being among those to be safeguarded in the withdrawal agreement is overwhelming. The Polish, Bulgarian and French Ambassadors to the UK told us of the contribution their nationals had made to the economy and culture of the UK, of the rise in xenophobia they had experienced since the referendum, and of the fundamental uncertainty they faced. We received equally compelling evidence of the deep anxiety of UK nationals living and working in other EU Member States. Many are pessimistic that the life that they had planned will still be possible. We are not surprised. Their rights to live, work and study in another country as a consequence of EU citizenship are far greater than those they would enjoy under national immigration rules, or under EU immigration rules for nationals of a State which is not a member of the EU.

As a consequence, we recommend that the Government should change its policy and give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK post-Brexit. The overwhelming weight of the evidence we received points to this as morally the right thing to do. It would also have the advantage of striking a much needed positive note for the start of the negotiations.

# Brexit: acquired rights

## CHAPTER 1: INTRODUCTION

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### The EU and acquired rights

1. Over time the European Union has provided individuals, companies, public bodies and government agencies with thousands of rights and obligations in fields ranging from employment law to free trade, from intellectual property to financial services. The UK has been an active participant in their creation. This complex framework of rules is enforced through EU law, which is either directly effective in the EU's Member States, or is transposed by them into national law.
2. What will happen to these rights and obligations after the UK leaves the EU, when EU law will no longer apply? Will EU nationals in the UK, or UK nationals in other EU Member States, be able to rely on them as 'acquired rights' under international law, as has been widely reported, or any other source of law? Or will it be necessary for the UK's withdrawal agreement, should one be agreed, to specify which EU rights are to be maintained? And what if no withdrawal agreement is agreed before the UK is obliged to withdraw from the EU? In our view, these are some of the most pressing questions to have arisen from the result of the June referendum.

### Our approach to the inquiry

3. This report of the EU Justice Sub-Committee seeks to answer these questions. Much of its focus is on EU nationals living, working and studying in the UK, many of whom are currently facing uncertain futures, and on UK nationals facing similar uncertainty in other EU Member States. We are conscious that many significant commercial rights are enforced by EU law, and that their future enforceability is of considerable concern. While this report does not focus on commercial rights, many of the legal principles it considers apply as much to companies as to individuals.
4. Chapter 2 of the report explains the current framework of EU citizenship rights, and Chapter 3 considers the consequence of those rights being removed for EU nationals in the UK and UK nationals in other Member States. Chapter 4 considers the evidence we received from the Ambassadors to the UK of Poland, Romania and France on the concerns of their nationals in the UK. Chapter 5 considers the evidence we received on the concerns of UK nationals in other EU Member States. Chapter 6 considers the extent to which the doctrine of acquired rights under international law will be able to safeguard EU rights post-Brexit, and Chapter 7 the extent to which the European Convention on Human Rights or bilateral investment treaties will be able to do so. Chapter 8 considers whether the withdrawal agreement itself should protect pre-existing EU rights, and, if so, how it should do so. Chapter 9 considers the role of EU law, and the Court of Justice of the EU (CJEU), in enforcing rights protected under the withdrawal agreement. Lastly, Chapter 10 considers the case for giving a unilateral undertaking, or seeking early agreement, on which EU citizenship rights should be maintained post-Brexit.

5. We met in September and October 2016 to take oral evidence from the witnesses listed in Appendix 2. We are very grateful to them, and to all those who submitted evidence in writing, for their participation in this inquiry.

### **The Government's approach to the inquiry**

6. The Foreign and Commonwealth Office provided written evidence to the inquiry on the concerns of EU nationals in other EU Member States, which is reflected in chapter four of the report.
7. In early October we invited a Minister from the Home Office, which leads on UK immigration policy, to give evidence to the inquiry. The Home Office declined to do so for the following reasons:

“We have considered the request for the Minister to give evidence to the committee but ... the government has been clear that it wants to protect the rights of EU nationals already living in the UK, and the only circumstances in which that would not be possible are if UK citizens' rights in other EU Member States were not protected in return. The government has provided repeated assurances on this point but this issue must be addressed as part of the wider negotiations on the UK's exit from the EU. The government has committed to invoking Article 50 by the end of March 2017 once it has clear objectives for negotiations. Therefore the government will not be able to provide any further detail at this time and we fear the session will not be particularly constructive if done at this time.”<sup>1</sup>

8. We wrote to the Home Office again, on 27 October, to explain that questions had arisen in the course of the inquiry on which we felt the Government ought to be given an opportunity to comment before we reported. We asked whether it still maintained that it would have no useful evidence to give to the inquiry. If its view had changed, we explained that we would need to receive the Government's evidence by early-to-mid November, as the inquiry planned to report in December.<sup>2</sup> We did not receive a reply to the letter.

### **The EU Committee's work**

9. Following the referendum on 23 June 2016, the European Union Committee and its six sub-committees launched a coordinated series of short inquiries, aimed at providing an analysis of the most important issues that will arise in the course of negotiations on Brexit. The pace of events means that these inquiries will be short, but with this constraint, we are seeking to outline a wide ranging and thorough view on important issues and how they might affect the United Kingdom and our European Union partners.
10. Our inquiries are running in parallel with the work currently being undertaken across Government, where departments are engaging with stakeholders, with a view to drawing up negotiating guidelines. But while much of the Government's work is being conducted in private, our aim is to stimulate informed debate, in the House and beyond, on the many areas of vital national interest that will be covered in the negotiations.

### **11. We make this report to the House for debate.**

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1 Email from the Home Office dated 5 October 2016, as set out in the letter from Lord Boswell of Aynho to Baroness Williams of Trafford, 27 October 2016: <http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Brexit/LtrtoBaronessWilliamsOfTrafford271016.pdf>

2 Letter from Lord Boswell of Aynho to Baroness Williams of Trafford, 27 October 2016.

## CHAPTER 2: THE RIGHTS OF EU CITIZENS AND THEIR FAMILIES

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### The definition of EU citizenship

12. The concept of EU citizenship was first introduced into EU law by the Maastricht Treaty in 1993.<sup>3</sup> Since then, anyone holding the nationality of an EU Member State has been also a citizen of the EU. Member State nationality is, therefore, a pre-condition of the status of EU citizenship. The concept is now set out in Article 20(1) of the Treaty on the Functioning of the European Union (TFEU),<sup>4</sup> which provides:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”<sup>5</sup>

### EU citizenship rights under the EU Treaties

13. EU citizens enjoy a range of EU Treaty-based rights including:
- the right to move and reside freely within the EU;<sup>6</sup>
  - the right to vote and stand as candidates in municipal elections and European Parliament elections wherever they live in the EU;<sup>7</sup>
  - the right to be assisted by another EU Member State’s embassy in a country outside the EU under the same conditions as nationals of that particular Member State, should their own Member State not be represented there;<sup>8</sup>
  - the right to petition the European Parliament;<sup>9</sup> and
  - the right to organise, together with other EU citizens, a citizens’ initiative to call for new EU legislation.<sup>10</sup>

### EU citizenship rights under the Citizens Directive

14. Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary School of Law, University of London, explained that the right to move and reside freely in another Member State had given rise “to a panoply of rights”, which were “likely to be of the most pressing concern in the event of a Brexit”.<sup>11</sup>

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3 Articles 8–8e, 1992 Treaty on European Union, [OJ C 191](#) (29 July 1992), pp 0001–0110

4 The Treaty on the Functioning of the European Union (TFEU) entered into force in EU Member States on 1 December 2009

5 Written evidence from Susie Alegre ([AQR0007](#))

6 Articles 20(1)(a) and 21, TFEU, [OJ C 202](#) (7 June 2016), p 1–388; written evidence from Mr Anthony Speaight QC, p 4 ([AQR0008](#))

7 Articles 20(1)(b) and 22, TFEU, [OJ C 202](#) (7 June 2016), p 1–388; written evidence from Mr Anthony Speaight QC, p 4 ([AQR0008](#))

8 Articles 20(1)(c) and 23, TFEU, [OJ C 202](#) (7 June 2016), p 1–388; written evidence from Mr Anthony Speaight QC, p 4 ([AQR0008](#))

9 Articles 20(1)(d) and 24, TFEU, [OJ C 202](#) (7 June 2016), p 1–388; written evidence from Mr Anthony Speaight QC, p 4 ([AQR0008](#))

10 Article 24, TFEU, [OJ C 202](#) (7 June 2016), pp 1–388

11 Written evidence from Professor Sionaidh Douglas-Scott ([AQR0001](#))

15. The majority of these rights were set out in the 2004 Citizens Directive,<sup>12</sup> which codified EU legislation dealing separately with the free movement and the residence rights of employed and self-employed people, students and other economically inactive people (such as those who are retired or unemployed), in order “to simplify and strengthen the right of free movement and residence of all Union citizens”.<sup>13</sup> We set out the principal rights codified by the Citizens Directive in Box 1.
16. The Citizens Directive also applies to the European Economic Area (EEA) States: nationals of Norway, Iceland and Lichtenstein enjoy the same citizenship rights as those of EU citizens when they work and reside in an EU Member State. Similarly, nationals of EU Member States enjoy EU citizenship rights in EEA States.<sup>14</sup>
17. The Citizens Directive was implemented into UK law by the Immigration (European Economic Area) Regulations 2006.

### Box 1: The Citizens Directive

The Citizens Directive codifies the following rights:

- Article 4 provides **a right of exit**. All EU citizens who hold a valid identity card or passport and their non-EU family members—spouses, registered partners, dependent descendants, dependent ascendants—<sup>15</sup>have the right to leave the territory of a Member State to travel to another Member State. No exit visa can be imposed on an EU citizen.
- Article 5 provides **a right of entry**. Member States must grant all EU citizens who hold a valid identity card or passport and their family members the right to enter their territory. No entry visa can be imposed on an EU citizen.
- Article 6 provides **a right of residence for up to three months**. All EU citizens and their non-EU family members have the right of residence in another Member State for a period of up to three months without any conditions, other than holding a valid identity card or passport.
- Article 7 provides for **a right of residence for more than three months**. All EU citizens have the right of residence in another Member State for longer than three months if they meet any of the following conditions:
  - They are employed or self-employed (no further conditions apply).
  - They are economically inactive but have: i) “sufficient resources for themselves and their family not to become a burden on the social assistance system of the host Member State”; and ii) “comprehensive sickness insurance cover”.

12 Council 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 April 2004), pp 77–123

13 Recital 3 of Council 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 April 2004), pp 77–123

14 References to EU nationals and EU Member States in relation to EU citizenship rights should be read as including EEA nationals and EEA States.

15 Article 2(2) of Council 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 April 2004), pp 77–123

- They are accredited students and have: i) “sufficient resources for themselves and their family not to become a burden on the social assistance system of the host Member State”; and ii) “comprehensive sickness insurance cover”.

These conditions are often referred to as **exercising treaty rights**.

The right of residence for more than three months extends to non-EU family members of EU citizens meeting one of these conditions.

- Article 16 provides a **right of permanent residence**. All EU citizens who have resided for a continuous period of five years in the host Member State, **and who have exercised their treaty rights during that time**, have the right of permanent residence there. The right of permanent residence extends to (non-EU) family members of EU citizens who have resided for a continuous period of five years. Once acquired, the right of permanent residence can only be lost through absence from the host Member State for a period exceeding two consecutive years. The following temporary absences do not affect continuity of residence:
  - absences not exceeding a total of six months a year; or
  - absences of a longer duration for compulsory military service; or
  - one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training; or
  - a posting in another Member State or a third country.
- Article 24 provides a **right to equal treatment**. All EU citizens and their non-EU family members have the right to be treated equally with nationals of the host State. The host State is not, however, obliged to grant social assistance to economically inactive people or students during the first three months of their stay.
- Article 27 provides a **right to expel** an EU citizen on grounds of public policy, public security or public health, subject to procedural safeguards. These grounds cannot be invoked to serve economic ends. The personal conduct of the individual concerned must represent “a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”

*Source: 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 April 2004)*

18. It is worth noting that all the individual rights to which the Citizens Directive gives effect are directly enforceable by EU citizens in any EU Member State. Unlike national immigration rules, they do not require the consent of the host State before they can be relied upon. It is for this reason that the rights of EU citizens to live in a Member State are not dependent on that State issuing a residence card. This does, however, lead to difficulties when EU citizens seek to prove that they have exercised their ‘treaty rights’ (see Box 1 above) for five years to gain permanent residence.

### Practical difficulties in obtaining proof of a right of permanent residence in the UK

19. We received evidence from two members of the public illustrating this problem. Mr Gary Holland drew our attention to “the very serious consequences that Brexit may have for EU nationals living in the UK for a long period of time who do not qualify for permanent residency rights, and a common misconception as to how such rights are acquired”.<sup>16</sup> He believed there was a “common myth” that simply residing in the UK for five consecutive years led to a right to permanent residency—but that this was incorrect. The comprehensive sickness insurance condition (see Box 1) meant that time spent as a student only counted towards residency if students possessed either medical insurance in their own country, or private medical insurance in the UK.<sup>17</sup> This was “not at all publicised” and most people were “completely oblivious to it.” Furthermore, as all EU citizens residing in the UK automatically qualified for NHS care, “there is no need for people to even consider this (why would they?)”. He stated that other cases where residency did not count towards the qualifying period included:

“a) taking a year off from work to attend university, without sickness insurance; b) being out of work for a period of time and not claiming benefits; c) travelling/working/studying abroad for a while; d) working part-time and not earning enough; e) taking time off to be a carer without sickness insurance.”

Mr Holland thought that, when it finally came to submitting an application for proof of permanent residence, “plenty of people will be shocked to discover they do not qualify regardless of the number of years spent in the country.”<sup>18</sup>

20. Mr Stuart Whitehouse submitted evidence, having attended one of the inquiry’s evidence sessions, to correct a similar misapprehension, namely that EU citizens resident in the UK acquired automatic residency rights after five years. He gave the example of an elderly parent (an EU citizen) who came to the UK to be near their son or daughter, but who was neither dependent on them nor had worked for five years in the UK. Such a person would never acquire the right to permanent residency in the UK under EU law (having not exercised their treaty rights—see Box 1), even if they had been in the UK for ten years. They would be “in a kind of limbo”: they could not be removed from the country because they were an EU citizen; but

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16 Written evidence from Mr Gary Holland (AQR0009)

17 According to the 2015 Home Office guidance note on the requirement for “comprehensive sickness insurance” to prove a permanent right of residence as an EU citizen, one of the following five documents is necessary: 1) “Schedule or other document from a private medical insurance provider outlining the level of cover. This must have covered you/your sponsor/your family member(s) for the majority of risks while in the UK.” 2) Valid European Health Insurance Card (EHIC) issued by an EEA Member State (not the UK). 3) Form S1 (certificate of entitlement to healthcare if you do not live in the country where you are insured). 4) Form S2 (authorisation to obtain planned health treatment in another EU or EFTA country). 5) Form S3 (Certificate of entitlement to healthcare in your former country of employment). The guidance note also states that “the definition of comprehensive sickness insurance does not include cash-back health schemes, travel insurance policies, or access to the UK’s National Health Service (NHS).” See EEA (PR) Guidance Notes, version 2.0., December 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/506058/EEA\\_PR\\_guide-to-supporting-documents\\_v1\\_3\\_2015-12-04\\_KP.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506058/EEA_PR_guide-to-supporting-documents_v1_3_2015-12-04_KP.pdf) [accessed 30 November 2016]. The Court of Appeal has confirmed that the requirement for comprehensive sickness insurance “must be strictly complied with”, irrespective of the availability of medical care under the NHS (*Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988, para 71).

18 Written evidence from Mr Gary Holland (AQR0009)

neither could they apply for permanent leave to remain because that system only operated for non-EU citizens. Mr Whitehouse's mother-in-law was in this situation:

"I can declare an interest in this because my mother in law has been in the UK for 9 years (Polish), her daughter (my wife) is a UK citizen by naturalisation but my mother in law did not work in the UK and the Home office says she has therefore not exercised her treaty right and is not eligible for permanent residence. We asked because she thought after 5 years she would be able to apply for naturalisation which she would be proud to obtain."<sup>19</sup>

### Conclusions

21. **The rights of an EU citizen to live and work in any EU Member State, and to gain a permanent right of residence in that State after five years, are some of the most fundamental in EU law. From them have derived all of the additional citizenship rights that are necessary for nationals of EU Member States, and their families, to conduct their lives in an EU Member State of their choosing on equal terms with the nationals of that State.**
22. **That said, we received evidence suggesting that many EU nationals who have been in the UK for over five years may not be able to prove that they meet the criteria for permanent residence as an EU citizen. For example, those who are not economically active, including students, will have to show that they have had comprehensive sickness insurance cover for five years in the UK, notwithstanding that the National Health Service is freely available. We call on the Government to explain whether this consideration will influence the decision it makes on the cut-off point for deciding which EU nationals in the UK are given a permanent right to reside after Brexit.**
23. **We also call on the Government to publish statistics on the number of EU nationals in the UK who have obtained proof of a permanent right to residence, and the number of applications that are pending.**

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19 Written evidence from Mr Stuart Whitehouse ([AQR0011](#))

### CHAPTER 3: THE LOSS OF EU CITIZENSHIP RIGHTS

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#### The consequences of the loss of EU citizenship rights for EU nationals in the UK

24. Professor Douglas-Scott said that the migrant rights of non-EU nationals in the UK,<sup>20</sup> as set out in the UK Immigration Rules, were “considerably more restrictive” than the rights of EU nationals in the UK. The loss of EU citizenship rights would, therefore, mean “a potential loss of valuable rights.”<sup>21</sup>
25. The Immigration Law Practitioners’ Association (ILPA) emphasised how complex the Immigration Rules had become:
 

“The categories of the Immigration Rules under which a person may apply for settlement (indefinite leave to remain) are closely and narrowly defined with prescriptive criteria, setting out not only what a person must prove in order to qualify for leave but also how they must prove it. As a result, the Immigration Rules are very long, complex and supplemented by a large amount of guidance and case law.”<sup>22</sup>
26. ILPA also referred us to three judgments of the Court of Appeal that were critical of the complexity of the Immigration Rules. In one, Lord Justice Underhill said:
 

“I fully recognise that the Immigration Rules, which have to deal with a wide variety of circumstances and may have as regards some issues to make very detailed provision, will never be ‘easy, plain and short’ (to use the language of the law reformers of the Commonwealth period); and it is no doubt unrealistic to hope that every provision will be understandable by lay-people, let alone would-be immigrants. But the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present. I hope that the Secretary of State may give consideration as to how their drafting and presentation may be made more accessible.”<sup>23</sup>
27. In another, Lord Justice Jackson commented: “The rules governing the PBS [Points Based System] are set out in the Immigration Rules and the appendices to those rules. These provisions have now achieved a degree of complexity which even the Byzantine emperors would have envied.”<sup>24</sup>

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20 EEA nationals—those from Norway, Iceland and Liechtenstein—also benefit from EU citizenship rights.

21 Written evidence from Professor Sionaidh Douglas-Scott (AQR0001)

22 Supplementary written evidence from ILPA (AQR0015)

23 *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/74.html>; supplementary written evidence from ILPA (AQR0015)

24 *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568; supplementary written evidence from ILPA (AQR0015)

### Box 2: A rudimentary guide to indefinite leave to remain

- For a person to qualify for indefinite leave to remain, otherwise called settlement, the Immigration Rules must first provide for a route to settlement in the category in which they are applying. There are several “tiers” of visa category, each with sub-categories (the Points Based System). The rules in each category identify whether it leads to indefinite leave to enter or remain. For example, Tier 1 (Investor) and Tier 1 (Entrepreneur), along with Tier 2 (General) visa holders would normally qualify to apply for indefinite leave, while student and visitor visa holders would not.
- The requirements for settlement under different visa categories usually include a qualification period, setting out the length of time a person must have had leave to enter or remain before becoming eligible to apply for settlement in that category. The length of time during which a person must have held leave to enter or remain before qualifying for settlement varies according to the category. For example, Tier 1 (Investor) and Tier 1 (Entrepreneur) visa holders are normally eligible for “accelerated settlement”.
- A person may qualify for settlement on the grounds of long residence following ten years lawful and continuous residence in the UK. This gives effect to the Council of Europe Convention on Establishment which protects those who have been lawfully resident in a Member State for ten years or more.
- Absences from the UK that render a person ineligible for settlement vary according to visa category.
- Most routes to settlement require that the applicant show sufficient knowledge of life in the UK and of the English language. The knowledge of life in the UK requirement may be met by sitting the Life in the UK test or through a combination of English language and citizenship classes under very specific requirements. The language requirement may be met through being a national of certain English-speaking countries, passing an approved test in speaking and listening in English at a particular level or holding a recognised academic qualification taught in English. Settlement under some categories of the rules does not include this requirement, for example those made for settlement as a refugee.
- A change to Home Office guidance in 2016 means that a person may also be refused settlement on character grounds, if they have been in breach of immigration laws at some time in the past.
- In most cases, the application must be made on a mandatory form and a fee must be paid. The fee for an application for settlement made within the UK is currently £1,875 for a single applicant, with a further £1,875 payable for each dependant included in the application. A family of four would therefore pay £7,500 for the application. There are additional fees for taking the relevant Life in the UK or English language tests.
- A grant of settlement confers legal permission to live permanently in the UK without being subject to immigration control. Settlement status also confers a right to work, study and access State benefits on the same terms as UK citizens. A grant of settlement is often the pre-cursor to an application for UK citizenship.

Source: Supplementary written evidence from ILPA (*AQR0015*); and the UK Visa Bureau: <http://www.visabureau.com/uk/default.aspx> [accessed 30 November 2016]

### The consequences of the loss of EU citizenship rights for UK nationals in EU Member States

28. The UK would become a ‘third country’ for the purposes of EU law on withdrawal from the EU. Whereas EU nationals in the UK would be subject to national immigration law alone, UK nationals in other EU Member States would be subject to common EU immigration rules for ‘third-country nationals’<sup>25</sup> (other than in Denmark and Ireland, which have opted out of them)<sup>26</sup> as well as the national immigration law of each Member State.

#### Box 3: EU rules on third-country nationals

- Third-country nationals may face visa requirements for entry into EU Member States, including for short-term trips and holidays.<sup>27</sup>
- Third-country nationals who seek to reside for longer periods in EU Member States would be subject to EU rules on managed migration, including quotas and EU-preference rules on labour migration. Highly skilled UK professionals, for example, would be required to apply for a Blue Card (the EU’s work and residence permit for highly-skilled non-EU nationals),<sup>28</sup> or to fall within the scope of intra-corporate transfers,<sup>29</sup> or to fall within criteria for scientific research.<sup>30</sup> These regimes are more restrictive than EU rights on free movement. There are few rules on low skilled workers, other than seasonal workers,<sup>31</sup> and on the self-employed, so the applicable rules would depend on the domestic immigration law of each Member State.
- Third-country national students wishing to study in the EU would not be granted equal treatment with EU nationals in relation to tuition fees and the right to undertake part-time work.<sup>32</sup>
- Third-country nationals who had been resident in an EU Member State for more than five years would be able to apply for the EU long-term residency status.<sup>33</sup>

25 [Article 77 TFEU](#) provides that the EU is competent to adopt rules relating to the absence of internal order controls, the management of external borders and short stay visa policy. [Article 79 TFEU](#) provides that the EU may adopt rules relating to the conditions of entry and residence, the definition of the rights of third country nationals residing legally, illegal immigration and unauthorised residence, and combating human trafficking.

26 The UK has also opted out of them.

27 Regulation 562/2006/EU of 15 March 2006 on the Schengen Borders Code, [OJ L 105](#) (13 April 2006), pp 1–32 (and associated implementation secondary legislation); Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas and those whose nationals are exempt from that requirement, [OJ L 081](#) (21 March 2001), pp 0001–0007, and Regulation 810/2009/EC of 13 July 2009 establishing an EU code on visas (and associated implementation directives), [OJ L 243](#) (15 September 2009), pp 1–58

28 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, [OJ L 155](#) (18 June 2009), pp 17–29

29 Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, [OJ L 157](#) (27 May 2014), pp 1–22

30 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting Third Country Nationals for the purposes of scientific research, [OJ L 289](#) (3 November 2005), pp 15–22

31 Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, [OJ L 94](#) (28 March 2014), pp 375–390

32 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, [OJ L 375](#) (23 December 2004), pp 12–18

33 Council Directive 2003/109/EC of 25 November 2003 concerning the status of Third Country Nationals who are long term residents, [OJ L 016](#) (23 January 2004), pp 0044–0053

- Third-country nationals legally resident in an EU Member State wishing for their families to join them would have to comply with stricter EU-wide rules on family reunion.<sup>34</sup>
- The EU Returns Directive<sup>35</sup> contains provisions for the detention, expulsion and exclusion of migrants irregularly present in the EU. This could apply to all UK nationals present in an EU Member States upon the UK's withdrawal in the event of a non-negotiated Brexit.<sup>36</sup>

Source: Brexit: The Immediate Consequences, Richard Gordon QC and Rowena Moffat, *The Constitution Society*, 2016, pp 53–56

29. Professor Douglas-Scott explained that UK nationals in other EU Member States, on becoming third-country nationals, would experience a considerable reduction in the rights they enjoyed as EU citizens:

“What about those ‘expat’ UK citizens who have resided long-term (i.e. more than 5 years) in an EU State? If they were no longer EU citizens, they could apply for long-term resident status (as 3rd country nationals) under EU law. But as compared to obtaining permanent residence status as an EU citizen, this carries fewer benefits, and British citizens would often need to satisfy ‘integration’ rules, such a requirement to speak the language of the host country, before getting such status, and would be subject to far stricter family reunion rules than at present. Those UK citizens who wished to remain working in an EU State, but did not yet benefit from long-term resident status could face quotas and discrimination against them as non-EU citizens.”<sup>37</sup>

30. Professor Catherine Barnard, Professor of European Union Law and Employment Law, Cambridge University, said “probably the most significant” of the third-country national rights was the Blue Card Directive for highly skilled migrants, but even this had not been much used:

“That was basically meant to be a response to the US’s green card scheme, but in fact it has been a pretty poor programme; the number of people taking advantage of those rights is only around 15,000 because they sit rather uncomfortably with the rights laid down by domestic law, and usually people find that the domestic regime is more favourable than the EU regime so they go down the domestic route instead.”<sup>38</sup>

## Conclusions

31. **In the absence of a negotiated settlement, the consequences of the loss of EU citizenship rights for EU nationals in the UK, and for UK nationals in other EU Member States, will be severe.**
32. **EU nationals in the UK will be subject to national immigration rules, which restrict the rights of migrants far more than EU citizenship**

34 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [OJ L 251](#) (3 October 2003), pp 0012–0018

35 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [OJ L 348](#) (24 December 2008), pp 98–107

36 It provides for immigration detention for up to 6 months, or 18 months in the event of complications with the removal process.

37 Written evidence from Professor Sionaidh Douglas-Scott ([AQR0001](#))

38 [Q 34](#)

**law, and which have been described as Byzantine in their complexity by the Court of Appeal.**

- 33. While UK nationals in EU Member States will also be subject to the national immigration law of their host State, they will enjoy additional protection as 'third-country nationals' under EU immigration law (except in Denmark and Ireland). The additional protection is, however, a considerable reduction on the migrant rights afforded to EU citizens.**

## CHAPTER 4: THE CONCERNS OF EU NATIONALS IN THE UK

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### The Polish community

#### *Size*

34. His Excellency Mr Arkady Rzegocki, the Ambassador of Poland to the UK, told us that the recorded number of Polish nationals living in the United Kingdom had increased from 70,000 in 2004 to around 984,000 in 2016.<sup>39</sup> The true number was difficult to calculate because the UK census did not include Polish migrants who had acquired UK citizenship, or children of Polish migrants born in the United Kingdom.<sup>40</sup> Nor did it include seasonal workers. He thought there were about a million Polish nationals in the UK overall. They formed the largest ethnic minority in the UK, representing about 1.4% of the population. Polish was the second most spoken language in the United Kingdom.<sup>41</sup>

#### *Composition*

35. Mr Rzegocki said there was a huge diversity among Poles living in the UK. There were “thousands of Polish scientists, scholars, entrepreneurs, students and artists active on British soil;”<sup>42</sup> but Poles also worked in cheap labour markets.<sup>43</sup> Polish workers demonstrated a “strong work ethic. They fill the labour market gaps by taking jobs in regions struggling with shortages. They add to job markets, too. There are over 22,000 Polish entrepreneurs currently running businesses in the UK.”<sup>44</sup> Some 92 per cent of Poles were in employment or studying in the UK,<sup>45</sup> and 5,245 Polish students had been registered at UK universities in the academic year 2014–2015. He thought that Poles “enrich both social-economic and cultural life of the UK, bringing closer Central-Eastern European perspective to the British society. It is a very important factor as far as unity of the European continent is concerned.”<sup>46</sup>

#### *The effect of the referendum*

36. Mr Rzegocki said there were two important effects of the June referendum on the Polish community in the UK.<sup>47</sup> The first was a rise in xenophobic behaviour, including hate crime, against Poles:

“Since the referendum, the Polish consular services in London, Manchester, and Edinburgh have offered assistance with 35 individual incidents and instances of ongoing harassment reported by the Polish nationals as hate crime. The most serious incidents included the killing of Arkadiusz Jóźwik in Harlow (Essex), 10 assaults, and 8 violent vandal attacks on houses and businesses belonging to the Polish people.”<sup>48</sup>

37. The second effect was “uncertainty, which is the biggest problem.”<sup>49</sup> The majority of Poles did not have UK passports. They were concerned about

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39 [Q 9](#)

40 EU citizens do not have to register with their embassies when they move to a new Member State.

41 [Q 9](#)

42 Written evidence from the Embassy of the Republic of Poland in London ([AQR0013](#))

43 [Q 13](#)

44 Written evidence from the Embassy of the Republic of Poland in London ([AQR0013](#))

45 [Q 13](#)

46 Written evidence from the Embassy of the Republic of Poland in London ([AQR0013](#))

47 [Q 14](#)

48 Written evidence from the Embassy of the Republic of Poland in London ([AQR0013](#))

49 [Q 14](#) (Mr Rzegocki)

their status after the UK left the EU; about travel document requirements; about NHS access for their families (for example grandparents who help bring up children); about how the transfer of social security entitlements would work after Brexit; and about the cut-off date for any changes.<sup>50</sup> Mr Rzegocki concluded: “The United Kingdom Government should ensure legal clarity and certainty for the European Union nationals since, for years, they have been working with the United Kingdom and paying taxes here.”

### The Romanian community

#### *Size*

38. His Excellency Mr Dan Mihalache, the Ambassador of Romania to the UK, said that the recorded data showed there were 272,000 Romanians in the UK. Children under the age of 16 and seasonal workers<sup>51</sup> were not recorded. 200,012 Romanians were recorded as being employed in the UK—the rate of employment within the Romanian community was 77%—and 185,000 Romanians had a national insurance number. Mr Mihalache estimated that, because these figures covered only those who had registered, there were actually around 400,000 Romanians in the UK. That number included a lot of students.

#### *Composition*

39. The Romanian community was as diverse as the Polish community. There was a great number of highly skilled Romanians. About 10,000 or more people worked for the NHS as doctors, nurses and dentists, for example. There were Romanians “who work in sectors that have limited interest for your labour workforce ... in agriculture, construction and caring for old people.” There were also many Romanians working in the tourism and restaurant industries.<sup>52</sup>

#### *The effect of the referendum*

40. Mr Mihalache said that two words were “key” in addressing the concerns of Romanians in the UK: “clarity” and “predictability”.<sup>53</sup> They wanted to know whether they would be given permanent residence or be asked to leave; whether they would need passports; whether the social contributions they have paid in the UK would be paid back as pensions in Romania when they returned home;<sup>54</sup> and what the cut-off point would be for maintaining the rights they already had as EU citizens.<sup>55</sup> Romanian students wanted to know if their studies would continue, if EU financing would continue, and if UK university degrees would be recognised in EU Member States.<sup>56</sup>
41. Mr Mihalache made a broader point about the effects of uncertainty:

“Uncertainty also influences the general climate in society: what some call hate crimes or xenophobic reactions. From my point of view, this is one issue that you, together with the Government, should address. As my colleague from Poland said, our citizens need to know what the

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50 Written evidence from the Embassy of the Republic of Poland in London (AQR0013)

51 Q 9

52 Q 13

53 Q 9

54 Q 14

55 Q 16

56 Q 9

process and their rights will be ... There is a lot of rumour. We are not only friends, we are together, and then somebody spreads a rumour and says, ‘Okay, from 1 September, you will need passports to travel in the United Kingdom’, and then we, as an embassy, have pressure to issue passports—even though, as European citizens, they can travel with their ID cards ... So clarity and predictability are necessary.”<sup>57</sup>

## The French community

### *Size*

42. Her Excellency Mme Sylvie Bermann, Ambassador of France to the UK, estimated that 300,000 French people lived in the UK, although the figure could be higher. There was no requirement to register with the French consulate in the UK; only 120,000 had done so.<sup>58</sup>

### *Composition*

43. Approximately half the French people working in the UK are highly qualified. About 8,000–10,000 worked in the City in investment banking, insurance and financial services. All the big French companies were also represented in the UK—for example EDF Energy, because of Hinkley Point, and RATP Dev London, which operated red buses in the UK. Many French people also studied or worked in UK universities, or had temporary jobs, such as working in restaurants: “It is a very rich and diversified community.”<sup>59</sup>

### *The effect of the referendum*

44. Mme Bermann said that the French community in the UK was “worried” and had “a lot of questions” about the consequences of Brexit. There was “great uncertainty” about the French community’s future in the UK. This was unfortunate, because “its members have invested a lot in this country, both personally and professionally”.<sup>60</sup>
45. She, too, reported a rise in xenophobic behaviour:

“In the aftermath of the referendum some French nationals were subjected to negative or aggressive language. I have received testimonies in this regard, as have my colleagues. They were not used to this sort of abuse in a country where many of them have lived for decades and which they regarded as a success story in terms of dynamism and respect for others.

“Some of them now view Britain in a different way and are ready to change their plans in the short term. Some of them told me that before 23 June they felt like Londoners and now they feel like foreigners, which is different. Many express a sense of sadness and are waiting for answers.”<sup>61</sup>
46. Mme Bermann said that, while reassurances could be given, there could not be “absolute certainty” about which rights would be safeguarded for EU nationals in the UK until the end of the negotiations: “It is very difficult, because we all know that will be part of the negotiations.”<sup>62</sup>

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57 [Q 9](#)

58 [Q 17](#)

59 [Q 18](#)

60 Oral evidence taken on 25 October 2016, [introductory remarks](#)

61 Oral evidence taken on 25 October 2016, [introductory remarks](#)

62 [Q 20](#)

47. **It is clear, and unsurprising, that the uncertainty caused by the referendum has given rise to deep anxiety among EU nationals, including Polish, Romanian and French nationals, in the UK. The Government is under a moral obligation to provide certainty and legal clarity to all EU nationals working, living and studying in the UK, who contribute so significantly to the economic and cultural life of the UK. It should do so urgently.**
48. **There is also a forceful economic case for the Government to act quickly. EU workers play an important role in filling gaps in the labour market that cannot otherwise be filled by UK workers. This is as true for highly skilled job markets, such as medical or financial services, as it is for lower skilled or seasonal job markets. The longer their future is uncertain, the less attractive a place to live and work the UK will be, and the greater labour market gaps will be.**
49. **The referendum result has contributed to a rise in xenophobia towards EU nationals. We deplore this. Question marks about the rights of EU nationals to live in the UK may be fuelling xenophobic sentiment, as the Bulgarian Ambassador suggested. We call on the Government to explain what action it is taking to counter xenophobia towards EU nationals.**

## CHAPTER 5: THE CONCERNS OF UK NATIONALS LIVING IN OTHER MEMBER STATES

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### The number of UK nationals resident in the EU

50. The Foreign and Commonwealth Office (FCO) explained that although the UK did not collect information on UK nationals resident overseas, UN migration statistics from 2015 estimated that there were around 1.2 million UK nationals living in the EU. The FCO explained that there was no requirement for EU citizens to register as residents in other EU countries, and that some EU countries actively discouraged EU citizens from formally registering their residency, as their EU citizenship conferred automatic entitlement to residency. As such, neither the UK nor individual Member States held accurate records of the numbers of UK nationals resident within the EU.<sup>63</sup>

### The views of UK nationals living in the EU

51. The evidence we set out below was collated from views expressed by UK residents, either in person to consular officials or online via comments on FCO channels, in the following countries: Spain, Portugal, Italy, France, Germany, the Netherlands, Luxembourg, Belgium, Austria, Bulgaria, Czech Republic and Hungary.<sup>64</sup>
- **Residency:** UK nationals have asked whether they would continue to be able to live abroad or would need to reapply for residency; whether different rules would apply to those registered as resident in another EU country to those who are not; and whether holders of permanent residency would be considered to have acquired rights.
  - **Nationality:** UK nationals have asked whether they could apply for nationality of an EU Member State, and if so whether they would be able to retain UK nationality (and therefore have dual nationality).
  - **Healthcare:** UK nationals have asked if they would still be able to use a UK-issued European Health Insurance Card (EHIC) when travelling as a tourist to other EU States, and whether their EU country-issued EHIC would be valid in the UK on holiday. They have asked whether, as a worker in another EU country, they would still be entitled to an EHIC card; and as a pensioner whether they would continue to be able to access free healthcare in their EU country of residence.<sup>65</sup>
  - **Timing and information requests:** UK nationals have asked when Article 50 would be invoked and when any resultant changes would come into force.
  - **Education:** UK nationals have asked whether their children would still be able to attend European Schools, whether they would be able to continue the university studies they had started in the UK, and whether studies from other EU countries would be recognised for access to UK universities.

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63 Written evidence from the Foreign and Commonwealth Office ([AQR0010](#))

64 All the evidence in this section can be found in the written evidence from the Foreign and Commonwealth Office ([AQR0010](#)).

65 Expat Citizen Rights in EU doubted the reliability of this evidence on concerns about EHIC. See the supplementary written evidence from EHIC ([AQR0014](#)).

- **Work:** UK nationals have asked whether they would require work permits in order to work in the EU, whether professional and educational qualifications would be recognised, whether there would be language requirements, and whether those who were currently employed would be able to continue on the same terms and conditions.
- **Travel:** UK nationals have asked whether they would need a visa to visit other EU countries or the Schengen area, if they would need to apply for a new non-EU UK passport, if their EU family members would need visas when they visited the UK, and whether their UK driving licence would still be valid in the EU/their EU licence valid in the UK.
- **Property:** UK nationals have asked if those who owned properties and/or businesses would be able to continue to own them in the same way, and expressed concern around restrictions on ownership by non-EU nationals in certain areas.
- **Financial:** UK nationals have asked if their pension would continue to be up-rated on an annual basis in the same way as if they lived in the UK, and if Brexit would affect their pension if it were paid by another EU state. There was concern around the impact of a weaker Pound on their personal finances, and questions over whether residents abroad would be able to continue to access local bank accounts on the same terms and conditions as before Brexit.

*Evidence collected by Expat Citizen Rights in EU*

52. Expat Citizen Rights in EU (ECREU) is “a self-help and lobby group”, whose aim is “to work to protect the best interests of UK citizens living in the EU and EU citizens living in the UK following the UK Referendum of 23 June 2016.”<sup>66</sup> It has approximately 4,500 members living in 23 EU Member States, 69 per cent of whom are retired.<sup>67</sup> Members identify the concerns that most worry them when they join on-line, from which ECREU has compiled the following list, in order of priority:
- Healthcare (84% of all members)
  - Pension rights (79%)
  - Exchange rates (73%)
  - The ability to travel (74%)
  - Home ownership (70%)
  - Votes for life (64%)
  - Inheritance rules (57%)
  - National driving licences (56%)
  - The right to retire in any country (52%)
  - The rights of EU citizens to live in the UK (44%)

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<sup>66</sup> ECREU, ‘ECREU aims and objectives’: <http://www.ecreu.com/ecreu-aims.html> [accessed 10 November 2016]

<sup>67</sup> Written evidence from ECREU (AQR0012)

- Employment (29%)
- Running a business (19%)
- Registering a UK car (18%).<sup>68</sup>

ECREU commented that the fact that 31 per cent of its members were below retirement age was likely to have influenced the level of concern about employment and running a business.

53. Further comments were sent in by 388 members of ECREU, which were set out in full, country by country, in the evidence that ECREU submitted to us.<sup>69</sup> We give below a sample of the comments from each country:

- **Austria:** “Might require dual British Austrian citizenship before Brexit.” “We are mainly concerned with healthcare and paying for medical treatment.” “My husband is a US citizen and his right to live here in Austria is reliant on my EU citizenship.”
- **Denmark:** “I am a British citizen living in an EU country, and am of course concerned about my status post-Brexit.” “I have serious mental health issues. And all this going on is causing relapse ... have been in Denmark almost 30 years. And love it here.” “As a disabled person, living in Denmark I am very concerned about my right to continue living here and about access to the Danish Health Service on which I rely.”
- **France:** “Marital breakup. Ongoing health complications.” “Anything and everything that revolves around us losing our EU citizenship.” “Right to vote in British General elections and French local elections.” “Child Benefit. Child Tax Credits (retired with state pension, so eligible currently).” “Education rights for the 4 of my children still in education in France.” “Right to practice as a medical doctor trained in the UK. Right to be a civil servant in France.” “The ability to stay and work in France without changing citizenship due to not being able to speak the language well enough.” “Reassurance that I will be able to continue to run my business legally in France, paying French tax and insurance contributions, as I have been doing over the past six years”.
- **Germany:** “I am a 55 disabled lady, originally from London now living in Frankfurt. I am extremely worried about my rights. I have lived in Germany about 30 years now.” “Just to echo many others, I am worried about my State Pension not being upgraded every year. I am worried about my Healthcare, which was transferred from the NHS to my local Krankenkasse. Obviously I am also worried about being able to stay here, where I live with my lady who is German. I will be 67 in February and the last thing that I would want is the upheaval in having to return to the UK.”
- **Greece:** “Health care that we have in Greece is covered by the UK. Afraid that we may lose this and be left without health care. Will we be allowed to stay at our home in Greece permanently?”

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68 Written evidence from ECREU ([AQR0012](#))

69 Written evidence from ECREU ([AQR0012](#))

- **Italy:** “Pension rights should include automatic right for those in receipt of a British pension to receive the same pension increases as those resident in Britain.” “Will we have to give up our UK citizenship to remain living/working within the EU? Ought we to consider dual citizenship to avoid the worst scenarios?” “Post Brexit health care for UK expat pensioners. My wife has been in hospital in Perugia for six weeks, free of charge at present but for how long?” “My daughter is studying at a university in the UK. Will her degree be recognised at European level? Will the terms of the tuition fee loan repayment remain the same if she resides in the EU after Brexit?”
- **Portugal:** “I have an 87 year old mother, English, with dementia following a stroke and needs 24hr care. She is in a care home in Portugal. The care is excellent, from what I’ve heard better than in the UK, and one quarter of the cost of a UK care home. We would be unable to afford any care home in the UK. What is her status likely to be in the future, her ‘permanent’ residency runs out in two years as does her UK passport? I hope this sort of situation will be addressed by the Brexit department during negotiations.”
- **Spain:** “Moroccan wife has residence in Spain due to my EU citizenship. Expires in 2 yrs”. “If pensions are not Index linked, we will have to go back to the UK and live off benefits.” “If Brexit goes ahead and I lose my right to live in Spain, where will I go from there? Will I be allowed to return to UK with my rights intact?” “As pensioners who are the guardians of a grandchild aged nine we are very concerned about the opportunities for her to finish her education in the UK. Before the referendum her future as a trilingual (almost quadrilingual) student seemed very bright. Now there is considerable uncertainty.”

### Conclusion

54. **The anxiety of EU nationals in the UK is matched by that of UK nationals in other EU States—the evidence we received of their distress is compelling. Many are pessimistic that the life that they had planned in another EU Member State will still be possible. Residence rights, employment rights, access to health care and the capacity to finance retirements feature large among their concerns. Just as the Government is under an obligation to provide certainty to EU nationals resident in the UK, so it is under an equal moral obligation to seek to provide certainty and legal clarity to all UK nationals working, living and studying in other EU States. It should do so urgently.**

## CHAPTER 6: THE PROTECTION OF EU RIGHTS AS ACQUIRED RIGHTS

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### Claims made before the referendum

55. Professor Douglas-Scott said that the topic of acquired rights had been “beset by confusion and misinformation.” This was regrettable, “because any future lack of protection of rights currently guaranteed under EU law is one of the most serious risks of a UK withdrawal from the EU. So further elucidation is needed.”<sup>70</sup>
56. Two principal claims were made in the run-up to the referendum: that Article 70 of the Vienna Convention on the Law of Treaties (the Vienna Convention) would safeguard EU rights post-Brexit; and that the customary international law<sup>71</sup> doctrine of acquired rights would safeguard EU rights post-Brexit.

### Acquired rights under the Vienna Convention on the Law of Treaties

57. Article 70(1)(b) of the Vienna Convention provides that 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”.
58. Professor Douglas-Scott explained that the “crucial point” to understand was that “parties” in this context referred to States, not to individuals or companies. The International Law Commission, in its commentary on the scope of the identically worded predecessor Article, made plain that it was not “in any way concerned with the question of the ‘vested interests’ of individuals”.<sup>72</sup> Professor Barnard agreed that Article 70 of the Vienna Convention concerned the acquired rights of States, not individuals.<sup>73</sup> Professor Vaughan Lowe QC of Essex Court Chambers also agreed that the “parties” in this context were the States Parties to that treaty: “Individuals and companies are not ‘parties’ to a treaty, and Article 70(1)(b) says nothing about their rights, obligations or legal situation.” The commentary of the International Law Commission made clear that this was intentional.
59. Professor Lowe also referred to Article 43 of the Vienna Convention, which clarified that when a treaty was terminated it no longer created or regulated the legal situation of individuals and companies who were previously affected by the treaty.<sup>74</sup>
60. **It is evident that the term ‘parties’ in Article 70 (1)(b) of the Vienna Convention on the Law of Treaties refers to States, not to individuals or companies. In no sense, therefore, can this provision be said to safeguard individual rights under EU law that will be lost as a consequence of the UK’s withdrawal, in the absence of a negotiated settlement.**

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70 Written evidence from Professor Sionaidh Douglas-Scott (AQR0001)

71 Article 38(1)(b) of the Statute of the International Court of Justice describes customary international law as “a general practice accepted as law”: <http://www.icj-cij.org/documents/?p1=4&p2=2> [accessed 7 December 2016]

72 Written evidence from Professor Sionaidh Douglas-Scott (AQR0001)

73 Q 33

74 Written evidence from Professor Vaughan Lowe QC (AQR0002)

### Acquired rights under customary international law

61. Professor Lowe explained that the principle of acquired rights had been developed in order to protect a range of property rights under international law, in circumstances where the enjoyment of those rights was threatened by a foreign State. One “archetypal scenario was that Government 1 in State A granted property rights to a foreign person, but was then overthrown by Government 2 in State A which disowned the acts of Government 1”.<sup>75</sup> The legal principle underlying acquired rights obliged every State, in broad terms, to respect property rights acquired by non-nationals in such a situation.
62. While there was no authoritative definition of acquired rights under international law, Professor Lowe said that “the legal principles and rules that protect acquired rights ... are, however, well established and recognized”.<sup>76</sup> The essence of an acquired right was that it should be “a vested right, rather than a contingent expectation, and that it should have an economic value, which suggests that it should be capable of being transferred”.<sup>77</sup>

### *Scope of acquired rights under customary international law*

63. Professor Douglas-Scott told us that the scope of the acquired rights recognised by customary international law was very narrow.<sup>78</sup> Professor Lowe said that the “difficulty comes in defining the limits of property”.<sup>79</sup> In written evidence<sup>80</sup> he gave the following examples of rights that could, and could not, be classed as acquired rights:
  - Ownership rights in real property and in personal property, both tangible (e.g. machinery) and intangible (e.g. intellectual property, shares and bonds) were acquired rights.
  - Business goodwill was an acquired right.
  - Certain contractual rights, whether arising from contracts with the State or with private individuals, were acquired rights. It was, however, “difficult to say precisely which contractual rights are included”. Concessions, franchises, licences or contracts giving express permission to engage in economic activity over a period of time were included—for example, running a railway or commercial television station for a certain period, or exploiting oil or gas reserves in a defined area. A simple contract for the sale of property would also be included. A contract for personal services, such as a contract for tuition at a college, “would almost certainly not give rise to an acquired right, however.”
  - Accrued pension entitlements, rent, and bank deposits were examples of acquired rights “which were less obvious”.
  - Court judgments and arbitration decisions were acquired rights.<sup>81</sup>
  - Public or civic rights, such as the right to vote or to reside in a State, were not acquired rights.

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75 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

76 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

77 Supplementary written evidence from Professor Vaughan Lowe QC ([AQR0003](#))

78 Written evidence from Professor Sionaidh Douglas-Scott ([AQR0001](#))

79 [Q 1](#)

80 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

81 Supplementary written evidence from Professor Vaughan Lowe QC ([AQR0003](#))

64. We asked Professor Lowe whether a company's right of establishment in any EU Member State<sup>82</sup> under EU law would be protected as an acquired right. He was clear it would not:

"A company that had exercised its right of establishment and had set up a factory, trading operation or whatever would have acquired rights in the factory—in the material it has there. It is those secondary rights, which would be protected: the rights it has acquired consequent on the exercise of its freedom of establishment. It would not, as a legal principle, protect the right to establishment itself."<sup>83</sup>

65. He gave a further example in relation to the right to establishment:

"If I set up a small grocery shop or window-cleaning business, I would have rights in the shop that would be protected—they could not be taken away from me—but the actual right to come and to set up that business itself would not be protected afterwards. That flows from membership of the club, as it were—from the EU."<sup>84</sup>

66. Professor Lowe thought that the case law of the European Court of Human Rights (ECtHR) on the scope of Article 1 of the First Protocol of the European Convention on Human Rights (A1P1 ECHR) could become a template for the type of property protected by the principle of acquired rights. We explore the protection afforded by A1P1 ECHR in the following chapter.

#### *Enforcement of acquired rights under international law*

67. Acquired rights, as a customary international law doctrine, were difficult to enforce: "The legal mechanisms that would be available for individuals and corporations to use to vindicate those [acquired] rights would be very narrow indeed."<sup>85</sup> There was "no realistic chance" of using the rule of international law as an independent cause of action in an acquired rights case in a UK court. At best, it could be used in the context of a judicial review application that decisions taken by the Government must be in conformity with the obligations of the UK under international law.<sup>86</sup>
68. Litigation on acquired rights could arise in an international court (such as the International Court of Justice) or an international arbitral tribunal, but only if the national State of the affected person brought a claim against the wrongdoing State and both States had agreed to accept the jurisdiction of the court or tribunal. Any such case would be preceded by a negotiation between the two States, and the case would only go to court if the dispute was not resolved by a negotiated settlement. If the complaint was that a national of the applicant State had been injured by a denial of the national's rights, the case could be brought only after available domestic remedies had been exhausted. As a consequence, Professor Lowe thought it was "unlikely that these circumstances would all arise: the chances of an international court case are very low".<sup>87</sup>

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82 The right of EU individuals and companies to work permanently in other Member States are set out in Articles 49–55, TFEU, [QJ C 202](#) (7 June 2016)

83 [Q 1](#)

84 [Q 1](#)

85 [Q 1](#) (Professor Vaughan Lowe QC)

86 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

87 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

*Overall assessment*

69. Professor Lowe thought it very unlikely that the international law doctrine of acquired rights would play a significant role in the legal processes arising from the implementation of Brexit:<sup>88</sup>

“Part of the problem is that the notion of acquired rights is a very useful label to describe people’s expectations, having relied on EU rights in the past and wanting them to persist. But the actual doctrine of acquired rights under international law is much narrower. Frankly, I do not think it is useful. As I have said in my written comments, the substantive protection given by the international law doctrine of acquired rights is pretty well eclipsed by the protection given by the European Convention on Human Rights, for example. There is no obvious reason why anyone would try to rely on the acquired rights doctrine, rather than rely on the European Convention.”<sup>89</sup>

70. Professor Douglas-Scott agreed: “in answer to your first question on the extent to which the principle of acquired rights could be relied on to protect rights derived from EU law—specifically property and contractual rights—I think the answer is very little.”<sup>90</sup> She also drew our attention to comments of Jean-Claude Piris, the former Director General of the Legal Service of the Council of the EU, in a policy paper entitled ‘Should the UK withdraw from the EU: legal aspects and effects of possible options’:

“Personally, I would not think that one could build a new legal theory, according to which ‘acquired rights’ would remain valid for millions of individuals (what about their children and their grandchildren?), who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever (including the right of movement from and to all EU Member States? Including the right to vote and to be a candidate in the European Parliament?). Such a theory would not have any legal support in the Treaties and would lead to absurd consequences.”<sup>91</sup>

**Conclusions**

71. **The evidence we received makes very clear that the doctrine of acquired rights under public international law will provide little, if any, effective protection for former EU rights once the UK withdraws from the EU. The scope of acquired rights is limited to certain contractual and property rights which, even were they to coincide with EU rights, are highly unlikely to be enforceable. Reliance on the doctrine before the referendum as a means of protecting EU rights was therefore misplaced.**
72. **Litigation is always possible, however, where valuable rights have been lost. There is, therefore, a strong incentive for the Government to address the underlying causes of such potential litigation in the withdrawal agreement.**

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88 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

89 [Q 2](#)

90 [Q 3](#)

91 Foundation Robert Schuman, 15 May 2015, p 10: <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-355-en.pdf> [accessed 12 November 2016]

## CHAPTER 7: THE PROTECTION OF EU RIGHTS UNDER ALTERNATIVE SOURCES OF LAW

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### The European Convention on Human Rights

#### *The right to peaceful enjoyment of one's possessions*

73. The first paragraph of A1P1 ECHR provides as follows:
- “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>92</sup>
74. Professor Lowe explained that the ECtHR, which oversees and interprets the ECHR, had drawn a parallel between the notion of possessions, as used in the first paragraph of A1P1, and the notion of property rights: “Because the notion of possessions is wide, it spills over into interests in pension rights and other matters of that kind. It is a fairly wide concept, more like the continental concept of patrimony or *bien*”.<sup>93</sup> He thought the following definition of the scope of A1P1 provided a good summary of the property rights covered:
- “In ‘substance’ this provision is ‘guaranteeing the right of property.’ In a series of decisions, the [European Court of Human Rights] has recognized that this includes the right to use, to transfer, and to exclude others from the covered possessions. The ‘possessions’ covered by this right include movable and immovable things, including intangibles such as intellectual property, contracts, judgments, licences, and public benefits.”<sup>94</sup>
75. Professor Lowe said that “legitimate expectations” were also protected as an aspect of possessions. For example, the legitimate expectation of planning consent arising from the grant of outline planning permission was regarded as a component of the property rights in the land concerned. This approach had “considerable potential for flexible and innovative application”<sup>95</sup> post-Brexit.
76. Mr Anthony Speaight QC of 4 Pump Court agreed that “possessions” under A1P1 extended to intangible possessions such as patents, contractual rights and entitlements to non-contributory social security benefits. They could also include assets which a person did not yet possess, but of which they had a legitimate expectation. For example, a licence would be protected by A1P1 provided the licence holder had a reasonable and legitimate expectation as to

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92 Article 1, Protocol 1 to the European Convention on Human Rights: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [accessed 7 December 2016]

93 Q 3

94 Supplementary written evidence from Professor Vaughan Lowe QC (AQR0003), citing John G Sprankling, *The International Law of Property*, 1st edition (Oxford: Oxford University Press, 2014), section 1.2.C(3)

95 Written evidence from Professor Vaughan Lowe QC (AQR0002)

the lasting nature of the licence. The Appellate Committee of the House of Lords was willing to assume that “possessions” could cover the right to the renewal of a government licence to fish in the waters around South Georgia.<sup>96</sup>

*The right to private and family life*

77. Article 8 ECHR provides as follows:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

“(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>97</sup>

*Preventing deportations*

78. Professor Douglas-Scott thought Article 8 would be useful in preventing deportations of EU nationals in the UK, or UK nationals in other EU States, who no longer had a right to reside.<sup>98</sup> Professor Barnard agreed, saying that both Article 8 and A1P1 could be invoked to help prevent any deportations. The rules under those Articles were “much more stringent”<sup>99</sup> in preventing deportation than the current rules on expulsion in the Citizens Directive.<sup>100</sup>

79. ILPA agreed, saying that the right to private life could encompass the right to establish and develop relationships with other human beings and the physical and psychological integrity of a person, as well as those features which were integral to a person’s identity or ability to function socially as a person.<sup>101</sup> They explained that, although each Article 8 challenge was case specific, certain principles could be derived from the ECtHR’s approach to determining whether a breach of Article 8 had taken place.

**Box 4: The approach of the ECtHR in determining a breach of Article 8**

The Immigration Law Practitioners’ Association summarised the ECtHR’s approach as follows:

- “A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
- “Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
- “Removal or exclusion of one family member from a State where other members are lawfully resident will not necessarily infringe Article 8, provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

96 Written evidence from Anthony Speaight QC ([AQR0008](#)); *R (Quark Fishing Ltd) v Secretary of State for Foreign & Commonwealth Affairs* [2006] 3 WLR 837

97 Article 8, [European Convention on Human Rights](#)

98 [Q 3](#)

99 [Q 33](#)

100 [Q 33](#)

101 Written evidence from ILPA ([AQR0004](#))

- “Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State, if it is not reasonable to expect the other members of the family to follow that member expelled.
- “Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
- “Whether interference with family rights is justified in the interests of controlling immigration will depend on:
  - (i) the facts of the particular case and
  - (ii) the circumstances prevailing in the State whose action is impugned.”

Source: Written evidence from ILPA ([AQR0004](#))

### *Protecting EU citizenship*

80. Professor Barnard did not think that the ECHR could be invoked to preserve the right to EU citizenship for UK nationals, once the UK had withdrawn from the EU:

“Under EU law that [ECHR] argument just will not wash because, in order to be able to enjoy EU citizenship, the precursor is to be a national of a Member State.<sup>102</sup> Since the UK will be leaving the EU, I will no longer be a national of a Member State and therefore will not enjoy EU citizenship.”<sup>103</sup>

Mr Speaight agreed: “I cannot think of a legal argument giving UK citizens here any sort of rights to hold on to EU citizenship.”<sup>104</sup>

81. On the other hand, Susie Alegre, an international human rights lawyer and Associate Tenant at Doughty Street Chambers, considered that EU citizenship was such “a core part of the social identity of many British nationals”<sup>105</sup> that its loss could fall within the ambit of protection provided by Article 8 ECHR. She referred to a judgment of the ECtHR in which it stated (in relation to national citizenship):

“While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that article.”<sup>106</sup>

82. Ms Alegre concluded that the removal of EU citizenship for the “many people who will be profoundly affected by the loss of their European identity” could be said to interfere with their right to private life under Article 8 ECHR.

102 Article 20(1) TFEU states that: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.” ([OJ C 202](#), 7 June 2016, pp 1–388)

103 [Q 33](#)

104 [Q 33](#)

105 Written evidence from Susie Alegre ([AQR0007](#))

106 *Genovese v Malta* (2011) 58 EHRR 25, para 33: <http://hudoc.echr.coe.int/eng?i=001-106785>

*The prohibition against discrimination*

## 83. Article 14 ECHR states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>107</sup>

*UK citizenship rights*

84. Ms Alegre explained that UK citizenship law allowed for dual nationality.<sup>108</sup> Many UK citizens would be able to acquire the nationality of another EU Member State, thereby maintaining their EU citizenship rights. Citizenship of other Member States could be acquired without taking residence in the Member State by various routes such as through the nationality of parents or grand-parents (e.g. Italy, Germany and Ireland), the nationality of a spouse (e.g. France) or through significant financial investment in the Member State (e.g. Cyprus). In addition, those born in the Island of Ireland, including Northern Ireland before 2005, were automatically entitled to dual UK and Irish citizenship. This meant that there would be some UK citizens who lost their EU citizenship and others who did not.<sup>109</sup> Ms Alegre argued that, if a right to EU citizenship were protected under Article 8 ECHR, those UK nationals who were not entitled to dual nationality could be said to be discriminated against on grounds “such as their national or social origin, association with a national minority, property, birth or other status,”<sup>110</sup> in breach of Article 14 ECHR. She cited a recent judgment of the Supreme Court concerning UK citizenship, in which Lady Hale stated:

“It is clear, therefore, that the denial of citizenship, having such an important effect upon a person’s social identity, is sufficiently within the ambit of Article 8 to trigger the application of the prohibition of discrimination in Article 14.”<sup>111</sup>

85. Mr Speaight also thought that the loss of EU citizenship could lead to unlawful discrimination, but between EU nationals in the UK and nationals from other countries in the UK, if the residence rights of EU nationals were not safeguarded. Mr Speaight thought this was a “significant” issue,” and imagined “a Convention argument succeeding”:

“That is the situation of EU or EEA citizens, or their dependants, who on Brexit day will have been in the UK for more than five years. Under EU law, currently embodied in regulations here, a day before Brexit they will have a permanent right of residence in this country. The day after Brexit, if the EEA immigration regulations are no longer in force, on the face of things they will have no right to remain. On the other hand, a third-country person who has come to this country and been here for five years has the possibility of applying for indefinite leave to remain.”<sup>112</sup>

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107 Article 14, [European Convention on Human Rights](#)

108 Written evidence from Susie Alegre, para 6 ([AQR0007](#))

109 Written evidence from Susie Alegre, para 6 ([AQR0007](#))

110 Written evidence from Susie Alegre, Summary ([AQR0007](#))

111 *R (on the application of Johnson) (Appellant) v Secretary of State for the Home Department (Respondent)*, (19 October 2016) (2016) EWCA Civ 22, para 27: <http://www.bailii.org/ew/cases/EWCA/Civ/2016/22.html>

112 [Q 32](#)

86. Professor Barnard saw a similar possibility for an unlawful discrimination challenge, but from the opposite perspective. Assuming that the residency rights of EU nationals were safeguarded in the withdrawal agreement, she asked: “under European Convention law, to what extent is it justifiable to carry on treating ex-EU citizens better than and differently from third-country nationals—Indian, Pakistani and so forth?”<sup>113</sup>

### *Enforcement of ECHR rights*

87. Professor Lowe thought any claims against the UK arising from Brexit would be brought under the ECHR (and bilateral investment treaties, which we consider below), for two principal reasons. First, the ECHR had “easily-activated dispute settlement provisions”, which could be invoked by private litigants (individual or corporate) against a State. Unlike the typical procedure for a claim under international law, in which the national State of the injured person brings the claim against the respondent State, there was no need for the injured person to persuade his or her government to take up the claim. Second, the protections specifically given to property rights were part of a “web of protections” established by the ECHR, so that if the claim failed under AIP1 it might still succeed under one of the associated provisions of the ECHR.<sup>114</sup>

### *Conclusions*

88. **In the absence of a negotiated settlement on which EU rights will be maintained, the ECHR offers a more likely route for successful litigation post-Brexit than the international law doctrine of acquired rights. A greater number of EU rights will overlap with ECHR rights, and the ECHR has an effective national enforcement mechanism in the Human Rights Act 1998.**
89. **The two most relevant ECHR rights are the right to family and private life under Article 8 and the right of peaceful enjoyment of possessions under Article 1 of the First Protocol. Article 8 is likely to be invoked in cases of deportations of EU nationals post-Brexit (should such a policy ever be implemented), to seek to prevent the deportation taking place. Article 1 of the First Protocol will be invoked to protect EU rights to tangible and intangible property that overlap with the scope of “possessions” under that Article.**
90. **We are not confident that the right to private and family life under Article 8 of the ECHR would prevent the status of EU citizenship from being removed as a consequence of Brexit. The ECHR case law on the protection of citizenship to which we were referred relates to national citizenship. It is arguable whether EU citizenship can be conflated with national citizenship for this purpose: Article 20 of the Treaty on the Functioning of the EU makes clear that EU citizenship “shall be additional to and not replace national citizenship”.**
91. **There is a risk that the loss of EU citizenship could lead to unlawful discrimination between UK nationals, EU nationals and third-country nationals in the UK post-Brexit, where an ECHR right is engaged, as it could for other UK nationals in other EU Member**

<sup>113</sup> [Q 40](#)

<sup>114</sup> Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

**States. We expect this risk of unlawful discrimination to lead to a high volume of litigation, unless it is addressed in the withdrawal agreement.**

92. **The overlap between EU and ECHR rights should, however, be kept in context: the full range of EU rights is not covered by the ECHR. In cases where there is no overlap the ECHR will not provide any protection. This appears to be the case for many of the EU rights about which UK nationals living in other Member States are worried, such as the right to work, to study, to retire, to access affordable healthcare and other public services, and to equal treatment.**

### **Bilateral Investment Treaties**

93. Professor Lowe explained that bilateral investment treaties (BITs) were intended to serve anyone who set up a business in one of the States party to the BIT. The investor would be protected against “discriminatory, unreasonable and other measures; expropriation and things of that sort. So anything that was done to the property of somebody who had set up a business in a State party would be protected.”<sup>115</sup> The UK had over 100 BITs. Each defined the scope of investments that were protected. For example, the UK-Malta BIT defined investments as:

“Every kind of asset and in particular, though not exclusively ... (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights and goodwill; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”<sup>116</sup>

94. The extent of the protection is also defined in each BIT. The UK-Malta treaty was again typical. The most relevant provisions were as follows:

“(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

“(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”<sup>117</sup>

95. As with the ECHR, Professor Lowe thought that the “key thing about ... investment treaties is that they ... have mechanisms that are available to individual litigants. An individual or a company can themselves initiate a case

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115 [Q 3](#)

116 Supplementary written evidence from Professor Vaughan Lowe QC ([AQR0003](#))

117 Supplementary written evidence from Professor Vaughan Lowe QC ([AQR0003](#))

against the State ... in a way that would not be possible under international law generally.”<sup>118</sup> Some uncertainty arose, however, from the fact that the European Commission had taken the view that BITs ceased to be effective between EU Member States by virtue of EU membership: “They are, in effect, displaced by the legal regime under EU law. It is unclear whether this argument would prevail, and if so whether such treaties may revive after one State leaves the EU, either automatically or by action of the States Parties.”<sup>119</sup>

96. Professor Barnard was less sure of the value of BITs as an alternative source of protection for EU rights. They were restricted to investments only, so the overlap with EU rights was limited; their dispute-resolution mechanisms were not transparent and litigation under them was very expensive: “in reality, those who benefit from it are big companies”.<sup>120</sup>
97. Professor Barnard also referred to the fact that the CJEU “does not like the fact that there are arbitral tribunals ruling in areas that might have an effect on EU law. So BITs raise a lot of interesting questions, but their role is at best limited and, from a natural justice point of view, they raise difficult questions about transparency and the reporting of what is agreed.” There was also the issue of enforceability: “A number of States, particularly in Latin America, think that the costs are so great that they have refused to pay.”<sup>121</sup>

### *Conclusions*

98. **We question whether the UK’s bilateral investment treaties (BITs) will provide effective alternative protection for many EU rights which have been lost as a consequence of the EU’s withdrawal from the EU. We do so for two reasons. First, the scope of BITs is limited to commercial investor rights, with the consequence that the overlap with individual EU rights is unlikely to be wide. Secondly, where there is an overlap with EU rights, EU law would appear to take precedence over a BIT.**
99. **Litigation is always possible, however, where valuable rights have been lost. There is, therefore, a strong incentive for the Government to address the underlying causes of such potential litigation in the withdrawal agreement.**

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118 [Q 3](#)

119 Written evidence from Professor Vaughan Lowe QC ([AQR0002](#))

120 [Q 35](#)

121 [Q 35](#)

## CHAPTER 8: CONTENTS OF THE WITHDRAWAL AGREEMENT

### Safeguarding EU rights in the withdrawal agreement

100. Our witnesses were united in concluding that the most effective way of protecting rights acquired under EU law after Brexit was to safeguard them in the withdrawal agreement concluded under Article 50 TEU, rather than rely on the ECHR, or BITs, or any other safeguards. Professor Douglas-Scott put the point forcefully:

“A lot of the rights that are derived from EU law are simply not replicated in other instruments, so there is a real deficit ... There will be many, many rights that simply do not find a home in any of these other instruments, particularly rights of free movement and, for example, social rights, which are provided for in EU law. Again, workers’ rights do not find a home in the European Convention because it is a civil and political rights charter.”<sup>122</sup>

101. Professor Barnard thought it was “imperative that the divorce agreement says something about the position of EU nationals who are currently living and working in the UK, and UK nationals living and working in other Member States”.<sup>123</sup> She noted, for example, that equality rights were poorly protected under the ECHR: “It is equality rights, which are so strong under EU law that will suffer as a result of the departure”.<sup>124</sup>

102. Mr Speaight agreed: “the more that can be covered by between the UK and the EU, the better”.<sup>125</sup> Professor Lowe also agreed:

“After Brexit the UK’s rights and duties to EU nationals in the UK would be governed by customary international law (including the principle of ‘acquired rights’), by the ECHR and investment protection treaties and—most importantly—by the terms of any withdrawal agreement between the UK and the EU and/or its Member States.”<sup>126</sup>

103. Professor Lowe thought that the best way to minimise the risks of litigation was:

- (i) to negotiate a withdrawal agreement that expressly sets out those rights that would in effect be carried over after Brexit by securing them in UK (rather than EU) law, and for the avoidance of doubt also setting out those rights that would not be carried over; and
- (ii) to act in conformity with the UK’s existing obligations under the ECHR and BITs.<sup>127</sup>

104. **We strongly agree with the unanimous view of our witnesses that the withdrawal agreement concluded under Article 50 should set out the EU rights that are to be maintained post-Brexit. This approach will give rise to the greatest legal certainty for EU nationals in the UK, and UK nationals in other EU States. This should be the most important consideration.**

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122 Q 3

123 Q 36

124 Q 33

125 Q 36

126 Written evidence from Professor Vaughan Lowe QC (AQR0002)

127 Written evidence from Professor Vaughan Lowe QC (AQR0002)

105. **In the event that the UK exits the EU without a withdrawal agreement, the most effective safeguard for maintaining the citizenship rights of EU nationals in the UK will be national law. It is, therefore, vital that the Great Repeal Bill that the Government plans to introduce in 2017 ensures that the Immigration (European Economic Area) Regulations 2006, which implement the EU Citizens Directive, will remain in force unchanged on the UK's withdrawal from the EU, with or without a withdrawal agreement. To do so will provide legal certainty to EU nationals in the UK. As importantly, it would mean that other EU Member States are more likely to ensure similarly full protection for UK nationals in their States, who will have lost their status as EU citizens, in the event that a withdrawal agreement is not agreed.**

### Reciprocity

106. Several witnesses agreed that reciprocity would be the key to agreeing which rights would be safeguarded in the withdrawal agreement. Professor Douglas-Scott did not think “that anything will be possible without reciprocity. This is the way the EU tends to work: whatever visa regulations it makes for third countries, it demands similar treatment for its own nationals.”<sup>128</sup> Reciprocity would, therefore, be a key element in protecting the interests of UK nationals in other EU Member States: “in order to protect British citizens’ rights, reciprocity would be necessary (i.e. the UK would have to offer similar protections to those from other EU states)”.<sup>129</sup> The Polish Ambassador, Mr Rzegocki agreed that “relations between the European Union and United Kingdom should be based on reciprocity”.<sup>130</sup>
107. The French Ambassador, Mme Bermann, was more cautious: “the negotiations will be based on reciprocity but whether it will be absolute reciprocity I cannot say”.<sup>131</sup> Professor Lowe said that, while reciprocity was “an intuitive moral and political principle”, it was “not a necessary component of the bargain, as it were. There may be rights to be traded in against other interests: but that is a matter of government policy and what the Government think they are trying to achieve by negotiations.”<sup>132</sup>
108. **The nature of the forthcoming negotiations is such that absolute reciprocity in all matters cannot be guaranteed. Nevertheless, we believe that absolute reciprocity should apply and be guaranteed in respect of citizenship rights.**

### Which rights to safeguard?

109. The Polish Ambassador, Mr Rzegocki, said that all EU citizenship rights were equally important for an EU national creating a life in another Member State. They were, in other words, indivisible:

“All rights enjoyed by the European Union citizens remain equally important. For instance, the right of a worker who has children to take up a job in another member state could be violated if his children cannot attend a local school there. It is no use prioritising one right over

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128 [Q 5](#)

129 Written evidence from Professor Sionaidh Douglas-Scott ([AQR0001](#))

130 [Q 16](#)

131 [Q 22](#)

132 [Q 8](#)

another; we should aim to preserve all of them. It is also obvious to us that, in such scenarios, the rights of United Kingdom nationals living in the European Union should also be maintained. It is very important, as my colleague said, and it is a question of freedom and our close co-operation in the future.”<sup>133</sup>

110. The Romanian Ambassador, Mr Mihalache, agreed with this assessment. Mme Bermann said that: “Of course, what the French community want is the status quo.”<sup>134</sup> She also thought the negotiations would be “complex and very difficult. We have been very clear that the four freedoms are indivisible. We heard from the British Government that the most important point is curbing immigration, so that will have consequences.”<sup>135</sup>

111. Professor Douglas-Scott agreed<sup>136</sup> with the importance of the EU rights highlighted in the Command Paper published by the Government ahead of the referendum, *The Process of Withdrawing from the European Union*:

“The UK’s relationship with the EU has built up over 40 years of membership and affects many aspects of life in the UK, and of UK citizens living across the EU; the terms of exit would have to cover the full extent of that relationship.

“This would include the status and entitlements of the approximately 2 million<sup>137</sup> UK citizens living, working and travelling in the other 27 Member States of the EU. They all currently enjoy a range of specific rights to live, to work and access to pensions, health care and public services that are only guaranteed because of EU law. There would be no requirement under EU law for these rights to be maintained if the UK left the EU. Should an agreement be reached to maintain these rights, the expectation must be that this would have to be reciprocated for EU citizens in the UK.”<sup>138</sup>

112. To these Professor Douglas-Scott added the right to vote in local elections in other EU countries; the enforcement of civil judgments across the EU; EU social rights; the right of prisoners to serve their term in a UK prison after a certain period of time; and the ability of students to study in EU Member States. This list was compiled after a “fairly cursory look”.<sup>139</sup>
113. The British Medical Association (BMA) was concerned about how the NHS would be staffed after Brexit. There were approximately 135,000 EU nationals working in the NHS and the adult social care system in England. This represented about 5 per cent of the NHS workforce and 6 per cent of the adult social care workforce. The EU’s policy of freedom of movement and mutual recognition of professional qualifications had helped NHS trusts and providers ensure that gaps in the UK medical workforce were filled quickly

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133 [Q 15](#)

134 [Q 21](#)

135 [Q 23](#)

136 [Q 5](#)

137 This figure includes tourists, and so does not represent the number of UK nationals permanently resident in other EU Member States.

138 HM Government, *The Process of Withdrawing from the European Union*, Cm 9216, February 2016, paras 4.2–4.4: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/503908/54538\\_EU\\_Series\\_No2\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf) [accessed 13 November 2016]

139 [Q 5](#)

by qualified workers, with the appropriate level of training and education, from other EU Member States.<sup>140</sup>

114. The BMA feared that the ongoing political uncertainty about the future of EU nationals living and working in the UK would inevitably lead to some of the EU national workforce leaving. It recommended:

“The Government must offer these highly skilled professionals the reassurance they need regarding their rights to live and work in the UK. Specifically, we believe these highly skilled professionals should be granted permanent residence in the UK. This would provide stability both to these individuals and to NHS workforce numbers.”<sup>141</sup>

115. The UK Medical Schools Council echoed these concerns:

“Leaving the EU is likely to have a negative impact on student admission numbers. Overseas students are less likely to be attracted to the UK when it is not part of the EU, and EU students will be less attracted to the UK if they are required to pay international fees. This could have a serious impact on university income and a disproportionately large impact on medicine and other STEM<sup>142</sup> subjects given the high training costs. Great care will be needed with transitional arrangements. If the UK no longer participated in the Mutual Recognition of Professional Qualifications UK doctors and dentists might find it difficult to work in the EU with reciprocal difficulties for EU clinicians wishing to work in the UK.”<sup>143</sup>

116. Lord Howard of Lympne QC thought the three most important EU rights that should be safeguarded were the right to live, work and study in the UK.<sup>144</sup> While he thought that the principle of free movement of people should end with the UK’s withdrawal from the EU, he was confident that flexible national immigration rules would replace them, which would be capable of addressing the needs of the NHS.<sup>145</sup>
117. Professor Barnard favoured giving EU nationals with five years’ residence in the UK a permanent right to reside, but warned against giving effect to this by establishing a right to seek “indefinite leave to remain” under national immigration rules. As we outlined in Box 2, obtaining indefinite leave to remain is expensive (£1,875), bureaucratic and, for those with poor records of residence, impracticable: “there are a lot of people here doing low-skilled jobs who do not have such documentation”. Professor Barnard also thought the administrative burden on the Government would be vast, given the number of EU nationals in the UK. She recommended instead creating a new status of “EU permanent residence” or “permanent residence for former EU citizens”, the criteria for which could be more easily fulfilled by EU nationals. National Insurance records would be a good place to start, “because they constitute the only official government registration that we

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140 Written evidence from the British Medical Association ([AQR0005](#))

141 Written evidence from the British Medical Association ([AQR0005](#))

142 Science, technology, engineering and mathematics

143 Written evidence from the Medical Schools Council ([AQR0006](#))

144 [Q 27](#)

145 [Q 28](#)

have”, though “they do not show that you have a consistent pattern of work and presence in the United Kingdom.”<sup>146</sup> In the end:

“The question for negotiators really is how much of a fight they want. Do they want to require individualised assessments of every single one of those 3 million people or do they want to take a light-touch approach and say, ‘Look, if you’ve got a national insurance number and you can produce some other evidence, you will get whatever the new status is going to be called?’”<sup>147</sup>

118. She thought a new status of residence might also be something that UK nationals in other EU Member States could enjoy without getting caught up in domestic immigration rules. Lord Howard agreed that you should “take away the hoops for people who have the acquired rights as EU citizens”,<sup>148</sup> to make the process of obtaining permanent residency simpler.
119. Professor Barnard thought the following EU rights should be safeguarded, in addition to permanent residence rights:<sup>149</sup> the right to rent or buy; the right to equal treatment; the right to access public services, including healthcare; the existing political rights to vote in regional and local elections; family member rights; the right to set up and run a business; the mutual recognition of qualifications; and the right of exportability of social security benefits.
120. **Ultimately, it will be for the Government and its EU partners to determine which EU rights they wish to safeguard in the withdrawal agreement.**
121. **In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement.**
122. **It is clear to us that, in terms of numbers and of complexity, it would be impractical to require EU nationals resident in the UK to apply for indefinite leave to remain under the UK’s Immigration Rules. We draw the Government’s attention to the recommendation of one of our witnesses that a new status of permanent residence should be given to EU nationals in the UK post-Brexit. It would also be open to the Government to grant them the existing status of indefinite leave to remain, while waiving both the usual charges and the requirement to comply with any eligibility criteria other than that they were EU citizens resident in the UK. This would avoid establishing discriminatory status and categories of rights between EU Citizens and other non-UK nationals permanently resident in in the UK post-Brexit. Whichever approach the Government chooses, we recommend that the criteria it applies for permanent residence for EU nationals post-Brexit should be reasonable, flexible, and cost-effective.**

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146 [Q 38](#)

147 [Q 38](#)

148 [Q 30](#)

149 [Q 38](#)

## CHAPTER 9: ENFORCEMENT OF THE WITHDRAWAL AGREEMENT

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### The issue

123. Professor Barnard explained why it was so important that any rights safeguarded in the withdrawal agreement should be enforceable:

“Will those rights, to use EU jargon, be directly effective, which means that I can go to the county court in Cambridge and get those rights enforced? ... Will the British courts that are enforcing my rights be able to ask the Court of Justice what those rules mean? What does the withdrawal agreement, the divorce agreement, actually mean?”<sup>150</sup>

### *Freezing the safeguarded rights*

124. Professor Lowe thought that the “safer and more sensible way” to safeguard EU rights in the withdrawal agreement was to “freeze the legal situation at the moment of exit and say that all rights that exist today will carry on until such time as they are repealed and altered by Parliament.” He thought this would be more consistent with “the political logic of Brexit” too. The withdrawal agreement could contain provisions stating that certain safeguarded rights would “not be phased out, or that some would be phased out over a certain period of time”.<sup>151</sup> He also thought that the negotiations should consider whether the scope of the safeguarded rights would be limited to existing EU citizens or to future generations:

“If it were drafted with future citizens in mind, I think you would take a very different view from that which you would take if you were dealing with the phasing out of rights that would be lost by natural mortality and by time-limiting rights that corporations and so on had as a transitional measure.”<sup>152</sup>

125. Mr Speaight agreed that the “wisest” legal course was to ensure that rights safeguarded in the agreement should be based on “the status quo at the moment of exit”. There would also be strong political pressure on the Government to ensure this was the case. An alternative mechanism, of allowing the safeguarded rights to evolve with EU law, sounded rather like a “blank-cheque arrangement under which the UK would enter a treaty agreeing to legislate domestically to match whatever future developments other countries might decide on.” He thought it would be better to have “something a little less rigid—perhaps an undertaking to give consideration”.<sup>153</sup>
126. Lord Howard agreed: “It would be quite difficult to sign up to some unknown future evolution of European Union law. It would have to be the law as it was at the point of exit.” If changes were made to EU legislation post-Brexit, “for example, the European Union decided to provide some extra benefit ... which it also conferred on UK citizens living in EU countries, we would consider at that stage whether we wanted to reciprocate”. He said that there could be divergence between UK law and EU law over time; that was a consequence of being “an independent country again”.<sup>154</sup>

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150 [Q 36](#)

151 [Q 4](#)

152 [Q 4](#)

153 [Q 39](#)

154 [Q 29](#)

127. Professor Barnard thought that greater difficulty would come when EU law was amended:

“What will happen to legislation on, for example, the public procurement directive? The current version, the 2014 version, is really quite different from the 2004 version. The fact that we implemented the 2014 directive a year ahead of time and copied its contents almost verbatim suggests that we like the directive very much and got what we wanted in the negotiations. What happens when that directive gets amended? By definition, we will not have been involved in the negotiations. What will happen to the amendments? Will we voluntarily assume them in order to keep our regime up to date with the EU regime?”<sup>155</sup>

128. Professor Douglas-Scott said that a further problem with freezing EU law in national law was that much of the EU law made specific reference to EU institutions:

“You do not necessarily have a provision of law that just sets out the law and says that these are the rights or whatever that people have; there may be a reference to the duties of the Commission. So you would have to go through the law quite carefully to see what you would do in such cases; otherwise, you would have a reference to an institution that we were no longer bound by treaty to have any relations with.”<sup>156</sup>

*Status of judgments of the Court of Justice of the EU*

129. Professor Barnard drew our attention to the approach of the Swiss courts to taking account of developments in EU law.<sup>157</sup> Switzerland had a series of 120 bilateral agreements with the EU, which were divided into groups. If one of the agreements in a group was breached by either Switzerland or the EU, the rest of the agreements in the group would be invalidated. Despite the theoretical autonomy of the Swiss courts, in practice they closely followed CJEU judgments:

“They look at the judgments and, in the past, the judgments of the Court of Justice had ‘persuasive effect’. They then waited for a judgment of the Swiss Supreme Court to say, ‘This does apply in Switzerland’. This became very onerous in Switzerland, so, eventually, in 2009, the Swiss Supreme Court said, ‘We will assume that we will take on the evolution of case law unless there is good reason not to’. So what is happening is that Switzerland very closely mirrors—admittedly in areas covered by the agreements—what is decided at least by the Court of Justice, because Switzerland is very worried that otherwise its law will become out of date.”<sup>158</sup>

130. She gave the example of competition law, where UK competition legislation mirrored EU law. It was widely thought it would continue to do so, not least because EU competition law had such strong extraterritorial effect. So in that area it seemed “inevitable that we will have to not just pay lip service to following what the Court of Justice does but ... take on board any new changes.”<sup>159</sup>

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155 [Q 40](#)

156 [Q 4](#)

157 [Q 39](#)

158 [Q 39](#)

159 [Q 39](#)

131. Professor Barnard thought that, because “under the great repeal Bill, all EU law will become part of UK law”, it was very likely that CJEU judgments “will have a very strong persuasive effect, if not full precedential value.” This could change with the passage of time, as the Government decided to repeal EU laws in particular areas.<sup>160</sup> Mr Speaight agreed: “if we are entering an international agreement the purpose of which is to preserve existing acquired EU rights, we certainly ought to respect the decisions of the Luxembourg court on what those rights mean.” Professor Barnard thought that CJEU judgments “handed down pre-Brexit will have the force that they already have under the European Communities Act.”<sup>161</sup>
132. Lord Howard expected that the forthcoming Great Repeal Bill would make provision for what was to happen to EU law after Brexit: “A sensible starting point would be for all EU law to be translated into UK law and then, over a period—not all EU law is bad; we would not want to get rid of it all—Parliament and the Government would consider which bits of EU law they wanted to keep and which bits they did not.” His views on the status of CJEU judgments post-Brexit differed from that of Professor Barnard and Mr Speaight: he thought they would have no formal status. A national court could give weight to them in the same way it did “to courts in other parts of the world that had considered similar questions”, but it would not give them as much weight as decisions of Commonwealth courts, “because their system of law is much more similar to ours than those of the EU”.<sup>162</sup>

*A special enforcement mechanism*

133. Professor Lowe said that, while the mechanisms for enforcing the withdrawal agreement would be the normal mechanisms of national legal systems, it would be possible “to add on to the withdrawal agreement some mechanism for handling the matter at a higher level.” If the UK Government considered that an EU Member State was not adequately respecting the rights that it believed were safeguarded for UK citizens abroad, that failure could then be followed up through some mechanism with the EU and/or the Member State concerned.<sup>163</sup>

*Approach taken in agreements between EEA States and the EU*

134. Although not raised as an issue by any of our witnesses, we note that a 2006 agreement between the EU and two EEA States, Iceland and Norway, on extradition procedures<sup>164</sup> contains provisions requiring the two-way transmission of developing case law, including the following Articles on “dispute settlement” and “case law”:

“Any dispute between either Iceland or Norway and a Member State of the European Union regarding the interpretation or the application of this Agreement may be referred by a party to the dispute to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months.

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160 [Q 39](#)

161 [Q 40](#)

162 [Q 30](#)

163 [Q 4](#)

164 Council Decision 2006/697/EC of 27 June 2006 on agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, [OJ L 292](#) (21 October 2006)

“The Contracting Parties, in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions of this Agreement, shall keep under constant review the development of the case law of the Court of Justice of the European Communities, as well as the development of the case law of the competent courts of Iceland and Norway relating to these provisions and to those of similar surrender instruments. To this end a mechanism shall be set up to ensure regular mutual transmission of such case law.”<sup>165</sup>

135. Thus the duty to keep under review the respective case law of the parties to the agreement is reciprocal. Norway and Iceland have to take account of developments in the case law of the CJEU, but so too the EU has to take account of developments in the case law of the courts of Iceland and Norway.

### *Conclusions*

136. **We recommend that the rights which are safeguarded in the withdrawal agreement should be frozen as at the date of Brexit; we cannot see any other approach that would provide for legal certainty.**
137. **The majority of the safeguarded rights are likely to be reciprocal with EU rights, which means that they will have to be applied so far as possible uniformly. EU law will evolve over time, and national legislation and its interpretation by the courts will have to evolve accordingly. We recommend that a reciprocal mechanism be established to ensure that UK law can take account of relevant developments in EU law, and, importantly, that EU law can take account of relevant developments in UK law.**
138. **The experience of the EEA States and Switzerland in this regard will be instructive. The 2006 extradition agreement between the EU, Norway and Iceland on extradition procedures, for example, may be a helpful precedent. The fact that the duty to keep under review the case law of the respective parties is reciprocal is particularly important: Norway and Iceland have to take account of developments in the case law of the CJEU, but so too the EU has to take account of developments in the case law of the courts of Iceland and Norway.**

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<sup>165</sup> [Council Decision 2006/697/EC](#), Articles 36 and 37

## CHAPTER 10: THE CASE FOR A UNILATERAL GUARANTEE OR EARLY NEGOTIATION

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### The views of our witnesses

#### *Unilateral guarantee*

139. Lord Howard recommended that the Government should “make it clear now—they should already have made it clear—that those EU citizens who are currently living in this country will be allowed to stay here, to carry on working here, and to carry on studying here.” He did not think it was necessary to “wait for any question of reciprocity”. In any event, he thought it “inconceivable that either the French Government or the Spanish Government would suddenly start rounding up hundreds of thousands of Brits and deporting them”, even if it were legally possible to do so. The same was not true of other rights, such as access to benefits, where he believed there was “a stronger case for saying that they should be the subject of reciprocity”.<sup>166</sup>
140. Lord Howard’s evidence to us reflected views he had expressed in a debate on the outcome of the European Union Referendum on 6 July:

“As so many of your Lordships have said during this debate, let us not begin to entertain any suggestion that immigrants who are here legally, including those from the European Union, should be used as bargaining chips. That is a matter of common, simple decency.”

“I am sure my noble friend understands that, by talking about this guarantee in the future, she has done little to allay the real anxieties which hang over the heads of millions of people from the European Union who are lawfully in this country now. This is a guarantee that could—and should—be given now and it does not take the matter further to suggest that it can be given at some time in the future.”<sup>167</sup>
141. Mr Speaight agreed that the Government “should unilaterally announce, not as a bargaining matter, that it will convert all five-year permanent residence rights under the EU arrangements into our concept of indefinite leave to remain”.<sup>168</sup> All other EU rights, he believed, should be the subject of negotiations.
142. In its written evidence, submitted after Mr Rzegocki had given evidence to us, the Polish Embassy stated: “We expect Her Majesty’s Government to extend to the Polish community statements of reassurance and clarification of all doubts about their status after the UK will have left the EU.”<sup>169</sup>

#### *Early agreement*

143. Mme Bermann did not foresee citizenship rights being agreed before the opening of the withdrawal negotiations: “the French Government’s position is very clear: we do not want to enter into any pre-negotiations before the

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<sup>166</sup> [Q 27](#)

<sup>167</sup> HL Deb, 6 July 2016, [cols 2035 and 2112](#)

<sup>168</sup> [Q 37](#)

<sup>169</sup> Written evidence from the Embassy of the Republic of Poland in London ([AQR0013](#))

triggering of Article 50”.<sup>170</sup> She also doubted that any aspect of the withdrawal negotiations could be agreed until all of the negotiation was agreed:

“My experience is that nothing is agreed until everything is agreed, so probably it will not be solved in the beginning. There may be some political reassurances, but I think that everything will be decided at the end. That is my feeling. I do not yet know how they will negotiate but that is how it works usually.”<sup>171</sup>

144. On several occasions she said that France was waiting for the UK’s proposals, including on acquired rights, before it could react:

“I am sorry to repeat that all the time, but it is for the UK Government not only to trigger Article 50 but to make proposals to which we will react. For the time being, the concern of France and the 26 is to strengthen the EU. We are not going to make any proposal regarding Brexit and it is not necessary. We will wait for the British proposals.”<sup>172</sup>

### The Government’s view

145. The Government has been put under pressure in both Houses of Parliament to give a unilateral undertaking to preserve the EU citizenship rights of EU nationals in the UK after Brexit. The Government’s views were set out in reply to an Opposition Day debate in the Commons on the rights of EU Nationals on 19 October. Robert Goodwill MP, the Minister of State for Immigration at the Home Office, said:

“The Government have been clear that they want to protect the status of EU nationals resident in the UK. As the Prime Minister has made clear, the only circumstances in which that would not be possible were if British citizens’ rights in other EU Member States are not protected in return. The Government have provided repeat assurances on this point, and their position has not changed ... The Government are therefore unable to set out a definitive position now: that must be done following an agreement with the EU.”<sup>173</sup>

146. On the timing of the negotiation the Minister said:

“I want to be able to conclude this matter as quickly as possible once negotiations begin, but there is a balance to be struck between transparency and good negotiating practice. Any attempt to pre-empt our future negotiations would risk undermining our ability to secure protection for the rights of British citizens living in the EU, and that is why we are unable to support the motion.”<sup>174</sup>

### Conclusions

147. **We urge the Government to change its stance and to give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK when the UK withdraws from the EU. The overwhelming weight of the evidence we received points to this as morally the right thing to do. It would also have the advantage of**

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170 [Q 21](#)

171 [Q 23](#)

172 [Q 25](#) (see also [QQ 21, 23, 24](#))

173 HC Deb, 19 October 2016, [cols 834 and 836](#)

174 HC Deb, 19 October 2016, [col 837](#)

**striking a positive note for the start of the negotiations, which will be much needed.**

- 148. Even if the Government refuses to give a unilateral undertaking ahead of the negotiations, there is a strong case to be made for agreeing EU citizenship rights as a preliminary and separate element of the negotiations as soon as Article 50 is triggered. EU nationals in the UK and UK nationals in other EU Member States should not have to wait until the end of the negotiations to find out whether they have a future in the EU States where they have decided to live.**

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### The rights of EU citizens and their families

1. The rights of an EU citizen to live and work in any EU Member State, and to gain a permanent right of residence in that State after five years, are some of the most fundamental in EU law. From them have derived all of the additional citizenship rights that are necessary for nationals of EU Member States, and their families, to conduct their lives in an EU Member State of their choosing on equal terms with the nationals of that State. (Paragraph 21)
2. That said, we received evidence suggesting that many EU nationals who have been in the UK for over five years may not be able to prove that they meet the criteria for permanent residence as an EU citizen. For example, those who are not economically active, including students, will have to show that they have had comprehensive sickness insurance cover for five years in the UK, notwithstanding that the National Health Service is freely available. We call on the Government to explain whether this consideration will influence the decision it makes on the cut-off point for deciding which EU nationals in the UK are given a permanent right to reside after Brexit. (Paragraph 22)
3. We also call on the Government to publish statistics on the number of EU nationals in the UK who have obtained proof of a permanent right to residence, and the number of applications that are pending. (Paragraph 23)

### The loss of EU citizenship rights

4. In the absence of a negotiated settlement, the consequences of the loss of EU citizenship rights for EU nationals in the UK, and for UK nationals in other EU Member States, will be severe. (Paragraph 31)
5. EU nationals in the UK will be subject to national immigration rules, which restrict the rights of migrants far more than EU citizenship law, and which have been described as Byzantine in their complexity by the Court of Appeal. (Paragraph 32)
6. While UK nationals in EU Member States will also be subject to the national immigration law of their host State, they will enjoy additional protection as ‘third-country nationals’ under EU immigration law (except in Denmark and Ireland). The additional protection is, however, a considerable reduction on the migrant rights afforded to EU citizens. (Paragraph 33)

### The concerns of EU nationals in the UK

7. It is clear, and unsurprising, that the uncertainty caused by the referendum has given rise to deep anxiety among EU nationals, including Polish, Romanian and French nationals, in the UK. The Government is under a moral obligation to provide certainty and legal clarity to all EU nationals working, living and studying in the UK, who contribute so significantly to the economic and cultural life of the UK. It should do so urgently. (Paragraph 47)
8. There is also a forceful economic case for the Government to act quickly. EU workers play an important role in filling gaps in the labour market that cannot otherwise be filled by UK workers. This is as true for highly skilled job markets, such as medical or financial services, as it is for lower skilled or seasonal job markets. The longer their future is uncertain, the less attractive

a place to live and work the UK will be, and the greater labour market gaps will be. (Paragraph 48)

9. The referendum result has contributed to a rise in xenophobia towards EU nationals. We deplore this. Question marks about the rights of EU nationals to live in the UK may be fuelling xenophobic sentiment, as the Bulgarian Ambassador suggested. We call on the Government to explain what action it is taking to counter xenophobia towards EU nationals. (Paragraph 49)

### **The concerns of UK nationals living in other Member States**

10. The anxiety of EU nationals in the UK is matched by that of UK nationals in other EU States—the evidence we received of their distress is compelling. Many are pessimistic that the life that they had planned in another EU Member State will still be possible. Residence rights, employment rights, access to health care and the capacity to finance retirements feature large among their concerns. Just as the Government is under an obligation to provide certainty to EU nationals resident in the UK, so it is under an equal moral obligation to seek to provide certainty and legal clarity to all UK nationals working, living and studying in other EU States. It should do so urgently. (Paragraph 54)

### **The protection of EU rights as acquired rights**

11. It is evident that the term ‘parties’ in Article 70 (1)(b) of the Vienna Convention on the Law of Treaties refers to States, not to individuals or companies. In no sense, therefore, can this provision be said to safeguard individual rights under EU law that will be lost as a consequence of the UK’s withdrawal, in the absence of a negotiated settlement. (Paragraph 60)
12. The evidence we received makes very clear that the doctrine of acquired rights under public international law will provide little, if any, effective protection for former EU rights once the UK withdraws from the EU. The scope of acquired rights is limited to certain contractual and property rights which, even were they to coincide with EU rights, are highly unlikely to be enforceable. Reliance on the doctrine before the referendum as a means of protecting EU rights was therefore misplaced. (Paragraph 71)
13. Litigation is always possible, however, where valuable rights have been lost. There is, therefore, a strong incentive for the Government to address the underlying causes of such potential litigation in the withdrawal agreement. (Paragraph 72)

### **The protection of EU rights under alternative sources of law**

14. In the absence of a negotiated settlement on which EU rights will be maintained, the ECHR offers a more likely route for successful litigation post-Brexit than the international law doctrine of acquired rights. A greater number of EU rights will overlap with ECHR rights, and the ECHR has an effective national enforcement mechanism in the Human Rights Act 1998. (Paragraph 88)
15. The two most relevant ECHR rights are the right to family and private life under Article 8 and the right of peaceful enjoyment of possessions under Article 1 of the First Protocol. Article 8 is likely to be invoked in cases of deportations of EU nationals post-Brexit (should such a policy ever be implemented), to seek to prevent the deportation taking place. Article 1

of the First Protocol will be invoked to protect EU rights to tangible and intangible property that overlap with the scope of “possessions” under that Article. (Paragraph 89)

16. We are not confident that the right to private and family life under Article 8 of the ECHR would prevent the status of EU citizenship from being removed as a consequence of Brexit. The ECHR case law on the protection of citizenship to which we were referred relates to national citizenship. It is arguable whether EU citizenship can be conflated with national citizenship for this purpose: Article 20 of the Treaty on the Functioning of the EU makes clear that EU citizenship “shall be additional to and not replace national citizenship”. (Paragraph 90)
17. There is a risk that the loss of EU citizenship could lead to unlawful discrimination between UK nationals, EU nationals and third-country nationals in the UK post-Brexit, where an ECHR right is engaged, as it could for other UK nationals in other EU Member States. We expect this risk of unlawful discrimination to lead to a high volume of litigation, unless it is addressed in the withdrawal agreement. (Paragraph 91)
18. The overlap between EU and ECHR rights should, however, be kept in context: the full range of EU rights is not covered by the ECHR. In cases where there is no overlap the ECHR will not provide any protection. This appears to be the case for many of the EU rights about which UK nationals living in other Member States are worried, such as the right to work, to study, to retire, to access affordable healthcare and other public services, and to equal treatment. (Paragraph 92)
19. We question whether the UK’s bilateral investment treaties (BITs) will provide effective alternative protection for many EU rights which have been lost as a consequence of the EU’s withdrawal from the EU. We do so for two reasons. First, the scope of BITs is limited to commercial investor rights, with the consequence that the overlap with individual EU rights is unlikely to be wide. Secondly, where there is an overlap with EU rights, EU law would appear to take precedence over a BIT. (Paragraph 98)
20. Litigation is always possible, however, where valuable rights have been lost. There is, therefore, a strong incentive for the Government to address the underlying causes of such potential litigation in the withdrawal agreement. (Paragraph 99)

### **Contents of the withdrawal agreement**

21. We strongly agree with the unanimous view of our witnesses that the withdrawal agreement concluded under Article 50 should set out the EU rights that are to be maintained post-Brexit. This approach will give rise to the greatest legal certainty for EU nationals in the UK, and UK nationals in other EU States. This should be the most important consideration. (Paragraph 104)
22. In the event that the UK exits the EU without a withdrawal agreement, the most effective safeguard for maintaining the citizenship rights of EU nationals in the UK will be national law. It is, therefore, vital that the Great Repeal Bill that the Government plans to introduce in 2017 ensures that the Immigration (European Economic Area) Regulations 2006, which implement the EU Citizens Directive, will remain in force unchanged on the

UK's withdrawal from the EU, with or without a withdrawal agreement. To do so will provide legal certainty to EU nationals in the UK. As importantly, it would mean that other EU Member States are more likely to ensure similarly full protection for UK nationals in their States, who will have lost their status as EU citizens, in the event that a withdrawal agreement is not agreed. (Paragraph 105)

23. The nature of the forthcoming negotiations is such that absolute reciprocity in all matters cannot be guaranteed. Nevertheless, we believe that absolute reciprocity should apply and be guaranteed in respect of citizenship rights. (Paragraph 108)
24. Ultimately, it will be for the Government and its EU partners to determine which EU rights they wish to safeguard in the withdrawal agreement. (Paragraph 120)
25. In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement. (Paragraph 121)
26. It is clear to us that, in terms of numbers and of complexity, it would be impractical to require EU nationals resident in the UK to apply for indefinite leave to remain under the UK's Immigration Rules. We draw the Government's attention to the recommendation of one of our witnesses that a new status of permanent residence should be given to EU nationals in the UK post-Brexit. It would also be open to the Government to grant them the existing status of indefinite leave to remain, while waiving both the usual charges and the requirement to comply with any eligibility criteria other than that they were EU citizens resident in the UK. This would avoid establishing discriminatory status and categories of rights between EU Citizens and other non-UK nationals permanently resident in in the UK post-Brexit. Whichever approach the Government chooses, we recommend that the criteria it applies for permanent residence for EU nationals post-Brexit should be reasonable, flexible, and cost-effective. (Paragraph 122)

### **Enforcement of the withdrawal agreement**

27. We recommend that the rights which are safeguarded in the withdrawal agreement should be frozen as at the date of Brexit; we cannot see any other approach that would provide for legal certainty. (Paragraph 136)
28. The majority of the safeguarded rights are likely to be reciprocal with EU rights, which means that they will have to be applied so far as possible uniformly. EU law will evolve over time, and national legislation and its interpretation by the courts will have to evolve accordingly. We recommend that a reciprocal mechanism be established to ensure that UK law can take account of relevant developments in EU law, and, importantly, that EU law can take account of relevant developments in UK law. (Paragraph 137)
29. The experience of the EEA States and Switzerland in this regard will be instructive. The 2006 extradition agreement between the EU, Norway and Iceland on extradition procedures, for example, may be a helpful precedent. The fact that the duty to keep under review the case law of the respective parties is reciprocal is particularly important: Norway and Iceland have to

take account of developments in the case law of the CJEU, but so too the EU has to take account of developments in the case law of the courts of Iceland and Norway. (Paragraph 138)

**The case for a unilateral guarantee or early negotiation**

30. We urge the Government to change its stance and to give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK when the UK withdraws from the EU. The overwhelming weight of the evidence we received points to this as morally the right thing to do. It would also have the advantage of striking a positive note for the start of the negotiations, which will be much needed. (Paragraph 147)
31. Even if the Government refuses to give a unilateral undertaking ahead of the negotiations, there is a strong case to be made for agreeing EU citizenship rights as a preliminary and separate element of the negotiations as soon as Article 50 is triggered. EU nationals in the UK and UK nationals in other EU Member States should not have to wait until the end of the negotiations to find out whether they have a future in the EU States where they have decided to live. (Paragraph 148)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Cromwell  
 Baroness Hughes of Stretford  
 Lord Judd  
 Baroness Kennedy of The Shaws (Chairman)  
 Earl of Kinnoull  
 Baroness Ludford  
 Baroness Neuberger  
 Baroness Newlove  
 Lord Oates  
 Lord Richard  
 Lord Polak  
 Baroness Shackleton of Belgravia

### Declarations of Interest

Lord Cromwell  
*No relevant interests declared*  
 Baroness Hughes of Stretford  
*No relevant interests declared*  
 Lord Judd  
*Member of the Advisory Board of the LSE Centre for the Study of Human Rights*  
*Life member of Court at Lancaster and Newcastle Universities*  
*Emeritus Governor of LSE*  
 Baroness Kennedy of The Shaws (Chairman)  
*No relevant interests declared*  
 Earl of Kinnoull  
*No relevant interests declared*  
 Baroness Ludford  
*Recipient of a pension as a former MEP*  
 Baroness Neuberger  
*No relevant interests declared*  
 Baroness Newlove  
*No relevant interests declared*  
 Lord Oates  
*No relevant interests declared*  
 Lord Polak  
*Chairman, TWC Associates Ltd*  
 Lord Richard  
*No relevant interests declared*  
 Baroness Shackleton of Belgravia  
*Practising Solicitor specialising in family and matrimonial matters*

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top  
 Lord Boswell of Aynho (Chairman)

Baroness Falkner of Margravine  
Lord Green of Hurstpierpoint  
Lord Jay of Ewelme  
Baroness Kennedy of The Shaws  
Earl of Kinnoull  
Baroness Prashar  
Lord Selkirk of Douglas  
Baroness Suttie  
Lord Teverson  
Baroness Verma  
Baroness Wilcox

During consideration of the report the following Members declared an interest:

Baroness Armstrong of Hill Top  
*Part-owner of a property in Spain*  
Baroness Falkner of Margravine  
*Husband is a national of another EU member state and therefore potentially affected by issues covered in this report*  
Lord Green of Hurstpierpoint  
*Chairman Natural History Museum*  
*Chairman Asia House*  
*President, Institute of Export*  
*Member, informal advisory group on Brexit and trade, convened by CEO of Engineering Employers' Federation*  
*Part-owner of a property in an EU member state*

A full list of Members' interests can be found in the Register of Lords Interests <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at <http://www.parliament.uk/brexit-acquired-rights-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with a \*\* gave both oral and written evidence. Those marked with \* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

|    |                                                                                                                                                                                   |                          |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| ** | Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary School of Law, University of London and Honorary Research Fellow, Lady Margaret Hall, University of Oxford | <a href="#">QQ 1–8</a>   |
| ** | Professor Vaughan Lowe QC, Essex Court Chambers                                                                                                                                   | <a href="#">QQ 1–8</a>   |
| *  | HE Dan Mihalache, the Ambassador of Romania                                                                                                                                       | <a href="#">QQ 9–16</a>  |
| ** | HE Arkady Rzegocki, the Ambassador of the Republic of Poland                                                                                                                      | <a href="#">QQ 9–16</a>  |
| *  | HE Sylvie Bermann, the Ambassador of France                                                                                                                                       | <a href="#">QQ 17–26</a> |
| *  | Sylvaine Carta-Le Vert, Consul-General of France to London                                                                                                                        | <a href="#">QQ 17–26</a> |
| *  | The Rt Hon The Lord Howard of Lympne CH QC                                                                                                                                        | <a href="#">QQ 27–31</a> |
| *  | Professor Catherine Barnard, Professor of European Union Law and Employment Law, Cambridge University                                                                             | <a href="#">QQ 32–40</a> |
| ** | Mr Anthony Speaight QC, 4 Pump Court                                                                                                                                              | <a href="#">QQ 32–40</a> |

### Alphabetical list of all witnesses

|    |                                                                                                                                                                                            |                                                    |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
|    | Ms Susie Alegre, Doughty Street Chambers                                                                                                                                                   | <a href="#">AQR0007</a>                            |
| *  | Professor Catherine Barnard, Professor of European Union Law and Employment Law, Cambridge University (QQ 32–40)                                                                           |                                                    |
| *  | HE Sylvie Bermann, the Ambassador of France (QQ 17–26)                                                                                                                                     |                                                    |
|    | British Medical Association                                                                                                                                                                | <a href="#">AQR0005</a>                            |
| *  | Ms Sylvaine Carta-Le Vert, Consul-General of France to London                                                                                                                              |                                                    |
| ** | Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary School of Law, University of London and Honorary Research Fellow, Lady Margaret Hall, University of Oxford (QQ 1–8) | <a href="#">AQR0001</a>                            |
|    | Expat Citizen Rights in EU (ECREU)                                                                                                                                                         | <a href="#">AQR0012</a><br><a href="#">AQR0014</a> |

|    |                                                                           |                                                                  |
|----|---------------------------------------------------------------------------|------------------------------------------------------------------|
|    | Foreign and Commonwealth Office                                           | <a href="#"><u>AQR0010</u></a>                                   |
|    | Mr Gary Holland                                                           | <a href="#"><u>AQR0009</u></a>                                   |
| ★  | The Rt Hon The Lord Howard of Lympne CH QC<br>(QQ 27–31)                  |                                                                  |
|    | Immigration Law Practitioners’ Association                                | <a href="#"><u>AQR0004</u></a><br><a href="#"><u>AQR0015</u></a> |
| ★★ | Professor Vaughan Lowe QC, Essex Court Chambers<br>(QQ 1–8)               | <a href="#"><u>AQR0002</u></a><br><a href="#"><u>AQR0003</u></a> |
| ★  | HE Dan Mihalache, the Ambassador of Romania                               |                                                                  |
|    | Medical Schools Council                                                   | <a href="#"><u>AQR0006</u></a>                                   |
| ★★ | HE Arkady Rzegocki, the Ambassador of the Republic<br>of Poland (QQ 9–16) | <a href="#"><u>AQR0013</u></a>                                   |
| ★★ | Mr Anthony Speaight QC, 4 Pump Court (QQ 32–40)                           | <a href="#"><u>AQR0008</u></a>                                   |
|    | Mr Stuart Whitehouse                                                      | <a href="#"><u>AQR0011</u></a>                                   |