



## Brexit and the Treatment of EU Citizens by the UK Home Office

Elspeth Guild

### Summary

While the British Government is seeking to negotiate a good deal for British citizens in the EU-27 and, on the basis of reciprocity, an acceptable deal for EU27 citizens in the UK, the Home Office is busy undermining good faith and trust in the process. Four specific actions by the Home Office reveal this lack of good faith:

- The Home Office has been sending out letters to EU citizens in the UK threatening them with detention and expulsion irrespective of their status.
- The Home Office continues to create mind-boggling administrative obstacles to prevent EU-27 nationals from applying for documents proving their immigration status in the UK.
- The Home Office has reinterpreted national law on citizenship to hinder EU-27 citizens from naturalising or registering as British citizens.
- The Home Office, with the blessing of the UK courts (so far at least), has determined that genuine relationships and marriages between EU-27 citizens and third-country nationals can nevertheless be classified as marriages or relationships of convenience and thus be treated under national law alone, which condones immediate expulsion with the possibility of an appeal only after the fact.

The status of EU citizens is among the most sensitive issues in the negotiations and a priority to be resolved before the trade discussions begin. It is essential for all parties to take great care to ensure that all the actors on their side of the table are singing from the same song sheet.

Elspeth Guild is Senior Research Fellow at CEPS, a Jean Monnet ad personam Professor of Law at Queen Mary University of London as well as at the Radboud University, Nijmegen the Netherlands. She is also a partner at the London based law firm Kingsley Napley.

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# Brexit and the Treatment of EU Citizens by the UK Home Office

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The EU and the UK resumed their third round of BREXIT negotiations on August 28<sup>th</sup>, with three issues still on the table that must be resolved before further items can be addressed: the method of calculating the divorce bill, the status of EU citizens in the UK and the EU after BREXIT and the UK-Irish border. This update focuses exclusively on the second issue, namely the fate of EU citizens living in the UK and British citizens living in the EU-27 after the UK leaves the EU. The European Commission is negotiating on behalf of the EU-27, with the European Parliament and the Council watching carefully as whatever deal is reached will have to be approved by them as well.

In June and July, the EU and the UK set out their agendas for EU (and by extension EEA and Swiss nationals) citizens living in the UK and British citizens living in the EU27. By the beginning of July, the Commission and the UK drew up a Note outlining the issues and how they plan to address them, including the areas of convergence and divergence. According to the Note, the following issues are still to be resolved:

- The cut-off date after which EU citizens no longer acquire rights in the UK; the Commission suggests the date of the UK's withdrawal; the UK has not clarified its position
- Current family members: slight divergences on what constitutes family members other than spouses, children, grandparents and grandchildren
- Family members who are resident will be independent rights holders according to the UK offer, but will be resident as family members for the EU; UK clarification is awaited
- Future family members: the EU proposes that the matter is one of preserving rights of EU citizens and so EU rules must continue; the UK proposes that national law would apply to EU citizens in the UK (a much more restrictive list of family members able to join a principal and much more onerous requirements)
- No agreement on the position of children born after BREXIT
- Future CJEU jurisprudence: the Commission insists that this must be taken into account; the UK is considering its position
- Flexibility: there is some disagreement on how much flexibility should be extended to EU citizens
- Administrative procedures: the EU proposes that documentation will continue to be declaratory and not mandatory after BREXIT; the UK insists that every EU citizen in the

UK will have to obtain nationally issued documents within two years of BREXIT (or risk being treated as an illegal immigrant)

- Criminality checks: the EU considers that these must not be carried out systematically; the UK insists the opposite in all cases
- Biometric information: at the moment EU citizens in the UK are the only non-citizens who do not have to provide their biometric data (fingerprints and numeric photos); this may change
- Fees: the EU wants free issuance or issuance at the same cost as that imposed on nationals for similar documents; the UK is in agreement, but this seems to imply that the UK would apply its fee structure for British citizens to third-country national family members –to whom fees of between GBP 993 and 3,250 are applied as opposed to GBP 60, which EU citizens currently pay for a residence certificate
- Fees: the EU wants free issuance or issuance at the same cost as that imposed on nationals for similar documents; the UK agrees to charge the same fees as those charged for similar documents but this seems to mean that the UK would apply its fee structure, which e.g. varies between GBP 993 and 3,250<sup>1</sup> for family members as opposed to GBP 60 which EU citizens currently pay
- Duration of the rights: both parties agree that these will be lifelong
- Benefits: there is agreement that all benefits covered in EU law will continue to be covered after BREXIT
- No agreement on professional qualifications
- No agreement on other economic rights

In the meantime, The UK Home Office has raised a series of issues (and own goals) that are likely to complicate the negotiations. For a number of years, the UK's Immigration Law Practitioners Association has been monitoring and discussing with the Home Office their treatment of EU citizens living in the UK. Since the BREXIT decision, the lines of communication between the officials dealing with applications for documents and advisors acting on behalf of EU citizens and their families seeking documents in the UK have come under severe strain.

## Expelling EU citizens from the UK

The Home Office policy of sending out letters notifying people that they are unlawfully present in the UK and must leave or face detention and expulsion is not new. Nor is the fact that such letters are frequently sent to people whose immigration status is lawful and indeed some letters have been sent to British citizens.<sup>2</sup> But the cultivation of this hostile environment is

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<sup>1</sup> See webpage on [“Family visas: apply, extend or switch”](#) on UK Government website.

<sup>2</sup> See [“Dutch woman with two British children told to leave UK after 24 years”](#), *The Guardian*, 28 December 2016; [“6 times the Home Office broke up British families in the name of immigration”](#), *New Statesman*, 6 February 2017; [“Mother faces deportation after 34 years of living in Britain”](#), *The Voice*, 12 July 2013.

official British policy, as explained on the UK's legal website Free Movement: "The 'hostile environment' for migrants is a package of measures designed to make life so difficult for individuals without permission to remain that they will not seek to enter the UK to begin with or if already present will leave voluntarily. It is inextricably linked to the net migration target; the hostile environment is intended to reduce inward migration and increase outward emigration."<sup>3</sup> According to the Home Office, all EU citizens in the UK will have to apply for and be granted UK residence permits within two years of BREXIT taking place for them to avoid the hostile environment.

### Administrative hurdles for EU citizens

Since the notification of BREXIT in March 2017, the Home Office has been discouraging EU citizens from applying for EU documents that would provide evidence of their right to live and work in the UK. First the Home Office told EU citizens that they do not need documents (although it states in its negotiating position that all EU citizens will have to obtain documents within two years of BREXIT taking place), and then officials stated that any documents issued will not be legally binding after BREXIT. The Home Office webpage states:

You don't need a registration certificate to confirm your residence status unless you're an extended family member of someone from the European Economic Area (EEA) or Switzerland... If you already have a registration certificate it won't be valid after the UK leaves the EU... A new scheme will be available for EU citizens and their families to apply to stay in the UK after it leaves the EU.

These are questionable legal statements given that the UK was obliged to transpose the EU Directive on citizens' rights (Directive 2004/38) into national law, which it did through the Immigration (European Economic Area) Regulations 2016. All residence documents issued to EU citizens in the UK are issued under this national legislation, and as long as that legislation is in place, the documents are valid. Perhaps the Home Office is suggesting that as soon as BREXIT takes place, it will repeal the national Regulations and who knows what will be put, if anything, in their place.

Clearly, the Home Office wishes to discourage EU citizens from applying for documents. In order to make it more difficult for them to do so, the GOV.UK information [page](#) dealing with registration certificate applications for EU citizens no longer includes a link to the hard copy of the relevant forms EEA(QP)(or form EEA(FM) for EEA national family members, nor to the relevant online application form. Until the third week of August, the Home Office had prominently displayed the link and forms on the same page on its website (see e.g. the Archived version of the same page from 19 May 2017), together with summary information about Qualified Persons and Family Members applications. The current wording of the page seems to imply that it is now simply not possible to apply for a registration certificate.

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<sup>3</sup> See webpage on "[The hostile environment: what is it and who does it affect?](#)" on the Free Movement website.

In short, if EU citizens are not willing to take the Home Office's advice and refrain from applying for a registration certificate, the Home Office has made it much more difficult for them to do so by hiding the forms. Of course, there is a strong legal argument that EU citizens are not required to use the application forms to apply for documents,<sup>4</sup> but these forms do make the application procedure easier for those who do not have legal advisers.

### The interface of EU law and British citizenship

Seven months before the BREXIT referendum in the UK on 23 June 2016, the Home Office changed its policy on British citizenship for EU citizens. Up until that time, the Home Office had accepted citizenship applications from any EU citizen who had lived and exercised EU rights in the UK for five years, as the time period for naturalisation as a British citizen is five years. The Home Office decided that it would no longer accept any application for British citizenship from an EU national who had not already received confirmation from the Home Office that he or she had permanent residence (acquired automatically under Directive 2004/38 on the completion of five years qualifying residence in a host member state). The result was that EU citizens who wanted to become naturalised UK citizens had to apply to the Home Office for permanent residence status (a process that often takes up to six months or longer) to obtain the document so that they could then send the document back to the Home Office with their naturalisation application.<sup>5</sup>

This change of policy led to a substantial increase in applications for permanent residence, which strained the human resources available at the Home Office. Moreover, as Barrett-Brown points out, the date that the Home Office stamps on a permanent residence certificate often bears no resemblance to the date of application and is determined by the Home Office on the basis of its own criteria. Thus, even before taking the latest steps in the negotiations on EU citizens and BREXIT, the Home Office had already created an administrative nightmare for itself with increased administrative burdens (and costs) for EU citizens seeking British citizenship. This change in policy was accompanied by another change affecting the status of EU national children born in the UK to EU-27 nationals, which is so complex and Byzantine that it defies simple explanation. Suffice it to say that the result of the policy change was to force parents of EU children born in the UK after 2000 to seek registration of their children as British citizens (at GBP 973 a pop) rather than allow the status to be acquired automatically.<sup>6</sup>

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<sup>4</sup> Article 9 of Directive 2004/38 states that member states must issue a residence certificate to EU citizens who stay more than three months but does not require the EU citizen to request a certificate on any particular form. Thus, member states cannot make issuance of a residence certificate dependent on a requirement (i.e. the use of a specific form), as this is an obligation that is not included in the Directive.

<sup>5</sup> Sophie Barrett-Brown, [“‘Detention’ letter error highlights Brexit problems at the Home Office”](#), *I-News Essential Daily Briefing*, 26 August 2017.

<sup>6</sup> See [“Briefing: A settlement for European children in the UK”](#), Coram Children's Legal Centre, Colchester and London.

### Third-country national family members of EU citizens in the UK – more hurdles

And as if the previous requirements were not onerous enough, the UK has been even more draconian in its treatment of third-country national family members of EU27 nationals living in the UK. Whereas under EU law, family members of any nationality are entitled to receive exactly the same treatment as their principal EU citizen principal, life is much different in the UK. EU citizens are entitled to work as soon as they arrive in a host member state. Their third-country national family members (as defined in Directive 2004/38) are also entitled to work from the first day of their arrival at least in principle, but not in the UK. Any employer who engages a third-country national family member of an EU-27 national will be subject to the UK's employer sanctions scheme, which imposes large fines and possible imprisonment on an employer who engages someone who has not submitted all of the numerous documents set out in the schedules to the employer sanctions scheme. But the schedule assumes that EU citizens' family members who want to work will already have succeeded in obtaining a residence card issued by the Home Office (which can take up to six months or more) and it does not allow for employers to accept other documentation confirming the status of such family members and their entitlement to work during the period when their application to the Home Office for a residence card is under consideration. Although these rules are inconsistent with EU free movement law, most employers are not willing to risk fines and imprisonment.

So the third-country national family member has to apply for a residence card, a process that regularly takes six or more months. In the meantime the Home Office provides the person in question with a letter confirming that he or she has applied for a card, but that letter does not qualify the third-country national to take up work. Nor does it protect an employer against possible fines and imprisonment.<sup>7</sup> The Home Office is fully aware of the problem but refuses to do anything to address it. A simple change to the wording of the letter of acknowledgement of the application for a residence card would suffice, but no one is budging on this one.

### Genuine marriages of convenience!

And over and beyond these problems for EU-27 citizens living in the UK, the Home Office has succeeded recently in convincing a national court (the High Court) that although a relationship or a marriage may be genuine under EU law, it may nevertheless be a marriage of convenience for EU law purposes and thus the third-country national spouse or partner is not protected from immediate expulsion.<sup>8</sup>

Let us review the facts. A Bolivian man entered the UK on someone else's passport and then overstayed for a few years. He met and settled in with an Italian woman and they made plans to marry. The marriage registrar notified the Home Office that there might be something

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<sup>7</sup> Correspondence between Penningtons Manches LLP and Free Movement Operational Policy Team, Immigration and Border Policy Directorate, Home Office of 5-8 June 2015 re: Regulation 7(3) family members on file with the author.

<sup>8</sup> *R (On the Application Of) v The Secretary of State for the Home Department* [2017] EWHC 1730 (Admin).

suspicious about the relationship, and the Home Office paid them a visit, detained the Bolivian and planned his expulsion. He and his Italian partner (and would-be wife) protested that as their relationship was genuine, the fact that the Bolivian did not have a legal status in the UK was irrelevant according to the constant jurisprudence of the Court of Justice of the European Union (CJEU). The Home Office and the court accepted that the relationship between the two was genuine. But as the Bolivian would receive an immigration benefit from the marriage (or relationship), it nevertheless constituted a marriage or relationship of convenience (presumably as it would simplify his life). The British court saw no need to refer the matter to the CJEU to ensure that its interpretation of EU law was consistent with the Court's interpretation of that law. This decision may well be appealed and the UK Supreme Court has recently also been obliged to review the situation of marriages of convenience.<sup>9</sup>

## Conclusions

The challenge of negotiating an equitable and satisfactory BREXIT deal for all parties is daunting. Already, with the clock running and the magnitude of the task becoming fully apparent, good will and good faith on all sides are critical to getting the right result. Among the issues that have dogged the negotiations from the beginning have been concerns about good faith on all sides. Recent outbursts by some politicians regarding transparency and goodwill have been most unhelpful in this regard. As the situation of EU citizens is among the most sensitive issues in the negotiations and a priority to be resolved before the trade discussions begin, it is essential for all parties to take great care to ensure that all the actors on their side of the table are singing from the same song sheet.

As examined in this Policy Insight, the UK team needs to more fully bring on board the Home Office in its actions regarding EU citizens in the UK to make sure that there is no unintended undermining of the UK's negotiating position by Home Office actions in preparation for the position of EU citizens after Brexit.

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<sup>9</sup> *Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent)* (Scotland)[2017] UKSC 54 (26 July 2017).



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