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The implications of Brexit for migration

Report¹

Committee on Migration, Refugees and Displaced Persons
Rapporteur: Mr Killion Munyama, Poland, EPP/CD

Summary:

The report points out the fundamental rights at stake for migrants as a consequence of Brexit, in relation to the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFR). The right of residence of EU nationals currently living in the UK, as well as those of UK nationals living in other EU countries, the right to family reunification, the right to return, the right to work, the right to social security and healthcare are particularly threatened in case of Brexit.

The Brexit process has revealed fundamental flaws in the UK migration system, which is in need of comprehensive reform to make it more efficient and more respectful of human rights. The report calls on the UK authorities to undertake a thorough review of all aspects of migration policies from entry to settlement through residence, in particular those rules which apply to skilled and unskilled workers, students and post-graduates, and to applicants for family reunion. and consider moving from a constitutive to a declaratory system of registration for the right of residence.

The Brexit debate would present an opportunity change the narrative around migration and to illustrate the mutual benefits that immigration brings for both migrants themselves and the local community in the host state. The Assembly encouraged the United Kingdom to pursue this objective by making more effort to counter negative discourse on migration.

In the recommendations, the report urges both the British authorities and the European Union negotiators to make sure that the fundamental rights of EU and UK citizens will be effectively guaranteed even in the event of no deal.

¹ Reference to committee: Doc. 14364, Reference 4356 of 22 January 2018.

A. Draft resolution²

1. The United Kingdom's decision, to withdraw from the European Union following the results of the 2016 national Referendum has evident wide-ranging repercussions for the rights of millions of citizens across Europe. The Parliamentary Assembly recognises that the failure of British and EU negotiators to reach an agreement so far on the conditions for withdrawal has put the continued guarantee of these rights at serious risk.
2. Rights at stake include the rights to employment, education and training, the right of residence, the right to family reunification, the right to hold a pension and the right to have access to voting rights and healthcare. Whatever the final measures taken to implement Brexit, the British authorities will need to ensure that EU nationals present in the United Kingdom who are eligible for settled status are given adequate time and resources to apply for Indefinite Leave to Remain. There is also much uncertainty concerning the rights of the 1.2 million Britons resident in EU countries, who will suddenly become third country nationals following the United Kingdom's withdrawal from the EU.
3. The Assembly commends efforts by France, Germany, the Netherlands and Norway to resolve the status of UK nationals who remain resident in their territory in the event of a "no-deal Brexit". The Berlin authorities, for instance, have promised that an "urgent registration process" will be made available in order to secure legal status for British citizens in the event of the UK leaving the EU without an agreement. Similar arrangements have been implemented by Norway and Ireland. These developments will bring welcome clarity for a number of citizens.
4. The Assembly salutes the work of NGOs such as the 3million and British in Europe who have provided vital advocacy work on behalf of British and EU nationals. Nevertheless, a lack of transparency has characterised certain aspects of the negotiations. Successive postponements of the immigration White Paper— a policy document setting out the government's vision for post-Brexit migration —have curtailed parliament's ability to scrutinise government proposals. UK nationals resident abroad have complained about the lack of direct communication and exchange with EU governments regarding how their rights would be secured after Brexit. There has been a general and continued failure by both EU and British negotiators to consult with civil society since the Referendum.
5. The Assembly is also concerned by the rise in racist and xenophobic incidents reported in the UK since the referendum campaign. In the eleven months following the vote to leave the European Union, crimes involving racial and religious discrimination rose by 23%. This prompted the UN Rapporteur on Racism to express alarm over the normalisation of hateful, stigmatising discourse including among high-ranking officials.
6. Britain's withdrawal from the EU would present an opportunity to change the narrative around migration and to illustrate the mutual benefits that immigration brings for both migrants themselves and the local community in the host state. EEA migrants alone pay £2 billion a year into the British tax system, for instance. The Assembly encourages the United Kingdom to pursue this objective by making more effort to counter negative discourse, which has tended so far to be exacerbated by frustration and incomprehension facing the impasse in current negotiations and lack of progress in any clear direction.
7. The Brexit process has revealed fundamental flaws in the UK migration system, which is in need of comprehensive reform to make it more efficient and more respectful of human rights. The Assembly refers to previous texts such as Resolution 1972 (2014) on "Ensuring that migrants are a benefit for European host societies" which urges states to "ensure that labour immigration policies match realistic labour market needs and recognise that some avenues of immigration cannot be regulated to the same extent as others without conflicting with human rights and humanitarian obligations". The current restrictions on employment quotas should be revised, in order to better take account of the needs of different sectors of the economy.
8. The Assembly therefore calls upon the UK authorities, whether Brexit finally happens or not, to undertake a thorough review of all aspects of migration policies from entry to settlement through residence, in particular those rules which apply to skilled and unskilled workers, students and post-graduates, and to applicants for family reunion. and consider moving from a constitutive to a declaratory system of registration for the right of residence.
9. In the event that Brexit does take place, with or without terms agreed with the EU, the Assembly further calls on the United Kingdom to:

² Draft resolution unanimously adopted by the committee on 2 December 2019.

- 9.1. consult widely with civil society to ensure a transparent and human rights-respectful conclusion to Brexit;
 - 9.2. provide comprehensive online information and paper documentation on applications for Settled Status in the UK, while ensuring that Home Office officials are trained and equipped to process applications and that technical difficulties with online application systems are smoothed out, thereby providing local services that can take people through the process;
 - 9.3. ensure that citizens who wish to appeal against Home Office decisions not to grant residence are given sufficient opportunity and resources to do so, including through the guarantee of legal aid;
 - 9.4. maintain voting rights of EU citizens resident in the UK in local elections;
 - 9.5. offer EU students the equal treatment and opportunities as to UK citizens;
 - 9.6. maintain, and consider expanding, the list of migrants entitled to family reunification, not limiting it only to direct dependent ascendants and descendant family members;
 - 9.7. provide a procedure for requesting return for individuals and families who are absent longer than the five years foreseen in the measures;
10. In the event that a Brexit does not occur, as a result of a second referendum, the Assembly urges the United Kingdom authorities to:
- 10.1 make greater efforts in future to promote the benefits of EU membership, in particular from the perspective of migration management and shared responsibilities for the reception and integration of migrants among EU member states, as well as for the rights and well-being of UK citizens abroad;
 - 10.2 endeavour to engage British citizens in the UK with the “idea of Europe” and with the objectives of European Union legislation and policies, including by organising regular information campaigns and consultations;
 - 10.3. expand the list of migrants entitled to family reunification, not limiting it only to direct dependent ascendants and descendant family members;
 - 10.4. ensure that British citizens are clearly and properly informed of the implications and scope of EU membership and legislation, avoiding misleading statements and sensationalism by politicians and the media, especially with respect to migration.
11. The Assembly also calls on European Union member states to:
- 11.1. ensure that the approach to any further Brexit negotiations is guided by human rights standards as set out in the EU Charter on Fundamental Rights and the European Convention on Human Rights;
 - 11.2. decouple the principle of reciprocity from any measures aimed at resolving the status of British nationals, thereby ensuring that people are not used as “bargaining chips” in negotiations;
 - 11.3. keep UK citizens adequately informed of their rights throughout the Brexit process;
 - 11.4. in the case of a Brexit (with or without an agreement):
 - 11.4.1. follow the advice of the European Commission and offer generous, speedy solutions to safeguard the rights of UK nationals resident on EU soil;
 - 11.4.2. set up a specialised joint EU-UK committee on citizens’ rights responsible for the elaboration of procedures and recommendations related to the rights of citizens in the context of migration;
 - 11.4.3. ensure continued recognition of British professional qualifications throughout the European Union 27 member States;

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11.4.4.; offer UK students the equal treatment and opportunities as to EU citizens;

11.4.5. maintain the voting rights of resident British citizens in local elections;

11.4.6. implement the citizens' rights provisions set out in the rejected withdrawal agreement, whatever the outcome of negotiations, so as to provide some certainty to British nationals.

B. Explanatory memorandum by Mr Killion Munyama, rapporteur

1. Introduction

1. The decision by the United Kingdom (UK) to leave the European Union (EU) following the referendum on 23 June 2016 provoked serious concerns amongst the migrant population in the UK, in particular, undocumented migrants and the 3.6 million people coming from European Union countries. Brexit will also affect the 1.2 million British nationals who live and work in EU countries. In addition to these categories, non-EU citizens with derivative rights of residence whose status depends on their EU relatives and who will have to apply for “settled status” are consistently forgotten.

2. The British Government has the firm intention of reducing migration flows by restricting freedom of movement into the country, which is part of the four freedoms enshrined in the EU single market agreement. This aspiration is evident in the negotiations which have been taking place between the EU and the UK since the triggering of Article 50 of the Treaty of the European Union on 29 March 2017. The goal of reducing immigration was set out in the conservative party manifesto and has been central to government policy since 2010, leading certain NGOs to criticise the British authorities for creating a “hostile environment,” for immigrants.

3. The first phase of negotiations ended in December 2017 with a Joint Report between the EU-UK negotiators³ focusing on citizen’s rights, among other aspects. Further negotiations took place in March 2018, which led to the presentation by the negotiators of a draft agreement on the terms of the exit including residence rights, workers’ rights and professional qualifications.⁴

4. While the draft agreement has certainly provided some clarifications, concerns remain because the fundamental rights of both EU and UK nationals remain threatened. These include the right to work, both for migrants living in the UK and for British citizens living in EU countries, as well as their right of residence, to family reunification, to social security and health care and the right to a pension.

5. This report points out the fundamental rights at stake for migrants as a consequence of Brexit, in relation to the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFR). While the latter will no longer be applicable to the UK after it leaves the EU, it remains binding in the EU member States when implementing EU law. The ECHR, on the contrary, must of course be observed by the UK as a Contracting Party.

6. Some rights are particularly threatened by the orientation of current negotiations, namely, the right of residence of EU nationals currently living in the UK, as well as those of UK nationals living in other EU countries, the right to family reunification, the right to return, the right to work, the right to social security and healthcare, etc. Therefore, one of the aims of this report is to call on the negotiating parties to take into account the rights of migrants in the context of Brexit.

7. My intention has been to formulate concrete recommendations, for instance on how to acknowledge the benefits migration brings to the UK, regardless of whether migrants are low or highly-skilled. The British Government should be encouraged to maintain the proportion of low-skilled EU migrants in the UK, both for the country’s benefit and for that of EU migrants. It would also be appropriate to recommend that the Brexit negotiators adopt a declaratory registration system for EU and UK nationals to obtain a residence permit, in line with the European Parliament’s resolution on the framework of the future EU-UK relationship of 14 March 2018.⁵ Most importantly, both the British authorities and the European Union negotiators should be urged to make sure that the fundamental rights of EU and UK citizens will be effectively guaranteed even in the event of no deal.

³ Joint Report between the EU-UK negotiators on progress during phase 1 of the negotiations under article 50 TEU on the UK’s orderly withdrawal of the EU, 8 December 2017.

⁴ https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

⁵ http://www.epgencms.europarl.europa.eu/cmsdata/upload/e9270809-8891-4d5d-bea41a764178e282/European_Parliament_resolution_on_the_framework_of_the_future_EU-UK_relationship_14_March.pdf.

2. Brexit puts fundamental rights at stake for EU and UK citizens.

2.1. *The right of residence*

8. To obtain the right of residence after Brexit, EU citizens covered by the Withdrawal Agreement (WA) will need to submit an application to acquire “settled status”. UK citizens in Europe might also be subject to such an application.⁶ To be successful, the lawfulness of the residence must be proven. EU citizens currently based in the UK can already apply to the EEA permanent residence scheme, a separate and distinct system that allows EEA nationals to reside permanently in their host state after five years. However, the Migration Observatory stresses in its report “The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?”⁷ that the current process for EU citizens seeking permanent residence in the UK has been highly criticised already due to its complexity and strict requirements. Recent NGOs reports show that applications have been rejected even where applicants were entitled to residency or settled status. For instance, the comprehensive sickness insurance requirement for certain categories of EU citizens (students, self-sufficient individuals, etc.) disqualifies people who have been legally residing in the UK, solely because they did not know about it or because they thought they did not need it, given that their status enables them to access the national health services (NHS). Many examples can be found in a report published by the organisation “the3million” (EU citizens living in the UK).⁸

9. In addition, the Migration Observatory underlines that in situations where citizens do not work or who are employed in the cash economy, or were accommodated on the basis of an informal agreement, evidence may be difficult to gather, especially because the UK only accepts formal evidence (bank statements, NHS letters, etc.), excluding letters from friends, or non-official emails for example. Such an application process also puts at risk EU citizens who qualify for a settled status or residence permit but do not apply due to, for instance, disabilities or language barriers. Therefore, citizens who risk facing legal, digital, and evidential or language barriers should be protected and adequately supported.

10. At the very least, the burden of proof of lawful residence should lie with the authorities. It should also be noted that one of the challenges of the UK application system would be to deal with the high number of applications from EU citizens (3.6 million in 2017). To properly do so, adequate resources (staff, etc.) should be provided in order to avoid wrongly rejected and wrongly accepted applications. There is a risk that EU citizens asking for settled status will be left potentially for years waiting for confirmation of their status post-December 2021, which means that they will be more at risk of exploitation. Trial phases of the process have highlighted numerous technical errors with potentially life-changing implications. It should further be noted that applications for settled status are already in place. Technical difficulties that have had a substantive impact on application results (for example, awarding individuals pre-settled status when they are entitled to fully settled status) will need to be resolved as quickly as possible.

11. The above-mentioned declaratory registration system for the new status, set out in the European Parliament resolution on the framework of the future EU-UK relationship, should be taken into account. At the same time many EU citizens are unaware of the settled status programme, and those who have heard of it often do not understand why they are obliged to apply for the right to stay, especially when have already been living in the UK for a very long time (such as Polish and Italian nationals). Evidently, both the Home Office and the UK Government will need to better inform those who need to apply.

12. Not all EU citizens residing in the UK will be eligible for residence permits. According to Home Office guidance, homeless EU nationals would not be entitled, on the grounds that they misuse their free movement rights.⁹ Job seekers would not be entitled either. Nevertheless, the Migration Observatory highlights in its report “Labour Immigration after Brexit: Trade-offs and Questions about Policy Design” that such restrictions would

⁶ <https://www.gov.uk/guidance/advice-for-british-nationals-travelling-and-living-in-europe>.

⁷ The Migration Observatory, Report “The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?”, 2017, p. 2, http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Burden_of_Proof_EU_Citizens.pdf.

⁸ The3million, Report “How do European citizens experience the process of applying for the permanent residence certificate?”, 2017, p. 20, https://docs.wixstatic.com/ugd/0d3854_c620324f11204d4aa1b3f2440c688867.pdf.

⁹ The Migration Observatory, Report “The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?”, 2017, p. 7, http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Burden_of_Proof_EU_Citizens.pdf.

be useless. Indeed, it is assumed that EU citizens will be able to visit the UK for short-term trips without a visa, allowing them to look for a job when in the country, then to make a second trip once employment is secured.¹⁰

13. The agreement also entitles the United Kingdom to deport EU nationals for criminal conduct, but grants the British authorities broad discretion to determine what constitutes behavior liable for deportation.¹¹ The prospect of nationals being deported for seemingly minor offences cannot be dismissed, especially in light of recent reports that EU nationals have been forcibly removed for “rough sleeping”.¹² This led to a UK High Court decision in December 2017, which held that removing EU nationals for rough sleeping was illegal.

14. EU workers arriving *after* the post-Brexit transition period in the UK will need to meet a salary threshold imposed by the government and provide evidence of a job offer in order to qualify for a residence permit.¹³ The duration of their residence permit is expected to vary depending on whether the applicant is low or high-skilled,¹⁴ which is in line with the government’s will to reduce the number of low-skilled EU migrants. The Migration Observatory points out that EU migrants mostly work in sectors such as agriculture, hospitality and social care which are unattractive because they are low-paid.¹⁵ Therefore the UK either needs EU migrants to occupy these low-skilled jobs, or to adopt new strategies, such as importing more food, particularly the most labour-intensive produce, or encouraging employers to increase wages to attract local workers. However, such options would increase costs, with consequences for consumers and, in the latter case, for the competitiveness of the business. Similar considerations apply to other crucial sectors of the UK’s economy.

2.2. *The right to return*

15. If a deal is concluded between the British and EU negotiators, UK and EU nationals and their family members covered by the agreement will be able to leave their member state of residence for up to five years without losing their right to return. Such a threshold is likely to prevent EU and UK nationals from working abroad or joining family members in need (sickness, disabilities, etc.) which threatens their private life. Thus, the civil society groups the 3million and British in Europe have called on negotiators to include a life-long right to return.¹⁶

2.3. *The right to family reunification*

16. The right to family reunification will be limited, as only direct family members (spouses, civil partners, unmarried partners, dependent children and grandchildren, dependent parents and grandparents) will be entitled. For partners, the relationship would have to already exist by the end of the implementation period (i.e. 31 December 2020); therefore, future partners will not be entitled to family reunification. As the coalition “British in Europe” stresses,¹⁷ excluding them from such a right would have implications on younger generations but also on citizens who wish to remarry following a divorce or death of their spouse. Therefore, it should be extended to future partners. The so-called “Surinder Singh” rights, which allow EU nationals to return to their home country (after having lived in another EU member state) with a non-EU spouse have also been impacted. After Brexit, if a British citizen wishes to join their EU national spouse in their country of origin, he or she will be subject to far stricter third country national requirements. Similarly, an EU citizen who wishes to return to the UK with their British spouse will also face stricter immigration rules.

2.4. *The right to work*

¹⁰ The Migration Observatory, “Labour Immigration after Brexit: Trade-offs and Questions about Policy Design”, 2017, p. 14, <http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2017/01/Report-Labour-Immigration-Policy-Brexit.pdf>.

¹¹ Smismans, S. 2018. EU citizens' rights post Brexit: why direct effect beyond the EU is not enough. *European Constitutional Law Review*, p.447.

¹² B.Kentish, “Brexit: Deportations of EU citizens soar since referendum,” *The Independent* available at: <https://www.independent.co.uk/news/uk/politics/brexit-latest-eu-citizens-deportations-rise-uk-home-office-referendum-a7935266.html>.

¹³ Draft immigration White Paper, “Border, Immigration and Citizenship System after the UK leaves the EU”, 2017, p. 26, https://fr.scribd.com/document/358064862/THE-BORDER-IMMIGRATION-AND-CITIZENSHIP-SYSTEM-AFTER-THE-UK-LEAVES-THE-EUROPEAN-UNION#from_embed.

¹⁴ *Ibid.*, p. 28.

¹⁵ The Migration Observatory, “Labour Immigration after Brexit: Trade-offs and Questions about Policy Design”, 2017, p. 8, <http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2017/01/Report-Labour-Immigration-Policy-Brexit.pdf>.

¹⁶ Coalition “British in Europe”, Report “Securing citizens’ rights: considerations for Phase 2 of the Brexit negotiations”, 2018, https://docs.wixstatic.com/ugd/0d3854_f40535c21db24dc084243acf19af7cba.pdf.

¹⁷ *Ibid.*

17. Regarding the right to work, after the implementation period EU and UK citizens will lose the possibility to move to the UK and EU without restrictions in order to look for a job or to set up a business. EU nationals who have been absent from the UK for over five years (to look after an elderly relative, for example) will have no guaranteed right to return to Britain.¹⁸ This will have private and family life implications for those whose personal circumstances require them to be in other EU countries for longer than the five year period. It is also likely that professional qualifications of EU and UK citizens who are not covered by the agreement will not be recognised, as the Brexit negotiators so far have only agreed that qualifications already obtained by those covered by the agreement will continue to be recognised after 31 December 2020. Academic qualifications in the course of being obtained by EU students would be recognised but nothing has been said about academic qualifications which are not yet in the process of being obtained.

18. The trade unions are concerned about the inability to fill the void created by the absence of EU workers post-Brexit. Both the Trade Union Congress and The National Farmers' Union have highlighted the vital role that European migrants play in the agriculture, hotel and hospitality sectors,¹⁹ although the Trades Union Congress expresses concern about the low pay and precarious conditions in these sectors which have served to discourage local workers from taking jobs in these sectors. In certain red and white meat processing plants, for example, up to 80% of the task force can be composed of eastern and central European migrants.²⁰ A shortage of agricultural workers from EU countries would have significant repercussions for other sectors of the British economy, as farming delivers raw materials for the domestic food industry.²¹

19. The immigration White Paper recently released by the UK Government also raises concerns. After its withdrawal from the EU, there will be two routes available for migrants wishing to work in the UK: a long-term route, and a short-term route. The long-term route is unnecessarily stringent and will be open only to skilled workers who have a contract worth 30 000 pounds a year or over.²² This validates concerns raised by the British Immigration Lawyers Association, which noted that companies from poorer regions in the UK may be unable to pay such a high salary, preventing them from benefiting from skilled migration.²³

20. The government has ruled out a permanent route for unskilled workers. According to the Immigration White Paper: "This is consistent with the public's view that we should be attracting the brightest and best to come to the UK, and that lower-skilled migrant labour may have depressed wages or stifled innovation in our economy".²⁴ The language of the White Paper is therefore consistent with the government's uncompromising approach towards "unskilled," migrants. The paper also contradicts findings by the London School of Economics, which has noted that areas of Britain that had witnessed a large increase in EU workers had not suffered sharper falls in pay. Wage depression was instead attributed to the financial crash.²⁵ The White Paper does envisage a route for temporary short-term work. However, this will be severely constrained: it will only be open to specified nationalities, will not allow individuals to access public funds or to bring their dependents to the UK and will only be available for a short period of time.²⁶ The government has acknowledged the difficulties that rural and remote areas of the UK will have in recruiting British staff, and has recognized that some sectors have become heavily reliant on short-term staff from EU countries.²⁷ The paper, however, gives little detail about how this will be addressed in the long term.

2.5. Social security and healthcare protection

21. It is still unknown whether social security contributions made after the UK's exit from the EU will continue to be aggregated for mobile workers (i.e. where an individual has worked in more than one member state will receive old-age pension from each state). In addition, it is still unclear whether EU regulations regarding social security of seconded and multi-state workers will continue to apply after Brexit. Yet this is very important as it determines in which country an individual and their employer are liable to pay their social security contributions, having consequences in terms of maternity/paternity benefits, pensions, etc.

¹⁸ *Ibid.*

¹⁹ TUC Submission to Migration Advisory Committee: EEA workers in the UK Labour Market. National Farmers' Union, *Vision for the future of farming: Access to a competent and flexible workforce.*

²⁰ National Farmers' Union, *Vision for the future of farming: Access to a competent and flexible workforce*, P.3.

²¹ *Ibid.*, p.5.

²² Immigration White Paper, The UK's future skills-based immigration system, para.6.23.

²³ Immigration Law Practitioners' Association: Submission of the Immigration Law Practitioners' Association to Professor Killon Munyama on the Implication of Brexit for Migration.

²⁴ Immigration White Paper, para.6.41.

²⁵ <https://www.theguardian.com/money/2016/may/11/eu-migrants-had-no-negative-effect-on-uk-wages-says-lse>.

²⁶ Immigration white paper, paras.6.45-6.46.

²⁷ Immigration White paper, para.6.42.

22. EU rules currently allow both Britons resident on the continent and EU residents living in the United Kingdom to enjoy the same access to healthcare as the local population. However, as the National Health Service Federation noted in its submission to the Health Select Committee inquiry on Brexit and health and social care, such rights are reciprocal. In the case of a no-deal, UK citizens living in the EU or in cross-border situations between several EU countries will be in a more advantageous position than the EU citizens who live in the UK,²⁸ as a result of applicable EU migration Directives.

23. The Joint Report provides that those covered by the WA will be able to continue to receive healthcare as they currently do. As the Lords EU Committee Report points out,²⁹ it neglects to mention whether reciprocal healthcare entitlements of citizens falling outside its scope will be upheld post-Brexit, nor does it mention particular groups such as short-term visitors, patients with rare diseases and people with disabilities.³⁰ In the absence of an agreement on future relations that covers this topic, the rights currently enjoyed thanks to the European health insurance card will cease after Brexit.

2.6. *The rights of vulnerable groups*

24. Numerous organisations have highlighted the failure of the British authorities to protect the rights of vulnerable groups. It is unclear how individuals with no internet access will be able to exercise their rights, as the system for determining eligibility for “settled status,” will be entirely online. The digitised system does not meet the diverse needs of the EU migrant community in the UK, which includes some 750 000 individuals who have indicated that they will have difficulties in accessing the application. The TUC has raised concerns that those employed in the informal economy who are not given a contract and are paid “cash in hand” will not be deemed to have the necessary documentation to prove their employment status, or how EU migrants on low and middle incomes will afford the £65 application fee.³¹ Indeed, it is worth questioning why EU migrants who have become well-established in the UK, and who exercised their free movement rights in good faith, should be required to pay at all. The Immigration Law Practitioners’ Association has highlighted the difficulties some may have in accessing justice. Once the United Kingdom leaves the European Union, there will be a burgeoning demand for legal advice. Legal aid cuts, however, have resulted in a reduced availability of immigration lawyers, meaning some may be left without legal counsel.³² Cuts to the civil service have reduced the number of home office workers. Given the likely surge in applications post-Brexit, this could have an impact on the quality of decision making and is likely to cause delays in applications being processed.³³ There have already been concerning reports of employers and landlords requiring EU nationals to show proof of settled status, even though an EU passport or ID is the only form of proof that should be required presently.

2.7. *Issues related to European Union borders*

25. To date, the biggest obstacle to achieving a final deal on Britain’s separation from the Union, has been the failure of negotiators to come to an agreement over the so-called Irish “backstop”. This stipulation has been deemed necessary to avoid a hard border between Northern and Southern Ireland. The original plan was to keep Northern Ireland aligned with the Customs Union and much of the Single Market in the event that a comprehensive trade agreement could not be concluded. More recent proposals, however, involve keeping the entirety of the United Kingdom in a temporary Customs’ Union.³⁴ Even during the final hours of negotiations, however, internal divisions within the British Government over a proposed exit clause—a stipulation aimed at extricating the UK from the customs union after a certain time period—have increased the likelihood of “no deal Brexit”.³⁵ Such a scenario risks putting the progress created by the WA in serious jeopardy.³⁶

²⁸ Brexit and Migration, Study for the LIBE committee, Policy Department for Citizens’s Rights and Constitutional Affairs, European Parliament, October 2018, p.78;

²⁹ House of Lords, European Union Committee, 13th Report of Session 2017-19 “Brexit: reciprocal healthcare”, 2018, chapter 1, <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/107/107.pdf>.

³⁰ *Ibid.*, chapter 5.

³¹ These concerns were raised in private correspondence between the Migration Committee and The TUC.

³² Immigration Law Practitioners’ Association, *Submission of the Immigration Law Practitioners’ Association to Prf Killon Munyama on the Implication of Brexit for Migration*, p.1.

³³ *Ibid.*

³⁴ H.Stewart and D.Boffey “Tory Brexiters planning to reject deal even with backstop exit clause,” available at: <https://www.theguardian.com/politics/2018/nov/08/tory-brexiters-reject-deal-irish-backstop-exit-clause-steve-baker>.

³⁵ D.Sabbagh et al “Brexit: May tells her cabinet, this is the deal – now back me,” The Guardian available at: <https://www.theguardian.com/politics/2018/nov/13/cabinet-members-called-in-to-sign-off-mays-brexit-deal>.

³⁶ Hence the proposal by The 3Million for the WA provisions on citizens’ rights to be ring-fenced from the final agreement. See, The Last Mile on Citizens’ Rights, p.1 available at: http://www.quenql.eu/uploads/news-documents/BiEthe3million_Last_mile_on_citizens_rights_.pdf.

2.8. Students' rights

26. Under the withdrawal agreement students who *currently* live in the UK will continue to pay the same fees as nationals. However, they will have to pay higher fees should they decide to move from their host state to another EU country.³⁷ After Britain's withdrawal, EU citizens not currently living in the UK will have to pay higher fees. Similar circumstances will apply to British students travelling to European countries.³⁸ EU students will need to apply for a tier 4 VISA which places more stringent requirements on students such as having to prove academic ability, English language ability and the ability to fund course fees and living costs.³⁹

2.9. Voting rights

27. EU citizens living in the UK and UK citizens living in Europe risk being disenfranchised. Currently, all EU citizens living in the UK can vote and stand as candidates in local elections and can vote for the members of the European Parliament. Such rights, however, will fall away after Brexit. This is because various European states have considered voting rights to be a matter of national sovereignty and have therefore left them unprotected in the withdrawal agreement. Additionally, Britons who have been resident outside the UK for over fifteen years lose the right to vote in general elections even if they return to the UK. Brexit therefore has lasting implications for civil liberties. That being said, there have been welcome developments in some EU member states. Madrid and London are pursuing negotiations to maintain local voting rights for the 280 000 British nationals living in Spain and the over 115 000 Spaniards residing in the UK.⁴⁰ These are, of course, bilateral arrangements; it remains unclear whether British citizens in other EU countries will be able to have a say in decisions affecting them. EU member states have discretion to grant local election voting rights.

3. Lack of transparency and legal uncertainty

28. Concerns have been raised regarding the transparency of the Brexit negotiations. British authorities have kept EU nationals up to date with developments in the negotiations via the Home Office "stay informed" campaign.⁴¹ This campaign has reached local government and some large employers with a certain degree of success. However, it is unclear whether this initiative has succeeded with the general public and EU nationals. Successive home secretaries have postponed the release of the Immigration White Paper, — a policy document setting out the government's vision for post-Brexit migration.⁴² Originally due to be released at the end of 2017, the paper was eventually unveiled only months before The United Kingdom's departure date from the European Union.⁴³ This created uncertainty for EU nationals and curtailed parliament's ability to scrutinise government proposals. This led the Home Affairs Select Committee of the British Parliament to raise concerns about the lack of information regarding the future of EEA nationals.⁴⁴ In a recent report, the committee noted that: "in the two years since the referendum there has been no attempt by the Government to build a consensus on immigration reform, to consult the public on options for change".⁴⁵ The British Government would do well to inform the general public about the change of status for EU citizens, so as to minimise any possible discrimination.

29. Contradictory statements by government officials have contributed to the feeling of uncertainty. In its White Paper the United Kingdom set out its intention to ensure that UK nationals could travel to the EU visa free of charge for tourism and temporary business purposes, and that "equivalent arrangements," existed for EU citizens coming to the UK.⁴⁶ In statements to the British media, however, The Prime Minister raised the

³⁷ Position Paper by the 3million and British in Europe, The lost (even with a deal!) rights of 5 million citizens, p.4.

³⁸ <https://www.topuniversities.com/student-info/university-news/what-does-brexit-mean-students>.

³⁹ Immigration white paper, para.7.5.

⁴⁰ https://elpais.com/elpais/2018/12/17/inenglish/1545034701_439896.html.

⁴¹ For example, see: <https://eucitizensrights.campaign.gov.uk/>.

⁴² Home Affairs Committee, *Policy Options for future migration from the European Economic Area: interim report, eighth report of session 2017-2019*, p.6.

⁴³ R.Wright and G.Parker, "Brexit immigration white paper to be delayed until autumn," *The Financial Times*, available at: <https://www.ft.com/content/c92d3418-0807-11e8-9650-9c0ad2d7c5b5>.

⁴⁴ Home Affairs Committee, *Policy Options for future migration from the European Economic Area: interim report, eighth report of session 2017-2019*, p.6.

⁴⁵ *Ibid.*, p.7.

⁴⁶ The British Government, *The future relationship between The United Kingdom and The European Union*, pp.33-34.

prospect of Britons requiring “U.S. style visas,” to visit and work in the EU, with similar arrangements being expected for EU nationals arriving on British soil.⁴⁷ There has been insufficient detail on other matters.

30. The measures proposed consist of, for instance, the reduction in numbers of low-skilled EU migrants by the granting of residency permits for a maximum of two years. However, as the paper states, these proposals are subject to negotiations with the EU. The rights of EU citizens who move to the United Kingdom after Brexit will be enshrined in the ordinary law already applicable to non-EU citizens. However, the UK’s immigration system has already been described as unfair, complex and extremely restrictive,⁴⁸ So concerns among future EU migrants about the predictability and transparency of UK immigration law are inevitable.

31. The White Paper also stated that student mobility would be facilitated, but gave no details as to how this would be done.⁴⁹ Meanwhile, UK nationals resident on the continent have complained about the lack of direct communication between themselves and EU governments regarding how their rights would be secured after Brexit.⁵⁰ The lack of clarity regarding the future has had a negative impact on the mental health of many EU nationals, with some even receiving treatment for mental illness.⁵¹ Some 130 000 migrants also left the UK between September 2017 and September 2018, the highest record since 2008.⁵² This will have further repercussions for the UK economy.

32. The European Union (Withdrawal) Bill grants government ministers the ability to unilaterally modify vast swathes of legislation, including laws applicable to migrant workers, asylum seekers and victims of human trafficking.⁵³ In a nutshell, the bill allows ministers to issue regulations that amend, repeal or replace domestic law giving effect to EU regulations.⁵⁴ Such prerogatives – referred to in the United Kingdom as “delegated powers,” – are less susceptible to parliamentary oversight.⁵⁵ As a result, the executive branch has, in theory at least, broad discretion to dilute rights afforded to vulnerable groups by virtue of EU law.⁵⁶ In a document leaked in 2017, the UK Government clearly indicated that it reserved the right to reduce, amend or withdraw the rights of EU citizens in the future, whether or not there is a deal.⁵⁷ There has also been insufficient detail about how the citizens’ rights provisions of the agreement will be monitored.

4. National Measures to resolve the status of British citizens

33. Several governments have put in place measures to resolve the status of Britons who remain resident on European soil in the event of a no deal. Authorities in Berlin have promised that an “urgent registration process,” will be implemented to secure legal status for British citizens in the event that the UK leaves the EU without an agreement.⁵⁸ Britain and Norway will soon conclude bilateral arrangements ensuring that nationals from both countries can remain resident in their respective host states regardless of the outcome of negotiations.⁵⁹ Similar arrangements are being made in Poland and in the Czech Republic.⁶⁰ Ireland has promised legislation on a number of matters related to citizens’ rights, including international protection, access to health care, social welfare provision and access to housing.⁶¹

⁴⁷The Guardian, “May says EU immigrants will lose priority status after Brexit,” the available at: <https://www.theguardian.com/uk-news/2018/oct/02/eu-citizens-lose-priority-under-post-brex-it-immigration-plans>.

⁴⁸ <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7506.htm>.

⁴⁹The UK government, *The future relationship between the United Kingdom and the European Union* p.33.

⁵⁰ L.Carroll, “Britons in Europe ‘entirely in the dark’ over post-Brexit status” *The Guardian* available at: <https://www.theguardian.com/uk-news/2018/mar/27/britons-in-europe-entirely-in-the-dark-over-post-brex-it-status>.

⁵¹ <https://www.ourbrexitblog.org/in-limbo-testimonies/>.

⁵² <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2018>.

⁵³ Liberty, *Bringing Human Rights Home? What’s at Stae for rights in the incorporation of EU law after Brexit* (London, 2018) p.18.

⁵⁴ European Union (withdrawal bill) Clause 7.

⁵⁵ Professor M.Elliot, “The EU Withdrawal Bill: initial thoughts,” available at:

<https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>.

⁵⁶ Liberty, *Bringing Human Rights Home?* p.20.

⁵⁷ <https://www.scribd.com/document/358064862/THE-BORDER-IMMIGRATION-AND-CITIZENSHIP-SYSTEM-AFTER-THE-UK-LEAVES-THE-EUROPEAN-UNION>.

⁵⁸ https://www.theguardian.com/politics/2018/dec/22/uk-nationals-in-berlin-given-assurance-of-residency-in-event-of-no-brex-it-deal?CMP=Share_AndroidApp_Messenger.

⁵⁹ <https://www.independent.co.uk/news/uk/politics/brex-it-latest-no-deal-theresa-may-citizens-rights-eu-nationals-norway-oslo-summit-a8609026.html>.

⁶⁰ <https://www.theguardian.com/politics/2019/jan/15/poland-and-czech-republic-to-allow-britons-to-stay-if-uk-crashes-out-of-eu>.

⁶¹ Government of Ireland, *Getting Ireland Brexit Ready*.

34. While these measures bring much-needed clarity for many citizens, too many governments have premised their action on the principle of reciprocity. The French Government has introduced draft legislation to ensure that Britons in France do not find themselves with irregular status in the absence of a deal. However, France's Europe Minister informed reporters: "We want to reach the best situation possible with a view to – and that is quite normal – working in a spirit of parallelism and reciprocity between the status we'll give UK residents in France and the status given to EU citizens in the UK".⁶² The treatment received by British nationals in France will therefore depend on the way in which French nationals are treated in the UK. This casts doubt on promises made by both British and EU negotiators that citizens would not be treated as "bargaining chips."

5. Conclusions and recommendations

35. To date, the biggest obstacle to achieving a final deal on Britain's separation from the Union has been the failure of negotiators to come to an agreement over the so-called Irish "backstop." This stipulation has been deemed necessary to avoid a hard border between Northern (UK) and Southern (EU) Ireland. The original plan was to keep Northern Ireland aligned with the Customs Union and much of the Single Market in the event that a comprehensive trade agreement could not be concluded. More recent proposals, however, involve keeping the entirety of the United Kingdom in a temporary Customs' Union.⁶³ Even during the final hours of negotiations, however, internal divisions within the British Government over a proposed exit clause—a stipulation aimed at extricating the UK from the customs union after a certain time period—have increased the likelihood of a "no deal Brexit".⁶⁴ Such a scenario risks putting the progress created by the WA in serious jeopardy.⁶⁵

36. An agreement between the EU and the United Kingdom was reached on 13 November 2018. Negotiating parties are, however, still a long way from bringing certainty to British and EU citizens. On 15th January 2019, the British Parliament voted against the withdrawal agreement. Subsequently, on 29th January 2019, British parliamentarians voted to reopen negotiations concerning the Northern Irish backstop.⁶⁶ Following the vote, a spokesperson for the President of the Council of the EU stated: "The backstop is part of the withdrawal agreement, and the withdrawal agreement is not open for renegotiation".⁶⁷ It now seems unlikely that an agreement can be renegotiated in the time left until the UK's departure from the EU.. After failing to obtain Parliamentary approval for her Brexit plan, Theresa May resigned on 7 June 2019 as Prime Minister and Boris Johnson was subsequently elected by the Conservative Party as new Prime Minister. He announced his intention to renegotiate a new deal with the EU, despite the EU's unchanged official position. Given the resulting impasse, a no deal scenario has become the most likely, placing the rights of millions of citizens further into uncertainty. There have also been some worrying signals to corroborate this probability, such as cabinet ministers insisting that the government is now "working on the assumption," of a no-deal Brexit⁶⁸. An extra £2.1bn has also been set aside to prepare for a no-deal scenario and Mr Johnson has repeatedly asserted that the United Kingdom would be ready to leave the EU regardless of the circumstances.⁶⁹ However, a "no Brexit" option cannot be ruled out completely, as opinion polls show that there is no longer a majority in the UK to support leaving the EU.

37. There is also much uncertainty surrounding the new Premier's approach to EU nationals living in Britain. In his first statement to the House of Commons, Mr Johnson assured EU nationals that, under his government: "they will have absolute certainty for the right to live and remain," in the UK⁷⁰. This initially suggested that the government was willing to introduce new legislation guaranteeing the residence rights of EU nationals, without any need for them to apply for new status. It subsequently became clear, however, through statements by the

⁶² <https://www.thelocal.fr/20181004/france-unveils-draft-law-to-help-secure-status-of-britons-in-france>.

⁶³ H. Stewart and D. Boffey "Tory Brexiters planning to reject deal even with backstop exit clause," available at: <https://www.theguardian.com/politics/2018/nov/08/tory-brexiters-reject-deal-irish-backstop-exit-clause-steve-baker>.

⁶⁴ D. Sabbagh et al "Brexit: May tells her cabinet, this is the deal – now back me," The Guardian available at: <https://www.theguardian.com/politics/2018/nov/13/cabinet-members-called-in-to-sign-off-mays-brexit-deal>.

⁶⁵ Hence the proposal by The 3Million for the WA provisions on citizens' rights to be ring-fenced from the final agreement. See, The Last Mile on Citizens' Rights, p.1 available at: http://www.guengl.eu/uploads/news-documents/BiEthe3million_Last_mile_on_citizens_rights.pdf.

⁶⁶ <https://www.theguardian.com/politics/2019/jan/29/may-goes-back-to-brussels-but-eu-says-nothing-has-changed>.

⁶⁷ *Ibid.*

⁶⁸ <https://www.bbc.com/news/uk-politics-49141375>

⁶⁹ <https://uk.reuters.com/article/uk-britain-eu-boris/deal-or-no-deal-we-leave-eu-on-october-31-pm-candidate-johnson-idUKKCN1T411L>; <https://www.politicshome.com/news/uk/political-parties/conservative-party/news/105752/number-10-says-brexit-will-happen-no-ifs-no>

⁷⁰ <https://www.channel4.com/news/factcheck/has-boris-johnson-broken-his-pledge-to-eu-nationals-living-in-britain>

government spokesperson that the government had no intentions of bringing in new primary legislation, and that Mr Johnston was merely stating his intention to implement the “settled status,” scheme, which has been the subject of criticism.⁷¹

38. Despite assurances that EU and British migrants would not be used as “bargaining chips,” many still remain in the dark over how their rights will be post-Brexit. The rights to work, to have access to healthcare and to receive a pension have not been adequately secured. EU migrants to the UK whose family circumstances require them to reside outside of Britain for longer than five years will also live with a significant amount of uncertainty. The draft WA published on 14 November 2018 fails to clarify the rights of EU citizens who will arrive in the UK after the transition period.⁷² A significant amount of discretion remains with the British authorities. As Professor Smismans from Cardiff University notes, the rights contained in The European Union (Withdrawal) Act only remain in place if the British Government decides not to repeal parts of the act.⁷³ The prospect of rights being diluted through devolved powers will also provoke uncertainty. In order to alleviate these concerns, the British authorities should consult as widely as possible with civil society, including trade unions, human rights groups and organisations with expertise in migration law. To bring clarity to both British and EU nationals, the citizens’ rights provisions of the agreement should ring-fenced, so that individuals are protected regardless of the outcome of negotiations.

39. From the beginning of the Brexit negotiations, the EU strongly insisted that securing the rights of EU citizens and UK nationals was the main priority for the EU as regards the impact of Brexit on migration. Therefore, a no-deal scenario should not be an acceptable solution and the EU negotiators should make sure that all guarantees provided in the Withdrawal Agreement should be maintained after Brexit. I also welcome cross-party initiatives in the British Parliament designed to limit the prospects of a no deal.⁷⁴ Moreover, talks of proroguing Parliament as a means of implementing Britain’s withdrawal from the EU are highly undemocratic and would limit MPs’ ability to scrutinise government over an issue that will have repercussions for generations. It can be done by signing a separate agreement on citizens’ rights. I support the idea of setting up of a specialised joint EU-UK committee on citizens’ rights responsible for the development of procedures and recommendations related to the rights in the context of migration.

40. The perceived impact of migration on jobs and wages was one of major reasons why the members of the British public voted to leave the EU. There has been an appalling rise in racist and xenophobic incidents since the June 2016 vote,⁷⁵ with the death of one EEA national being treated as a hate crime.⁷⁶ Additionally, there have been worrying reports of verbal attacks against EU migrants speaking their mother tongue.⁷⁷ Immigration is a mutually beneficial process, entailing advantages both for the migrants concerned and the general public in the host country. This is clear in Britain, where EEA immigrants alone pay £2 billion a year into the tax system.⁷⁸

41. The British Government should listen to the concerns raised by The UN Special Rapporteur on Racism regarding the rise in hate crimes and “hateful, stigmatising discourse,” in the post Brexit era.⁷⁹ In keeping with this trend, the state has significantly cut legal aid for migrants, resulting in a significant decrease in the availability of immigration lawyers. As a result, low skilled migrant workers will experience great difficulties in accessing financial support for legal fees. This will, in turn, hinder their access to justice and place them at greater risk of exploitation.

42. Finally, the British government should redouble its efforts to resolve internal divisions over the Irish backstop. This is essential in order to prevent EU citizens from being forced to live in a legal limbo.

⁷¹ <https://www.independent.co.uk/news/uk/home-news/eu-nationals-brexit-settlement-scheme-undocumented-windrush-a8735426.html>.

⁷² D.Sabbagh et al “Brexit: May tells her cabinet, this is the deal – now back me,” *The Guardian*.

⁷³ S.Smismans “What happens to EU citizens living in the UK in the case of no deal?” Available at: https://docs.wixstatic.com/ugd/0d3854_5772a6660b5349f6a99b5a6d6db667d4.pdf.

⁷⁴ <https://www.theguardian.com/politics/2019/aug/07/new-rebel-bid-to-halt-no-deal-brexit-amid-fury-at-pms-enforcer>.

⁷⁵ M.Weaver Hate crime surge linked to Brexit and 2017 terrorist attacks *The Guardian*: <https://www.theguardian.com/society/2018/oct/16/hate-crime-brexit-terrorist-attacks-england-wales>.

⁷⁶ <https://www.theguardian.com/uk-news/2016/aug/30/five-teenage-boys-arrested-after-man-dies-following-attack-in-essex>.

⁷⁷ <https://www.theguardian.com/politics/2016/aug/31/after-the-brexit-vote-it-has-got-worse-the-rise-in-racism-against-east-europeans>.

⁷⁸ TUC, *EEA Workers in the UK Labour Market: TUC submission to the migration advisory committee October 2017*, p.12.

⁷⁹ United Nations, “UN rights expert hails UK for anti-racism action but raises serious concerns over Immigration Policy, Prevent programme and Brexit.” Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23074&LangID=E>.

43. To conclude, the Brexit process has revealed fundamental flaws in the UK migration system, which is in need of comprehensive reform to make it more efficient and more respectful of human rights. The aging population of the United Kingdom is heavily dependent on migrant workers. The current restrictions on employment quotas should be revised, in order to better take account of the needs of different sectors of the economy. The government should develop a long-term migration strategy. There is a need for flexibility in sectors where there is a lack of manpower, such as the agricultural sector, hospitality, IT, construction, the health sector, food processing and education. The Tier visas system distributed by the labour authorities does not currently provide a balanced solution to the problems of the labour market. The current division between high skilled and low skilled visas should be rethought, so as to better reflect the needs of different sectors. Investment in training should be provided for sectors where there is already a shortage of qualified specialists, like the health and education sectors. The education sector would gain much from reducing university fees, which would encourage young people to continue their education. The UK immigration system is considered among the harshest in the world. Brexit presents an opportunity to create a system that is fair and simple for both EU and non-EU citizens alike. Privileging skilled migrants over “unskilled,” migrants only serves to foster inequalities.

44. The family reunification system should also be revised to better protect the human rights of non-EU citizens wishing to join families in the UK after Brexit.

45. The United Kingdom has provided commendable aid to refugees, for example by financially supporting the International Migration Organisation. The United Kingdom should match its good deeds on the international plain with humane policies on a domestic level. A worthy starting point would be to adopt a policy of regularisation for undocumented migrants.⁸⁰

⁸⁰ According to the IOM, the number of undocumented migrants could be anywhere between 250 000 and 500 000.