**Brexit and the (not quite) constitutionalised status of EU citizenship\***

Since its formal introduction in the Maastricht Treaty, EU citizenship has laid claim to a constitutional status. The Union Treaties – long described by the Court of Justice as the [EU’s constitutional texts](http://curia.europa.eu/juris/document/document.jsf;jsessionid=519E2A2F91AAB2CC7DEEBF38986B462A?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8727395) – explicitly confer the status of Union citizenship on all nationals of the Member States. The asserted significance of this was subsequently confirmed in the seminal [*Grzelczyk*](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-184/99)judgment, in which the Court famously declared that EU citizenship was ‘destined to be the fundamental status of nationals of the Member States’.

UK withdrawal from the EU – and the consequent uncertainty surrounding the residence rights of the Union citizens living there – has, however, thrown into sharp relief the weakness of Union citizenship’s claims to a fundamental, constitutionalised status. As the Joint Parliamentary Committee on Human Rights [recently highlighted](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/569/569.pdf), almost three years after the Leave vote those EU citizens already living in the UK are still at risk of being denied the residence and equal treatment entitlements that were likely to have been central to their decision to exercise their free movement rights during the UK’s EU membership.

In truth, however, the disconnection between EU citizenship’s promises and its delivery far pre-dates the referendum. At the Union-level the ongoing links between free movement rights and economic activity mean that they have never been enjoyed equally across the EU citizenry. On the domestic side, national legislation, as well as administrative implementation, rarely reflect the ambition of ‘financial solidarity between nationals of a host State and nationals of other Member States’, visible in the *Grzelczyk* decision.

Interestingly, beyond the important question of the loss of residence rights post-withdrawal, it is Brexit itself that has exposed the long-term, ongoing internal weaknesses in EU citizenship’s purportedly protective rights offering. In the specific context of securing the rights of those already living in the UK, it is the UK’s political constitution and not Union citizenship that has offered some (albeit limited) protection. For this to suffice, however, a much closer scrutiny of post-Brexit residence security mechanisms is needed, particularly as regards their administrative implementation

**Post-Brexit residence insecurity: exposing the long-term gaps in the EU citizenship framework**

Article 21 TFEU confers free movement rights on *all* nationals of the Member States by virtue of their personal status as EU citizens, rather than as a by-product of their activity as workers. And yet, this provision is also explicitly ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’. This raised questions, when EU citizenship was first introduced, about whether there would be a continuing distinction between the free movement rights of workers and non-economically active EU citizens. Article 7 of the [Citizens’ Rights Directive](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF) (CRD) confers extended residence rights on *workers* by virtue of this economic activity. By contrast, non-economically active Union citizens must be self-sufficient and have comprehensive sickness insurance to access this entitlement. This has a knock-on effect for accessing the social assistance that can make a personal right to free movement possible in practice. While workers automatically reside legally under the CRD and so also trigger equal treatment provisions, an application for social assistance by a non-economically active Union citizen could suggest that they are not self-sufficient, not residing legally under the Directive and so not entitled to equal access to social assistance.

Admittedly, in its early post-Maastricht case-law, the Court of Justice held that, given Union citizenship’s basis in the Treaties, these requirements were subject to the [principle of proportionality](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-413/99), and that a ‘[certain degree of financial solidarity](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-184/99)’ was expected between Member State nationals ‘particularly if the difficulties are temporary’. However, the Court has nevertheless [long accepted](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-456/02) that an application for social assistance can indicate that a non-economically active Union citizen is no longer residing legally in their host State, which would mean that she/he is also not entitled to equal access to social assistance. This already casts doubt on EU citizenship’s constitutionalised ‘fundamental status’. As O’Brien argues Union citizenship instead offers, at best, ‘[a right to have restrictions applied proportionately](https://www.bloomsburyprofessional.com/uk/unity-in-adversity-9781849467193/)’. And, as she notes, even this has crumbled in the Court’s more recent [case-law](http://curia.europa.eu/juris/liste.jsf?num=C-333/13), in which it has prioritised the requirements of Article 7 CRD over the once overarching free movement rights contained in the Treaties. Member States, [including the UK](http://curia.europa.eu/juris/document/document.jsf?text=&docid=180083&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8040200), have been permitted to impose ‘right to reside’ tests, whereby Union citizens must reside in accordance with the CRD in order to access social assistance. The Court has then increasingly found individualised proportionality assessments to be [unnecessary](http://curia.europa.eu/juris/document/document.jsf?text=&docid=167661&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8039412).

The UK has long taken advantage of these gaps in the EU citizenship framework, exposing Union citizens to residence insecurity far before the Brexit vote. Its [Immigration (European Economic Area) Regulations](http://www.legislation.gov.uk/uksi/2016/1052/made) largely confer residence rights on ‘qualified persons’, namely EU citizens who reside in accordance with the CRD, while the [Social Security (Persons from Abroad) Amendment Regulations](http://www.legislation.gov.uk/uksi/2006/1026/made) also make access to benefits contingent on a ‘right to reside’ in line with that Directive. In 2014, the UK government announced a [minimum earnings threshold](https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced), which introduced an administrative presumption that anyone working for fewer than 24 hours a week at minimum wage should not be categorised as a ‘worker’ and so would not be able to access social assistance. Meanwhile, the Court of Appeal held that applications for permanent residence by non-economically active EU citizens could be refused where they could not provide evidence of fully comprehensive sickness insurance [*FK (Kenya)* [2010] EWCA Civ 1302].

Ultimately, then, far before the referendum there was a disconnection between the promises of Union citizenship and their delivery, both at the EU and the domestic levels. The ongoing distinction between the rights of workers and those of non-economically active Union citizens exposed groups of individuals – [children](https://theconversation.com/bad-news-for-most-vulnerable-as-court-rules-uk-can-restrict-child-benefit-for-eu-migrants-61122), [unpaid carers](https://ukandeu.ac.uk/the-eu-speaks-the-language-of-gender-equality-but-with-a-male-voice/), the [homeless](https://theconversation.com/the-uk-can-no-longer-remove-eu-citizens-for-sleeping-rough-why-this-matters-for-brexit-89463), and [those in precarious work](https://theconversation.com/what-the-eus-rules-on-free-movement-allow-all-its-citizens-to-do-62186) to the risk of losing residence and equal treatment rights. Yet much of this was masked by the overarching constitutional claims of Union citizenship. This was particularly the case because, prior to the referendum it was commonly only those citizens who sought social assistance or to avoid removal who were confronted with these issues.

Following the referendum, in the absence of unilateral commitments to Union citizens’ residence security from either the UK or the EU, a [high volume](https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/list-of-tables) of EU citizens living in the UK began, understandably, to make applications for permanent residence under the CRD despite the fact that this entitlement is itself contingent on the continuing application of EU law. Now, Union citizens who had previously enjoyed more secure residence in the UK and not had to interact with the Home Office – for instance, those in permanent, well-paid work – found themselves facing challenges that had in fact existed for some time. For example, an application for permanent residence by a doctor who had worked continuously in the UK for the past 3 years could be rejected on the basis that she hadn’t provided evidence of comprehensive sickness insurance during the prior 2 years, when she was a student. This situation, and the issuing of ‘please leave’ letters (seemingly in error) by the Home Office garnered the attention of both the [press](https://www.theguardian.com/politics/2017/aug/23/eu-nationals-did-you-receive-a-letter-threatening-deportation) and [social media](https://twitter.com/naomiohreally/status/900260784885960704?lang=en).

The UK parliament then turned its attention to the residence security of EU citizens living in the UK. Several [amendments](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0132/amend/european_daily_cwh_0207.pdf) to the EU (Notification of Withdrawal) Act 2017 on the issue were proposed. However, by replicating the existing Union citizenship framework, these amendments were unlikely to have addressed the core risks to residence security and, ultimately, were not passed in any case. Nevertheless, as is common within the UK’s political constitution, the consequent pressure on Government was of greater significance. The Government subsequently announced that its EU Settlement Scheme would confer settled status on EU citizens who had been *factually* resident in the UK for 5 years, without it being necessary to demonstrate *legal* residence in accordance with the CRD. Accordingly, non-economically active EU citizens – or those who had been so in the past – would no longer have to provide evidence of comprehensive sickness insurance. This would seemingly also reduce the administrative burden on those who had had several employers to provide evidence of each job and of retention of worker status or sufficient resources and comprehensive sickness insurance for the periods in between employment. Indeed, the Government committed to using its own HMRC data to provide automatic proof of residence.

**Papering over the cracks: ongoing issues with the EU Settlement Scheme and the Withdrawal Agreement**

Of course, it might be argued that EU citizenship has therefore had a more subtle constitutionalising effect on proceedings. The practical consequence of EU free movement law is the residence of around 3 million Union citizens in the UK – who moved here in reliance on a legal framework that will cease to have effect on Brexit day – the residence security of whom the Government has come under political pressure to protect. More significantly, the Government has committed, in its [White Paper on Legislating for the Withdrawal Agreement](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf), that should any future UK parliament decide to repeal the citizens’ rights part of the [Withdrawal Agreement](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf) (should this be adopted), ‘Parliament must activate an additional procedural step’. Whilst clearly not going as far as to entrench EU citizens’ rights, this commitment arguably seeks to find a compromise between their importance and the sovereignty of Parliament.

On the EU side, citizens’ rights were one of the Union’s [three negotiating priorities](https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/) on which sufficient progress had to be made before it would proceed to the second phase of negotiations. As well as the ongoing supremacy and direct effect of relevant Union norms under Article 4 of the Withdrawal Agreement, it also contains additional commitments on citizens’ rights. For example, pursuant to Article 158, UK courts could continue to refer questions on the citizens’ rights part of the Agreement to the Court of Justice in the eight years following the end of the transitional period.

Yet the specifics of EU citizenship, as a fundamental status conferring free movement rights on all nationals of the Member States, has not been the decisive factor here. Article 50 TEU does not contain any explicit instruction to the European Council to include citizens’ rights within the negotiating guidelines. Moreover, the Withdrawal Agreement itself largely replicates the rights – and therefore the ongoing problems – operating under the CRD. Indeed, when the Commission was asked about the fact that the UK’s commitment to waive the comprehensive sickness insurance requirement was unilateral and non-binding, [the Commission stated](https://ec.europa.eu/unitedkingdom/sites/unitedkingdom/files/2017-12-12_qa_citizens_rights.pdf) that ‘we seek to protect the rights as they stand under current EU law, nothing more, nothing less’. And of course, Article 50 explicitly allows for a ‘no deal’, an ongoing possibility, which would mean the UK would be under no international obligation to provide even the problematic residence entitlements available under the Withdrawal Agreement.

As the Joint Committee on Human Rights has [highlighted](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/569/569.pdf), the UK government would also face no domestic obligations. Any Legislating for the Withdrawal Agreement Bill, and the primary legislation on citizens’ rights that it would introduce, would become irrelevant upon ‘no deal’. While the Government has said this is not a problem since it is committed to the EU Settlement Scheme, the scheme is implemented through statutory instrument as an [appendix to national immigration rules](https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu) and so does not benefit from the level of protection offered by an Act of Parliament. Meanwhile, as the Joint Committee rightly points out, the [Immigration and Social Security Coordination (EU Withdrawal) Bill](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/18309.pdf) ends free movement rights in the UK into the future whilst making no reference to the rights of already resident EU citizens, leaving them at risk. Consequently, the Committee proposes an amendment to the Bill whereby any exercise of powers under the Bill by the Secretary of State must ‘protect the acquired rights of those persons who, prior to Exit Day, benefitted in the UK, from right of free movement of persons under EU law’.

And yet, deal or no deal, both the Legislating for the Withdrawal Agreement White Paper and the Committee’s suggested amendment to the ISSC Bill overlook the real issue: that of administrative implementation.

**The need for greater scrutiny of administrative implementation of EU citizens’ rights**

The key issues for citizens’ residence security in the UK post-Brexit largely mirror those already in play before the vote, namely the need to demonstrate *legal* residence in line with the CRD. The additional step outlined in the White Paper only conditions Parliamentary repeal of the residence rights contained in the Withdrawal Agreement, not the more generous approach to residence security offered by the EU Settlement Scheme. Similarly, the Joint Committee’s proposed amendment to the ISSC Bill simply refers to free movement rights ‘under EU law’. Should Government decide, once more, to require *legal* residence rather than *factual* residence, neither of these mechanisms would stop it.

More importantly, even if the EU Settlement Scheme remains in place in its current form, there is a real need for scrutiny of its administrative implementation. Though the Scheme claims to focus on *factual* residence, the means by which Union citizens can demonstrate this fact still [largely relate to economic activity](https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence). For instance, applicants are able to link their application to HMRC data, which will provide evidence of their residence. While this might work for those in permanent work, unpaid carers, for example, will not benefit. Though the Government has said applicants will also be able to rely on [DWP records](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf), the operation of the ‘right to reside’ test means that those not categorised as workers are unlikely to have been able to access the benefits that would generate this data. Those in precarious work will also face a heavier administrative burden, since they will have to provide evidence of residence during gaps in their HMRC profile. Much of this [additional evidence](https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence) is also linked to economic activity: P60s, P45s, mortgage or rental payments and utility bills. This will present problems for victims of domestic abuse, who are less likely to have control over domestic finances, not to mention for children, who by simple virtue of their age will lack an economic paper trail. Though the Scheme foresees some other forms of evidence, such as GP letters, these are limited, and only cover the month of the appointment, which, needless to say, raises the evidential challenge when trying to demonstrate 5 years’ residence. While the Government says this is unproblematic because affected individuals will be offered ‘temporary settled status’ until they accumulate the necessary years, these ongoing requirements risk making ‘temporary settled status’ a perpetual one.

Worryingly, there is the real possibility that much of this will go unnoticed. Political pressure to bring about change to longstanding issues with EU citizenship rights only came about after the referendum when more privileged categories of Union citizen began to be affected and voice their experiences. At present, ongoing problems with the [use of HMRC data](https://twitter.com/citizen689/status/1117476121103208448), amongst other things, are continuing to affect [high-profile applicants](https://www.bbc.co.uk/news/education-47853438), raising awareness of current problems with the Scheme. However, these cases concern applicants with good access to societal voice whose long-term residence in permanent work highlight issues with what should be relatively straightforward aspects of the Scheme. Ongoing scrutiny of application outcomes, once these more high-profile problems have been ironed out, is essential. Of course, EU citizens in the UK have also become mobilised by the referendum result, with campaigns groups such as [the3million](https://www.the3million.org.uk/) paying attention to the cliff edges for a wider range of Union citizens that are created by a Settlement Scheme that still largely focuses on economic activity as proof of residence. It is crucial that these additional stories are heard.

Thus, though the legislative safeguarding of EU citizens’ residence security is important, proper scrutiny of administrative implementation is even more vital. Of course, pursuant to Article 159, the Withdrawal Agreement requires the UK to establish an Independent Monitoring Authority that would be empowered to conduct inquiries concerning alleged breaches of the Citizens’ Rights part of the Withdrawal Agreement. Once again, however, since that Authority would be established under the Withdrawal Agreement, it would presumably only have the power to consider strict adherence to the rights available under the Agreement itself and not the more generous entitlements that appear available, on paper, under the EU Settlement Scheme. If these additional rights turn out to be restrictive in practice, it appears there is little about the fundamental status of Union citizenship that can resolve the problem. Political focus on the Scheme is therefore critical.

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