



Labour Campaign for Human Rights

**Brexit and human rights project briefing No.1:
Protecting citizens' rights**

September 2017

Executive Summary

It has been over a year since the Brexit referendum, yet there remains no guarantee that the rights of EU nationals living in the UK and British citizens living in EU countries will be adequately protected. This is despite a shared rhetorical commitment from those on both sides of the Brexit negotiations to reach an urgent agreement, and consistent advice from across civil society to ringfence rights from the negotiations.

In March 2017, LCHR published a briefing on the rights of EU nationals in which we argued that “to put those people through the emotional turmoil of an uncertain future as a negotiating strategy, and to potentially cede control of the situation to other governments as a result, is indefensible as a course of action.”¹

In the subsequent months, both the UK government and the EU negotiating team have given a clearer indication of their positions. Yet there remains a sizeable gap between the two stances, and a solution remains to be found as the rights of millions appear to be stuck within the trade-offs of the negotiations.² This briefing paper considers how Labour can fight for a deal that will safeguard the rights of EU and UK nationals, whilst balancing the demands of the referendum with the lessons learnt from the recent general election.

Recommendations:

Getting the best deal for EU and UK nationals

LCHR recommends that:

- The rights of EU nationals who arrived in the UK prior to Britain leaving the EU should not be reduced in any way.
- EU citizens should continue to be protected under their existing EU treaty rights.
- UK citizens living in the EU should receive a similarly fair and beneficial reciprocal deal.
- There should be no “cut-off date” that is prior to the date that Britain officially leaves the EU.

Protecting rights after Brexit

LCHR recommends that:

- If continuing to accept CJEU jurisdiction is politically impossible, Labour should consider an EFTA style court-like body to arbitrate disputes about citizens’ rights after Brexit.
- Children born to EU nationals in the UK should be automatically granted UK citizenship, and will be entitled to their rights accordingly.
- The rights of EU nationals who have clear and substantial ties to the UK but who do not presently live here should be guaranteed as well. These include EU nationals who have recently lived in the UK for an extended period, have immediate family residing in the UK, or have property, employment, or social security in the UK. The same should be guaranteed for UK citizens who have clear ties to EU countries.

Opportunities for broader reform

LCHR recommends that:

- All migrants, including EU nationals, who have lived in the UK for 12 months or more should have the right to vote in all UK elections.

¹ Labour Campaign for Human Rights, Article 50 and EU nationals’ right to remain, March 2017, <https://lchrblog.files.wordpress.com/2014/02/right-to-remain-briefing-final.pdf>.

² Brexit: EU negotiator Barnier firm on citizens’ rights, 12th July 2017, <http://www.bbc.co.uk/news/world-europe-40579769>

- In order to avoid inequality between the rights of EU nationals and others, the spousal income requirement for family reunion for all UK citizens and migrants should be abolished.

Resolving Futures and Ending Distress

The immediate effect of the lack of clarity regarding citizens' rights is that it has caused prolonged uncertainty and significant distress amongst those whose futures remain unresolved. After over a year, the rights of the more than 3 million EU citizens living in the UK and the 1.2 million British citizens living in the EU remain undecided. Medical professionals have noted the strain of this protracted doubt on the wellbeing of EU citizens living in the UK.³ The ongoing anxiety of millions makes finding a suitable deal a matter of moral urgency.

It is worth remembering that the Vote Leave campaign pledged "there will be no change for EU citizens already lawfully resident in the UK ... [who] will be treated no less favourably than they are at present."⁴ ICM research on behalf of British Future found that 84% of the British public supported EU migrants' right to remain, including 77% of Leave voters.⁵ A number of increasingly prominent citizens' groups and campaigns, such as the 3million and British in Europe, have called for citizens' rights to be ringfenced from the negotiations.⁶ They have also criticised the government's willingness to see millions of individuals as one of the 'main cards' to be traded off in the negotiations.⁷

There is a broad consensus between Labour, the SNP, the Liberal Democrats and the Green Party that rights for EU nationals ought to be guaranteed in their entirety, and as a matter of urgency.⁸ Moreover, the cross-party House of Commons Committee for Exiting the EU argued in April 2017 that:

*"the status of EU nationals in the UK and UK nationals living elsewhere in the EU cannot be left unresolved until the end of the two-year period for negotiations ... it would be unconscionable for the more than four million people in these groups to find themselves living in a state of uncertainty about their futures until negotiations are complete"*⁹

Since the referendum, Labour has consistently called on the government to unilaterally guarantee the rights of EU citizens.¹⁰ The 2017 Labour manifesto pledged that a "Labour government will immediately guarantee existing rights for all EU nationals living in Britain and secure reciprocal rights for UK citizens who have chosen to make their lives in EU countries."¹¹ This is an area where Labour can draw on the common ground between itself and other parties to achieve a resolution.

³ Emmy van Deurzen, 'It's been one year since the Brexit vote – and the strain on people's mental health is becoming apparent', *The Independent*, 24th June 2017, <http://www.independent.co.uk/voices/brexit-uk-citizenship-eu-citizens-uncertainty-csi-negotiations-anxiety-a7806231.html>.

⁴ Statement by Michael Gove, Boris Johnson, Priti Patel, and Gisela Stuart, 'Restoring public trust in immigration policy - a points-based non-discriminatory immigration system', 1st June 2016, http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html.

⁵ British Future, Report of the Inquiry into securing the status of EEA+ nationals in the UK, December 2016, http://www.britishfuture.org/wp-content/uploads/2016/12/EUNationalsReport.Final_12.12.16.pdf.

⁶ British in Europe & the Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU: a Joint Response to the UK's Proposal', 1st July 2017, https://docs.wixstatic.com/ugd/0d3854_57a1cddbfc00429ebfaca186d9a5d43b.pdf.

⁷ EU nationals in UK 'one of our main cards' in Brexit deal - Liam Fox, 4th October 2016, <http://news.sky.com/story/eu-nationals-in-uk-one-of-our-main-cards-in-brexit-deal-liam-fox-10605533>.

⁸ Jean Lambert MEP, 'UK Government must end "awful uncertainty" on status of EU citizens', 30th November 2016, <https://www.greenparty.org.uk/news/2016/11/30/uk-government-must-end-awful-uncertainty-on-status-of-eu-citizens/>; Liberal Democrats, Lib Dems launch fight for EU citizens' right to stay in UK, 10th February 2017, https://www.libdems.org.uk/lib_dems_launch_fight_for_eu_citizens_right_to_stay_in_uk;

What is the SNP's position on EU citizens living in the UK and UK citizens living in other EU countries?, https://www.snp.org/pb_what_is_the_snp_s_position_on_eu_citizens_living_in_the_uk_and_uk_citizens_living_in_other_eu_countries.

⁹ House of Commons Exiting the European Union Committee, 'The Government's negotiating objectives: the White Paper, Third Report of Session 2016–17', 4th April 2017, <https://publications.parliament.uk/pa/cm201617/cmselect/cmexeu/1125/1125.pdf>.

¹⁰ Heather Stewart, 'Keir Starmer: UK should guarantee EU citizens' rights before talks begin', 30th November 2016, <https://www.theguardian.com/politics/2016/nov/30/keir-starmer-uk-guarantee-eu-citizens-rights-talks-brexit>.

¹¹ The Labour Party Manifesto 2017, 'For The Many, Not The Few', <http://www.labour.org.uk/page/-/Images/manifesto-2017/Labour%20Manifesto%202017.pdf>.

UK Government's Position

The clearest indication of the UK government's stance was enumerated in a June 2017 position paper. The government begins with the recognition that "EU citizens who came to the UK before the EU Referendum ... came on the basis that they would be able to settle permanently ... We recognise the need to honour that expectation. The choice made in the Referendum was about our arrangements going forward, not about unravelling previous commitments."¹²

Yet the proposal raises significant concerns that this stated aim will not be met. In summary, it offers:

- That all EU citizens who have resided in the UK for five years will be entitled to apply for "settled status". This effectively resembles Indefinite Leave to Remain, the residency status granted to non-EU citizens pursuant to the Immigration Act 1971.
- That the "cut-off date" will be a matter of negotiation, but will be between 29th March 2017 (when Article 50 was invoked) and the date the UK leaves the EU.
- EU citizens who arrived in the UK after the "cut-off date", but have not accrued five years' continuous residence, will be able to apply for temporary status to remain resident in the UK until they have accumulated five years residency.
- EU citizens who arrive after the "cut-off date" will be allowed to remain for a temporary period but will have to apply for permanent residence under the yet to be determined domestic UK immigration rules. The proposal states that "this group should have no expectation of guaranteed settled status". This includes students, who will be eligible to apply for permission to stay to complete their course only.
- There will be an automatic "grace period" of up to 2 years between the date the UK leaves the EU and the date that all EU citizens will need to possess a "residence document".¹³

EU Position

The UK's offer was met with disappointment from negotiators, campaigners and citizens alike, with chief EU negotiator Michel Barnier calling for "more ambition, clarity and guarantees."¹⁴ This consternation was largely due to the fundamental differences between the UK's offer, and the EU's previously stated desire to see its nationals maintain "the same level of protection as in [European] Union law."¹⁵ This was initially outlined in the EU's position paper outlining the "Essential Principles on Citizens' Rights", which demanded that:

- EU citizens be protected under the same provisions enumerated in their existing treaty rights. This includes the free movement of citizens (Article 21), equal opportunities for workers, as well as protections for the unemployed and self-employed (Article 45, Directive 2004/38), access to social security (Article 49) and equal treatment of students (Article 18).
- The rights of EU citizens, and the derived rights of their family members, should be protected in perpetuity (even in the cases of divorce, or death of the initial right holder).
- The Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizen's rights in the withdrawal agreement.¹⁶

The central difference is that whilst the EU demands that its citizens may live, in the words of one senior advisor, "as if Brexit never happened"¹⁷, the UK government's proposition to incorporate these protections into UK law would result in a de facto reduction in their current rights, including their right to

¹²The United Kingdom's Exit from the European Union, Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU, June 2017; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf.

¹³ Ibid.

¹⁴ Paul Dallison, Michel Barnier calls for 'more ambition' from UK on citizens' rights, 26th June 2017, <http://www.politico.eu/article/michel-barnier-calls-for-more-ambition-from-uk-on-citizens-rights/>.

¹⁵ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, 'Working Paper "Essential Principles on Citizens' Rights"', 24th May 2017, https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf.

¹⁶ Ibid.

¹⁷ Heather Stewart and Jennifer Rankin, 'Theresa May to set out proposals for EU citizens in UK at Brussels dinner', 21st June 2017, <https://www.theguardian.com/politics/2017/jun/21/theresa-may-to-set-out-proposals-for-eu-citizens-in-uk-at-brussels-dinner>.

move around the EU to work and to settle with family members who are based abroad.¹⁸ It is crucial that the UK government clearly distinguishes between future migration policy, and protecting the rights of those who settled in the UK or EU countries with the understanding that they would be able to build their lives without intrusion or alteration.¹⁹ As the House of Lords EU Justice sub-committee argued, “EU citizenship rights are indivisible ... Remove one, and the operation of others is affected.”²⁰ Reneging on this social contract by retroactively altering rights would be an unmandated and unjust betrayal, and would be in direct violation of the government’s stated negotiating aims.

This impasse is particularly challenging as it demonstrates the need to balance a strong protection of rights with the fact that the referendum vote signalled a desire for increased British sovereignty. Nearly half (49%) of leave voters said that the biggest single reason for wanting to leave the EU was “the principle that decisions about the UK should be taken in the UK”.²¹ But it is also worth remembering that polling data suggests that Labour’s election result was aided by the perception that it was “the best bet for those wanting to keep closer ties with our European neighbours”.²² Above all, there is a moral and social imperative to ensure that all those who arrived in the UK with the clear understanding that they would have the right to work, to return to their country of origin and to have their loved ones join them in the UK do not have these rights retroactively rescinded. The best way of guaranteeing the exact continuation of the rights of EU nationals is to ensure that their existing treaty rights are maintained.

- LCHR recommends that the rights of EU nationals who arrived in the UK prior to Britain leaving the EU should not be reduced in any way.
- LCHR recommends that EU citizens continue to be protected under their existing EU treaty rights.

Another benefit of this approach is that it is likely to elicit a better deal for the 1.2 million UK citizens living in EU countries. Despite this being the largest affected nationality, Jane Golding, Chair of British in Europe, was one of many campaigners who described the UK’s position paper as lacking detail and clarity for UK nationals living abroad.²³ The possibility of UK citizens having their rights determined by the varying domestic systems of disparate EU countries should be avoided at all costs, especially as 10 EU countries do not allow their citizens to have dual nationality.²⁴ Allowing EU citizens in the UK the exact continuation of their treaty rights would likely lead to a similarly beneficial and fair reciprocal deal for UK nationals.

- LCHR recommends that UK citizens living in the EU should receive a similarly fair and beneficial reciprocal deal.

It is also crucial that Labour opposes the government’s willingness to make the cut-off date for those being able to apply for settled status the date that Article 50 was triggered. This has gained support from a prominent British Future study which argued that a 29 March 2017 cut-off date could prevent the potential for increased migration flows.²⁵ Yet this suggestion risks the possibility that EU nationals arriving over a two-year period could retrospectively find themselves unable to settle in the UK through routes that were available to them upon their arrival, and could even be forced to leave. As a recent report by the New Europeans and Britain in Europe put it: “EU27 citizens are told their rights will be

¹⁸ Colin Yeo, ‘Analysis: what is the UK proposing for EU citizens in the UK and EU citizens in the EU?’, 27th June 2017, <https://www.freemovement.org.uk/analysis-what-is-the-uk-proposing-for-eu-citizens-in-the-uk-and-eu-citizens-in-the-eu/>.

¹⁹ JCWI briefing: A future settlement for EU treaty rights holders in the UK: <https://www.jcwi.org.uk/sites/jcwi/files/2017-01/A%20future%20settlement%20for%20EU%20treaty%20rights%20holders%20in%20the%20UK.pdf>; British in Europe & the3million, Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU: a Joint Response to the UK’s Proposal’, 1st July 2017: https://docs.wixstatic.com/ugd/0d3854_57a1cddbfc00429ebfaca186d9a5d43b.pdf_

²⁰ Seventh Report: Immigration Bill, House of Lords Constitution Committee, 21 December 2015, <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7506.htm>.

²¹ Lord Ashcroft, ‘How the United Kingdom voted on Thursday... and why’, 24th June 2016, <http://lordashcrofthpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

²² Ed Fieldhouse and Chris Prosser, The Brexit election? The 2017 General Election in ten charts, 1st August 2017, <http://www.manchester.ac.uk/discover/news/the-brexit-election/>.

²³ British in Europe Press Release, ‘Government must do much more to protect UK Citizens in Europe’, 27th June 2017, <http://www.bremaininspain.com/in-the-press/government-must-much-protect-uk-citizens-europe/>.

²⁴ Alan Travis, Brexit will cement disenfranchisement of millions of citizens, 27th June 2017, <https://www.theguardian.com/politics/2017/jun/27/brexit-will-cement-disenfranchisement-of-millions-of-citizens>.

²⁵ British Future, Report of the Inquiry into securing the status of EEA+ nationals in the UK, December 2016, http://www.britishfuture.org/wp-content/uploads/2016/12/EUNationalsReport.Final_12.12.16.pdf.

protected, but the harsh reality for thousands of them is that they continue to be treated as 'second class citizens' and negotiating capital in the Brexit negotiations."²⁶

- LCHR recommends there should be no "cut-off date" that is prior to the date that Britain officially leaves the EU.

It is also necessary to question the moral and practical virtue of the proposed "settled status" system. By making even those who have already obtained settled status in the UK re-apply, the government appears to cast doubt upon the legitimacy of established and valued members of British society. Despite proposed commitments to streamline applications, such as by ending the requirement to demonstrate healthcare insurance, the British immigration service is notoriously onerous and it is highly unrealistic that a new immigration regime will be ready by 2019.²⁷ Given the current rate of processing, it would take more than 150 years to clear the required 2.8 million applications for permanent residence.²⁸

Protecting Citizens' Rights After Brexit

Due to the fundamental differences between the British and EU negotiation positions, the rights of EU citizens appear unlikely to be settled as urgently as they ought to be. Perhaps the most significant point of conflict stems from Theresa May's red-line demand that EU courts will no longer have jurisdiction over anyone living in the UK, and that the rights of EU citizens will be incorporated into the framework of British law.²⁹ The EU has valid reasons for wanting its citizens to remain in the UK based on their EU treaty rights; if the rights of EU citizens were enshrined only in UK law and determined only by UK courts, they would be extremely vulnerable to unilateral future changes by the UK parliament.³⁰

A solution to this impasse may be provided by the model of international legal arbitration that presides over the relationship between the EU and the Economic Free Trade Association (Iceland, Norway and Lichtenstein). As the judges of the EFTA court are appointed by the common accord of all participating nations, a similar body governing Britain's withdrawal from the EU would likely assuage European fears that the rights of its current citizens will be at the sole mercy of future British legislators.³¹ Yet crucially, the EFTA court is comprised solely of judges nominated by the government of the three member countries, and unlike in the EU, there is no supranational panel scrutinising the nominees.³² Bearing in mind that a degree of sovereignty must inevitably be sacrificed in the legal arbitration of international agreements, an EFTA style judicial arrangement offers a realistic compromise whilst maintaining a high degree of British sovereignty.

- LCHR recommends that, if continuing to accept CJEU jurisdiction is politically impossible, Labour should consider an EFTA style court-like body to arbitrate disputes about citizens' rights after Brexit.

Future Generations and Right to Return

A problematic element of the EU's negotiating position is the demand that the derived rights of EU citizens perpetually extend to their family members under the conditions set out in Directive 2004/38.³³ This raises the conceivable possibility that the descendants of EU citizens living in the UK would have

²⁶ Dr Dimitrios Giannouloupoulos and Dr Ruvi Ziegler, 'The rights of EU27 citizens in the UK and UK citizens in the EU27: A response to Theresa May's "fair and serious" offer', 10th July 2017, <file:///C:/Users/Joe/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/XZKA1WQX/Paper%20on%20Citizens'%20Rights%20from%20New%20Europeans%20and%20BiE.pdf>.

²⁷ Joe Owen, Institute for Government, Implementing Brexit: Immigration, May 2017, https://www.instituteforgovernment.org.uk/sites/default/files/publications/Brexit_immigration_WEB.pdf.

²⁸ British Future, Report of the Inquiry into securing the status of EEA+ nationals in the UK, December 2016, http://www.britishtfuture.org/wp-content/uploads/2016/12/EUNationalsReport.Final_12.12.16.pdf.

²⁹ Heather Stewart, "PM's European court stance has 'hamstrung' Brexit negotiations", 30th June 2017, <https://www.theguardian.com/law/2017/jun/30/brexit-hamstrung-theresa-mays-absolutist-stance-european-court-exit>.

³⁰ Colin Yeo, 'Analysis: what is the UK proposing for EU citizens in the UK and EU citizens in the EU?', 27th June 2017, <https://www.freemovement.org.uk/analysis-what-is-the-uk-proposing-for-eu-citizens-in-the-uk-and-eu-citizens-in-the-eu/>.

³¹ <http://www.eftacourt.int/the-court/jurisdiction-organisation/introduction/>.

³² <http://www.eftacourt.int/the-court/jurisdiction-organisation/questions-and-answers/>.

³³ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, 'Working Paper "Essential Principles on Citizens' Rights"', 24th May 2017, https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf.

access to rights that are denied to the children and grandchildren of non-EU citizens, including free movement and spousal migration.³⁴

- LCHR recommends that children born to EU nationals in the UK should be automatically granted UK citizenship, and will be entitled to their rights accordingly.

It is also worrying that the government's proposals will prevent people who have lived in the UK in the past from returning to a country where they have significant ties. The case study of Monique Hawkins demonstrates how people with substantial ties to Britain can see their rights slip through the cracks in immigration policy. A Dutch national, Monique has lived in the UK for 24 years with her British husband and two children, yet had her application for permanent status rejected on the basis that she was unable to submit her passport as she regularly travelled to the Netherlands during the last months of her fathers' life.³⁵

- LCHR recommends that the rights of EU nationals who have clear and substantial ties to the UK but who do not presently live here should be guaranteed as well. These include EU nationals who have recently lived in the UK for an extended period, have immediate family residing in the UK, or have property, employment, or social security in the UK. The same should be guaranteed for UK citizens who have clear ties to EU countries.

Opportunity for Broader Reform

The UK's post-Brexit immigration system is yet to be determined and will require its own briefing paper, but it is important to note two areas of immigration reform that will be necessary to safeguard and enhance the rights of EU nationals.

The government's position paper made no mention of maintaining EU nationals' right to vote in local elections. Yet even if this right was protected, the fact that EU citizens and foreign nationals from outside the EU are not permitted to vote in general elections means that there would still be over 4 million long-term UK residents who have no power at the national ballot box. This is an unacceptable and easily solvable violation of a cornerstone of democracy and human rights.

- LCHR recommends that all migrants, including EU nationals, who have lived in the UK for 12 months or more should have the right to vote in all UK elections.

As mentioned previously, it is comparatively easier for EU citizens to bring non-EU family to live with them than UK residents or non EU/EEA citizens.³⁶ This is because of Theresa May's notoriously harsh minimum income requirement policy, which mandates that any British citizen with a spouse from outside the EU must earn an annual income of £18,600 or above (or £22,400 when including a child) before their partner can come to live with them.³⁷ This threshold contributes to Britain being ranked as the worst of 38 developed countries for family migration, and places a financial barrier on the right to a family life, excluding 41% of the British working population whilst disproportionately penalising women and children.³⁸ Scrapping or reducing the cap for everyone would not only mean that EU nationals do not suffer an unjust retroactive reduction in rights, but would also eradicate a pernicious form of wealth inequality which excludes many British citizens from their right to live with their loved ones.

³⁴ Jon Henley, How do citizens' rights affect Brexit negotiations?, 27th June 2017, <https://www.theguardian.com/politics/2017/jun/19/how-do-citizens-rights-affect-brexit-negotiations>.

³⁵ Lisa O'Carroll, 'Dutch woman with two British children told to leave UK after 24 years', The Guardian, 28th December 2016, <https://www.theguardian.com/politics/2016/dec/28/dutch-woman-with-two-british-children-told-to-leave-uk-after-24-years>.

³⁶ Labour Campaign for Human Rights, Restrictions on Family Migration – Spousal Visas, August 2017, <https://lchrblog.files.wordpress.com/2014/02/spousal-visa-briefing-1.pdf>.

³⁷ Cassie Werber and Christopher Groskopf, Which countries make it hardest for citizens to live with foreign spouses, 24th February 2017, <https://qz.com/917688/countries-are-cracking-down-on-immigration-by-making-it-hard-for-citizens-to-live-with-foreign-spouses/>.

³⁸ Migrant Integration Policy Index 2015, Family Reunion, <http://www.mipex.eu/family-reunion>; Madeline Sumption, Carlos Vargas-Silva, The Minimum Income Requirement for Non-EEA Family Members in the UK, 27th January 2016, http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Report-Minimum_Family_Income.pdf.

- LCHR recommends that, in order to avoid inequality between the rights of EU nationals and others, the spousal income requirement for family reunion for all UK citizens and migrants should be abolished.