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The rights of EU27 citizens in the UK and UK citizens in the EU27: A response to Theresa May's 'fair and serious' offer

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This is a joint report produced by academic advisers in the citizenship unit of the [New Europeans](#) civil rights organisation and members of the [Britain in Europe](#) think tank.

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1. Introduction

The UK's decision to leave the European Union following an advisory referendum and a vote in parliament has created a situation of uncertainty for an estimated 3.4 million EU27 citizens in the UK and 1.6 million UK citizens in the EU27.

These 5 million EU citizens took advantage of their rights of freedom of movement in the European Union and exercised their treaty rights in an entirely legal manner, expecting these rights to be permanent. The vote to leave the EU has therefore had a catastrophic and unexpected impact on those 5 million people. EU27 citizens in the UK not only feel anxious about their future status, they no longer feel welcome in a place they had learned to love and call home. Many are leaving or planning to leave the UK, creating skills shortages in numerous sectors of the economy, including the health services.

Despite the work of organisations like New Europeans to make the voice of EU27 citizens in the UK and UK citizens in the EU27 heard before the referendum including the attempt to enfranchise both groups in the referendum vote itself, the issue of EU27 citizens' rights was never fully considered in the referendum itself.

Subsequently, EU citizenship rights have been top of the political agenda and the EU has made securing the rights of EU27 citizens in the UK its number one priority. A recent [survey](#) by the London School of Economics has shown that 60% of UK citizens do not want to give up their EU citizenship rights either.

The decision to leave the EU has not only deeply affected 5 million EU citizens who had affirmed their right to free movement, it also stands to strip 63 million UK citizens of their rights to free movement and to non-discrimination (equal treatment) in the EU.

EU27 citizens in the UK and UK citizens in the EU27 are threatened with the loss of the automatic right to continue to live and work in their adoptive home country, and the loss of a series of other rights including the right to vote and/or stand as a candidate in local government (including regional assemblies and Mayoral) and European elections.

2. The example set by the European Union

The Commission's working paper on the [‘Essential Principles on Citizens’ Rights’](#) (hereinafter ‘Principles’) sets an ambitious agenda for the protection of citizens’ rights.

The ‘Principles’ set out a vision for a wide protective framework for EU27 citizens' rights. The document provides the same protection to EU27 citizens and UK citizens, and extends the protection to their family members. It only requires that EU27 citizens have exercised rights relating to free movement, without making any connection with a requirement to have spent 5 years in the country, and to have obtained permanent residence; the document even speaks of rights which are *in the process of being obtained* and *rights the enjoyment of which will intervene at a later date*. It requires legal residence at the time of the entry into force of the withdrawal agreement, but does not even make this conditional upon holding a residency document. Such documents should only have a declaratory nature and should be issued free of charge, the document explains.

The ‘Principles’ aim to provide protection even to citizens who may be working in the UK while residing elsewhere in the EU (and vice versa). EU27 citizens can also change status – for example where a student or inactive citizen becomes an ‘EU worker’ – and still accumulate periods leading to permanent residence and rights pursuant to Union law.

The material scope of the rights protected is equally ambitious: *free movement of workers and jobseekers, self-employed, students, and economically inactive persons; protection of the right to entry and residence, family reunification rights, protection against expulsion, access to the labour market and/or to pursue economic activities, and non-discrimination as regards working conditions, social and tax advantages, workers’and family members’access to education, apprenticeship and vocational training, housing, recognition of professional qualifications and protection of collective rights*.

And *protection of all these rights should be for life*, the document mandates, while enforcement should be by the CJEU.

3. The shortcomings of the UK offer to EU27 citizens

The PM [told](#) EU leaders her aim was ‘to provide as much certainty as possible to the three million EU citizens currently living in Britain’, pledging that ‘no EU citizen currently in the UK lawfully will be asked to leave the country at the point that the UK leaves the EU’. The Government’s paper on [‘safeguarding the position of EU citizens living in the UK and UK nationals living in the EU’](#) attempted to reinforce this point, by noting that the government will put EU27 citizens first, and ‘do all [they] can to provide reassurance to the EU citizens who have made the UK their home, and likewise for UK nationals who have done the same in countries across the EU.’

The solution that Theresa May’s government proposed achieved the opposite result, however, as one could tell just from observing EU27 citizens’ negative reactions to the proposals. A close look at them explains why EU27 citizens have every reason to be concerned.

Firstly, the UK Government proposals speak of ‘a specified cut-off date no earlier than the trigger of Article 50, and no later than the UK’s exit from the EU’. In other words, the cut-off point can be set at any date between 29 March 2017 and 29 March 2019. Depending on the precise point at which the date is set across this two-year window, thousands of EU27 citizens may find themselves on the wrong side of the dividing line, between those who can stay and those who must go. The UK Government paper states more specifically that ‘those EU citizens who arrived after the specified date will be allowed to remain in the UK for at least a temporary period and *may* become eligible to settle permanently [emphasis added], depending on their circumstances – but this group should have no expectation of guaranteed settled status’.

The cut-off date will also affect access to benefits, pensions, healthcare, eligibility for Higher Education and further Education student loans and home fees status as well as economic and other rights (those arriving in the UK prior to the specified date will continue to have access).

The PM cannot possibly be oblivious to the fact that, from the outset, the cut-off point has been a major cause of concern for EU27 citizens. Her proposals do not alleviate existing concerns; they make them worse. Until now, many EU27 citizens may have had good reason to dismiss – in good faith – the possibility that 29 March 2017 would be selected as the cut-off date. Now this is presented as one of possible options as part of the negotiations. EU27 citizens are told

their rights will be 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.

To be sure, the proposals provide for a ‘grace period’, expected to last up to two years, to allow people to eventually ‘regularise their status’, but there is very little clarity about how this would operate in practice and the extent to which it would provide protection. In any case, it would not apply to those arriving in Britain after the cut-off date.

In addition, the uncertainty over the cut-off date and the commencement of the ‘grace period’ already restricts EU27 citizens’ right to move freely within the EU, for fear that they [‘would interrupt their continuous residence and forgo the opportunity to transition to settled status post-Brexit’](#).

It is equally worrying that those who have already obtained a certificate of permanent residence will need to apply again, for ‘settled status’ this time. The Government has promised to make the application process for settled status as streamlined as possible, but the lack of planning will add insult to injury for the thousands of EU27 citizens who have already gone through the trouble of collecting dozens of documents, paying a fee and waiting for months for their application to be processed, and all the more so for EU27 citizens whose permanent residence applications may have originally been rejected.

In a similar vein, there is cause for concern over the status of EU27 citizens’ family members who are *not currently* in the UK. The PM said that the UK does not ‘want families to be split up’, but failed to explain how this will be avoided given that the ‘settled status’ that she promised seems to revolve exclusively around the five-year lawful residence criterion for those who are *already* here.

The gravest anxiety concerns ‘reciprocity’. The UK Government subjects the abovementioned rights that EU27 citizens are guaranteed to recognition by the EU27 of reciprocal rights for UK citizens residing elsewhere in the EU, namely subject to a UK-EU27 agreement, a prospect that is becoming increasingly uncertain. The UK Government has resisted the continuous calls of organisations representing the rights of EU27 citizens for the unilateral recognition of rights, which would provide true reassurance to EU27 citizens in the UK.

The proposals of the House of Lords European Union Committee have similarly fallen on deaf ears. In the conclusions of its report on [‘Brexit: Acquired Rights’](#), the Committee urged the Government to:

30. [...] change its stance and to give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK when the UK withdraws from the EU. The overwhelming weight of the evidence we received points to this as morally the right thing to do. It would also have the advantage of striking a positive note for the start of the negotiations, which will be much needed. (Paragraph 147)

The Government has simply ignored these recommendations. Lord Judd (Lab), a member of the Committee, [commented in the House of Lords](#) in that regard that:

[i]t is totally unacceptable how long it has taken the Government to reply to this report, given the importance of the issue with which it deals. Much more importantly, there is all the anxiety and distress meanwhile suffered by ordinary people in this country and abroad. I do not like living in a Britain where that kind of distress is unnecessarily suffered by people who live here or where my fellow citizens serving abroad, often to very good effect, or living abroad after distinguished lives are equally in anxiety. I ask myself what kind of Britain we want to be. Of course, it would be a great thing if we had acted forthrightly and decisively right at the beginning. That would have earned us immense standing in the world. Yet we wasted that opportunity and anything we do now will be trying desperately to regain ground lost in terms of our place in the world.

Seemingly oblivious to the urgency and seriousness of the situation, the Government has instead opted to make everything dependent on the Brexit agreement, and yet we must stress here that the Government already rejects one of the EU27’s fundamental demands: that the CJEU will be responsible for any adjudication relating to EU citizens’ rights. This reinforces the point about the risk of not even reaching the second stage in the Brexit negotiations, let alone a final agreement. As [Baroness Smith of Newnham put it during the debate on acquired rights](#) in the House of Lords (5th July 2017):

The only way there will be a reciprocal deal is if there is a negotiated solution for withdrawal. At the moment, the European Union expects that the rights of its citizens should be dealt with by the Court of Justice of the European Union. In its paper, the British Government seem to suggest that cannot be the case and that any decisions would be taken by UK courts. How are we going to get to a solution that allows reciprocity and justiciability that will not leave UK citizens and EU citizens uncertain and insecure?

This begs the question of what the UK Government intends to do with the 3.4 million EU27 citizens in the UK. Let us stress once again that their right to remain and work in the UK is

protected under international human rights law (Article 8 of the European Convention of Human Rights [ECHR] in particular), and that practically the UK courts system would come under very considerable strain even if a small percentage of EU27 citizens took their cases to court.

Hence the precarious state of affairs continues – and this very uncertainty over the future is a condition that can trigger a violation of the right to private and family life, as enshrined in Article 8 of the ECHR. Those interested in the legal basis for this claim may look at the European Court of Human Rights (ECtHR)'s decision in the case of [Ariztimuno Mendizabal v France](#), for instance, or the [report](#) that we have submitted to the European Parliament [with the 'New Europeans' and the 'Britain in Europe' think tank](#) in that respect.

We must also not lose sight of the fact that the UK Government's proposals do not go much further than a simple restatement of existing immigration rules, which already give EU27 citizens the right to permanent residence if they have been exercising treaty rights for five years. In other words, May offers to provide protection to those who least need it – those who already qualify on the basis of the 'five-year' criterion, and have the documentation to prove it – while failing to provide any reassurance to those who need it the most; those, in particular, with fewer than five years in the UK, those who may have been here for long and fulfill the permanent residence requirement but cannot trace the documentation to prove it, those who have previously acquired – but subsequently lost – their permanent residence status, due to being away from the country for more than two years and, ultimately, those who may have been in the country for long but were not in a position to establish permanent residence rights in the first place (perhaps because they have not been working, or did not have comprehensive sickness insurance). Put simply, by relying exclusively on UK immigration law, the UK Government's proposals entirely fail to address the exigent circumstances created by Brexit.

Even if its proposals were taken at face value, there is no intention whatsoever on the part of the UK government to allow the CJEU to adjudicate these rights, as mentioned before. This would potentially leave EU27 citizens in the UK without international oversight of their status or treatment – apart from recourse to the ECtHR, to which EU27 citizens in the UK (and UK citizens in the EU27) will be able to resort regardless of Brexit.

Last, but not least, there is the risk that the UK Government's proposal will also reduce the level of protection that the EU27 might be prepared to offer to UK citizens in the EU27. Claude Moraes MEP, the chair of the European Parliament's civil liberties committee and a member of the parliament's Brexit steering committee, said that [Theresa May's controversial offer to EU27 citizens in the UK could be matched by Europe](#), leading to diminished rights for the 1.6 million UK citizens in the EU27. From the outset, the New Europeans and the Britain in Europe think tank have urged the UK government to unilaterally recognize the rights of EU27 citizens in the UK (and urged the EU to recognize the rights of UK citizens in the EU27) to avoid this prospect. The EU has a moral duty to provide such recognition; the need to guarantee fundamental human rights was one of the key drivers for its creation.

The recognition of the rights of UK citizens in the EU27 ought not to be conditional upon the UK Government's willingness to adequately protect the rights of EU27 citizens in the UK. The EU and its member states are bound by the EU Charter of Fundamental Rights and by the ECHR, which protect the right to private and family life. Moreover, even if negotiations were to collapse, the EU would be bound by EU law to provide protection to UK citizens in the EU. Notably, the [Directive](#) on Third Country Nationals who are long-term residents ['confers equal treatment of \[third-country nationals or TCNs\] \[which is what UK citizens in the EU would become\] compared with nationals in the host country in significant areas](#), subject to such TCNs meeting certain conditions.

The EU should therefore not follow the UK Government down the path of reduced protection for the rights of the millions of people affected by Brexit; rather, it should adopt a strict approach whereby failure by the UK to guarantee sufficiently (in practice, for life) the rights of EU27 citizens in the UK should bar transition to the second phase of the Brexit negotiations. The recognition of the rights of EU27 citizens is a precondition for the start of the negotiations per se.

4. The problem with reciprocal deal-making

Prior to the referendum, New Europeans together with other organisations from both sides of the Remain/Leave divide such as Migrant Voice, British Future and Migration Watch (an anti-free movement think tank) published a letter in the Financial Times calling for the rights of EU27 citizens to be safeguarded regardless of the outcome of the referendum. A [letter published in the Guardian](#) by several [academic experts, part of the Britain in Europe think](#)

[tank](#), shortly after the Referendum, likewise called upon ‘the Government and all other political parties to offer the strongest possible reassurance to all EU citizens living in the UK that they will in no way be adversely affected by exit negotiations with the EU once Article 50 has been triggered, and that they can continue to plan their future in this country exactly as before’. The think tank’s academic experts argued that ‘the government has a moral duty to alleviate as rapidly as possible the feelings of uncertainty, fear and alienation that the referendum vote ha[d] inevitably brought about in EU citizens living in the UK, and to take positive action to demonstrate that they are an integral part of British society and their contributions are highly valued’.

There has been a broad cross-party and cross-campaign consensus on the issue of unilateral guarantees even before the result of the referendum was known.

Immediately after the referendum, New Europeans petitioned the then PM, David Cameron, for unilateral guarantees. We now know that the UK Cabinet had agreed this with one exception, the then Home Secretary, Theresa May.

There is no moral case for the Government to hold out for a reciprocal deal for UK citizens in the EU27. On the contrary, to hold out for such a deal is to turn 3.4 million EU27 citizens in the UK into ‘bargaining chips’. This is unacceptable.

There are four key flaws with the reciprocity approach:

- i) Organisations representing UK citizens in the EU27 consistently supported calls for rights of EU27 citizens to be guaranteed by the UK government unilaterally. In December 2016, 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 EU27 citizens. This view was recorded in the [minutes](#) (Q656) of the Committee on Exiting the European Union inquiry from January 2017 as to the UK’s negotiating objectives for withdrawal from the EU. It was also the position expressed by a [‘coalition of groups respecting UK citizens in the EU’](#) in March 2017 in response to the Select Committee [report](#). The claim that, the Government is protecting UK citizens in the EU27 by refusing to unilaterally *and unconditionally* give EU27 citizens the reassurance they seek is specious.

- ii) Thus far, it is the Union institutions who appear to be making a ‘fair and serious’ proposition. Moreover, some aspects relating to citizens’ rights (not least a dispute resolution mechanism) will need to be agreed bilaterally and given effect in international law. Hence, it is desirable for EU27 citizens that the EU negotiates with the UK to properly secure their rights. However, there is no evidence to support the claim that EU27 citizens want to see UK citizens in the EU27 used as ‘bargaining chips’ in those negotiations.
- iii) What happens to EU27 citizens’ rights in the UK, and to rights of UK citizens in the EU27, if no agreement is reached between the UK and the EU27? The UK Government’s insistence on reciprocity logically implies that, if negotiations fail, rights of EU27 citizens *may be curtailed*. In 2017, such an approach is morally indefensible.
- iv) Even if an agreement will eventually be reached, the process (which is at its embryonic stages) could take nearly two years, during which time nearly five million citizens in the UK and the EU27 will continue to suffer from stress and anxiety.

The absence of any unilateral guarantees in the meantime constitutes a daily violation of the right to private and family life in Article 8 of the ECHR (as New Europeans and Britain in Europe [argued in the European Parliament](#) in May 2017), which binds the UK internationally and in domestic law (pursuant to the Human Rights Act 1998), and which is separately recognised in EU case law. In Twenty-First century Europe, the continuation of such uncertainty is intolerable.

5. Concluding remarks

In view of the above, the EU must be cautious not to lower the threshold for protection of rights that it has set with its ‘Essential Principles’ document; *its* proclaimed reciprocity approach should be taken to mean that the EU should refuse to negotiate a trade deal with the UK until and unless the UK has matched the guarantees offered by the EU. These rights are enshrined in international human rights law and the EU institutions as well as the EU27 are thus bound

to secure them fully. An agreement in this area should be a pre-condition for the start of the negotiations as a means of the EU fulfilling *its* obligations towards EU citizens.

Moreover, and irrespective of the actions of the UK Government, we argue that the non-negotiable character of these rights requires the EU27 to grant UK citizens in EU27 unilateral guarantees. By doing so the EU will provide immediate reassurance to UK citizens in EU27 and reclaim the moral high ground in the negotiations. It is safe to predict that this strategic move will also back the UK Government into a corner about recognition of the rights of the EU27 citizens in the UK. Government ministers have previously resisted calls for unilateral recognition on grounds of [fearing that the EU would not reciprocate](#); even the UK Government's position paper on 26 June 2017 suggests that the UK Government's undertakings are made ['in the expectation that the EU will offer reciprocal treatment for UK nationals resident in its member states'](#). The moment the EU would recognise rights unilaterally this line of reasoning would no longer hold water.



European Parliament hearing on EU citizens' rights on May 11, with the participation of 'New Europeans' and 'Britain in Europe' experts



New Europeans Citizenship Unit

The [New Europeans](#) Citizenship Unit is a think tank which specialises in issues relating to European Citizenship. They partner with organisations in the EU and internationally which share their commitment to disseminating knowledge and deepening the understanding of EU citizenship in a global context. Reports from the Citizenship Unit are open resource material for academics, public institutions, politicians, civil society organisations, and campaign groups working in the area of EU citizenship and available on the New Europeans website.

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