

"ON 23 JUNE I BECAME AN ALIEN"
BREXIT: THE VOICE OF EU CITIZENS

EUROPEAN PARLIAMENT HEARING 11 MAY 2017

BRIEFING

A MORAL AND LEGAL CASE FOR UNILATERAL GUARANTEES



May 2017

About New Europeans:

New Europeans was founded in 2013 as a citizen-led association that promotes the rights of European Union citizens living and working in the UK and UK citizens living and working in another EU member state. New Europeans is a platform which gives European citizens a voice in local communities, at regional and national level and in the continuing Europe-wide debate about the challenges we face in Europe.

We believe that European co-operation and integration is a fact of life in a global economy and the only way for Europe to maintain its influence in the world and meet the needs of its citizens.

New Europeans does not take a position about the form that this cooperation and integration should take but rather seek to provide opportunities for citizens to engage directly in the ongoing public debate about the future construction of Europe.

New Europeans work in partnership with a number of leading community based organisations in the UK, EU NGOs and worldwide groups representing UK overseas citizens. Through their programmes, they facilitate and host a series of events UK-wide to foster dialogue. They produce guides to empower EU citizens to exercise and assert their EU citizens' rights and to promote successful integration. They benefit from a strong base of supporters of over 50,000.

They host the secretariat of the All-Party Parliamentary Group (APPG) on Freedom of Movement¹, which aims to promote informed parliamentary and public debate about the value of free movement to British society and the UK economy and to conduct research into the impact of free movement on individuals and their communities and related issues.

Through workshops, seminars and other citizen focused events, New Europeans have engaged with non British EU citizens across all parts of the United Kingdom and collected evidence of concerns that affect them most.

New Europeans sought the views of non British EU citizens in the UK and UK citizens in the EU for a period of 15 months (before the EU Referendum, immediately after the EU Referendum, in January 2017 and after the triggering of Article 50).

This briefing draws from our analysis of the above and 2 surveys attracting sizeable samples of 3,097 and 1,435 citizens respectively. It is submitted as evidence in the European Parliament Committee Hearing on EU citizens to be held on 11 May 2017. Our primary objective is to draw attention to the particularly devastating impact the Referendum vote/ the current state of uncertainty is having on non UK EU citizens and UK citizens who currently reside in the EU and for the Committees to examine any potential breach of Human rights for these Union citizens.

The research is conducted and presented by Samia Badani, Director of Best Brexit 4 You programme. The legal arguments are presented by Dr. Reuven (Ruvi) Ziegler, Associate Professor in International Refugee Law at the School of Law, University of Reading, and adviser for New Europeans; and Dr Dimitrios Giannouloupoulos, Senior Lecturer in Law and College Associate Dean at Brunel University London, and the founder of the 'Britain in Europe' think tank

1. The Brexit vote : impact on non-UK EU citizens

a) Community Relations

According to a UK Home Office report, there was an increase of 41% of 'post-Brexit' hate crimes reported to the police in July 2016 compared to the same month the year before (a 58% increase the week following the Brexit vote according to the National Police Chiefs' Council).

Recently published statistics from 30 of England's police forces indicate an increase of 89% of hate crime reported in school the month before the EU referendum.

Concerns have been raised by UK charities but also the Equality and Human Rights Commission about a possible backlash once Article 50 is triggered. Our evidence indicates that a majority of non-UK EU citizens have noticed changes around them, in their workplace or in their community.

Many non-UK EU citizens tell us they are fearful or lack the confidence to come forward as we have seen through our work in different UK cities. Little was done nationally to strengthen community relations and give EU citizens reassurances.

Our survey shows that 27% of non-UK EU citizens feel that people are less friendly since the EU Referendum and that 1 out of 4 non-UK EU citizens has been the victim of a hate crime/incident or know someone who has been the victim of a hate crime/incident by virtue of being an EU citizen.

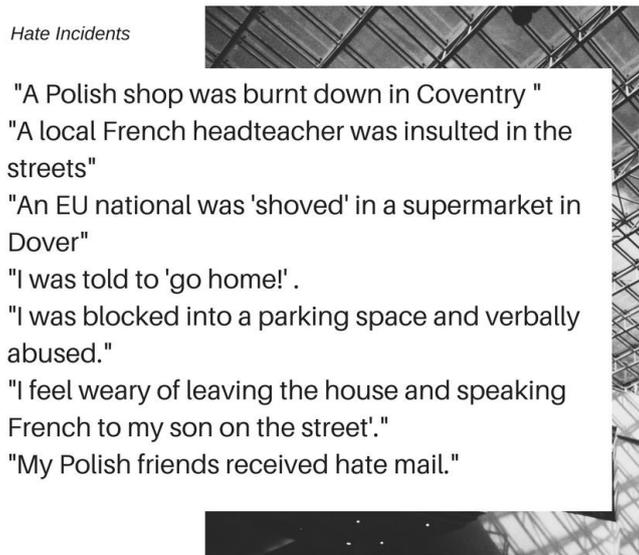
A German national told us that ‘I have withdrawn dramatically from social life, fearing I might come across Brexiters. I have left all the social clubs I was a member of and only socialise with friends and colleagues (luckily work in a very pro EU team) now.’”

A French national reported that ‘I have myself been insulted and told to go home because I am an EU citizen and I know of others who have also been insulted. The climate has changed and people are less friendly. I was even subjected to a racist comment by a nurse while in hospital - luckily the reaction of the other nurses there counteracted that.’”

44.5% on non-UK EU citizens no longer feel welcome in the UK

Below is a sample illustration of the experiences that some non-UK EU citizens have shared with New Europeans

Hate Incidents



"A Polish shop was burnt down in Coventry "

"A local French headteacher was insulted in the streets"

"An EU national was 'shoved' in a supermarket in Dover"

"I was told to 'go home!' .

"I was blocked into a parking space and verbally abused."

"I feel weary of leaving the house and speaking French to my son on the street!."

"My Polish friends received hate mail."

The UK has, on a number of occasions, recognised the contributions made by non-UK EU citizens but little has been done nationally to attempt to strengthen community cohesion following the EU Referendum.

We have however seen some positive initiatives on a local or regional level. Public statements were made in London and Scotland that non-UK EU citizens are welcome. In Oxford, the City Council set up the Oxford European Association, an initiative aimed at giving a voice to the non-British Europeans in Oxford. Councillor John Tanner declared that “The Council is determined that Oxford should remain an international city and will continue to thrive with non-British Europeans welcome to live, work, study and visit the city.”

In the London borough of Brent, Councillor Mohammed Butt moved immediately to reassure non-UK EU citizens and stated that “my message to our neighbours and co-workers who are EU citizens and also to investors and employers in West London is not to panic. Nothing will change instantly overnight.”

New Europeans continue to work with Local Authorities and UK regions to build similar forum engaging with non-UK EU citizens.

b) A heightened state of anxiety

Non-UK EU citizens report that they still feel as worried as they were on 24 June 2016. They have described an array of emotions ranging from devastation, a sense of betrayal, depression (over 7%) and even equating the Brexit vote to bereavement.

One non-UK EU citizen told us that on 24th June 2016, she felt ‘like an alien’. Although, whilst the UK remains a member the EU, non-UK EU citizens continue to enjoy their Treaty rights, many reported that they feel they are being treated differently, for example at work.

They are not subject to immigration control and for the first time on 24 June 2016 their right to stay in a country they call home was under threat. This has caused widespread anxiety and a majority of non-UK EU citizens feel like their life plans are on hold or that they are being held hostage, or that they will be told to leave as illustrated in the case study below

CASE STUDY

When the referendum result was announced, I felt the country's majority had 'voted me out'. This may sound dramatic, emotional, self-centred even. But in truth, I was shocked that after having contributed positively to this country for over a decade, my future was suddenly uncertain. Would I need to leave the country? ...my family, my friends...my job? Sadly, any reassurance by my husband and friends was never confirmed by any official source.

I desperately looked into applying for British naturalisation, for which I qualify on several levels (my mother was British, my husband is British and I've been in the country for many years). Nonetheless I grew even more fearful that I might be rejected in the process and told to leave, as many other EU-Nationals have experienced. Normally, I am not a fearful person, I have always been positive in my outlook and confident that I am an asset to any country or company or community. So to feel thoroughly unsupported by the hardline rhetoric of both the nation I live in and the nation I originate from, is a form of unsettling trauma I had never imagined any citizen of this continent would have to endure again post-WWII. I sincerely hope I don't have to uproot my children (7&4) and migrate to another country that welcomes my professional skills, communal social activities and financial investment more warmly and vocally. However, I don't feel I can subject my family to another two years of waiting without any certainty of our future. I feel like I don't have any say as

to what happens now (as I can't vote in the general election despite my whole life being here). Surely, having choices is a human right, so I welcome the New Europeans' initiative to give EU-nationals a voice in the UK.

A German national

One non-UK EU citizens told us *'From 24th June 2016 I have been unable to sleep and in a permanent state of depression.'*

Some said *"The sheer uncertainty of my future causes me stress and sleepless nights"*

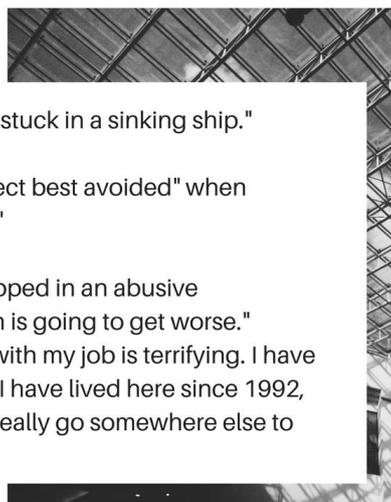
"The uncertainty is really getting to me."

"I'm feeling very anxious about it and it's beginning to affect my health (physically and mentally)."

"The insecurity of our lives is very difficult to come to terms with."

Prof Emmy van Deurzen, Principal of the New School of Psychotherapy and Counselling, London has raised concerns about the impact the current level of uncertainty is having on the mental health of non –UK EU citizens.

She commented that 'there is increasing concern amongst psychotherapists in the UK over the deteriorating mental health of numerous EU citizens who have been under considerable emotional pressure for the past year. As their previous safety and continuity of residency are at risk and they experience being treated as second class citizens, their levels of stress have increased dramatically. The UK government and the EU have a moral and legal duty to address this alarming and inequitable situation forthwith.'



"It feels like being stuck in a sinking ship."

"I feel like an "Object best avoided" when applying for work"

"I feel like I am trapped in an abusive relationship which is going to get worse."

"The uncertainty with my job is terrifying. I have a home here, and I have lived here since 1992, therefore cannot really go somewhere else to live."

Living in this status of uncertainty is very worrying and stressful.

It affects a little more people than the person with an EU passport; it affects families, friends, workplaces, communities.

Not knowing what our future will be means we live from one day to the next always fearing the knock on the door, the ring of the telephone or the letters through the door”
A German national

I felt scared, betrayed, desperate, bereaved, heartbroken, incredulous, shaken, sold out. I cried the whole day on Friday 24th. I was unable to work, cook or do anything. On a personal level the grief was overwhelming and had an immediate devastating impact on my mental health. I am recovering from a severe depression that took me to suicidal thoughts “
A Finnish national

c) *Impact on personal and family life*

Thousands of non-UK EU citizens have expressed their concerns and describe how the Brexit vote affects them in their private and family life. Shortly after the Referendum results were announced, non-UK EU citizens mobilised and many online groups/forums were formed with the support of New Europeans.

Their plight was widely portrayed in British and European media. New Europeans received a considerable amount of testimonies from non-UK EU citizens and they will be made available shortly. We selected a few quotes/examples from non-UK EU citizens in this section to give them a voice. They very much mirror what we have discovered through our research.

“I just got married and should be excited but knowing I will need to leave my UK husband, friends and family in a few years is making me cry.”
A Belgian national.

” I am married to a British national with a British toddler and a baby on the way. My husband’s job is tied to London and he could not do his highly qualified profession anywhere else. He would have to re-train and learn a new language-not feasible at our age.”
A Swedish national

“I feel paralysed to make changes and take decisions about my future because I don’t know what will happen.”
A Spanish national

“I’m not just concerned about my own long term status. My parents retired to Scotland and none of us knew there was any requirement for them to take out private health insurance, so under current rules, they won't qualify for a permanent residence card. Yet They are too elderly and infirm to relocate again, and they've got nothing to go back to live in Germany.”
A German national

“Thinking of moving elsewhere but I have a life here and a family ... I am stuck really in a place that used to be my home but now the veil has fallen away and I am left here to live in the ruins of what was a good life.”

An Estonian national d)

d) Applying for permanent residence

Our research shows that in January 2017, over 55% of non-UK EU citizens said that, should their right to stay not be guaranteed now, they would apply for permanent residency (PR) and 46.93% would apply for British citizenship. This is likely to place a considerable burden on the UK Home Office resources. We are concerned that official figures from the UK Home office reveal a 28% rejection rate of requests for PR made in the last two quarters of 2016.

We recall the difficulties experienced by some non-UK EU citizens in accessing social security benefits in the UK notably in the UK’s application of a stringent ‘right to reside’ test. Many were rejected despite having acquired permanent residency. The UK has since hardened its stance and impose a new earnings requirement to qualify as ‘a worker’ and a genuine ‘prospect of work test limiting access to unemployment benefits (again there are some indications that the latter test is applying to non-UK EU citizens with permanent residency).

Many non-UK EU citizens would receive rejection letters stating that they were ‘persons from abroad’ not legally resident in the UK. The situation, however, did improve over time. Given the current levels of uncertainty, it is pivotal that the UK Home office ensures that the right decisions are made at an early stage of the process. The situation also requires a pragmatic and reasonable approach including placing the onus of on the UK Home office to provide/verify information when it is no longer available to applicants. This is certainly the case with the Department for Works and Pensions (DWP) who would access other government records including tax records to establish the work history of applicants and/or their family members (including in cases where partners are estranged). There are situations where applicants do not have access to such information, such as in domestic violence cases, and it would be unreasonable to require such applicants to find the evidence (while it is available to the UK Home office).

We asked non-UK EU citizens to tell us the main reasons for the rejection of their application: they are in lack of CSI, gaps in periods of employment followed by a failure to provide documents. 39% of non-UK EU citizens felt the process sin itself was time consuming followed by 21% who found it costly.

“I have attempted to fill in the PR form but gave up as I find it difficult to collect evidence for 27 years of residency, I mean for every one of those years. I also fall foul of the health insurance rule and my earnings are minimal. In other words, I fear I would not get PR status.”

“I was rejected because I had not understood that I could pick any period of time, so I picked the last 5 years. This happened before brexit and little info was available.”

“In spite of living in the UK for 23 years, I am not able to apply for PR because, after having consulted with three different immigration lawyers, I have to accept that - surreally - as a self-sufficient person, I would have needed to have Private Health Insurance (CSI): a technicality of which I, and many many other people in my situation, had never heard of. All this in spite of having paid taxes here since 2004 and being married to a British citizen.”

The PR process

"I have not applied for PR because I hear it is impossibly complex 85 page form and I don't have all the records of when I have been out of the UK on holiday.. "

"Frustrating, time consuming, not clear and unfair for those in England before 2000 ."

"Some questions seem to be focused on last 5 years but others take into account your whole stay in the UK and at times it is not clear whether it refers to either or both."

Some have derivative rights but find it difficult to provide or understand the type of evidence they need in support of their application (parallel with DWP/LA assessment of right to reside cases and years to improve). It is anticipated that non-UK EU citizens will encounter similar difficulties (some have already reported being refused while eligible). There are limited communications between applicants and the Home Office limiting opportunities to resolve any issues/remedy to any deficiency at an early stage. Often the Home Office will reject applicants unless they provide evidence they had a comprehensive health insurance (CSI). The EU Commission stated that:

“Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law.²”

There are no clear opportunities to remedy a defective application and currently limited sources of free legal advice services for non-UK EU citizens and the Legal Aid Agency does not usually fund this type of cases.

Permanent residency is acquired after 5 years of continuous legal residence. There are no requirements for this status to be applied for.

We recommend that:

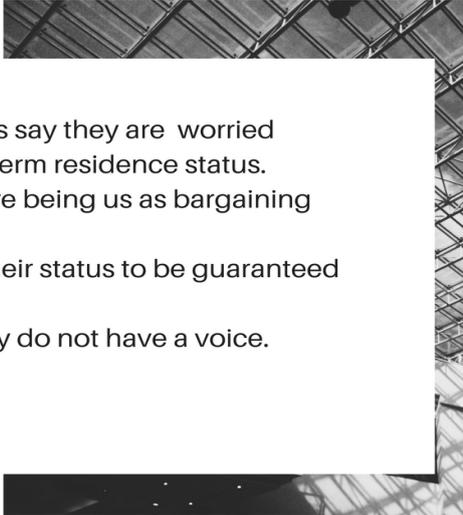
² http://europa.eu/rapid/press-release_IP-12-417_en.htm?locale=en

- Clarity is sought without delay on whether entitlement to NHS satisfies the Comprehensive Sickness Insurance requirement
- The UK should allow defective claims to be remedied to
- The onus should be placed on the UK to access governmental records to verify periods of employment (an unemployment).

d) Engaging with non-UK EU citizens

- in the UK

As seen in the illustration below, non-UK EU citizens do not feel they have a voice although they stand to lose fundamental rights when the UK leaves the EU. Our research shows that non-UK EU citizens expect both the UK and EU institutions to engage meaningfully with them by ensuring that their views are well represented by a wide range of organisations representing them.

- 
- 71% of EU citizens say they are worried about their long-term residence status.
 - 83.3% feel they are being used as bargaining chips
 - 91% would like their status to be guaranteed now
 - 93.2% do feel they do not have a voice.

New Europeans and a coalition of 14 leading UK based migrant organisations³ have called on the UK government to grant formal consultation rights to organisations representing EU citizens and migrant rights groups throughout the Brexit process.

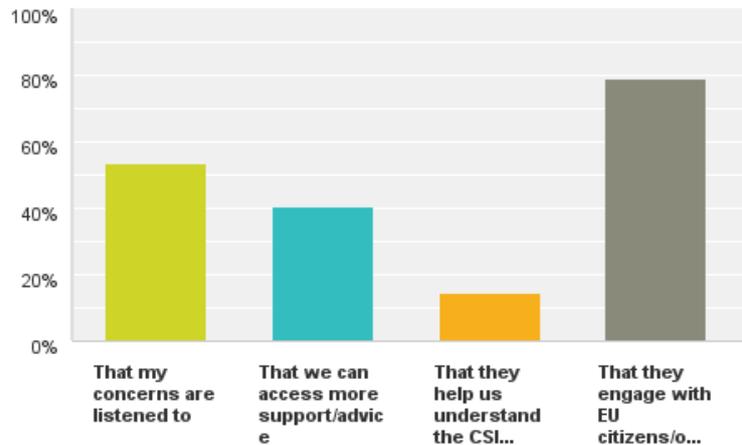
‘I am worried that the UK government will not even respect the rights of EU permanent residents, even those of us married to Britons and parents of British children. I am very anxious about this situation and planning to apply for citizenship as soon as possible. This anxiety has mostly been caused by the UK government refusing to guarantee our rights after the referendum.’

A Spanish national

³ Migrant Voice, Migrants Rights Network, Migrants Resource Centre, Migrants Organise, Runnymede Trust, ILPA, Refugee Action, Detention Action, Race on the Agenda, Hope not Hate, City of Sanctuary, Amnesty UK, Right to Remain, Refugee Women’s Association, Joint Council for the Welfare of Immigrants, UK Lesbian and Gay Immigration Group, Refugee & Migrant Centre

- in the EU

An overwhelming majority of non-UK EU citizens expect engagement with EU institutions and that their concerns are listened to, as seen below



2. The Brexit vote : impact on UK citizens in the EU

a) A heightened state of anxiety

We find that UK citizens who live in the EU expressed similar feelings of anxiety and anguish as non-UK EU citizens. The mere fact that UK citizens who have lived abroad for 15 years or more lose their right to vote in UK Parliamentary elections does little to assure them that their that the UK government will adequately represent their interests.

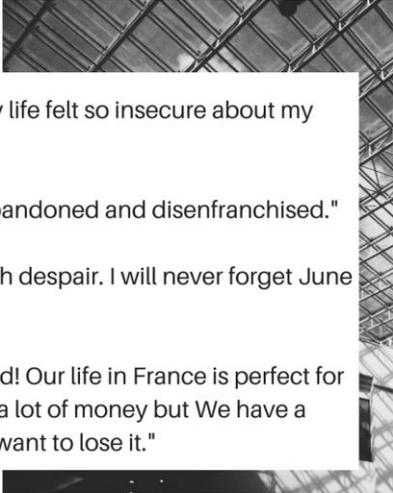
A UK national who lives abroad reported the comments made by a British MP when challenged over the 15 year rule as follows:

“You won’t be voting for us or anyone else in the UK again because you have moved abroad and decided to pay your taxes abroad. The referendum was a decision rightly taken by British citizens who live and pay their taxes in this country and I am not going to overturn it just because it might cause a small amount of inconvenience to a few people who long ago left our shores taking their money with them”.

A majority of UK citizens who live in the EU report that they find it difficult to plan ahead with some feeling quite distressed by the uncertainty.

“I am in a state of constant turmoil because the future is so unclear”

“My life feels up in the air and out of my hands. It's scary! I worry, cry & wake up in the night panicking - but there is nothing I can do but leave the decisions to politicians I don't trust.”



"I have never in my life felt so insecure about my future status."

"I feel shocked, abandoned and disenfranchised."

"I've never felt such despair. I will never forget June 24th."

"I felt totally terrified! Our life in France is perfect for us. We don't have a lot of money but We have a good life. I do not want to lose it."

b) Impact on personal and family life

As in 1 c), in this section, we submit some of the testimonies we have received:

"We are in limbo. As long as May's government insists on using expats (both British and EU) as bargaining chips our position is unclear. We are applying for French nationality and will hopefully obtain it before Brexit happens. We are strongly considering giving up our British nationality after that."

I am happy where I am and have a very successful business which has taken me a long time to get where it is. All my assets are in France and my children are educated here. If forced back to the UK we would have nothing as we probably could not sell our house & business before the move back.

We never applied for the official 'residencia' status in Spain and now I worry every day that the paperwork mess I have landed myself in will "come home to roost" and we will be forced, against our will, back to the UK. I am about to apply for residency to make positive steps to put this right but, as I cannot prove five years of residency, it is a massive cause for concern. Admittedly, this is my own fault but I never thought this situation would happen - not before June 23.

I am concerned about the status of my 7 year old British daughter who was born in France. If I die before she is 13 she would quite possibly lose her right to remain in France and unless my wife achieves French nationality they could possibly be forced to leave France.

"France is my home now, home owner, business owner my 8 year old son born here, schooled here and bilingual."

I am worried about my disabled daughter who I care for here in France. She is a U.K. Citizen and continues to receive benefits and pay NI in the U.K. What happens to her future

c) Concerns over residency

A majority of UK nationals in the EU are considering applying for citizenship in their country of residence. The rules on applying for permanent residency do vary within the EU27 and it may be worth conducting further research on the subject. We see early indications that, as with non-UK EU citizens, UK citizens face bureaucratic hurdles with some reports at times of discrimination.

“I am unable to take any steps, much as I would like to, because I work in Spain, where dual citizenship is not possible for British people. I have been told by the authorities that permanent residency is automatic while Britain is still in the EU, so I cannot apply for a separate document which says I have permanent residency. This seems to be different in the UK, where people actually have to apply for permanent residency.”

“I am considering applying for citizenship in Spain. My partner is Spanish and it is doubtful he would be welcome in UK.”

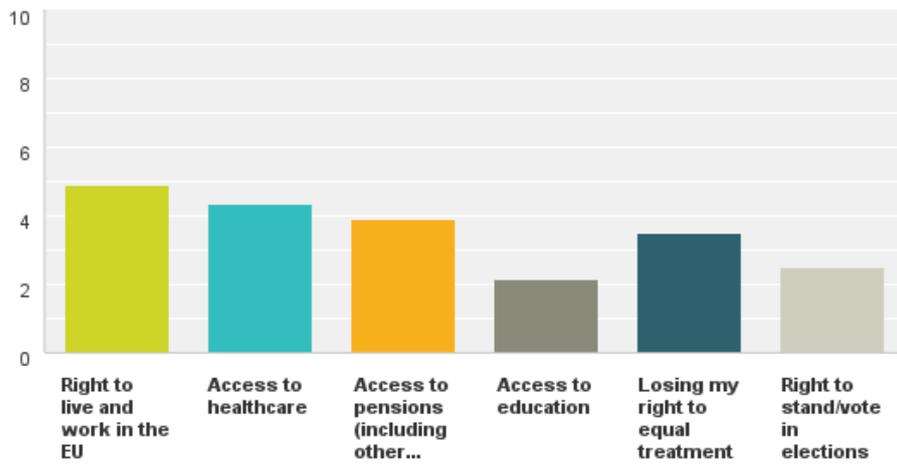
“I haven't been living in Germany long enough (five years) to get permanent residence under EU rules. I am (desperately) hoping that the triggering of article 50 will be delayed by a further six months so that I will have been living in Germany for more than five years by the time the two-year period is up, enabling me to obtain permanent residency.”

“In France the prefectures have not been too helpful applying for permanent residency as whilst still in the EU they say we don't need it. Some prefectures are slowly issuing the carte de sejour though the life of the carte depends on the prefecture.

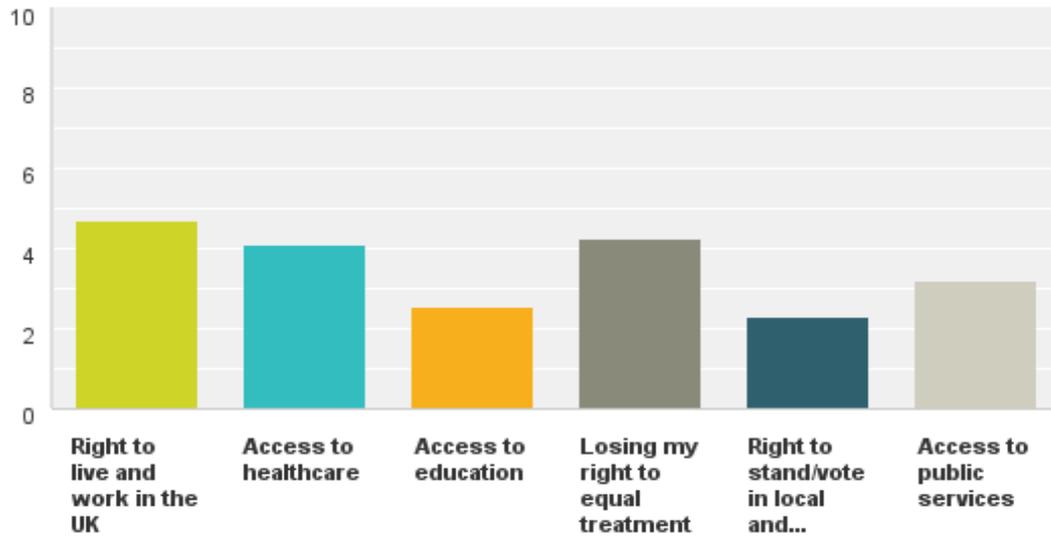
For Citizenship the rendez-vous is approx an 18mths wait at the moment and only those speaking excellent French seem to be applying as the interview in French along with a history test is very very hard. Every family member has to apply individually and some family members are getting through and some not, what happens then??? “

“British applicants for German citizenship are being fast-tracked. This is not the case in Denmark. I sent in my application in July and have been told that I will have to wait approximately 18 months before I get a decision.”

Top 3 concerns for non-UK EU citizens and UK citizens in the EU



UK citizens in the EU



EU citizens in the UK

We find similar levels of anxiety for non-UK EU citizens and UK citizens in the EU and an adverse impact on their personal and family life.

Both groups do not want to be used as bargaining chips. They both feel they do not have a voice nor are they adequately engaged with. Although it is understood that certain rights post-Brexit are by nature subject to reciprocity and negotiations, there is little argument against the UK or the EU to give unilateral guarantees to citizens now.

3. The UK's position on citizens rights and reciprocity

Robert Goodwill MP, the Minister of State for Immigration at the Home Office, said: “The Government have been clear that they want to protect the status of EU nationals resident in the UK. As the Prime Minister has made clear, the only circumstances in which that would not be possible were if British citizens’ rights in other EU Member States are not protected in return. The Government have provided repeat assurances on this point, and their position has not changed ... The Government are therefore unable to set out a definitive position now: that must be done following an agreement with the EU.”

The cross-party Exiting the EU Committee recommended that the UK government should guarantee EU citizens' rights, regardless of whether UK citizens living in the EU are given a comparable assurance.

Committee chairman Hillary Benn said: “EU citizens who have come to live and work here have contributed enormously to the economic and cultural life of the UK. They have worked hard, paid their taxes, integrated, raised families and put down roots.”

Lord Howard recommended that the UK should “make it clear now—they should already have made it clear—that those EU citizens who are currently living in this country will be allowed to stay here, to carry on working here, and to carry on studying here.” He did not think it was necessary to “wait for any question of reciprocity”.

In July 2016, New Europeans called for the UK to give non-UK EU nationals a unilateral guarantee to stay. It has since once been joined by a number of leading migrant organisations. New Europeans organised the mass lobby of the UK parliament with other partners and was instrumental in tabling amendments to this effect. Our ‘Right 2 Stay’ campaign was voted Campaign of the year by the public. There is immense support in the UK for the Prime Minister to give such guarantees now.

In a letter to a non-UK EU citizen, David Jones, Minister of State at the Department Exiting the EU stated that the EU citizens ‘contact your equivalent elected representative in your home state and suggest that this is a matter that should be capable of early resolution with goodwill’⁴. He further stated that the UK’s position on reciprocity is “reasonable”.

Reciprocity: The UK government case (by Dr Ruvi Ziegler)

“There are substantive difficulties with the government’s insistence on reciprocity

First, the claim that the government is protecting UK citizens residing in the EU-27 by refusing to unilaterally and unconditionally give non-UK EU citizens the reassurance they seek is fanciful. Organisations representing UK citizens resident in Germany, Gibraltar, France, Spain, Finland, and Belgium signed a joint letter to the PM urging her to unilaterally offer guarantees to non-UK EU citizens. There is no evidence of hostility against UK citizens in the EU-27, and assigning blame to EU institutions for supposedly refusing to reach a reciprocal agreement before the UK serves its Article 50 notification is a red herring.

Second, the government’s insistence on reciprocity logically implies, however that, if negotiations fail, rights of non-UK EU citizens *may be curtailed*. This is why Liam Fox, Secretary of State for International Trade, referred to "EU nationals" as "one of our main cards" in the negotiations. In 2017, such a ‘bargaining chips’ approach is morally indefensible (see also the JCHR Report on ‘[The Human Rights Implications of Brexit](#)’ [50] and the Lords EU Committee Report on ‘[Brexit: Acquired Rights](#)’ [147]).

Third, whereas it is within the unilateral power of Westminster to secure the status and rights of non-UK EU citizens irrespective of the withdrawal agreement, reciprocity *ipso facto* requires agreement, and it is far from certain that it will be reached at an early stage of the negotiations.

4. EU citizens’ rights and the European Convention on Human Rights (by Dr Dimitrios Giannouloupoulos)

EU citizens’ rights and the European Convention on Human Rights

NB: *This section is submitted by the [‘Britain in Europe’ \(BiE\) think tank](#) as a contribution to ‘New Europeans’ briefing on ‘A Case for Unilateral Guarantees’, to be submitted to the European Parliament hearing of May 11. It was drafted by BiE director, [Dr Dimitrios Giannouloupoulos](#), and incorporates expert commentary provided in recent BiE events, most notably a roundtable event at the British Academy on [Brexit and Human Rights](#) (23 February 2017) addressing the question of ECHR and the rights of EU citizens in the UK. The author would like to thank BiE experts Dr Merris Amos and Dr Ed Bates for commenting upon the brief.*

The legal argument for unilateral recognition of the rights of UK citizens in the EU (and those of non-UK EU citizens in the UK) has strong roots in fundamental rights enshrined in the European Convention on Human Rights (ECHR), most notably the right to private and family life protected under Article 8 ECHR.

It is therefore indefensible for the EU to purport to prioritise the protection of citizens' fundamental rights, and yet to entertain action – i.e. treating EU citizens' rights as part of the negotiation – that accommodates, at least in theory, the possibility of the violation of such rights.

By treating EU citizens' rights as part of the negotiations, the EU seems to accept in principle that it might not recognise the rights of UK citizens in the EU (if the UK fails to recognise the rights of non-UK EU citizens in the UK or if it decides to leave the Union without a deal). However, doing so could result in direct breaches of the ECHR by all EU-27 member states that would not recognise the rights of UK nationals living in these member states.

The EU institutions themselves are not directly bound by the ECHR as such. However, Article 6 § 3 of the Treaty on European Union refers to the ECHR as part of the general principles of Community law, and the European Union's Courts apply the ECHR as part of the general principles of the Union's law.

Entertaining the possibility of not recognising the rights of UK citizens in the EU-27 is therefore inconsistent with general principles of EU law, in all these cases where non-recognition would be in breach of ECHR rights.

The EU institutions *are* directly bound by the EU Charter of Fundamental Rights, which entrenches all the rights and freedoms enshrined in the ECHR, including the right to respect for private and family life (Article 7 of the EU Charter). When the Charter contains rights that stem from the Convention, their meaning and scope are the same. When interpreting these rights, the Court of Justice of the European Union utilises European Court of Human Rights (ECtHR) case law.

The ['Britain in Europe' \(BiE\) think tank](#) – a think tank based at Brunel University London, whose membership comprises academic experts, legal professionals and NGO members from across the UK – has undertaken detailed investigations of the issue of whether non-recognition of the rights of EU citizens' would violate the ECHR. Many BiE experts, and external participants that have contributed to recent BiE debates and research events, have addressed this question in recent months. They all agree that *Article 8 of the European Convention on Human Rights provides considerable level of protection to residence rights of EU citizens.*

Analysis of ECtHR case law supports the conclusion that the forced deportation of EU citizens from a member state (non-UK EU citizens in the UK or UK citizens in the EU) would trigger Article 8 ECHR. Discrimination on grounds such as nationality, length of residence or level of income will also bring into play Article 14 of the ECHR.

The point of departure for legal analysis here is that Article 8 is not an absolute right. It is a qualified right, which requires an examination of the circumstances under which interference with the right might be seen as necessary (and therefore legal). Factors that could be taken into consideration to establish whether Article 8 might be breached would include *whether the person has settled in the country* (even if he or she is not working), *what their family life is like*, for example if they have family in the country, whether their children go to nursery or school, what associations they

have developed, what contributions they make to their communities, but also factors relating to whether family life could be continued in the new, receiving states (once the EU citizen would be deported) and what the effect might be on a new life for the family there.

The more embedded a citizen – and his or her family – are in the life of the country, the more difficult it would be to deny any of them the right to stay and exercise the equivalent of residence rights. The less embedded the citizen and his/her family, the more justified the government's interference with the (qualified) right to stay under Article 8 might appear to be.

But the government would need to go a long way to show that interference with Article 8 – in the form of non-recognition of the right to stay and possible deportation – would be necessary. A legislative basis would probably be required.

The applicability of Article 8 to immigration control has been accepted since the decision of the ECtHR in *Abdulaziz, Cabales and Balkandali v United Kingdom*.⁴ Even if the ECHR does not guarantee the right of an alien to enter or reside in a country, the ECtHR has on many occasions held that the removal of a person from a country where close members of his or her family are living may amount to a violation of Article 8.⁵

In the case of *Berrehab v the Netherlands*, in reflecting on whether interference with Article 8 would be 'necessary in a democratic society' (and therefore justified, in accordance with Article 8 para 2), the ECtHR distinguished between someone seeking admission to a country for the first time and someone who had already been living there, and examined whether there were close family ties that needed to be protected:

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.⁶

It emerges from a finding of a violation of Article 8 in this case that where the person is already living in the country, and there are close family ties, interference with an individual's right to private and family life is very likely to be found to be in breach of Article 8.

In *Moustaquim v Belgium*,⁷ the ECtHR accepted that the applicant's family life was seriously disrupted by the deportation measures taken against him, and that interference with family life was disproportionate even if deportation was sought on the basis that the applicant had committed criminal offences and the deportation measures were required to maintain public order.

⁴ (1985) 7 EHRR 471, 493.

⁵ R. Stone, *Civil Liberties & Human Rights*, 8th edn, para 8.385.

⁶ *ibid*, para 29.

⁷ Application 12313/86, 18 February 1991, para 45. See also

In *Maslov v Austria*, another expulsion case, the Court held that where a settled migrant had spent the major part of his or her childhood and youth in the host country ‘very serious reasons are required to justify expulsion’ (it found a violation of Article 8 in this case).⁸

To move on to an application of this jurisprudence by UK national courts, we can discuss *Huang v Secretary of State for the Home Department*, a judgment that is ‘widely regarded as the triumph of the rule of law over executive power’.⁹ In this case, the House of Lords went so far as describe human beings as ‘social animals’ who ‘depend on others’, sketching the fundamental importance of family life (it even spoke of a ‘positive duty’ to respect family life, let alone pointing a ‘negative duty’ to refrain from interference with the right) and individuals’ intrinsic connection with the social environment in which they develop their lives:

It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person’s right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant’s dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.¹⁰

More generally, the ECtHR accepts that an interference with Article 8 will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’, and, in particular, if it is proportionate to the legitimate aim pursued. Applied to the issue of EU citizens, it would be very difficult to see how the expulsion of citizens who would have already developed their lives in particular EU-27 member states would answer a pressing social need, and, even if it did, how expulsion could ever be perceived as an interference ‘proportionate’ to that aim.

In *Amrollahi v Denmark*, the ECtHR examined the crucial issue of whether the family of a deported individual could go elsewhere to start a new life and whether return to the country of origin would be a suitable alternative accommodation. The Court noted

⁸ Judgment of 23 June 2008, [2008] ECHR.

⁹ M. Ockelton, ‘Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash? A Judicial Perspective’ in K. Ziegler, E. Wicks and L. Hodson, *The UK and European Human Rights – A Strained Relationship?* (Oxford, Hart Publishing, 2015) 215, at 218.

¹⁰ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, para 18.

that the seriousness of the difficulties which family persons of the deported are likely to encounter in the country of origin should be taken into consideration, ‘though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion’.¹¹ Other factors included how long previously to deportation the applicant had left the country of origin, and whether the family could establish a new life there.

At this point, it is difficult to imagine how national authorities or the ECtHR could reach the conclusion that expulsion to the country of origin would be a suitable alternative accommodation in cases where the EU citizen would be embedded in the EU member state of residence (which could also go to show his or her disconnect from the country of origin or other EU member state with which the EU citizen may be connected).

On the other hand, for those UK citizens who may have only recently moved to an EU member state (and conversely, EU citizens who may have only recently arrived at the UK), national authorities might be able to convincingly argue that return to the member state of origin *would be* a suitable alternative.

In any case, the above should not make us blind to the fact that Brexit is an entirely different beast, which means existing case law must be taken for what it’s worth; an application of relevant Article 8 principles to situations that have some resemblance to, but are infinitely less dramatic than, Brexit. It is impossible to underestimate the impact of a potential break in Brexit negotiations leading to non-recognition of the rights of EU citizens, which would have a devastating impact upon the lives of the nearly 4,5 million people affected by Brexit in the EU; the sheer number of people automatically and simultaneously affected, and the lack of any similar precedent in the modern history of Europe, militates for taking an altogether fresh approach to the issue of potential Article 8 breaches as a result of Brexit.

We can therefore examine the Article 8 claim at a normative level, freed from precedent. From such a normative vista, it can be claimed that the ECtHR would be well placed, and would indeed have the duty, to read Article 8 widely, casting a wide safety net to safeguard the rights of UK citizens in the EU and those of non-UK EU citizens in the UK. Explaining in detail why the ECtHR should adopt such an approach is beyond the scope of this brief, but it suffices to quickly reflect on what it would mean for the right to private and family life, and for European human rights more generally, if the rights of nearly 4.5 million were affected at once, as a result of a process that is, at the end of the day, regulated by the EU treaties. It is difficult to see how irreparable damage to the integrity of the Treaties, and the architecture of European human rights law more generally, would be avoided.

Perhaps the case that could open the way towards such a wider interpretation of Article 8 in cases relating to Brexit is *Ariztimuno Mendizabal v France*,¹² where the Court held that ‘the uncertainty and precariousness of the applicant’s situation affected the network of her personal, social and economic relations that make up her

¹¹ *Amrollahi v Denmark*, Application 56811/00, 11 July 2002, para 35.

¹² Application 51431/99, 17 January 2006.

private life and did thus constitute an infringement of Article 8 ECHR'.¹³ The case concerned the failure of the French authorities to deliver a residence permit, which continued over a long period. It is important to note that the applicant was not threatened with deportation, and yet the ECtHR found a violation of Article 8, noting that the 'precarious state of affairs and the uncertainty over her future had important consequences for her in material and psychological terms (precarious and uncertain employment, social and financial difficulties, impossibility to open a bar in default of a residence card required for the exercise of the profession she was trained for)'.¹⁴

As evidence from EU citizens cited in this report illustrates, the precarious and uncertain future of UK residents in the EU, and non-UK EU residents in the UK, has important consequences for them 'in material and psychological terms'. In other words, there is evidence here that could support an expansive interpretation of Article 8 ECHR in relation to the EU-27 and UK failure to unilaterally recognise the rights of EU citizens in respective member states. To the extent that this failure can be linked to material and psychological consequences for the EU citizens affected, the relevant EU member states are acting in violation of Article 8 ECHR. Unilateral recognition of the rights of EU citizens can substantially reduce the effect of these consequences for EU citizens, if not remove them altogether.

At a practical level, we must, also, take note of the fact that Article 8 ECHR requires individual treatment. This would make it practically impossible to ask anyone to leave, even if the negotiations between the UK and the EU collapsed. This is because each case of potential violation of Article 8 would have to be assessed on its own facts. Now, given that deportation poses serious logistical problems, and requires the civil service to devote considerable time to it, it is highly unlikely that the government would pursue this in practice. The UK Joint Committee on Human Rights reached this conclusion about the UK civil service, but practical realities in the EU-27 would probably provide support to the same conclusion there. In other words, Article 8 litigation could take years to conclude, it could have significant financial costs and would risk overwhelming national courts' systems in the EU-27. This litigation would be in addition to, and independent from, litigation that would derive from violations of relevant EU legislation, which would naturally exacerbate the logistical burdens that would derive from a decision to remove EU nationals.

In view of all the above, we can reiterate that Article 8 provides strong support to the argument that the EU must now unilaterally recognise the rights of UK citizens in the EU. Unless it does so, it risks causing irreparable damage upon the right to private and family life of 4.5 million Europeans, bringing disrepute to the system of human rights protection in Europe and overwhelming the administration of justice in affected EU countries. The EU would also bring its own law into disrepute, to the extent that this incorporates the rights enshrined in the ECHR and ECtHR jurisprudence.

On the other hand, we should not lose sight of the fact that the ECtHR does not provide a detailed framework for the protection of EU citizens' rights. The above analysis has already brought to the surface the limitations of an approach to EU

¹³ See D. Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 *International & Comparative Law Quarterly* 87, 97.

¹⁴ Application 51431/99, 17 January 2006, para 71.

citizens' rights that would exclusively revolve around the right to private and family life. Put simply, many citizens would slip through the cracks of a framework that would make private and family life the main axis for protection. We may ask ourselves: what would happen to citizens who may have only recently arrived at a member state, citizens whose family remains in the member state of origin and citizens who may be residing in a member state but keep close ties with the member state of origin? The scope for protecting their residence rights under Article 8 would probably be particularly narrow.

These questions require the EU institutions' immediate attention.

By unilaterally recognising the rights of UK citizens in the EU, EU institutions can put an end to the distressing feelings of anxiety and uncertainty about the future experienced by UK citizens in the EU (and EU citizens in the UK) as illustrated in this report.

While the ECHR and European human rights law can provide substantial levels of protection, they are not a tailor-made system for the protection of citizens' rights in the EU. It is imperative – legally, politically and pragmatically – that EU institutions fill this gap.

5. The way forward

On 20 April 2017, European Parliament President, Antonio Tajani met in London with 'New Europeans' and other NGOs. The President noted that the maintenance of rights of non-UK EU citizens and UK citizens in the EU-27 is a 'red line' and that, absent a satisfactory arrangement that ensures that their acquired rights will be maintained post-Brexit, the European Parliament will vote against an exit agreement. However, a rejection of the exit agreement may lead to disorderly exit, which is surely the worst outcome for citizens of the Union.

Mr Barnier, the Commission's Chief Brexit negotiator noted in his 'State of the Union' address at the European University Institute (5 May 2017) that 'the only way to remove uncertainty and to protect rights properly is through an Article 50 agreement'. Indeed, the 'European Council (Art. 50) Guidelines for Brexit Negotiations' (29 April 2017) state in 'Core principle 2' that 'Negotiations under Article 50 TEU will be conducted in transparency and as a single package. In accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately.' The Commission's underlining premise seems to be that the question of rights of non-UK EU citizens and UK citizens in the EU-27 (should be) part and parcel of the exit negotiations and that its resolution will be tied to the conclusion of these negotiations.

New Europeans submit that **the EU should unilaterally recognise the rights of UK citizens in the EU.**

The guiding principle ought to be that rights of citizens of the Union should not be negotiated away, and that the anxiety and uncertainty suffered by over 4 million citizens of the Union should end now. Dr. Ruvy Ziegler, an adviser to NE, called in

the meeting with President Tajani for the adoption by the European Parliament on a cross-party basis of a motion calling for parallel guarantees of rights of non-UK EU citizens and of UK citizens elsewhere in the EU irrespective of and disentangled from the negotiations between the EU-27 and the UK.

The motion reads: [The European Parliament](#),

- Noting the anxiety felt amongst citizens of other Member States residing in the UK and among UK citizens residing elsewhere in the Union, about their own and their families' situation, in light of the outcome of the referendum held in the UK on 23 June 2016.
- Celebrating the role of Union citizens in the democratic life of the Union and deeply concerned about the adverse effects of the UK's EU Referendum on their ability to continue to enjoy their acquired rights as citizens of the Union, including the right to remain in the member states where they reside.
- Believing that, in the Twenty-First century, it is unacceptable to treat individuals as 'bargaining chips' and that Union citizens' rights should be guaranteed irrespective of the outcome of the overall negotiations between the UK and Union institutions.
- Calls on the Commission to make proposals to the Council, which shall act by a qualified majority, for adoption of measures with a view to the maintenance of rights acquired by UK citizens residing elsewhere in the Union during the period when the UK had been a Member State of the Union (The language in the final bullet point is taken, verbatim, from Article 2 of the Protocol on Special Arrangements for Greenland, which was part of the ['Treaty Amending, with regard to Greenland, the Treaties Establishing the European Communities'](#) (13/3/1984).