The Situation and Rights of EU Citizens in the UK

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For the European Parliament LIBE, EMPL & PETI Committees

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Dank Je Merci Beaucoup Vielen Dank Grazie Thank you Muchisimas Gracias Obrigado Tak Takk Tack ευχαριστώ Dziękuję bardzo Köszönöm Efcharisto etc..

….to you at the European Parliament for your amazing achievements
Achievements since May 2017

Life-long protection for the rights holder

Right to future family reunion incl:
- Dependent Relatives in the ascending line
- Children aged under 21
- Adult dependent children
- Pre-existing durable partners and spouses (under EU law not draconian national law!)

Specified date: time of the UK’s withdrawal (subject to likely extension during ‘transition period’)

Approach to applications
“Short, simple, user friendly application forms”

Evidential flexibility, possible discretion & “The host state will work with the applicants to help them prove their eligibility under the WA and to avoid any errors or omissions that may impact on the application decision” (p.8, Comparison, Dec 2017)

Exchange of permanent residence card free of charge & loss of permanent residence only after 5 (not 2) years

Dual Nationals covered by article 21 TFEU (CJEU judgment in Lounes (Citizenship of the Union : Border checks : Judgment) [2017] EUECJ C-165/16 (14 November 2017))
Who is Excluded?

**Family members of Surinder Singh nationals** (Case C-370/90)

- CJEU: Under EU law returning UK citizens should be treated as EU citizens (not a domestic matter) but are currently not covered by WA

**NO** rights to future family reunion under EU law (*subject to restrictive national law*)

*Exclusion affects:*
- family members currently resident in the UK (no status after Brexit) and
- family members outside the UK of British citizens who have returned or will be returning to the UK post-Brexit.

**Discrimination** on grounds of nationality of EU national
What are Derivative Rights?

Derive from article 20 & 21 of the Treaty on the Functioning of the European Union (TFEU) which preclude national measures which have the effect of depriving EU citizens of the genuine enjoyment of EU rights.

Who are covered?
Carers, relatives, legal guardians
(not defined or restricted by Directive 2004/38 – case-specific assessment)

When?
When EU national needs presence and care of the person

Why?
Because without them, rights holder would have to leave

What care?
EG: emotional, financial and other support/care
Can cover future care
Who is Excluded?

The following persons with EU Derivative Rights:

Family members of UK nationals resident in accordance with Article 20 TFEU such as:

- **Carers** of UK nationals and EU nationals (currently protected under Ruiz Zambrano C-370/90) and Ahmed (Amos; Zambrano; reg 15A(3) (c) 2006 EEA Regs) Pakistan (Rev 1) [2013] UKUT 89)

- **Non-EU citizens lawfully resident in accordance with Article 21 TFEU** (including Carers of EU nationals such as non-EU national parents who are not dependent on the rights holder but vice versa)

- **Children** of those Carers, etc (currently covered by Home Office policy)
…..Also not included:

- **Persons whose RIGHT OF RESIDENCE is derived from Article 7 of Charter of Fundamental Rights of the European Union**
  “Everyone has the right to respect for his or her private and family life, home and communications.”

- **OTHER FAMILY MEMBERS residing outside Host State**
  (as defined by Article 3(2) 2004/38/EC except pre-existing durable partners e.g. dependants or member of household)

- **CHILDREN post-education (Chen/Teixeira)**
  (Not independent right holders compared to UK’s position prior to DEC2017, not eligible for settlement after 5 years)

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**CJEU case law:**
If Applicant’s situation is “covered by European Union law”, then “it must [be] examined whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter.”
If not, the “covered by European Union law”, same examination must be undertaken in the light of Article 8(1) of the ECHR (Derici [2011] EUECJ C-256/11, para.70 & 72)
What will happen to those persons already in the UK whose status is not covered by the WA?

- **LEGAL UNCERTAINTY**
  - Need to “regularise” their status

- **EXPENSIVE APPLICATION**
  - To be made:
    - Under the Immigration Rules
    - Outside the Rules on the basis of right to family and private life (Article 8 ECHR)

- **APPLICATION FEE**
  - ILR application on basis of long residence £2,297
  - Total: 4 x HR + ILR = £6,269

- **LEAVE THE UK**
**Potential Immigration Rules**

**Long Residence**

Rule 276B: “at least 10 years continuous lawful residence in the United Kingdom” (resulting in ILR)

**FEE**

GBP 2,297.00

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**Private Life**

Rule 276ADE(1) on the basis that the applicant:

(iii) has lived continuously in the UK for at least 20 yrs (discounting any period of imprisonment*); or

(iv) is under 18 and has lived continuously in the UK for at least 7yrs* and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 yrs/above and under 25yrs and has spent at least half of their life living continuously in the UK*; or

(vi) subject to sub-paragraph (2), is aged 18yrs/above, has lived continuously in the UK for less than 20yrs* but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK.

Duration of grant: 30 months (2.5 years). Fee: £993. After 10yrs can apply for ILR/settlement.
Recommendations

1) All persons resident under EU law at time of their application (before end of extension period) to be treated as independent rights holders eligible for settlement after 5 years.

2) All persons entitled to be resident under EU law at time of their application (before end of extension period) to be entitled to enter UK as independent rights holders eligible for settlement after 5 years.

3) Additional category re future (family) reunion: all persons who would qualify for derivative rights in relation to rights holders post extension period.

EU law includes those whose EU rights derive from CJEU case law including in relation to article 20 and 21 TFEU, those with Derivative Rights and Family Members of Surinder Singh beneficiaries.
Treaty on the Functioning of the European Union (TFEU)

Article 20 TFEU

“1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.”

Article 21 TFEU:

“1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.”