

The millions in the margins

Over the last few weeks the EU Commission and UK ministers have published a number of important documents giving the outline, and then the detail, of what they have in mind for citizens' rights post-Brexit. Nothing has been finalised, but even on their face, do they suggest politicians' promises will be fulfilled and the new rights will be fit for purpose? [The People's Challenge is crowdfunding to examine these critical questions in detail](#), but here John Halford of Bindmans LLP explains why the answers are likely to be 'no', how millions of EU and UK nationals may well be marginalised and what might be done to prevent that.

The first anniversary of the UK's notification of its intention to leave the EU is just days away. Until very recently it seemed that little progress had been made by the EU and UK negotiators on perhaps the most challenging issues arising from the UK's withdrawal - those relating to citizens' rights. But there was then a flurry of activity last December, resulting in a [Joint Technical Note](#) and a [Joint Report on progress](#) purporting to describe a "single coherent package" of "positions" on which "[a]greement in principle" had been reached.

Having duly satisfied fans of the party game 'Twister', EU officials then set about pleasing lawyers, producing a [Draft Withdrawal Agreement](#) on 28 February which runs to 119 pages. It is [said to "translate" the Report and Note "into a legal text"](#). Their UK counterparts answered with a three-page [Policy Statement: EU Citizens Arriving in the UK During the Implementation Period](#), which is one of many indications that differences remain. But the ink on this was barely dry when [the UK's negotiators made further concessions to the EU](#). The [latest, multi-coloured version of the Draft Agreement](#), published on 19 March, shows where the convergence of positions in green highlighted text.

Read together, this material maps the common ground established by the negotiators in some detail. For some people, it will be comforting, because the clear intention is that most EU nationals exercising core EU freedom of movement rights here and now, along with their UK national equivalents exercising those rights elsewhere in the EU, will be granted meaningful rights to remain where they are and continue doing so in future. If that intention is fulfilled, those rights will be clear, enforceable, subject to limited exceptions and minimal bureaucracy. There will even be a duty to publish information about rights and a new statutory body in the UK to help individuals enforce them and to hold the Home Office to account.

According to the Home Office, that body should have little work to do. Its website proclaims:

"The UK government has reached an agreement with the European Union on citizens' rights in negotiations on the UK's withdrawal from the EU. This will provide certainty about the future to millions of EU citizens and their families in the UK. Most importantly, it will allow you to stay here after we leave the EU on 29 March 2019, and to continue to access public funds and services."

But in reality, every one of these words is wrong.

No agreement, no rights

To begin with, nothing is firmly agreed, even between the negotiators. The EU's description of the Joint Technical Note and Joint Report as "positions" is more apt; they describe where the negotiators have got to. Neither creates rights, less still "certainty". The Draft Agreement has yet to be agreed and [Teresa May initially said parts, in particular those concerning Northern Ireland, are unacceptable](#) (they are now to be a 'backstop', however). There is still a risk of the negotiations breaking down.

Assuming something resembling the Draft Agreement is agreed, that will only be the start of a process to approve a formal treaty that requires the approval of a majority of MEPs in the EU Parliament and then that of 72% of the remaining 27 EU states represented on the EU Council. That treaty will also need to be approved by the UK Parliament. Legally, that part of the process is not straightforward, as discussed in the [Three Knights Opinion](#).

As the UK's head negotiator David Davis has said, "[n]othing is agreed until everything is agreed" to which "and approved by democratically elected representatives here, in Strasbourg and in Brussels" must be added.

Citizens' rights, but no more citizenship

The next issue with the Note, Report and Draft Agreement is how they deal with the issue of future entitlement to citizens' rights. At present, under the EU Treaties, Citizens' Directive and Charter of Fundamental Rights enfranchise, empower and protect all EU nationals, including UK nationals, as EU citizens simply because they are nationals of EU member states. In a sense, their existing EU citizens' rights are a form of birth right. Very few need to be 'activated' or 'claimed'; they are mostly automatic. Nor, for the most part, do they depend on proving a status to any authority (other than nationality of an EU member state).

In the *Miller* case, The People's Challenge [catalogued many of these rights](#) and explained to the Courts how the UK would be incapable of preserving them in UK law after withdrawal from the EU. The Divisional and Supreme Courts accepted those arguments; there could be no doubt that most UK nationals would lose fundamental rights associated with EU citizenship as a result of withdrawal.

On this issue, the Note, Report and Draft Agreement offer no comfort at all. EU citizenship will not be preserved for any UK national (unless they happen to be a dual national of a remaining EU 27 state). If the Draft Agreement is adopted and it becomes the last word on citizens' rights, even the most established and well-protected UK national expat will no longer be an EU citizen, and so will lose their voting rights in local and EU Parliament elections. Even more significantly, the rights they will enjoy will concern their relationship with the EU 27 state they reside in. UK nationals will lose all free movement rights throughout the EU as a whole. Article 32 of the original Draft Agreement stated emphatically:

"In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States."

This has been dropped from the latest multicoloured version, the text of which oddly jumps from Article 31 to 33, but there remains nothing to prevent UK nationals becoming landlocked in other EU states once the transition period ends. It follows that the position of UK nationals in the remaining EU27 states will be very different from that of EU nationals residing in the UK.

It is possible that, even were the Draft Agreement finalised in its current form, it might still not be final word on EU citizenship. In some [leave campaign material](#) and [statements](#) preceding the EU Referendum and in some debates afterwards, it was suggested that EU law might preserve the benefits of EU citizenship for at least some UK nationals after withdrawal, particularly ex pats currently living elsewhere in the EU.

Few experts now believe this is the case, as reports from [by the House of Lords EU Select Committee](#) and [for the EU Parliament](#) discuss. But the EU Court of Justice has been [asked make a definitive ruling by a group of British ex pats](#). The reference, made by an Amsterdam first instance court, is under appeal, however, and a hearing is expected to take place next month.

The protected few

Unless the Court of Justice gives a positive answer in that or a similar case, the impact of UK withdrawal from the EU on the rights of most people will depend on the Draft Agreement become finalised and formalised as a treaty and, if it is, what it says. But if citizenship is no longer the model, who will be the beneficiaries and what rights are they likely to have?

On this, the Note, Report and Draft Agreement seek to draw clear dividing lines between the few whose position will be preserved and protected and the many who are to be offered nothing. As the Report puts it:

“The overall objective of the Withdrawal Agreement with respect to citizens' rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date.”

There is much here to unpack.

First, the focus is on “past life choices” and “exercised... rights.” Only a minority of EU nationals, including UK nationals, will have made choices to exercise rights affected by the UK’s withdrawal. The primary concern of both the EU and UK negotiators was to protect this minority, with a particular focus on those EU nationals ‘legally residing’ in the UK at the point of the UK’s withdrawal, their UK national equivalents living elsewhere in the EU and the close family members of both groups.

‘Legal residence’ for these purposes means actively exercising core free movement rights under [Article 21](#) of the Treaty for the Functioning of the EU (TFEU) or one of the rights listed in Article 6(1), 7(1)(a), (b) or (c) or (3), 12(3), 14, 16(1) and/or 17 of [Directive 2004/38/EC](#). Broadly, these are the rights to reside temporarily, then work, or to be self employed, live self-sufficiently, or study (subject to sickness insurance requirements which the UK intends to waive).

Secondly, there to be a cut off for the protected few – the “specified date” which is defined as “the time of the UK’s withdrawal.” This is not as straightforward as it appears. The EU negotiators are insistent on a transitional period after 29 March 2019 and that, as long as it lasts, that those who exercise Article 21 and Directive 2004/38 rights must be treated just the same as those who have done so earlier. Article 212 of the Draft Agreement proposed that this should last until 31 December 2020. The UK’s [Policy Statement](#) grudgingly accepted that EU nationals should be allowed to come here for the first time during any agreed transitional period, but indicated the UK’s intention was to treat them differently than those who arrived earlier, to apply different registration requirements and to offer less long term security (“[t]he expectations of EU citizens arriving in the UK after our exit will not be the same as those who moved here before our withdrawal, and the same will be true of UK nationals moving to an EU Member State”). The latest Draft Agreement suggests this stance has largely been abandoned.

Thirdly, the position of most family members of lawful residents will be protected. The intention is that most family members (e.g. spouses and civil partners, direct descendants of a European national, and most adopted children, dependent direct relatives in the ascending line) who want to join or remain with a EU or UK national who is legally resident here in the UK or in another EU state respectively will have a right to do so throughout a lawful, right-exercising resident’s lifetime. The UK has also made some concessions. It intends to ‘facilitate entry and residence’ of ‘partners’ (for instance unmarried couples) who are in a relationship after 29 March 2019, provided the relationship is accepted as ‘durable’ and continues to exist at the point the partner wishes to join the qualifying EU national.

Fourthly, ‘frontier workers’, i.e. those pursuing genuine and effective work as an employed or self-employed persons in one or more states other than the one they reside in, will be permitted to continue doing so until they cease to be a ‘worker’ in the state where they work or cease working across the frontier. This will be especially important for Spanish nationals working in Gibraltar.

Fifthly, these protected groups will retain many of the secondary rights that are intended to facilitate free movement and put them on a level footing with host state nationals, including those to equality of treatment in employment, self-employment and managing an undertaking (for example, the right to equal treatment in the participation in the capital of EU companies or firms) social security, social assistance, health care, education (including higher education) along with training, social and tax advantages, subject to the limits of Articles [18](#), [21](#), [45](#) and [49](#) TFEU, [Directive 2004/38/EC](#) and [Regulation \(EU\) No 492/2011](#).

Problems for the few?

So far, so good – at least for EU nationals in the UK exercising core free movement rights and their UK national equivalents in other EU states who wish only to stay put. But even these protected groups should not be too complacent. There will be very real differences between the rights they enjoy now and those they will have in future. The future status the Note, Report and Draft Agreement proposes for them is not as secure as it first appears; they can all too easily find themselves forced into the margins of those documents, where they will join the millions that are to have no rights at all.

The first problem is formalities. Automatic rights will be phased out altogether. EU nationals in the UK, for example, will ultimately need to apply for what the UK describes as 'settled status' (which the Note, Report and Draft Agreement all call 'permanent residence'). This should be subject to limited formalities and those here who already have formal confirmation their rights based on five years of continuous past residence will be fast-tracked. The EU has evidently been insistent that the requirements imposed on others will be "objective" and "evidentially straightforward" to satisfy. Host states will not be able to insist on more than what is strictly necessary and proportionate to demonstrate entitlement, something that runs very much against the grain of UK immigration law.

As far as the UK is concerned, the intention is that EU nationals living here who have five years' continuous residence at the proposed 'cut-off date' of 29 March 2019 will seek and be granted the 'settled' status, so that they end up in the same position as those with 'indefinite leave to remain in the UK' under current British immigration law. Those EU nationals who arrive before the cut-off date and so qualify later can 'settle' once they too have been lawfully resident for five years. In the meantime, they can apply for a 'temporary status'. The position of those arriving from April 2019 but before the end of the transition period is now to be equalised, according to the latest Draft Agreement, reflecting a further UK concession.

Those who cannot prove that they qualify for settled or temporary status on the basis of present or past exercise of core free movement rights will be in real difficulty once the transitional period ends, however. Proving physical presence in the relevant state is not enough in itself. Applicants will need to prove their own exercise of core free movement rights, or that they are a family member of a person who is entitled on that basis. If entitlement to one status or the other is not ultimately established, subject special provisions for pending applications, an EU national in the UK will become something EU law currently does not recognise: an 'overstayer' whose very presence here is criminalised. Oxford University's Migration Observatory [estimates that hundreds of thousands of EU nationals living in the UK may end up in this position](#). Many UK nationals living in other EU member states will undoubtedly face similar problems. Exactly when they will crystallise is unclear. The UK's intention was that all EU nationals should at least apply for temporary or settled status before the transitional period ended, but the Draft Agreement proposes a further, extended period during which applications can be made that would last at least until 31 December 2022.

The second problem is the flipside of the first. It is absence. In the UK, for example, EU nationals' settled status will be 'settled' only up to a point. Whilst the Note, Report and Draft Agreement provide that no state is obliged to terminate residence status after five years of continuous absence, all allows them to do so.

The concept of continuous absence is also tricky. Proving there has not been such an absence is often difficult: passports are not currently stamped when EU and UK nationals enter each other's countries. To be truly secure for the future, EU nationals need to seek citizenship, but for some that is a drastic option because their countries of origin prohibit dual nationality. Fortunately the UK does not, so seeking citizenship of their state of residence will be an increasingly attractive option for British expats, particularly as that will be the only way to access full free movement rights within the remaining EU 27 states in future.

There are other absence problems. Suppose a British child moves to France with their parents and grows up there, then returns to the UK to study medicine, only occasionally returning to France for

holidays during their course. There is then a real risk that such a person will lose the permanent residence status they are currently entitled to, which the Draft Agreement intends to replicate. Establishing that core free movement rights are being exercised back in France during, or at the very least before the end of the five year period, will be critical.

Thirdly, the stated guiding principle of the Note and Report is that rights will be guaranteed for the lifetimes of right-holders. The Draft Agreement is a little more nuanced, stating “[t]he persons covered by this Part shall enjoy the rights provided for therein for their lifetime, unless they cease to meet the conditions set out therein”, underscoring the point that right-holders generally need to be right-exercisers.

Compromises have been made to cut back on current rights too. Most significantly, perhaps, both the EU and UK both intend that some family reunion rights will be restricted and will then lose their EU character during and after the transitional period, being replaced with national law. This will be a particular problem for EU nationals here in low paid work as family reunion is dependent on a certain level of income. National laws throughout the EU will also apply to more distant family members wishing to join UK expats after the transition period. The one main caveat to this concerns children born or adopted after the transitional period over whose protection will vary hugely depending on their parentage.

The fourth problem is criminality and other unwelcome conduct, which creates exceptions to the principle of life long rights. This manifests itself in two ways. To begin with, any status that needs to be applied for can be, and in the UK definitely will be, subject to a ‘criminality’ check. The Draft Agreement has little to say on this save that past criminal records may be examined and criminality or innocence confirmed with other states.

Further, restrictions on rights based on ‘public policy’ or ‘security’ though necessary because of what this check reveals, including refusal of status, will be subject to EU law provided the conduct occurred before the transition period is over. Chapter VI of [Directive 2004/38/EC](#) imposes strict, principled limits on the rights that can be taken away on account of such conduct. But the consequences of criminal conduct that occurs after that period, whether by EU nationals here or UK nationals elsewhere in the EU will be wholly a matter for the ‘national law’ of each state.

Troublingly, the Draft Agreement appears to set no limits on the post-transition period “conduct” that might lead to all rights being terminated. On its face, it will be possible for people who have lived almost all their lives in the UK, exercising core free movement rights, to be deported because they have committed relatively minor offences after withdrawal, and for the same to happen to UK nationals living elsewhere in the EU. The criminalisation of those who fail to establish their entitlement to temporary or settled status could even have that consequence. It appears the EU is alive to this particular problem, however, and the Draft Agreement proposes that, if a late application is made the authorities “shall assess all the circumstances and reasons for not respecting the deadline and allow those persons to submit an application within a reasonable further period of time, unless such an application is manifestly abusive.”

These are simply examples. Many other devils will be hidden in the detail of the Draft Agreement.

The millions already in the margins

So much for those people the Note, Report and Draft Agreement are meant to protect. What about those who have not made the right “past life choices” or are not about to exercise the core free movement rights in a way that will activate future protection?

The basic point made above bears repeating: the negotiators’ aim was not to preserve EU citizenship in a first or even a second class form; it was to protect those who have exercised core free movement rights or are about to. This, aim, coupled with the principle of ‘bright line rules’ so beloved of officials, has a number of striking effects. For those who have no interest in or wish to enjoy, the benefits of EU citizenship they will not matter. But a great many people will be marginalised and disenfranchised.

Take EU nationals living in the UK and their UK national counterparts living in the EU. For now, they fall into three groups – those exercising core free movement rights, their family members and those who are resident but not exercising such rights. The latter group will include EU national children in care, some elderly and mentally incapacitated person, some detained people and some homeless. There will be UK national equivalents throughout the EU. For now, most are able to remain living where they are as [a recent High Court ruling](#) confirmed. These vulnerable groups are going to face serious, often insurmountable, barriers to establishing entitlement to temporary or permanent status, however.

Another potentially huge class of people left out of the Draft Agreement are those who have made different, but still very significant “past life choices” to invest in the idea of the EU. For instance, those who have established businesses in other states (itself a core economic right) but are resident elsewhere have no obvious protection in future (there is some possibility of rights arising under [the UK’s bilateral investment treaties with other EU states](#), but these are expensive to enforce). And what of UK nationals who have a holiday home elsewhere in the EU or planned to retire there before the EU Referendum? No concessions are made for them. From the negotiators’ perspective, these life choices mean little and groups will either need to establish residence before the end of the cut off period, or rely on national immigration laws in future.

Paragraph 58 of the Note is also significant. It contains a somewhat apologetic bullet point list of issues raised for discussion that have simply yet to be resolved. Included are UK nationals who move after the transitional period to take up residence in another EU state, posted workers and lawyers practising under home title, and those wishing to exercise other economic rights, in particular secondary establishment and cross-border provision of services by those who are not frontier workers. The way these groups are dealt with in the note belittles their significance.

Take professionals, another group that merits only a bullet point. The Note, Report and Draft Agreement all provide for future recognition of professional qualifications when those qualifications have been acquired before the transitional period is over. They also create the quaint-sounding notion of ‘grandfathering’ the future recognition of qualifications which people are in the process of acquiring.

But all of this may be hollow if professionals have no right to practice outside their state of nationality. At present none is envisaged, save for those who already fall in the protected groups. So the best a UK national studying, say, architecture in Spain, can hope for is that, upon qualification, he or she will be able to change status from student and practice there, as a worker or self employed

person. Although their qualifications will be recognised in France, they will have no right to establish themselves or practice there unless this is created by a future amendment to the agreement.

Rights for the millions?

What can the marginalised millions do about being left out of the Note, Report and Draft Agreement? There are two main possibilities, one political, one legal.

The political possibilities are obvious. Although the Draft Agreement is an impressive and sophisticated document, it is just a draft. It can still be changed to make it more generous and embrace more people in different circumstances. For example, there might be a special class of residents who are protected on account of spending, say, 10 years in another state regardless of whether they can establish what they have been doing (which would chime with UK and EU international law obligations). Or there might be a change of political tack, towards some form of future associate status for the UK and its nationals that carried better, less backward-looking rights, or even abandonment of Brexit.

Though political pressure within the UK could prompt modification of the Draft Agreement, the EU Parliament may well be a better target for campaigners and lobbyists.

The EU Parliament has a special responsibility for safeguarding citizens' rights, after all, and for now that includes those of UK nationals as well as those of the remaining 27 states. It can insist on the proper assessment of the impact of proposals on fundamental rights (and can call on a special body, the [European Agency for Fundamental Rights](#), to help with this). It can also refuse to agree to a draft Withdrawal Treaty if it believes it contains insufficient protection for fundamental rights (and [signalled its awareness of the need for its agreement back in 2016](#)). This would not be unprecedented. Painstakingly negotiated draft treaties have been blocked in the past because MEPs were sufficiently concerned they would [override human rights to data protection](#) and [condone child labour](#). Perhaps most significantly, the EU Parliament has already [indicated that its approval any future UK/EU trade deal will be contingent on the UK maintaining its human rights obligations](#).

The EU Parliament also has legal tools close to hand. Under [Article 218\(11\) TFEU](#), it can refer a draft treaty to the EU Court of Justice for a pre-emptive opinion on its legality. States and the Commission have the same right. By contrast, individuals can only seek a reference when at a later stage when their rights are sufficiently clearly affected to give them standing (by which point individual legal action might be too late).

Should the EU Parliament and Court step in?

There is plenty within, and missing from, the Draft Agreement that might trouble the EU Court of Justice were the Parliament to make a reference. The Court would need to be satisfied that the agreement did not breach the EU Treaties, the Charter on Human Rights or the fundamental rights principles of its own case law, or the human rights standards the EU and, separately, the UK has signed up to, including the European Convention on Human Rights (ECHR). These are high bars to hurdle.

For example, can it really be compatible with respect for Article 8 private life rights for long term vulnerable EU residents in the UK, or UK residents in EU 27 states, including children in care, to be

left in a legal limbo or criminalised because they will not qualify for settled or temporary status? How does that sit with the protection of children's rights discussed in Article 3 TFEU and the Charter? The Court of Appeal recently confirmed that [long-established business activities can give rise to private life rights too](#), so is it human rights-compatible to offer those who have undertaken such activities elsewhere in the EU no protection in the Draft Agreement? Does it offer sufficient fairness and due process guarantees, especially to those facing deportation following the end of the transition period for failing to apply for a status or on the amorphous "conduct" ground. What of the property rights of those with holiday or retirement homes that may no longer be able to enjoy?

All these detailed questions and more besides are worth exploring fully. The stakes are far too high not to do so.

There are also two overarching questions which must be confronted. Both arise because, in the EU legal order, the principles of equality and non-discrimination are amongst the most powerful and will often demand a 'levelling up' of rights.

The first concerns the disparity of treatment between UK nationals and their EU counterparts: assuming it is lawful to strip UK nationals of the EU citizenship, does EU anti-discrimination law allow a treaty to be made which leaves UK national beneficiaries without any free movement rights?

The second concerns Northern Ireland, which the EU proposes should remain within the customs union, benefitting Irish nationals and UK nationals living in Northern Ireland alike. These proposals are said to be justified on account of unique "geographical circumstances". Undoubtedly, there is force in this. But if Irish nationals and UK nationals living in Northern Ireland are to enjoy the benefits, why not Spanish nationals with ties to Gibraltar, or UK nationals living in Gibraltar with ties to Spain?

With the Note, Report and Draft Agreement the EU and UK negotiators have almost pulled off the most ambitious branding exercise ever undertaken in Europe: presenting arrangements that will ultimately strip millions of their existing fundamental rights as generous rights-granting measures for the minority that will benefit in future. Of course that minority comprises millions of people too, but that will be little consolation to those who fall just outside the protected groups because their "past life choices" are not quite the right ones or because they planned to exercise their EU citizenship rights, but have yet to do so. MEPs have a special responsibility for these people, which they should embrace on an informed basis and then take action.