**CHAPTER 9**

**MAY WE STAY? ASSESSING THE SECURITY OF RESIDENCE FOR EU CITIZENS LIVING IN THE UK**

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EU Citizens Living in the UK

1. INTRODUCTION

The seismic effects of the British electorate’s decision to leave the European Union will be felt in almost every corner of the UK’s political and legal landscape over the short, medium and longer term. On the day of the referendum result, however, one question arose immediately: would currently resident non-national EU citizens – most of whom did not themselves have a say in the outcome of the referendum[[1]](#footnote-1) – be able to remain in the UK? Despite assurances from the UK Government that it wanted to secure residence rights for such EU citizens[[2]](#footnote-2) when it formally notified the European Council of UK withdrawal, concrete commitments were yet to be made. Consequently, EU citizens were left, somewhat blindly, seeking means of pre-emptively securing their residence in the UK in the absence of any indication from Government as to the correct path to follow. The UK Prime Minister consistently asserted that the Government’s hands were tied, arguing that it needed to ensure reciprocal protection for UK citizens living in the remaining Member States and claiming that ‘one or two’ EU leaders refused to reach early agreement on the issue, ahead of the commencement of formal negotiations.[[3]](#footnote-3)

The Government’s delay in responding to the question of EU citizens’ residence rights and its preoccupation with reciprocity has already led to ‘a great deal of anxiety and uncertainty’ amongst the UK’s resident EU population about their security of residence.[[4]](#footnote-4) The Government’s stance has also increased the urgency of the residence question, with both substantive and procedural consequences for any agreement reached. First, a deal is now likely to focus on the immediate question of whether and how currently resident EU citizens can stay in the UK, with reduced time and space to consider equally pertinent longer-term residence issues. Second, the emphasis on reciprocity further limits the opportunity for a legally binding outcome, while any political agreement will still need to be translated into legal reality.

By analysing the potential benefits and pitfalls of options for safeguarding residence rights, this chapter offers an opportunity to reflect both on the challenges currently facing EU citizens living in the UK, but also on the obstacles that will have to be overcome further down the line, not only by Union citizens who wish to remain in Britain, but also by the legal and political actors tasked with realising Brexit. To that end, Section 2 will outline the residence rights currently enjoyed by EU citizens in the UK as a matter of Union law. Section 3 will explain, in more detail, the UK Government’s approach to the question of EU citizens’ residence security and assess the alternatives presented by other actors, primarily parliamentary committees. Section 4 will then situate this analysis against the broader need to secure meaningful residence rights for EU citizens in the UK and critique the Government’s emphasis on a reciprocal deal in this context.

2. UNION CITIZENS’ CURRENT RESIDENCE RIGHTS IN THE UK UNDER EU LAW

Pursuant to Article 21 TFEU, EU citizens enjoy the right to move and reside freely throughout the Union. The practicalities of this right are, however, broadly realised through secondary Union legislation, largely via the Citizens’ Rights Directive (the CRD/the Directive).[[5]](#footnote-5) Under the Directive, EU citizens have a right to enter the UK, as an EU Member State, and reside there for up to three months with minimal formalities.[[6]](#footnote-6) If EU citizens wish to remain in the UK for longer, Article 7 CRD subjects their residency to additional requirements. The Union citizen must be a worker or self-employed, or, if she/he is non-economically active, she/he must have sufficient resources and comprehensive sickness insurance for herself/himself and any accompanying family members so as not to become a burden on the social assistance system of their host state.[[7]](#footnote-7) These latter conditions are however subject to proportionality assessment as a result of Court of Justice case law (CJEU/the Court).[[8]](#footnote-8) The Directive also offers a right of permanent residence, via Article 16, for those who have resided legally in the UK for a continuous period of five years.

Nevertheless, some individuals derive EU residence rights outwith the CRD framework. For example, the primary caregiver of the school-age child of a Union worker may draw residence entitlements from the Free Movement of Workers Regulation,[[9]](#footnote-9) by virtue of the CJEU’s *Teixeira* and *Ibrahim* judgments,[[10]](#footnote-10) irrespective of whether the primary caregiver is self-sufficient or the EU worker continues to be employed in the UK. Third country nationals may be able to reside in the UK as a result of the citizenship rights that the EU Treaties bestow on their Union citizen family members. In *Chen*,[[11]](#footnote-11) the third country national primary caregiver of an EU citizen minor had a right to reside in the UK, in order that the child could exercise her Article 21 TFEU right to move and reside freely around the Union, subject to sufficient resources and comprehensive sickness cover. In *Ruiz Zambrano*, a third country national primary caregiver derived a right to reside and to work in their child’s Member State of nationality because to refuse this would seemingly have required the child to leave the Union territory and thus have ‘deprive[d] them of the genuine enjoyment of the substance of their rights conferred by’ their Union citizenship.[[12]](#footnote-12)

All of these EU-law derived residence entitlements are transposed into UK law via the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).[[13]](#footnote-13) However, the clear concern for the UK’s EU population is whether these rights will continue after the UK leaves the Union, particularly given the many obstacles to the potential routes to residence security.

3. MAY WE STAY? SPECULATING ON THE RETENTION OF RESIDENCE RIGHTS IN THE ABSENCE OF GOVERNMENT GUIDANCE

Despite these concerns, when the Government published its White Paper on ‘the UK’s exit from and new partnership with the European Union’ (the White Paper), it offered little in the way of firm assurances. The White Paper simply reaffirmed that while the UK remains an EU Member State, residence rights are unchanged,[[14]](#footnote-14) while conveying the Government’s wish to secure the status of EU citizens living in the UK, and British nationals in other Member States ‘as early as we can…in forthcoming negotiations’.[[15]](#footnote-15) However, the White Paper stopped far short of providing immediateclarification, omitting to offer a unilateral declaration as to EU citizens’ residence entitlements in the UK. Instead, the White Paper retained the Government’s position on the need for a reciprocal deal, which would see the UK and the remaining Member States mutually commit to protecting the residence rights of EU citizens and UK nationals living in their respective territories.[[16]](#footnote-16)

Against this vacuum in Government guidance as regards how EU citizens might secure their residence rights, other actors, such as parliamentary committees, have sought to outline the potential options available. These include UK membership of the European Economic Area; ongoing status for EU citizens in the UK as a consequence of the doctrine of ‘acquired rights’; security of residence for those EU citizens qualifying for permanent residence status under Article 16 CRD; reliance on human rights protection conferred by the separate framework of the European Convention on Human Rights (ECHR/the Convention); or unilateral conferral by the UK Government either of the rights currently enjoyed by EU citizens or through ‘light-touch’ permanent residence.

3.1. EEA MEMBERSHIP AND THE DOCTRINE OF ACQUIRED RIGHTS: ROADS TO NOWHERE

Membership of the European Economic Area, which would have meant the preservation, generally speaking, of existing EU rules on free movement of people,[[17]](#footnote-17) was explicitly ruled out as an option for the UK’s future partnership with the EU in the White Paper.[[18]](#footnote-18) Consequently this route to securing residence for EU citizens in the UK is necessarily closed off.

The House of Lords EU Committee (Lords EU Committee) accurately concluded that despite ‘much speculation before the referendum that EU law rights would somehow be protected as “acquired rights”, meaning that they would continue irrespective of the UK’s withdrawal from the EU…[this] is highly unlikely to provide meaningful protection against the loss of EU rights upon Brexit’.[[19]](#footnote-19) Article 70 Vienna Convention stipulates 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’.[[20]](#footnote-20) However, the Committee correctly noted that the provision was not ‘in any way concerned with the question of the vested interests of individuals’, rather Article 70 covers state parties.[[21]](#footnote-21) Similarly, the scope of the customary international law doctrine of acquired rights is ‘limited to certain contractual and property rights which, even if they were to coincide with EU rights, are highly unlikely to be enforceable’.[[22]](#footnote-22)

3.2. PERMANENT RESIDENCE: A BUMPY (YET EXCLUSIVE) ROAD

By contrast, the option of securing rights for EU citizens who enjoy permanent residence – either via continued domestic recognition of that status[[23]](#footnote-23) or through the automatic eligibility of permanent EU residents for the broad domestic equivalent of indefinite leave to remain – continues to attract attention.[[24]](#footnote-24) The White Paper explicitly references the availability of Article 16 CRD to EU citizens, though without indicating its pertinence to post-Brexit residence rights.[[25]](#footnote-25) Moreover, parliamentary committees have explored the potential of permanent residence as a means of retaining residence rights.[[26]](#footnote-26) Crucially, applications by EU citizens to the UK Home Office for permanent residence certificates soared by 264 per cent between the first and fourth quarter of 2016 – from 12,117 to 44,112 – in other words, over the periods before and after the referendum.[[27]](#footnote-27) This indicates that, regardless of the Government’s refusal to shine a light upon the correct path to follow, resident Union citizens are understandably – given that many would consider the UK their home – searching in the dark, nevertheless, for a possible route to residence security.

And indeed, there are advantages to the use of permanent residence as a means of safeguarding residence in the UK, even if these are ultimately outweighed by the disadvantages. First, permanent residence status brings access to equal treatment – for instance, in terms of social support, healthcare and student maintenance – without the need for an EU citizen to meet the conditions attached to residence under Article 7 CRD.[[28]](#footnote-28) Second, continued domestic recognition of permanent residence acknowledges that many EU citizens, having lived in the UK under that framework, cannot be slotted into the more restrictive national immigration categories, currently applicable to non-EU immigrants. In particular, they may not qualify for the domestic broad equivalent of indefinite leave to remain.[[29]](#footnote-29) While permanent residence generally requires five years’ continuous legal residence under the CRD, indefinite leave to remain carries different requirements dependent on the many tiers of visa category applicable to non-EU nationals living in the UK, not all of which qualify for such settlement in any case. Generally speaking, however, between five and ten years’ continuous, lawful residence is needed.[[30]](#footnote-30) The majority of routes to settlement require applicants to demonstrate sufficient knowledge of the English language and of life in the UK. Applications may be rejected on character grounds, and on the basis of unspent convictions, and indefinite leave to remain is subject to the sizeable fee of £2297 per applicant.[[31]](#footnote-31) Moreover, the summary provided here does not do justice to the ‘degree of complexity’ behind the system that ‘even the Byzantine emperors would have envied’.[[32]](#footnote-32)

Nevertheless, whether as a consequence of EU law, UK implementation of Union rules, or a combination of the two, permanent residence is, in practice, far from a catch-all solution. Some individuals, currently resident under EU law, are automatically excluded from the status. Others might fail to meet eligibility requirements in practice. In any case, providing evidence that those conditions have been met can be a challenging task.

First, under the UK’s EEA Regulations,[[33]](#footnote-33) accurately implementing CJEU case law,[[34]](#footnote-34) those residing in the UK under a ‘derivative right of residence’, specifically the *Teixeira, Chen* and *Ruiz Zambrano* carers outlined in Section 2 (above), are not eligible for permanent residence since they do not reside under the CRD’s own residence categories. Accordingly, their residence entitlements would not be protected if this model were used to safeguard residence rights post-Brexit. Conversely, UK nationals residing in other Member States, with primary caregiving responsibilities for citizens of those countries, may well seek to rely on *Ruiz Zambrano*, should any gaps in a UK/EU deal affect their residence. This will make for potentially interesting twists in this line of jurisprudence, particularly since the principle developed in that judgment has generally been pushed to the peripheries of Union citizenship in subsequent CJEU case law.[[35]](#footnote-35) Specifically, should EU citizen children have to leave the Union territory to return to the UK with their parents, a reversal of judicial reluctance to ensure the ‘genuine enjoyment of the substance of the rights’ conferred by Union citizenship may be irresistible, given that such children would fall squarely within the parameters of *Ruiz Zambrano*, even if that decision was clearly not delivered in knowledge of the wholesale exit of a Member State.

The second obstacle that emerges from reliance on permanent residence relates to meeting eligibility requirements. Even those who appear to reside under the Directive might struggle to accumulate the five years’ *continuous*, *legal* residence required by Article 16 CRD. A common barrier arises from the need for non-economically active Union citizens to have comprehensive sickness insurance (CSI). Consider the position of a French national who has been living continuously in the UK for five years. For the past two years he has worked as a nurse and so resides in accordance with the Directive. However, for his first three years in the UK, he was a student and not economically active. He had sufficient resources to support himself but did not realise he needed CSI. He never really relied on national health services during this time, though he was able to register with his university GP.[[36]](#footnote-36) Regardless, since he did not have insurance, he will not, technically, have been living in the UK in accordance with the Directive and may not qualify for permanent residence status. Similarly, an EU citizen who has not worked continuously for five years, nor retained worker status when unemployed,[[37]](#footnote-37) is unlikely to have been aware that she/he changed residence categories – from worker to non-economically active – during periods of economic inactivity, with the consequent need to obtain insurance.

Though little known prior to the referendum, the CSI requirement has become one of the most prominently reported potential barriers to residence security,[[38]](#footnote-38) resulting, positively, in increased parliamentary scrutiny of the issue. The Commons Committee on Exiting the EU (Exiting the EU Committee) has explicitly called on the UK Government to ‘state that access to the NHS is considered sufficient to fulfil the requirements for CSI, and that it will introduce legislation to that effect’.[[39]](#footnote-39) The Home Office response has been limited to a media statement indicating that ‘EU citizens will not be removed from the UK or refused entry solely because they do not have this insurance’.[[40]](#footnote-40) However, since its emphasis was on removal, the statement offers little guidance to those applying for permanent residence certificates as a means of safeguarding their UK residence into the future.[[41]](#footnote-41) Indeed, in the permanent residence context, refusal to recognise national health services as meeting the CSI requirement was Home Office policy long before the referendum and has even been confirmed as lawful by domestic courts.[[42]](#footnote-42)

The EEA Regulations also impose more onerous requirements on the issuing of permanent residence documents than those operating under the Directive. Specifically, a refusal to issue such documentation can be justified ‘on grounds of public policy, public security or public health or on grounds of misuse of rights’.[[43]](#footnote-43) CJEU case law dictates that residence documentation reflects but does not confer residence status, while the CRD stipulates that permanent residents may only be removed for ‘serious reasons of public policy or public security’.[[44]](#footnote-44) The compliance of UK rules with Union law is therefore open to serious question.

The third hurdle confronting permanent residence applicants relates to evidence. The combination of EU law’s clear stipulation that residence documents do not, of themselves, bestow residence rights on EU citizens – since these entitlements are intrinsic to one’s status as a Union citizen[[45]](#footnote-45) – with the fact that the UK does not operate a registration or ID card system means that, for many EU citizens in the UK, their post-referendum application for a permanent residence certificate might be their first application for residence documentation. Accordingly, the sudden need for evidence to support applications might only be met by historical records not easily to hand. This evidential burden will be particularly difficult for individuals who have moved between the CRD’s residence categories and those who have not been in long-term, more secure, employment in the UK.

This problem is exacerbated by the now mandatory[[46]](#footnote-46) completion of an 85-page application form for permanent residence documents.[[47]](#footnote-47) Arguably, the form’s complexity stems from its attempts to cover the various routes to permanent residence offered by the CRD.[[48]](#footnote-48) Nevertheless, a more streamlined process has been designed by outside actors, which relies principally on existing Government data on applicants rather than placing the administrative burden on the EU citizen.[[49]](#footnote-49) Crucially, the inaccessibility of the current document might be one of the reasons behind the increasing number of applications declared ‘invalid’ by the Home Office. This occurs, for instance, where the form is incorrectly completed or evidence is missing. Applicants may resubmit their application, subject to the second payment of a £65 processing charge; a fee not permitted by the CRD.[[50]](#footnote-50) Between the first and third quarter of 2016 – ie before and after the referendum – the number of invalid applications nearly doubled, from 6.7 per cent to 11.8 per cent, though this steadied back to 6.8 per cent by the year end.[[51]](#footnote-51) More broadly, commentators recognise that the logistical challenge facing the Home Office – should permanent residence prove to be the route to residence security for EU citizens and current methods be maintained – is simply too great to be achieved in the two years between the triggering of Article 50 TEU and UK departure.[[52]](#footnote-52)

Crucially, the Government is still to confirm the pertinence of permanent residence status to residence security. Nonetheless, against the void in Government guidance, the high percentage of refusals to issue permanent residence documents – on average 22 per cent over 2014–16[[53]](#footnote-53) – is a source of anxiety for EU citizens who consider that a rejection indicates they might not be able to remain in the UK post-exit. Further, in some instances, rejection letters have also contained the conclusion that the applicant is not residing legally and an accompanying instruction ‘to prepare to leave the UK’.[[54]](#footnote-54) This has led some EU citizens to express concern about being caught between the need to secure their residence into the future – albeit through an unconfirmed means of achieving this – and the desire to avoid alerting the Home Office to what it might view as unlawful residence, by placing a permanent residence application.[[55]](#footnote-55) Given the anxiety that can arise not only about future but also current residence rights in the UK as a result of a rejected permanent residence application, the Exiting the EU Committee has also been openly critical both of the ‘prepare to leave’ statement and of the lack of clarity offered by Government ‘on whether it intends the permanent residence system to be the basis for EU nationals to demonstrate their eligibility to reside in the UK’.[[56]](#footnote-56)

In light of the abundant problems with the permanent residence framework, its presentation as a comprehensive answer to the question of residence security has been accurately described as a myth.[[57]](#footnote-57) Crucially, permanent residence would offer nothing for EU citizens who fall short of five years’ residence in the UK, whether in compliance with the Directive or otherwise. Yet medium-term EU citizens in particular might still have forged family and social ties in the UK. If the UK fails to cater for such individuals, and/or maintains its strict approach to permanent residence eligibility, it leaves itself open to potential human rights litigation. This invites the question of whether the ECHR might offer an alternative means of ensuring currently resident EU citizens can remain in the UK.

3.3. THE ECHR BASELINE: NOT ALL ROADS LEAD TO THE SAME LEVEL OF PROTECTION

In the absence of a UK/EU agreement on residence rights, or the focus within any agreement only on certain categories of resident, the ECHR might indeed offer some opportunity for protection from removal, since, regardless of its exit from the EU, the UK must still meet its separate obligations under the Convention. In particular, pursuant to Article 8 ECHR, the UK will be required to respect the right to the family and private lives that resident EU citizens have established in the UK and confer residence rights where necessary.[[58]](#footnote-58) The European Court of Human Rights (the ECtHR) considers a ‘lawful and genuine marriage’ to amount to a ‘family life’, while a parent-child relationship, apart from in exceptional circumstances, will automatically qualify.[[59]](#footnote-59) Moreover, Article 8 does not merely encompass family life in a strict sense but also ‘private life’, including the ‘totality of social ties between settled migrants and the community in which they are living’.[[60]](#footnote-60) Once a private or family life is established, a prima facie breach of Article 8 ECHR will almost always be triggered by removal,[[61]](#footnote-61) though, of course, under Union law no such links are needed at all, at least for those residing as EU citizens.[[62]](#footnote-62) Union citizens currently enjoy independent rights in the UK simply by virtue of their EU citizenship.

Moreover, prima facie interferences with the right to private and family life may be justified under Article 8(2) ECHR. Restrictions must be in accordance with the law and necessary in a democratic society. They must be in the interests of national security, public safety, the economic well-being of the country, for the prevention of crime and disorder, or the protection of health, morals or the rights and freedoms of others. Thus, the reasons justifying removal of an individual from the UK under the Convention are far broader than those available to a host state under the CRD, which permits removals only for reasons of public health, public security or public policy.[[63]](#footnote-63) For permanent residents serious grounds of public policy or public security are needed, while those resident in the UK for 10 years may only be deported for imperative grounds of public security.[[64]](#footnote-64) Both legal frameworks, however, require decisions to be taken at the individual level, subject to the requirements of proportionality, which takes various factors, such as length of residence in the UK, the strength of family ties, the language skills of the family, access to employment and social needs, into account.[[65]](#footnote-65) Therefore, though the proportionality assessment under the CRD might be harder for public authorities to overcome,[[66]](#footnote-66) the ECHR does offer a clear baseline of protection. Where the applicant is married to a British national ‘[i]t cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact’.[[67]](#footnote-67) Similarly, it will rarely be proportionate if the effect of the order is to sever a genuine and subsisting relationship between parent and child.[[68]](#footnote-68) Ultimately, however, Article 8 ECHR does not impose any obligation on a state to respect the choices of a married couple.[[69]](#footnote-69) The question largely hinges on whether family life can reasonably be expected to be enjoyed elsewhere, by reference to the material but not decisive consideration of whether there are any ‘insurmountable obstacles’ to this,[[70]](#footnote-70) and the need to achieve a balance between the interests of society and the individual.[[71]](#footnote-71)

Crucially, then, while Article 8 ECHR will be useful in preventing the adoption, by the UK Government, of a bright line rule that foresees the removal of EU citizens who arrived in the UK after an arbitrarily set date,[[72]](#footnote-72) it cannot offer an all-encompassing solution to the issue of residence security. On the question of the right simply to be in the UK, it would depend on family or social ties between the Union citizen and individuals with firmer residence in the UK. Moreover, critically, it does not necessarily provide access to equal treatment in the UK once residence has been secured, as is generally the case for EU citizens residing legally under the Directive.[[73]](#footnote-73) This is instead dependent on which domestic immigration categories individuals are subsequently placed.

The various pitfalls to the options considered thus far have led an increasing number of political actors to call for a unilateral conferral upon EU citizens resident in the UK, either of the rights they currently enjoy under Union law, or of the rights arising from permanent residence status, though with a light-touch approach to its eligibility criteria.

3.4. UNILATERAL CONFERRAL OF CURRENT RESIDENCE RIGHTS OR A ‘LIGHT-TOUCH’ PERMANENT RESIDENCE

Having conducted inquiries into the viability of different means of safeguarding the residence rights of the UK’s EU population, various parliamentary committees, across both Houses of Parliament, have ‘urge[d] the Government to change its stance and to give a unilateral guarantee now’.[[74]](#footnote-74) The pertinence of the issue is also reflected in the fact that the rights of EU citizens in the UK were the focus of attempted parliamentary amendments to the Notification of Withdrawal Act.[[75]](#footnote-75) Several proposed Commons amendments sought to ensure that it preserved the same citizenship rights enjoyed by EU nationals who were lawfully resident in the UK at certain points in time.[[76]](#footnote-76) Others pursued the inclusion of a ‘fast-track’ to permanent resident status, for instance for those who had been resident in the UK on the referendum date and at least since 23 December 2015.[[77]](#footnote-77) However, the amendment selected – focused on continuation of residence rights for those lawfully resident in the UK on 23 June – was ultimately defeated in the Commons, 332 to 290.[[78]](#footnote-78) While amendment on the issue was passed by the House of Lords, the upper chamber later accepted the Commons’ rejection of that amendment.

Unilateral conferral either of current residence entitlements or of permanent residence via less restrictive eligibility criteria has a number of advantages. A light-touch approach to permanent residence status would avoid the bright light distinction created by the five-year cut-off under Article 16 CRD. In fact, it would offer some EU citizens, who would not yet qualify for permanent residence, more extensive residence security than they would have enjoyed had the UK opted to remain in the EU. Meanwhile, focus on the retention of current entitlements would protect, for instance, *Ruiz Zambrano* carers. However, the retained emphasis on *legal* residence in the tabled amendments, particularly in relation to historical points in time, still raises substantive issues, for instance around the question of CSI, as well as administrative and evidential challenges, even if these are lower if the time period to qualify for permanent residence is shorter.

Crucially, while it is commendable that political actors seek to protect EU citizens living in the UK, the complexity of retaining the plethora of rights arising from EU citizenship status, within what will become a former Member State, requires rather more consideration of how this would work in practice than was arguably reflected in the broad-brush proposed amendments to the Notification of Withdrawal Act.[[79]](#footnote-79) Nevertheless, the Government’s insistence on waiting to secure a quick reciprocal deal with the wider EU is no indication of the Government’s understanding of the intricacies involved, since a reciprocaldeal in fact invites further complexity.

4. CAN WE STAY? ENSURING MEANINGFUL RESIDENCE AND THE RECIPROCITY DISTRACTION

What is reassuring about parliamentary support for the retention of all of the rights arising from EU citizenship that are currently conferred on Union citizens living in the UK is its implicit understanding that a simple right to *be* in the UK is insufficient. As the House of Lords EU Committee neatly summarised:

‘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 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.’[[80]](#footnote-80)

Indeed, for many EU citizens, the ability to remain in the UK will depend on whether they continue to enjoy those rights that make the exercise of their residence entitlements possible in practice. For example, EU citizens residing legally in their host state have the right to equal access to employment and remuneration,[[81]](#footnote-81) and, generally speaking, social assistance, education and healthcare, on the same basis as nationals.[[82]](#footnote-82) Certain family members are also able to accompany or join the EU citizen in the UK, and enjoy equal treatment there.[[83]](#footnote-83) As discussed above, Union citizens who were able to move to the UK as a result of EU free movement rules might struggle to remain there under the more restrictive conditions of its national immigration law, such as the minimum earnings threshold of £35,000 for settlement under the Tier 2 (general) visa.[[84]](#footnote-84) By contrast, Union citizens qualify as a worker, a route to legal residence under the CRD, so long as their work is ‘genuine and effective’ and not ‘marginal and ancillary’.[[85]](#footnote-85) British citizens who have not exercised free movement rights and settled third country nationals must generally also satisfy a minimum income threshold if they wish to bring family members with them to the UK.[[86]](#footnote-86) Residence permits are commonly granted ‘without recourse to public funds’[[87]](#footnote-87) and are normally subject to a surcharge to access national health services.[[88]](#footnote-88)

Indeed, this appears to be the crux of the matter. It seems unlikely that the UK will systematically remove EU citizens from its territory – whether a UK/EU agreement on residence is reached or not – if only because this would be administratively extremely burdensome, as well as exposing the UK to potentially lengthy and expensive litigation.[[89]](#footnote-89) What requires more vigilance is whether Union citizens, if denied the equal treatment rights that they currently enjoy under Union law, will face the choice of leaving or living in destitution. The UK’s decision to treat non-economically active Union citizens as ‘lawfully present’ in the UK but lacking a ‘right to reside’ for the purposes of access to social support, is potentially portentous here.[[90]](#footnote-90)

And yet, parliamentary calls for the Government to safeguard allof the rights arising from Union citizenship arguably overlook the complexity of the issue, particularly those made via the proposed amendments to the Notification of Withdrawal Act. While the EEA Regulations could be maintained short-term and therefore preserve some of the central rights of Union citizenship, such as residence and equal treatment, others will simply be lost by virtue of the fact that the UK will no longer be an EU Member State. For example, Union citizens will no longer be able to vote for or stand as an MEP in their constituency of residence. The retention of other rights is likely to be politically controversial and it seems probable that they will be reassessed, as part of what seems an inevitable wider review of the national immigration framework.[[91]](#footnote-91) For instance, as outlined above, non-national EU citizens presently enjoy more generous family reunification rights in the UK than British nationals, who have not exercised their free movement rights, do. The maintenance of this for family members already residing in the UK with EU citizens seems only fair. However, it would be interesting to see how the retention of those rights for family members not yet in the UK would play out politically, particularly since, as part of its pre-referendum negotiations with the EU, the Government already sought to tighten up on the ability of British nationals to circumvent national immigration rules through the exercise of their free movement rights.[[92]](#footnote-92)

Perhaps the clearest example of the complexity of the task ahead is the EU Social Security Regulation.[[93]](#footnote-93) This instrument coordinates social security provision across the Member States – and therefore facilitates free movement – in a number of ways, one of which is to permit the aggregation of periods of residence and/or social security contributions made by individual Union citizens in different Member States. This ensures that the exercise of free movement rights does not place EU citizens at a disadvantage by causing them to lose contributions made in one Member State when moving to another.[[94]](#footnote-94) For instance, should Germany require 35 years’ contributions to qualify for a state pension there, a French national who has worked for 10 years in France, 15 years in the UK and 10 years in Germany, who then decides to retire in the latter Member State, is able to satisfy the German rules since she can combine contributions made across different Member States. Crucially, an implementing Regulation provides specific formulae for calculating her entitlements and a set of procedures and deadlines for Member States to follow in order to claim back money from one another.[[95]](#footnote-95)

Critically, when the UK leaves the EU, it will drop out of this complex system. This will leave Union citizens and British nationals in the UK, who have been employed elsewhere in the Union for parts of their working lives, at risk of losing contributions and therefore of lesser pension entitlement in the UK if agreement is not reached. Likewise, EU citizens and British nationals who have worked for periods of time in the UK but also in other Member States, and wish to retire outside the UK might lose sizeable portions of their state pension entitlement.

Yet, the Government’s steadfast refusal to confer existing rights unilaterally upon the UK’s resident EU population is no indication of its understanding of the intricacies involved in safeguarding a set of rights borne from, and embedded in, EU law. This is demonstrated by its consistent emphasis on the need for a reciprocaldeal, which simultaneously overcomplicates and oversimplifies the Union legal framework.

First, the UK can already look to existing Union legislation on third country nationals as an indicator of the rights that the EU might be able to offer UK nationals living in other Member States. Arguably, there are question marks over whether the Union will change its existing one-size-fits-all legislation to offer a custom fit for the UK. For instance, secondary EU legislation already offers third country nationals the capacity to acquire long-term resident status, following five years’ continuous, legal residence in a Member State.[[96]](#footnote-96) This provides rights comparable, but in no way identical, to permanent residence for EU citizens. For example, the status is not available to students or seasonal workers.[[97]](#footnote-97) Applicants are required to show that they have the stable and regular resources required to support themselves without recourse to the Member State’s social assistance and appropriate sickness insurance.[[98]](#footnote-98) Integration requirements may be imposed[[99]](#footnote-99) and equal access to social assistance may be limited to core benefits.[[100]](#footnote-100) As regards social security, Regulation 1231/2010 extends the Social Security Regulation to third country nationals in a cross-border situation.[[101]](#footnote-101) However, though an increasingly present feature of association agreements,[[102]](#footnote-102) where intra-EU movement is not present, social security coordination generally remains within the domain of bilateral agreements between individual EU Member States and third countries. Nevertheless, Member States willing to reach such an arrangement with the UK will still consider the effects of applicable Union principles, such as those arising from the CJEU’s *Gottardo* judgment.[[103]](#footnote-103) Following this decision, an agreement under which, for example, Ireland recognises contributions made in the UK when individuals make a claim to its social security system, would have to be extended not just to Irish and British nationals but also to any EU citizens who have worked in the UK and come to Ireland, with potential financial and administrative difficulties for Ireland as a result.[[104]](#footnote-104)

Second, the EU remains reliant on the powers conferred upon it by its Member States to act. Consequently, although some secondary Union legislation also exists for those who do not meet the eligibility requirements for long-term residence, relating, for instance, to a single application procedure for residence and work permits and a minimum level of rights for third country nationals,[[105]](#footnote-105) the creation of something more far-reaching for UK nationals will need to overcome significant legal hurdles. At the very least, it makes agreement on a reciprocal deal by EU leaders prior to the UK’s formal exit negotiations and even early agreement during them more legally complicated than the White Paper was willing to admit. Specifically, UK nationals’ residence and equal treatment rights within the other Member States currently arise from their Union citizenship. After exit, British nationals will no longer be EU citizens and therefore will cease to derive these rights from the Treaties. Given that securing residence, and the equal treatment rights that make such residence meaningful, will largely fall within areas of shared or Member State competence,[[106]](#footnote-106) the inclusion of this issue within the withdrawal agreement could make it mixed in nature. If so, the agreement may not be able to be processed via the procedure foreseen by Article 50 TEU; ie with the approval of a qualified majority of the Council of Ministers and the consent of the European Parliament. Instead, it could also require the ratification of the 27 remaining Member States, in accordance with their domestic constitutional requirements.

That said, the Commission’s negotiating recommendations identified a somewhat novel ‘exceptional [Union] horizontal competence…for all matters necessary to arrange the withdrawal’, derived from Article 50 itself.[[107]](#footnote-107) This would appear, under these very specific circumstances, to give the Union competence over substantive areas in which the EU would ordinarily share power with the Member States or where competence might even remain with them. On the one hand, this could be beneficial as it would bypass the need for a mixed agreement and therefore perhaps avoid some of the delays that might arise from the requirement of Member State agreement in accordance with national constitutional arrangements, since these can include, for example, national referendums, or the approval of regional parliaments.[[108]](#footnote-108) On the other hand, inclusion in the withdrawal agreement of fields in which the EU’s power is usually more limited is likely to make the negotiations themselves lengthier, particularly given the Union’s consistent attitude towards EU/UK withdrawal: that nothing is agreed until everything is agreed. In short, the UK Government’s accusations against ‘one or two EU leaders’ who refused to come to the pre-negotiating table therefore overlooks the legal complexity of the matter, treating the EU as a single entity when, in this context, it is a body of 27 independent states, each with their own experiences of UK free movement on their territories.

Given that a legal agreement outside the formal withdrawal agreement would face identical challenges, what seems more probable is a *political* commitment. The UK would agree to adopt legislation to protect the rights of its resident EU population and the Union would similarly pledge to adopt secondary Union legislation to offer specific rights to UK citizens in the remaining 27, though with less time and space, at least at the moment, to consider very technical medium- and longer-term issues, such as the future framework for social security coordination. However, the translation of a political agreement into a legal reality would still be subject to the requirements of the Union’s legislative procedures, though the Commission’s recent negotiating recommendations introduce some ambiguity in the specific context of UK withdrawal. Specifically, while those recommendations identify special horizontal competence for the Union in the context of ‘the Agreement’, it is unclear where this extends to any future implementation, since they also state that ‘[t]he exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned’.[[109]](#footnote-109) In any case, it is highly likely that secondary instruments would need to be jointly adopted by the Council of Ministers and the European Parliament, with no legal comeback for the UK should this fail. Moreover, it is also probable that since UK citizens would, by that stage, be third country nationals, the instrument would fall within the Area of Freedom, Security and Justice and therefore require the positive opt-in of Denmark[[110]](#footnote-110) and Ireland.[[111]](#footnote-111)

Clearly, the question of converting a political commitment into a legal reality is equally pertinent for EU citizens in the UK, if not more so, since the UK will implement the agreement outside the Union’s legal structures. While the EEA Regulations could maintain the status quo in the shorter term, in the longer term, the Government envisages immigration reform via separate primary legislation. Thus far, it has been clear that ‘the Free Movement Directive will no longer apply’ and that it seeks to ‘control the numbers of people who come here’ to address ‘public concern about pressure on public services’.[[112]](#footnote-112) Effective scrutiny of these measures as regards future EU movement is clearly pivotal. However, any proposals must also be examined to ensure that those already resident in the UK prior to Brexit continue to benefit from any EU/UK deal reached, particularly in relation to equal treatment, rather than also falling within the UK’s new immigration framework. While a clear delineation might be apparent in legislative instruments, it will be important to ensure that lines do not become blurred in practice. Even as an EU Member State, the UK’s decision to process EU citizens through its national ‘permissions-based’ administrative and adjudicative immigration structures, means that concepts developed in the context of domestic immigration law can seep into, and restrict, the ‘rights-based’ model that operates under EU citizenship.[[113]](#footnote-113)

Effective mechanisms by which Union citizens can enforce their maintained rights before the courts will be needed and, relatedly, an approach to interpreting any agreement that seeks to avoid divergence between UK and EU law, particularly if some level of reciprocity is achieved. The Lords EU Committee has reported on a number of enforcement options, albeit in the context of the formal withdrawal agreement.[[114]](#footnote-114) The first is the freezing of safeguarded rights, including current interpretations, at the point of exit, through the Great Repeal Bill, with the opportunity for repeal and reform in subsequent legislation. This raises a number of questions. For instance, as a matter of EU law, though a non-economically active Union citizen must ordinarily be self-sufficient in order for their residence to be legal, revocation of any right to reside as the result of financial hardship must be subject to a proportionality assessment.[[115]](#footnote-115) The concept of proportionality is an increasingly common feature of UK case law as a result of its ‘Europeanisation’ – not just by EU law but also by the ECHR – but its maintenance as the British legal system enters a period of ‘de-Europeanisation’ is open to question.[[116]](#footnote-116) And yet, proportionality is a central feature of those rights the UK’s resident EU population wish to retain and will continue to form part of CJEU development of residence rights post-exit. Conversely, the UK could, second, opt to permit safeguarded rights to continue to evolve in line with Union law. However, this seems unlikely given the clear hostility towards the CJEU visible in the White Paper.[[117]](#footnote-117) The third option considered fell between these two extremes, and followed the Swiss approach of ‘taking account of developments in EU law’ and incorporating it into domestic jurisprudence. However, as expert witnesses to the Committee pointed out, this mechanism has become difficult in practice with the Swiss Supreme Court opting to assume the incorporation of Union case law unless there is good reason not to do so.[[118]](#footnote-118) Finally, the House of Lords speculated on the possible introduction of a mutual case law transmission system, which allowed for the two-way influence of UK and EU case law through intergovernmental meetings. Nevertheless, despite the House of Lords’ assertion that clear precedent for such a system exists in the agreement between the EU, Norway and Iceland on extradition procedures, it seems unlikely that a third country would be able to exert such influence over the development of Union citizenship, particularly given that the UK will not even be a participant in the single market.

5. CONCLUSION

Despite its assertion that providing certainty to EU citizens living in the UK is ‘the right and fair thing to do’,[[119]](#footnote-119) when the UK Government triggered exit negotiations on 29 March 2016 it was still to offer concrete assurances to the UK’s resident EU population. This was due to its insistence on the need for a reciprocal deal, which would protect both EU citizens in the UK, and British nationals resident in the remaining Member States. The Government’s preoccupation with reciprocity, however, is ultimately something of a distraction. On the one hand, it overcomplicates the issue, since existing Union legislation, for instance on the long-term residence status of third country nationals, already provides some insight into what the Union is able to offer non-EU citizens. On the other hand, it oversimplifies the matter, treating the EU as a single entity, rather than an organisation reliant on the powers conferred upon it by its Member States, each with their own experiences of welcoming British nationals into their territories.

Consequently, a *political* settlement is the likely outcome of EU/UK negotiations on this question. As with the majority of Brexit issues, which will require legal solutions to realise political deals, scrutiny of the mechanisms used to translate any political agreement into a legal reality will be essential to ensure that commitments made come to fruition. On the EU side, secondary Union legislation that seeks to implement any residence agreement will be subject to the EU’s legislative procedures and will likely require the opt-ins of Denmark and Ireland. From the UK side, it will be particularly important that rights secured for the UK’s resident EU population are enforceable under the domestic framework and are not subsequently lost when the UK enacts primary legislation on *future* EU migration. Crucially, a quick, reciprocal deal early in negotiations simply cannot cater for technically complex and longer-term issues, such as ongoing social security coordination, and must be accompanied by rigorous legal legwork.

While attempts by actors outwith the UK executive to outline the options available for resident EU citizens represent a significant failure by the Government to offer the certainty to Union citizens it claims to wish to offer, they nonetheless provide useful insights into the benefits and pitfalls of legal routes to realising future political commitments. In particular, the focus on permanent residence status, whether subject to the current eligibility criteria or more light-touch conditions, highlights the problem of reliance on legal residence under the CRD, which will give rise to substantive and administrative hurdles for both Union citizens and the Home Office, as well as exposing the Government to potential human rights litigation. Conversely, emphasis on such status reflects an encouraging consensus across the UK’s broader political institutions of the need to secure the package of rights, beyond simply the right to *be* in the UK, which make residence possible in practice. This political pressure must continue into and past formal negotiations on the issue to ensure that *meaningful* residence rights are available to the UK’s resident EU population.

1. \* Liverpool Law School, University of Liverpool. I am grateful to Eleanor Drywood for comments on previous drafts and in particular her insights on UK nationals as Ruiz Zambrano carers. Any errors remain my own.

 Those eligible to vote in national parliamentary elections were entitled to vote in the referendum, including British, Irish, Cypriot and Maltese nationals: European Union Referendum Act 2015, section 2. [↑](#footnote-ref-1)
2. HM Government, *The United Kingdom’s Exit from and New Partnership with the European Union* (Cm 9417, February 2017) section 6. [↑](#footnote-ref-2)
3. Lancaster House Speech, 17 January 2017 <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>>. [↑](#footnote-ref-3)
4. House of Commons Exiting the EU Committee, *The Government’s Negotiating Objectives: the Rights of UK and EU Citizens* (HC 2016–17, 1071) para 16. [↑](#footnote-ref-4)
5. Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. [↑](#footnote-ref-5)
6. Article 6 CRD: passport/ID card upon entry; Article 14(1) CRD: requirement not to become an ‘unreasonable burden’ on the host state’s social assistance system. [↑](#footnote-ref-6)
7. Article 7 CRD. [↑](#footnote-ref-7)
8. Case C-184/99, *Grzelczyk*,ECLI:EU:C:2001:458; Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493. Though see the more textual judicial approach in Case C-333/13, *Dano*, ECLI:EU:C:2014:2358; Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597. [↑](#footnote-ref-8)
9. Specifically, Article 10 Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1. [↑](#footnote-ref-9)
10. Case C-480/08, *Teixeira*, ECLI:EU:C:2010:83; Case C-310/08 *Ibrahim and SSHD*, ECLI:EU:C:2010:80. [↑](#footnote-ref-10)
11. Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639. [↑](#footnote-ref-11)
12. Case C-34/09, *Ruiz Zambrano*,ECLI:EU:C:2011:124, para 41. [↑](#footnote-ref-12)
13. Immigration (European Economic Area) Regulations 2016, SI 2016/1952. Article 6 CRD through Regulation 13; Article 7 CRD via Regulation 14; Article 16 by Regulation 15; the *Teixeira, Ibrahim, Chen* and *Ruiz Zambrano* judgments via Regulation 16. [↑](#footnote-ref-13)
14. *The United Kingdom’s Exit from and New Partnership with the European Union*, above n 2, p 30. [↑](#footnote-ref-14)
15. Ibid, pp 29–30. [↑](#footnote-ref-15)
16. Ibid, p 30. [↑](#footnote-ref-16)
17. Article 28 and Annexes V and VIII, Agreement on the European Economic Area [1994] OJ L1/3. The Decision of the EEA Joint Committee No 158/2007 [2007] OJ L124/20 incorporates the CRD into EEA law legal framework but an accompanying joint declaration expressly states that ‘the concept of Union citizenship…has no equivalent in the EEA Agreement’. [↑](#footnote-ref-17)
18. *The United Kingdom’s Exit from and New Partnership with the European Union*, above n 2, pp 25 and 35. [↑](#footnote-ref-18)
19. House of Lords European Union Committee, *Brexit: Acquired Rights* (HL 2016–17, 82) p 3. [↑](#footnote-ref-19)
20. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Treaty Series, Vol 1155, p 331. For reliance on this approach, see ‘Debate must be about future immigration policy’, Letter to the Financial Times, signed by both Leave and Remain campaigners, 11 April 16, <<https://www.ft.com/content/c5d52fe8-fd80-11e5-b5f5-070dca6d0a0d>>. [↑](#footnote-ref-20)
21. *Acquired Rights,* above n 19, para 58, citing written evidence from S Douglas Scott. [↑](#footnote-ref-21)
22. Ibid, paras 61–62, citing written evidence from V Lowe. [↑](#footnote-ref-22)
23. Regulation 15, EEA Regulations. [↑](#footnote-ref-23)
24. See eg British Future, *Report of the Inquiry into Securing the Status of EEA+ Nationals in the UK*, 01 December 16, <<http://www.britishfuture.org/wp-content/uploads/2016/12/EUNationalsReport.Final_.12.12.16.pdf>>, p 26. [↑](#footnote-ref-24)
25. *The United Kingdom’s Exit from and New Partnership with the European* Union, above n 2, p 30. [↑](#footnote-ref-25)
26. *Acquired Rights*,above n 19, paras 19–23; Joint Committee on Human Rights, *The Human Rights Implications of Brexit*, (2016–17, HL 88 and HC 695) paras 29–34. [↑](#footnote-ref-26)
27. Home Office Immigration Statistics, eea-q4-2016-tables, published 23 February 2017, available at <<https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/list-of-tables>>. [↑](#footnote-ref-27)
28. Article 16(1) CRD; Article 24 CRD. [↑](#footnote-ref-28)
29. *Human Rights*, above n 26, paras 35–45. [↑](#footnote-ref-29)
30. As summarised in *Acquired Rights*,above n 19, p 13. [↑](#footnote-ref-30)
31. Home Office Immigration and Nationality Charges 2017, available at <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/606076/Visa\_Fees\_table\_Apr2017.pdf>. [↑](#footnote-ref-31)
32. Jackson LJ, *Pokhriyal v SSHD* [2013] EWCA Civ 1568, para 4, cited in *Acquired Rights*, above n 19, [27]. [↑](#footnote-ref-32)
33. Regulation 15(2), EEA Regulations. [↑](#footnote-ref-33)
34. Case C-424/10, *Ziolkowski*,ECLI:EU:C:2011:866. [↑](#footnote-ref-34)
35. See eg Case C-434/09, *McCarthy*, ECLI:EU:C:2011:277; Case C-256/11, *Dereci*,ECLI:EU:C:2011:734. I am grateful to Eleanor Drywood for highlighting the particular issue of UK *Ruiz Zambrano* carers to me. [↑](#footnote-ref-35)
36. A number of EU citizens informed the Exiting the EU Committee that they had been able to access NHS services and register with universities or jobcentres without ever being told about the need for CSI: above n 4, para 70. [↑](#footnote-ref-36)
37. In certain circumstances, EU citizens may retain their worker status during periods of unemployment. See Article 7(3) CRD and Case C-507/12, *Saint Prix*, ECLI:EU:C:2014:2007. [↑](#footnote-ref-37)
38. eg R Hawkins, ‘EU citizens ‘denied residency documents’, *BBC News*, 18 February 2017 <<http://www.bbc.co.uk/news/uk-39014191>>; L O’Carroll, ‘Dutch woman resident in the UK for 30 years may have to leave after Brexit’, *The Guardian*, 14 January 2017 <<https://www.theguardian.com/politics/2017/jan/14/dutchwoman-resident-in-uk-for-30-years-may-have-to-leave-after-brexit>>. [↑](#footnote-ref-38)
39. *Negotiating Objectives*,above n 4, para 73. [↑](#footnote-ref-39)
40. Home Office in the Media Blog, ‘Current residency rights of EU citizens’, 1 March 2017 <<https://homeofficemedia.blog.gov.uk/2017/03/01/home-office-in-the-media-1-march-2017/>>. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. *FK (Kenya) v SSHD* [2010] EWCA Civ 1302; *Ahmad v SSHD* [2014] EWCA Civ 988. [↑](#footnote-ref-42)
43. Regulation 24(1), EEA Regulations. [↑](#footnote-ref-43)
44. Case C-325/09, *Dias*, ECLI:EU:C:2011:498; Article 25(1) CRD. [↑](#footnote-ref-44)
45. Ibid. [↑](#footnote-ref-45)
46. Since March 2016, Regulation 21, EEA Regulations. [↑](#footnote-ref-46)
47. Available at <<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505032/EEA_PR__03-16.pdf>>. [↑](#footnote-ref-47)
48. eg Article 17 CRD confers permanent residence status before 5 years’ residence in set circumstances. [↑](#footnote-ref-48)
49. *EEA+ Nationals*, above n 24, paras 27–28. [↑](#footnote-ref-49)
50. Article 25(2) CRD. [↑](#footnote-ref-50)
51. Above n 27. [↑](#footnote-ref-51)
52. Evidence to the Exiting the EU Committee, above n 4, para 77. [↑](#footnote-ref-52)
53. Above n 27. [↑](#footnote-ref-53)
54. *Negotiating Objectives,* above n 4, para 72. [↑](#footnote-ref-54)
55. Questions to the panel, ‘Arrangements for EU Nationals’, Cambridge Stays Meeting, 11 January 2017. [↑](#footnote-ref-55)
56. *Negotiating Objectives,* above n 4, para 80. [↑](#footnote-ref-56)
57. *Human Rights*,above n 26, para 31; *Acquired Rights*,above 19, paras 21–23. [↑](#footnote-ref-57)
58. Other human rights issues may also arise, eg under Article 1, Protocol 1 ECHR (right to property). [↑](#footnote-ref-58)
59. *ZH (Tanzania) v SSHD* [2011] UKSC 4. [↑](#footnote-ref-59)
60. *Üner v Netherlands* [2006] ECHR 873. [↑](#footnote-ref-60)
61. *DM (Zambia) v SSHD* [2009] EWCA Civ 474. [↑](#footnote-ref-61)
62. Article 2(2) CRD outlines those ‘family members’ who may accompany or join their EU citizen family members in the host state. [↑](#footnote-ref-62)
63. Article 27 CRD. [↑](#footnote-ref-63)
64. Article 28 CRD. Though this is broader than ‘national security’ (Case C-348/09, *PI,* ECLI:EU:C:2012:300). [↑](#footnote-ref-64)
65. *EB (Kosovo)* [2008]UKHL 41; Article 27(2) CRD. [↑](#footnote-ref-65)
66. Since beyond proportionality questions related, inter alia, to health, family life and social integration, pursuant to Article 28(1) CRD, Article 27(2) CRD also requires a genuine, present and sufficiently serious threat to a fundamental interest of society, posed by the personal conduct of the individual concerned. [↑](#footnote-ref-66)
67. *AB (Jamaica)* [2007] EWCA Civ 1302. [↑](#footnote-ref-67)
68. *EB (Kosovo)*,above n 65. [↑](#footnote-ref-68)
69. *DM (Zambia)*, above n 61. [↑](#footnote-ref-69)
70. *R (on the application of Agyarko) v SSHD* [2015] EWCA Civ 440. [↑](#footnote-ref-70)
71. *Huang and Kashmiri* [2007] UKHL 11. [↑](#footnote-ref-71)
72. The Government asserts that it does not foresee Article 8 ECHR litigation since a ‘speedy agreement’ is anticipated: *Human Rights*, above n 26, para 41. [↑](#footnote-ref-72)
73. Article 18 TFEU and Article 24(1) CRD. Article 24(2) CRD allows for certain derogations. See also recent CJEU case law that allows for restrictions to equal treatment for non-economically active Union citizens: above n 8. [↑](#footnote-ref-73)
74. *Acquired Rights*, above n 19, para 147. See also *Human Rights*, above n 26, para 45; and *Negotiating Objectives*, above n 4, para 45. [↑](#footnote-ref-74)
75. House of Commons, Committee of the Whole House, Tables Amendments to the European Union (Notification of Withdrawal) Bill, 8 March 2017, <<https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0132/amend/european_daily_cwh_0207.pdf>>. [↑](#footnote-ref-75)
76. Ibid, NC6, NC27, NC146, NC57, NC135. [↑](#footnote-ref-76)
77. Above n 75, C17. [↑](#footnote-ref-77)
78. *Hansard* HC Deb, 8 March 2017, Vol 621, cols 556–560. [↑](#footnote-ref-78)
79. For analysis of Parliament’s role in the Notification of Withdrawal Act, see the contribution by M Gordon (Ch 1) in this edited volume. [↑](#footnote-ref-79)
80. *Acquired Rights*, above n 19, para 121. [↑](#footnote-ref-80)
81. Article 45(2) TFEU. [↑](#footnote-ref-81)
82. Article 24 CRD. Ongoing tensions exist in CJEU case law as to whether those residing as ‘self-sufficient’ under the Directive are then able to access social assistance: see above n 8. [↑](#footnote-ref-82)
83. Articles 2 and 3 CRD. [↑](#footnote-ref-83)
84. UKVI, ‘Tier 2 of the Points-Based System’, Version 11/16, 65. Subject to certain exemptions for labour shortages. [↑](#footnote-ref-84)
85. Case 139/85, *Kempf*, ECLI:EU:C:1986:223. [↑](#footnote-ref-85)
86. Statement of Changes in Immigration Rules, HC 194, 13 June 2012, 4. [↑](#footnote-ref-86)
87. UKVI, Guidance on Public Funds, <<https://www.gov.uk/government/publications/public-funds--2/public-funds>>. [↑](#footnote-ref-87)
88. <<https://www.gov.uk/healthcare-immigration-application>>. [↑](#footnote-ref-88)
89. *Human Rights*, above n 26, para 42. [↑](#footnote-ref-89)
90. eg The Social Security (Persons from Abroad) Amendment Regulations, SI 2006/1026; see C O’Brien, ‘The Pillory, the Precipice and the Slippery Slope : the Profound Effects of the UK’s Legal Reform Programme Targeting EU Migrants’ (2015) 37(1) *Journal of Social Welfare and Family Law* 111–136. [↑](#footnote-ref-90)
91. The White Paper indicates that primary legislation on immigration will follow exit: see above n 2, para 10. However, the Government has also stated that it judges the UK’s non-EEA immigration system to be ‘very effective’ such that ‘it may be that some aspects of those non-EEA systems could be applicable to [arriving] EU citizens’: House of Lords EU Committee, *Brexit: UK-EU Movement of People* (HL 2016–17, 121) para 133. [↑](#footnote-ref-91)
92. Possible following Case C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296; Conclusions of the European Council, 18–19 February 2016, EUCO 1/16, 35. [↑](#footnote-ref-92)
93. Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1. [↑](#footnote-ref-93)
94. Article 6. [↑](#footnote-ref-94)
95. Articles 60–66, Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation 883/2004 [2009] OJ L284/1. [↑](#footnote-ref-95)
96. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, [2003] OJ L16/44. [↑](#footnote-ref-96)
97. Ibid, Article 3(2). [↑](#footnote-ref-97)
98. Ibid, Article 5. [↑](#footnote-ref-98)
99. Ibid, Article 5(2). [↑](#footnote-ref-99)
100. Ibid, Article 11(4), though this term must be interpreted in light of the EU Charter of Fundamental Rights: see Case C-571/10, *Kamberaj*, ECLI:EU:C:2012:233. [↑](#footnote-ref-100)
101. Regulation 1231/10 of the European Parliament and of the Council of 24 November 2010 extending Regulation 882/2004 and Regulation 987/2009 to nationals of third countries [2010] OJ L344/1. [↑](#footnote-ref-101)
102. eg Article 39, Additional Protocol and Financial Protocol, 23 November 1970, annexed to the Agreement establishing the Association between the EEC and Turkey [1972] OJ L293/3; Decision 3/80 of the Association Council of 19 September 1980 on the application of social security schemes of the Member States of the European Communities to Turkish workers. Neither of these covers contributions made in Turkey. [↑](#footnote-ref-102)
103. Case C-55/00, *Gottardo*, ECLI:EU:C:2022:16. [↑](#footnote-ref-103)
104. For further discussion, see the contribution by M Dougan (Ch 3) in this edited volume. [↑](#footnote-ref-104)
105. eg Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State [2011] OJ L343/1. [↑](#footnote-ref-105)
106. Article 4 TFEU. [↑](#footnote-ref-106)
107. Opinion 1/94, ECLI:EU:C:1994:384; Annex to the Recommendation for a Council Decision authorising the opening of negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out arrangements for its withdrawal from the European Union, COM(2017) 218 final, para 5 [↑](#footnote-ref-107)
108. eg Belgium’s signature of the EU/Canada trade agreement was delayed by disagreement amongst regional parliaments. [↑](#footnote-ref-108)
109. Articles 77(2) and 79(2) TFEU; above n 107 [↑](#footnote-ref-109)
110. Protocol No 22 on the position of Denmark [2012] OJ C326/299. [↑](#footnote-ref-110)
111. Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice [2016] OJ C202/295. [↑](#footnote-ref-111)
112. *The United Kingdom’s Exit from and New Partnership with the European Union*, above n 2, p 25. Research has consistently found that EU migrants rely less on public services than resident populations: Eurofound Report (EF1546), *Social Dimension of intra-EU Mobility: Impact on Public Services*, 10 December 2015. [↑](#footnote-ref-112)
113. See J Shaw and N Miller, ‘When Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law’ (2013) 38 *European Law Review* 137–166. [↑](#footnote-ref-113)
114. *Acquired Rights*, above n 19, paras 123–137. [↑](#footnote-ref-114)
115. Case C-184/99, *Grzelczyk*, above n 8. [↑](#footnote-ref-115)
116. For further discussion of the impact of exit on the courts, see the contribution by T Horsley (Ch 4) in this volume. [↑](#footnote-ref-116)
117. *The United Kingdom’s Exit from and New Partnership with the European Union*, above n 2, p 13. [↑](#footnote-ref-117)
118. *Acquired Rights*, above n 19, para 129 (citing evidence by C Barnard). [↑](#footnote-ref-118)
119. *The United Kingdom’s Exit from and New Partnership with the European Union*, above n 2, p 30. [↑](#footnote-ref-119)