

**RE: GAPS IN PROTECTION FOR BRITISH NATIONALS IN  
THE PROPOSED UK–EU WITHDRAWAL AGREEMENT**

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**ADVICE**

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<i>Content</i>	<i>Page</i>
<b>A. Introduction and Summary</b>	2
<b>B. The Role of the Withdrawal Agreement</b>	6
<b>C. The Withdrawal Agreement</b>	8
I. Introduction	8
II. Personal Scope of the Citizens Rights	8
III. People whose rights are not protected	10
(a) <i>People who do not exercise rights before end of transition period</i>	11
(b) <i>Relationships which do not come about before the end of the transition period</i>	13
(c) <i>Children where one or more parents is a third country national</i>	13
(d) <i>Children in care</i>	14
(e) <i>People with right of residence under Surinder Singh, Lounes and Carpenter</i>	15
(f) <i>People not currently resident but who have previously acquired the right of permanent residence</i>	16
(g) <i>People who do not have comprehensive sickness insurance</i>	17
(h) <i>People who do not apply for residence status in time</i>	18
IV. Ways in which Citizens’ Rights can be lost	20
(a) <i>Loss of right by absence</i>	20
(b) <i>Conduct and criminality after the transition period</i>	22
V. Restriction of protected right to a single country	22
<b>D. Legality of the Withdrawal Agreement</b>	23
I. Compatibility with General Principles of EU Law	23
(a) <i>Non-discrimination and duty of consistency</i>	24
(b) <i>Non-retroactivity, Legal Certainty and Legitimate Expectations</i>	29
II. Fundamental Rights	
(a) <i>The right to private and family life</i>	35
(i) <i>Deprivation of EU citizenship</i>	35
(ii) <i>Deprivation of Certain Citizenship rights</i>	36
(iii) <i>Proportionality and Legality</i>	37
(b) <i>Deprivation of Voting Rights</i>	38
<b>E. “Acquired” or “Executed” rights under international law and EU law</b>	39
(a) <i>Whether EU Law requires Acquired or Executed Rights to be Respected</i>	41
(b) <i>Identification of Acquired or Executed Rights</i>	43
(c) <i>Gaps in protection and Acquired rights</i>	44
<b>F. Challenges concerning the Withdrawal Agreement in the UK</b>	45

**A. INTRODUCTION AND SUMMARY**

1. We are asked to advise on the draft Withdrawal Agreement between the United Kingdom and the European Union, in particular on the extent to which it fails to protect the interests of certain categories of British nationals, giving rise to unlawful discrimination or a breach of fundamental rights; and the legal remedies, if any, that may be available to address those shortcomings in the Agreement.
2. In summary, our Advice below is that:
  - a. Citizens' rights have been given special prominence in the negotiations for the Withdrawal Agreement. The 'personal scope' of the Withdrawal Agreement is set out in considerable detail in the draft of the Agreement and includes various categories of EU and UK citizens, including 'frontier workers', and their EU and non-EU family members, dependants etc, subject to certain requirements. It is not envisaged that there will be any enforceable legal guarantees of citizens' rights between the EU and the UK arising from the current negotiations other than those set out in the green text of the draft Withdrawal Agreement.
  - b. Under the Withdrawal Agreement, a significant number of people will either not have the right to reside or will have significantly limited rights compared with the current position. These include, in particular: (a) people who do not exercise relevant rights before the end of the transition period; (b) people in relationships which do not pre-date the end of the transition period; (c) children with one or more parent who is a third country national; (d) children in care; (e) people with rights of residence under CJEU case law *Surinder Singh*, *Lounes* and *Carpenter*; (f) people who have acquired a permanent right of residence in another EU Member State but who are not currently resident there; (g) those who do not have (or have not at all relevant times had) comprehensive sickness insurance; and (h) those who do not make a relevant application for residence status in time.
  - c. Even where rights are granted under the Withdrawal Agreement, there are ways in which those rights can be permanently lost in future, which would not arise in the same way at present under EU law, including the loss of the right of residence by certain types of absence, and loss of the right of residence as a result of conduct or criminality occurring after the transition period.
  - d. The right of residence granted under the Withdrawal Agreement is restricted to a single country. This may amount to a considerable restriction, e.g., for a British citizen living

in one Member State while working in another, or operating a business in more than one Member State, or hoping to expand a business to another Member State in the future. It may also amount to a considerable restriction for British nationals currently studying in one Member State while planning to work or live in another in future, and for those in the process of obtaining professional qualifications which they expected to be recognised across the EU.

- e. To be lawful under EU law, the Withdrawal Agreement will have to comply with general principles of EU law including non-discrimination, the general prohibition on retroactivity, the principles of legal certainty and legitimate expectations, as well as EU fundamental rights.
- f. In our view, there are identifiable gaps in the protection of existing rights afforded by the Draft Withdrawal Agreement, including significant inconsistencies in the treatment of different types of relationship or categories of person who, ostensibly, appear to be similarly situated, as well as apparently neutral rules which are likely to impose a disproportionate burden on certain vulnerable groups (children, the disabled, the elderly). We think that a number of these gaps and distinctions – e.g. treating the non-EU parents of EU children differently depending on the reason for residence in the EU; distinguishing between family reunions based on the time at which a relationship arises; or denying a right to family reunion based on the time at which a need for care based on serious health grounds arises – gives rise to concerns regarding non-discrimination and consistency.
- g. Such substantial differences in treatment call for objective justification. It is far from clear that these differences, which are in many cases essentially arbitrary, can be justified in accordance with the requirements of EU law, especially bearing in mind the likely significant (and disproportionate) impact on the private and family life of affected individuals (which will include children and vulnerable or elderly adults); the risk of indirect discrimination on grounds of age; and the lack of any obvious legitimate aim justifying such differences in treatment.
- h. There is also reason to doubt the compatibility of the Draft Withdrawal Agreement with other general principles of EU Law including the principles of non-retroactivity, legal certainty and legitimate expectations, since it appears to infringe the legitimate expectations of a number of groups of individuals, such as those who had (until 2016 at least) a legitimate expectation that their rights, such as the right to reside or to obtain

recognition of professional qualifications in another Member State, would not be abrogated without affording them protection.

- i. Where individuals have relied on their citizenship rights to their substantial detriment (financial and personal), in the full expectation that they would continue to enjoy such rights, e.g. in retirement or post-qualification, there is a need to justify frustrating those expectations. Again, given that certain of the groups who are affected will suffer substantial detriment, without the availability of compensation or residual protection of their rights, and in an arguably arbitrary or discriminatory manner, there must be considerable doubt as to whether the Draft Withdrawal Agreement complies with the requirements of EU law in this respect. In most cases there is no obvious “overriding” public interest justification in failing to protect such groups.
- j. Respect for fundamental rights is a condition for the legality of EU acts, including any agreement between the EU and a third country. Many fundamental rights are, in principle, potentially engaged by withdrawing the rights, entitlements and benefits conferred by EU citizenship.
- k. While the strength of any claim would depend on individual facts and circumstances, it is clear that the wholesale deprivation of EU citizenship for all UK citizens, and the deprivation of certain citizenship rights such as certain rights of family reunification, risk infringing the right to respect for private and family life under Article 8 ECHR and equivalent EU Charter rights. Again, we note that the deprivation of existing derived rights of residence, such as *Zambrano* rights, is likely to have a severe impact on those affected, which will include children, the elderly and disabled persons, who may be among the most seriously affected. This is likely to weigh heavily in any proportionality assessment of the effect of the Draft Agreement on those exercising derived rights of residence.
- l. The absence of any protection for the voting rights of those in Northern Ireland who have Irish citizenship, or who have (or are entitled to) both British and Irish citizenship, and who may continue to be significantly affected by decisions made by the European Parliament, is also arguably contrary to fundamental rights principles relating to the deprivation of voting rights. If, and insofar as, EU Law continues to apply to the UK as a whole after Brexit, the blanket deprivation of democratic rights of UK nationals to participate in EU Parliamentary elections may raise a fundamental rights issue.

- m. Under international law, the EU and UK will each remain bound as a matter of international law to continue to respect (and give effect to) “acquired rights” conferred by the EU Treaties. They will also have to respect “executed” rights, obligations or a “legal situation” created by the EU Treaties, save where the Withdrawal Agreement makes provision not to do so.
- n. We think it would be contrary to EU Law for the EU’s institutions to fail to respect the “acquired rights” of UK (or EU) citizens after Brexit, absent specific agreement as to how such rights are to be addressed in the Withdrawal Agreement. We therefore think that it will be possible for individuals in possession of “acquired rights” for the purposes of international law to challenge a failure on the part of EU Law to respect the continued effect of such rights, if they are not expressly curtailed by the Withdrawal Agreement. We also think that consent on the part of the EU states or on the part of the United Kingdom to remove vested or executed rights is not to be lightly inferred.
- o. A number of the categories of rights considered in this Advice, including continuing rights of residence and/or derived rights of residence, are not expressly extinguished by the Draft Withdrawal Agreement. We consider that there is a strong argument, in particular where UK or EU citizens rely on such rights prior to the end of the Transition Period, that such rights are “vested” or “executed” and therefore continue in force as a matter of international (and therefore EU) law, absent agreement between the UK and EU to the contrary. In interpreting and applying the Withdrawal Agreement, it is strongly arguable that the Courts would have to interpret and apply EU law in accordance with these requirements.
- p. The UK and the EU27 countries will have to put in place domestic legislation to implement the Withdrawal Agreement, and the parties are likely ultimately to agree to long term arrangements for dispute settlement which will enable individuals or groups based in the United Kingdom to raise issues as to the interpretation or validity of the Withdrawal Agreement (or aspects thereof) for purposes of EU Law, premised on EU Law arguments. Where individuals in the United Kingdom consider that either provisions in the Withdrawal Agreement, or the interpretation and application of the Agreement by the United Kingdom or their country of residence is unlawful, it will be possible for individuals to rely on EU law arguments (including general principles of EU Law and arguments based on the Charter of Fundamental Rights) to bring a challenge. In addition, individuals may seek reference to the CJEU both during the Transition Period and, insofar as citizenship rights are concerned, for 8 years after the end of the Transition Period.

## B. THE ROLE OF THE WITHDRAWAL AGREEMENT

3. According to Article 50(2) TEU (emphasis added):

*2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

4. By Article 50(3) TEU the Treaties ‘shall cease to apply’ either when the Withdrawal Agreement comes into force or, failing that, two years after the notification. As such, any rights currently provided to EU citizens<sup>1</sup> by or under the Treaties will cease to be provided to UK citizens under those Treaties.

5. That does not necessarily mean that those rights will cease to be provided. The UK and other EU Member States may choose to continue to provide those rights under their own domestic legislation (albeit that such provision will not be subject to any international enforcement mechanism). Alternatively, bilateral arrangements between the UK and individual Member States may be entered into in order to preserve certain rights (where such arrangements are consistent with Member States’ obligations under the EU Treaties).

6. Nonetheless, one of the strongest ways by which such existing rights can be preserved is by replicating them in the Withdrawal Agreement. Rights preserved under the Withdrawal Agreement will continue without interruption. Moreover, for certain rights dependent on access to EU institutions (such as the right to seek a reference to the Court of Justice), such rights can only be replicated by an agreement with the EU such as the Withdrawal Agreement.

7. Citizens’ rights have been given special prominence in the negotiations for the Withdrawal Agreement:

- a. The European Council’s *Guidelines Following the United Kingdom’s Notification under Article 50 TEU* (29 April 2017) emphasised that the first phase of negotiations will aim to ‘provide as much clarity and legal certainty as possible to citizens,

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<sup>1</sup> It is worth noting that some rights under EU law, for example data protection rights, are enjoyed by third country nationals as well. Qualifying UK citizens would remain entitled to exercise those rights (e.g. where their data was being processed in the EU).

*businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union*'.

- b. Chapter III of the Council of the European Union's Directives for negotiating the Withdrawal Agreement focused on citizens' rights and noted that the Agreement '*should safeguard the status and rights derived from Union law **at the withdrawal date***' (emphasis added). Such safeguards were to cover rights which would become effective at a later date (e.g. pension rights) and rights in the process of being obtained (e.g. where someone is in the process of accumulating the five years' residence in another Member State required to obtain the right of permanent residence). The Council emphasised residence rights, rights of free movement, social security rights, and the right to take up and pursue self-employment.
- c. On 8 December 2017 a Joint Technical Note and a Joint Report from the EU and UK negotiators were published, setting out the extent of 'common understanding' which had been reached by the negotiators under the caveat that '*nothing is agreed until everything is agreed*'. The Joint Report emphasised that '*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.*' (original emphasis).
- d. On 28 February 2018, the European Commission published a draft Withdrawal Agreement which purported to reflect that common understanding. Part Two of the draft Withdrawal Agreement is entitled Citizens' Rights.
- e. On 19 March 2018, a little under three weeks later, the draft was republished with colour coding. Green text represents text agreed at negotiators' level subject only to technical legal revision; yellow text represents where negotiators are agreed on the policy objective but not the precise text, whereas text in white indicates that negotiations are ongoing. The entirety of Part Two (Citizens' Rights) is coloured green.
- f. On 23 March 2018, the European Council published further Guidelines which welcomed '*the agreement reached by the negotiators on parts of the legal text of the Withdrawal ~Agreement covering citizens' rights...*' The Council set out further guidelines on negotiations for an overall understanding of the framework for the future relations that will be '*elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement.*'

8. It follows from the above that whereas there may be a political declaration accompanying the Withdrawal Agreement, it is not envisaged that there will be any enforceable legal guarantees of citizens' rights between the EU and the UK arising from the current negotiations other than those set out in the green text of the draft Withdrawal Agreement.

## **C. THE DRAFT WITHDRAWAL AGREEMENT**

### **I. Introduction**

9. The overall structure of the Withdrawal Agreement is to provide for a transition period to last until 31 December 2020 (i.e. 19 months after the current withdrawal date of 30 March 2019) (Article 121). During that period the majority of Union law shall remain applicable to and in the United Kingdom. As a result, the majority of citizen rights will also remain in place (but importantly not those that allow British citizens to stand and vote in European Parliament and local elections).
10. However, in the case of Citizens Rights the draft Withdrawal Agreement goes further and provides that some rights will last beyond the end of the transition period. The substantive rights provided by the draft Withdrawal Agreement fall under four headings:
  - a. Rights related to residence, residence documents (Articles 12-21)
  - b. Rights of workers and self-employed persons (Articles 22-24)
  - c. Professional Qualifications (Articles 25-31)
  - d. Coordination of social security systems (Articles 28-31). Access to these rights is determined by a separate scoping provision in Article 28.

### **II. The personal scope of the Citizens Rights under the Withdrawal Agreement**

11. Article 9 identifies the categories of people who will have access to rights under the Withdrawal Agreement. These categories of people are set out in intricate detail and include:
  - a. UK citizens who have exercised their right to reside in a Member State in accordance with Union law and '*continue to reside there thereafter*'. The same applies to Union citizens who have exercised their right to reside in the UK.

- b. UK citizens who exercise rights as frontier workers<sup>2</sup> in a Member State and ‘*continue to do so thereafter*’ are covered. The same applies to Union citizens who exercise rights as frontier workers in the UK and ‘*continue to do so after*’. This protection will be especially important to UK citizens in Gibraltar who work in Spain and vice-versa.
- c. Family members. These include:
  - i. spouse;
  - ii. registered partners (e.g. civil partners). To count as registered partners, the couple must be in a legal relationship which the host state treats as equivalent to marriage.<sup>3</sup> Cohabitation (for however long a period) is insufficient (although see subparagraph (f) below for the treatment of durable relationships);
  - iii. direct descendants (children and grandchildren) who are aged under 21 or are dependents of the UK/Union citizen or their spouse; and
  - iv. dependent direct ascendants (e.g. parents and grandparents) (we shall refer to these four categories as “**Principal Family Members**”);
  - v. a person other than a Principal Family Member and/or someone who satisfies Article 3(2) of the Citizens Directive<sup>4</sup> whose presence is required in order not to deprive the Union/UK citizen of their right of residence (such people do not need to be related to count as family members).
- d. A family member will have rights under the Withdrawal Agreement if:
  - i. they resided in the host state before the end of the transition period and continue to reside there thereafter;

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<sup>2</sup> NB a frontier worker is someone who resides in one member state and works in another in accordance with Article 45 or 49 TFEU. They should be distinguished from ‘posted workers’ who are sent on short term assignments to another Member State by their employer. Their situation is not addressed by the draft Withdrawal Agreement.

<sup>3</sup> Citizens Directive Recital (5)

<sup>4</sup> This covers: (a) any other family members [i.e. apart from Principal Family Members], irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested.

- ii. they had the relevant relationship before the transition period and continue to qualify as one of the first four types of family member (but not the fifth) at the time they seek residence;
  - iii. they are born or adopted after the end of the transition period and where both parents fall into category (a) or (b) above or where one does and the other is a citizen of the host state;
  - iv. they are born or adopted after the end of the transition period and a parent falls into category (a) or (b) above and has sole or joint custody over the child;
  - v. they currently enjoy a right of residence under special rules under the Citizens Directive (involving the death, retirement, ill-health of, or divorce from the person with the primary right of residence) and continue to reside in the host state after the transition period.
- e. Further, dependants or members of the household of the UK/Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the UK/Union citizen, will have rights under the Withdrawal Agreement provided they have been granted the right of residence (or have applied for it) before the end of the transition period.
  - f. Where the UK/Union citizen in a durable relationship which predates the end of the transition period that person can apply to join their partner in the host state if they have not done so beforehand even after the end of the transition period, provided they are still in the relationship at the time.
12. The right of residence is broadly intended to replicate (and be subject to the same benefits and conditions as) the Citizens Directive 2004/38/EC and many of the rights in the Withdrawal Agreement are provided by means of cross reference to that Directive. In broad terms, the Citizens Directive allows visa free travel to another Member State and the right to move and reside for those who are workers, are self-sufficient, are students with adequate insurance, and accompanying family members.

### **III. People whose rights are not protected in the draft Withdrawal Agreement**

13. However, under the Withdrawal Agreement a significant number of people will either not have the right to reside or will have significantly limited rights compared with the current position.

14. We have been provided with example situations by the People’s Challenge, which consist of a name and a brief description of that person’s status. We refer to these **in bold** below. We emphasise that these can do no more than demonstrate the general effect of the Withdrawal Agreement; without further details of the circumstances of any individual case, it is not possible to provide definitive legal advice on any particular individual’s status, rights and/or remedies under the Withdrawal Agreement, and this Advice does not do so.
15. A great deal of analysis has already been carried out on these issues and we are indebted, in particular, to the following research:
- a. British in Europe, *The Draft Withdrawal Agreement - British in Europe’s Comments* (14 March 2018) [https://britishineurope.org/wp-content/uploads/2018/03/BiE\\_Detailed-Response-to-draft-WA\\_FINAL.pdf](https://britishineurope.org/wp-content/uploads/2018/03/BiE_Detailed-Response-to-draft-WA_FINAL.pdf)
  - b. John Halford, Bindmans LLP, *The millions in the margins* (23 March 2018) <https://www.bindmans.com/insight/brexit/the-millions-in-the-margins>
  - c. House of Commons Library, Briefing Paper 8269, *Brexit: the draft withdrawal agreement* (23 March 2018) <http://researchbriefings.files.parliament.uk/documents/CBP-8269/CBP-8269.pdf>
  - d. Professor Steve Peers, *EU27 and UK citizens’ acquired rights in the Brexit withdrawal agreement: detailed analysis and annotation*, (13 March 2018) <http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>
- a. People who do not exercise rights before end of transition period*
16. As indicated in the Joint Report, the rights to be preserved are to be based on past life choices and drafting of Article 9 is intended to reflect this.
17. A UK national who has moved to a Member State prior to the end of the transition period could continue to reside there afterwards (subject to the limits and conditions under the treaties and Citizens Directive).
18. By contrast, where a UK person has not yet moved to a Member State prior to the end of the transition period, the Withdrawal Agreement does not provide them with the right to do so.
19. **Carol and Ray** are UK residents who have purchased a property in an EU27 country and hope to move to it upon a trigger event (for example when their children leave home or on retirement). At present, they could move to that property provided they fell into a relevant

category under Article 7 of the Citizens Directive. However, the Withdrawal Agreement only provides them with the right to do so where they make that move before the end of the transition period. Although the draft Withdrawal Agreement purports to protect rights based on past life choices, investment in a property is insufficient. Residence is required.

20. Similarly, **Karen** has never resided in an EU27 country but owns a property overseas and until a couple of years ago visited regularly for extended stays. Although Karen has invested in an EU27 country and has connections there, the draft Withdrawal Agreement does not provide her with the right to reside there unless she resides there before the end of the transition period and continues to do so afterwards.
21. **Sue** is a UK resident who owns and operates a business in an EU27 country, which she regularly visits. She is not a resident in that EU27 country, but having exercised the right of establishment under Article 49 TFEU is a ‘frontier worker’ within the meaning of the Withdrawal Agreement. She will accordingly continue to have the rights of a frontier worker (set out in Chapter 2 of Part Two), in that EU country. However, the rights of a resident and of a frontier worker are not interchangeable. Sue will not gain the right of residence and will not be able to become a permanent resident unless she begins to reside in the EU27 country before the end of the transition period.
22. **Douglas** has worked as an employee in a number of EU27 countries but is currently working in the UK. Assuming he is a UK national, if he is not working in an EU27 country at the end of the transition period the Withdrawal Agreement will not provide him with the right to move there to work at a later point.
23. There are also other categories of people who need to exercise the right to reside in a Member State before the end of the transition period if they wish to have a right of residence under the Withdrawal Agreement. These include:
  - a. People who fall under Article 3(2)(a) of the Citizens Directive, i.e. any family members (other than Principal Family Members) who, in the country from which they have come, are dependants or members of the household of the Union/UK citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen. They must have either been granted residence or applied for it before the end of the transition period. This means that if such a family member only became ill after the end of the transition period, and needed to join and be cared for by a Union/UK Citizen living overseas, they would not be entitled to do so under the Withdrawal Agreement.

- b. People other than Principal Family Members and those falling under Article 3(2) of the Citizens Directive but whose presence is required in order not to deprive the Union/UK citizen of their right of residence must have begun to reside in the host state before the end of the transition period if they are to retain rights under the Withdrawal Agreement.

***b. Relationships which do not come about before the end of the transition period***

- 24. In other cases, the right of residence may be exercised after the transition period has ended provided the relevant relationship existed before the end of the transition period. For example, a spouse or someone in a durable relationship may join an EU citizen in their host state so long as they were married or in a durable relationship prior to the end of the transition period. However, where that relationship arises after the transition period has ended, there is no right of residence under the Withdrawal Agreement.
- 25. On the one hand, such people are better placed than, for example, unwell family members (who must have applied for or exercised the right to reside before the end of the transition period). To that extent, there is arbitrariness in allowing a partner to join a UK/Union citizen in a host state after the transition period so long as their relationship predates the transition period but not, say, a seriously unwell sibling, regardless of when their illness and need to join the UK/Union citizen arose. In practice, such distinctions may cause significant disruption and interference and, unless national legal systems make relevant provision, they risk compelling UK/Union citizens to choose between retaining their right of residence or providing care for a loved one.
- 26. Further, there is a distinction between these types of relationship and children. As explored in the next section, children born after the end of the transition period may have a right of residence, but this depends on who their parents are.

***c. Children where one or more parents is a third country national***

- 27. A child born after the end of the transition period shall have a right of residence only in three circumstances: (i) both parents have exercised a right of residence to live in a host state before the end of the transition period; (ii) one parent has exercised a right of residence before the end of the transition period and the other parent is a national of the host state; or (iii) one parent has exercised a right of residence prior to the end of the transition period and has joint or sole custody of the child.
- 28. This again creates meaningful distinctions between different sorts of people depending on their life choices. Take the case of a British person who retains a right of residence in France after

the end of the transition period and has a child with a French person who is born after the end of the transition period. Their child shall have a right of residence. However, in the case a British person living in France who – after the transition period – meets and marries a third country national and has a child with them, neither the spouse nor the child will have a right of residence. Perhaps more extraordinarily, in certain cases (e.g. where the relationship predated the end of the transition period) the third country parent will have a right of residence, but not their child.

29. A further category of children who have EU law rights are *Zambrano* children.<sup>5</sup> The EU Court of Justice has ruled that Article 20 TFEU means that (say) a UK citizen child who requires the presence of a third country national parent or parents in order to prevent them being deprived of the genuine enjoyment of their rights as an EU citizen is entitled to have their parents resident in the UK. Our understanding of the Withdrawal Agreement is that during the transition period such children will retain this right (since, with the exception of voting rights, Article 20 TFEU remains in force). However, no provision is made for such children following withdrawal. Indeed, as *Zambrano* is predicated on the child having the rights of an EU citizen, the conceptual underpinning is removed when that child ceases to be an EU citizen.
30. The UK recognises *Zambrano* rights not just in respect of children but in respect of any British Citizen resident in Britain who requires the presence of a primary carer to continue residing in Britain.<sup>6</sup> This would apply for example in the case of a disabled UK citizen whose primary carer is a third country national. Since *Zambrano* rights are not protected by the Withdrawal Agreement, the agreement does not guarantee the continued residence of their primary carer. It is notable that in response to the Draft Withdrawal Agreement, the European Parliament (whose consent is required for the EU to enter into the agreement) called for ‘*protection against the expulsion of disabled citizens and their carers*’.<sup>7</sup> The absence of *Zambrano* rights from the Draft Withdrawal Agreement represents a shortcoming in those protections.

#### ***d. Children in care***

31. A further category of people who are not catered for by the Withdrawal Bill are children in care. Under the Citizens’ Directive the immigration status of children who have been removed from their parents and placed in care is uncertain. This is the case for both a UK child in care in a Member State or an EU national child in care in the United Kingdom. A description of the experiences of the latter is provided by Coram Children’s Legal Centre:

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<sup>5</sup> C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*. EU:C:2011:124

<sup>6</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257807/zambrano.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257807/zambrano.pdf)

<sup>7</sup> European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, paragraph 58.

*Currently, European national children who are removed from their parents may struggle to demonstrate their entitlement to reside in the UK. Due to a lack of understanding of the free movement directive, the need to be exercising treaty rights in order to have a qualified right to reside is overlooked for this group. Often, it is only when a young person is planning for their future with a personal advisor that it becomes clear that they will not be able to access benefits as a care-leaver in the same way as a young British national, and that their right to reside in the UK is linked either to their economic activity, or the activities of their parents from whom they are estranged.*

Brief: Settlement for European national children in care <sup>8</sup>

– Coram Children’s Legal Centre

32. However, at present, at least, on leaving care, such children have the opportunity to demonstrate that they fall within Article 7 of the Citizen’s Directive (say by getting a job and becoming a worker) and thus have a right of residence. Under the Draft Withdrawal Agreement such children are not catered for. If someone leaves care after the transition period, they will not be able to establish a right of residence at that point unless they can show that they already were lawfully resident in the host country during the period they were in care. There may be considerable difficulties in doing this.

***e. People who have a right of residence in accordance with Surinder Singh, Lounes, and Carpenter***

33. In accordance with the Citizens’ Directive, a UK national who lives in an EU State has the right to be joined by a third country spouse. The case of *Surinder Singh*<sup>9</sup> recognises a further right which arises where the UK national returns to the UK. In that case the third country spouse gains the right to move to and reside in the UK with their spouse (without needing to meet domestic legal requirements such as an income threshold) and enjoy rights at least as good as those which EU law grants during their residence in the host state.

34. The Withdrawal Agreement does not include any language which preserves the effect of the *Surinder Singh* rights. Indeed, once the UK national no longer continues to reside in their host state and returns to the United Kingdom they would fall outside the personal scope of Part 2 of the Withdrawal Agreement.

35. Similarly, the Court of Justice has recognised in its decision in *Lounes*<sup>10</sup> that an EU national who moves to the UK but then gains UK Citizenship loses rights under the Citizens’ Directive

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<sup>8</sup>[https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/European-national-children-in-care\\_March2018Final.pdf](https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/European-national-children-in-care_March2018Final.pdf)

<sup>9</sup> Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*. EU:C:1992:296

<sup>10</sup> Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department*. EU:C:2017:862

(including the right to have a third country spouse join them). However, they nonetheless are granted such a right directly by the treaties by Article 21(1) TFEU. The same would apply to a UK national who has moved to an EU Member State and acquired citizenship there. Article 9 of the Draft Withdrawal Agreement is ambiguous as to whether such people would continue to have a right to be joined by their spouse. Arguably, such people fall within the scope of the draft withdrawal agreement since they exercised their right to reside in the UK in accordance with EU law and continue to reside there (albeit their continued residence is based on their UK citizenship rather than EU law). If that is the case, then much as someone who had not taken UK citizenship, they would continue to have the right to be joined by their family members (including spouses) so long as the relationship precedes the end of the transition period (Article 9(1)(e)(ii) read with Article 12(3)). However, some consider that *Lounes* rights are not adequately protected by the Draft Withdrawal Agreement such that there is more work to be done to clarify the situation.<sup>11</sup> This is pressing, in particular, when *Lounes* rights have only recently been recognised in European jurisprudence and their scope can still be expected to be clarified and refined by further decisions over time.

36. In the line of case law starting with *Carpenter*<sup>12</sup>, the Court recognised a right for a third country spouse to join an EU citizen who is resident in their home state where refusal to allow this would discourage the EU citizen from effectively exercising their rights under Article 45 TFEU (free movement of workers). For example, such rights might arise where the EU citizen is a self-employed person who regularly travels to provide services in other Member States and their third country spouse provides support to enable this. Whilst ‘frontier workers’ will retain some rights under the Withdrawal Agreement – as set out in Chapter 2 of Part Two (Rights of workers and self-employed persons) the preserved rights seem to be rights provided by the state of work and not the home state. In other words, nothing in that section appears to preserve *Carpenter* rights provided by the home state even when they have already been exercised prior to the Withdrawal Agreement.

***f. People not currently resident but who have previously acquired the right of permanent residence***

37. It appears to be the intention of both the UK and EU that rights of permanent residence shall be retained. Indeed, Article 10 of the Draft Withdrawal Agreement (Continuity of residence) states that ‘the right of permanent residence acquired under Directive 2004/38/EC before the end of the transition period shall not be treated as lost through absence from the host State for a period

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<sup>11</sup> <http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html> ; [https://britishineurope.org/wp-content/uploads/2018/03/BiE\\_Detailed-Response-to-draft-WA\\_FINAL.pdf](https://britishineurope.org/wp-content/uploads/2018/03/BiE_Detailed-Response-to-draft-WA_FINAL.pdf) (para 6)

<sup>12</sup> Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* EU:C:2002:434

[exceeding five consecutive years].’ However there appears to be a gap in the drafting in the case of people who are residing outside the state where they have acquired permanent residence at the end of the transition period. Such people would not seem to fall within the personal scope of Part Two of the Draft Withdrawal Agreement since, although such people have exercised their right to reside in a Member State before the end of the transition period, they do not obviously satisfy the requirement that they continue to reside there thereafter.

38. For example, **Beth** has been resident in an EU27 country for two decades up to a few years ago but is currently resident in the UK. Having lived there for more than five years, Beth will have obtained a right of permanent residence in her EU27 country if she met the requirements of the Citizens Directive. Depending on how long Beth has been back in the UK, it is possible she has already lost that right. Assume, however, she retains the right of permanent residence in the EU27 at the end of the transition period but is resident for the time being in the UK. Since she is not currently resident at the end of the transition period, on one interpretation of the agreement, there is a risk that she will not be considered to ‘*continue to reside*’ in her EU27 country. On that interpretation, she would therefore fall outside the personal scope of part 2 of the Draft Withdrawal Agreement and lose her right of permanent residence immediately.
39. If this is the correct interpretation (and it is not clear) then this would be an example of the Draft Withdrawal Agreement failing to secure a right (that of permanent residence) which has been exercised prior to the end of the transition period.

***g. People who do not have comprehensive sickness insurance***

40. An issue which has received a substantial amount of media attention is the need for certain categories of people exercising rights under the Citizens’ Directive to have comprehensive sickness insurance. This requirement does not apply to workers but does apply where the primary right holder is either self-sufficient or a student. In practice this requirement is in many cases neither observed nor enforced. The issue may equally affect a UK national living in a EU Member State and EU nationals living in the UK. The numbers affected are necessarily unknown.
41. The concern is that the personal scope of the Draft Withdrawal Agreement only preserves the rights of those who have exercised their right ‘in accordance with Union law’ (Article 9). Similarly, the right of permanent residence is recognised for those who have resided legally in accordance with Union law for a period of five years (Article 14). Those who needed to, but did not, have comprehensive sickness insurance arguably have not resided in accordance with Union law, such that their right to permanent residence may not arise under Article 14 of the Draft Withdrawal Agreement.

42. At least as the situation concerns EU citizens in the UK, as a matter of policy, the UK government has indicated to the Select Committee on the European Union (12 December 2017) that it will not enforce this requirement:<sup>13</sup>

*Lord Cashman: Minister, earlier you said that you want to deal with the decisions that people are taking now and that you wish EU citizens to stay. Following the referendum, many EU citizens in the UK applied for permanent residence. We understand that a large number of applications were refused, possibly because individuals did not have comprehensive sickness insurance in the circumstances where it was required or because they could not provide information requested in this extensive, complicated 85-page application form. My question to you is twofold. Why was the original system so complicated? Given that the problems that have been experienced by applicants are continuing, how confident are you that the current complicated and bureaucratic hurdles can be eliminated?*

....

*The Chairman: Will there be support for older people who are not good with technology?*

*Brandon Lewis MP: Yes, there will. This is why the Home Office is taking a different cultural approach. We have taken a very pragmatic approach. **For example, we are removing the need to demonstrate comprehensive sickness insurance, which you mentioned, Lord Cashman, to secure settled status.** The current system is not designed for the scale of numbers that we are talking about—the 3.5 million. As I say, the system will be very simple. One reason why we are recruiting so many people is obviously the sheer scale of numbers that we are looking to deal with. Also, I want our team to be proactive so that, if people have an issue, they can help them to resolve that issue, to take up Baroness Kennedy’s point, rather than spending their time deciding whether someone should or should not be granted something—that presumption will be there positively. (emphasis added).*

43. However, since policies can change over time (including when governments change), a policy assurance from a government does not carry the same force as a legal guarantee in the Draft Withdrawal Agreement. Nor, further, would this protect UK Citizens who might apply for permanent residence in a host Member State which enforces this requirement. Indeed, the draft Withdrawal Agreement (Article 17(1)(k)) entitles host countries to see proof of comprehensive sickness insurance as a precondition to granting residence status (discussed below). Accordingly, there remains a real risk that such people will lack legal entitlement to permanent residence.

#### ***h. People who do not apply for residence status in time***

44. Article 17 of the Draft Withdrawal Agreement enables the host state to require UK/Union citizens, as the case may be, to apply for a new residence status which will ‘confer the rights

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<sup>13</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-citizens-rights/oral/75516.html>

under this Title’, and a document evidencing such status. This is an important change from the *status quo* where the rights come directly from the Citizens’ Directive and there is no separate need to apply for a status (albeit in some cases there is a registration requirement). Under the Draft Withdrawal Agreement, the implication of Article 17 appears to be that a State which imposes a requirement to apply for residence status will be entitled to refuse the status (and all the rights that flow from it) to those who fail to apply in time or who are unable to demonstrate the requirements.

45. Article 17 sets conditions on the application to apply for the status. The process is purely designed to verify entitlement, and the deadline for applications shall be at least six months from the end of the transition period. Where the deadline is not respected an extension can be granted where there are reasonable grounds for failure to respect it. Procedures should be smooth, transparent and simple. Restrictions are placed on the sorts of supporting documents the host state can require. There is a right to judicial redress in the case of a dispute. Further, Article 33 requires Member States and the UK to disseminate information on rights and obligations, *‘in particular by means of awareness-raising campaigns conducted, as appropriate, through national and local media and other means of communication.’* All of this evinces an intention to maximise the chances of those who are entitled to the residence status being aware of the need to apply for it and therefore able to obtain it.
46. However, in spite of these measures, there is an inevitable risk of non-compliance with any application deadline and, as a result, the serious consequence of losing the right of residence may arise in some cases. Analysis conducted by Oxford University’s Migration Observatory<sup>14</sup> has indicated particular groups which are most vulnerable to failing to apply, including: children, very long-term residents, those who have already applied for permanent residence, and people who believe they are ineligible (e.g. who have breached the requirement for comprehensive sickness insurance). It further highlights the problems faced by victims of domestic violence and highlights groups of people who may particularly struggle to navigate the application process (e.g. where there are language barriers, age, disability or digital exclusion). Finally, it indicates people who may lack the relevant documentation to evince their right to reside (e.g. those without bank accounts).
47. The Migration Observatory estimates that there are around 3.5 million non-Irish EU citizens and third country national partners in the UK. A small percentage rate of non-compliance would

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<sup>14</sup> The Migration Observatory, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (12 April 2018) <http://www.migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexite/> This research focuses on EU citizens in the UK. But there is no reason why its concerns would not apply equally to UK citizens living in EU Member States.

quickly add up to large numbers of people in absolute terms. UK Citizens in EU Member States may well face similar issues to the extent that EU Member States choose to issue residence documents under Article 17.

#### **IV. Ways in which Citizens' Rights can be lost under the Draft Withdrawal Agreement**

48. Even where people are entitled to a residence status and successfully apply for the correct documentation, such status is capable of being lost in certain circumstances. The consequences of such a loss are more significant than under the present regime where it would (generally speaking) be open to a UK/Union national who has lost a right of residence or permanent residence to return to the host state and begin accumulating a period of residence again. However, once the right is lost following the end of the transition period, the exercise of the right of residence under the Withdrawal Agreement cannot be recommenced.

##### ***a. Loss of right by absence***

49. A resident who has not yet obtained a permanent right of residence, will need to ensure that they maintain continuous residence for five years if they wish to obtain permanent residence. This is because, under Article 9 of the Draft Withdrawal Agreement, the people within scope are those who have exercised a right of residence in a host state and '*continue to do so thereafter.*' Once the residence is interrupted, they are no longer within scope. Article 10 applies the same provisions as Article 16(3) and 21 in determining what constitutes discontinuance of residence:

a. Article 16(3) indicates that: *Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.*

b. Article 21 indicates that an expulsion decision ends continuous residence.

50. It is easy to see that there may be many good reasons which, in the ordinary course of events, lead someone to leave their host country for more than 12 months (e.g. an unwell relative or a job opportunity). At present such a person can do so safe in the knowledge that they can return to their host country after that absence (so long as they still satisfy the criteria for a right of residence). However, under the new regime, a person who was in the process of building up the five years of personal residence would be faced with the dilemma that leaving the host country may result in them losing their chance to obtain permanent residence.

51. The situation is different for those who have completed 5 years continuous residence and obtained the right of permanent residence. Under the current arrangements such a right can be lost by an absence exceeding two consecutive years. The Draft Withdrawal Agreement is on its face more generous as the right of permanent residence can be lost only through absence for a period exceeding five consecutive years. However, as identified by British in Europe and the 3 million, the Withdrawal Agreement does not provide an ability after an absence of more than 5 years to rebuild a right of permanent residence (even where there are strong personal and family ties to the host country).
52. There is less clarity in relation to the retention of rights for frontier workers. A frontier worker is someone who pursues economic activity in a state other than their home state without residing there. This would include a Gibraltar who works in Spain or a British person who regularly provides services to clients in France. Such people retain their right to pursue their economic activity in their state of work or states of work, and the rights which accompany that under Article 22 and 23 of the Draft Withdrawal Agreement. However, pursuant to Article 9, they only qualify for so long as they continue to exercise their rights as a frontier worker. However, the concept of continuous exercise of the right of frontier worker appears to be new to EU law. No guidance is given in the draft Withdrawal Agreement and the wording is entirely nebulous.
53. How much economic activity must take place in the state of work to qualify for the right in the first place? What constitutes a sufficient break in such activity? What if a worker is willing to provide their services in (say) Germany but has no clients for the time being? In the absence of clearer definitions there is likely to be considerable uncertainty whether someone has or retains the right of a frontier worker.
54. **Harry** is a UK resident self-employed consultant who regularly undertakes short term assignments across the EU and world-wide. Assuming Harry is a UK national, if his economic activity in any given EU country is sufficient for him to count as a frontier worker then he will retain the right to do such work. But there will be a lack of clarity about those countries in which he has sufficient economic activity to count as frontier work and where he continues to meet the threshold after the end of the transition period. Moreover, the draft Withdrawal Agreement does not provide him with the right to work in countries where he has had no economic activity to date even where his business might have evolved over time to include such countries. By contrast, were Harry an EU national, he would be able to continue to exercise the right to work in other Member States.
55. **William** is an EU27 resident self-employed consultant in the service sector who regularly undertakes short term assignments across the EU and world-wide. Like Harry, if William is a

UK citizen, the draft Withdrawal Agreement only gives him the right to continue exercising the rights of a frontier worker in countries where he already has sufficient economic activity. If he is a Union citizen he would be free to operate his business throughout the Union.

56. Similarly **Charles** is resident in the UK and runs a Small/Medium sized business buying and selling across the EU, possibly directly between EU27 countries. If he is a UK Citizen, the draft Withdrawal Agreement similarly fails to protect his freedom to expand his business throughout the EU.

***b. Conduct and criminality after the transition period.***

57. The Citizens' Directive, Chapter VI, enables the right of residence to be restricted in certain cases on grounds of public policy, security or health. Such restrictions are carefully limited by the principle of proportionality. Measures based on public policy or security must relate to the personal conduct of the specific individual, who must represent a genuine, present and sufficiently serious threat to the fundamental interests of society. The Directive provides for a series of procedural safeguards; the right to apply to have a ban lifted; and expulsion cannot be a penalty unless one of the restrictive grounds for expulsion is made out. Children cannot be expelled unless to do so is in their best interests and no one can be expelled (except on imperative grounds of public security) after 10 years of residence.
58. According to Article 18 of the Draft Withdrawal Agreement, these safeguards against expulsion will continue to apply to conduct before the end of the transition period. However, the legal effect of conduct occurring after the end of the transition period will be determined instead by national law. The Draft Withdrawal Agreement does not expressly seek to limit or curtail what the grounds for expulsion of UK/Union nationals in their host state might be. As a result, there is uncertainty and the risk that a right of residence may be lost in cases where it would not or could not have been removed under the Citizens Directive.

**V. Restriction of protected right to a single country**

59. The right of residence provided in the draft Withdrawal Agreement is carefully limited to a single host country. Similarly, the right of a frontier worker is limited to the country (or countries) of work where the worker has established economic activity before the end of the transition period. In other words, a right for residence in France will not be transferable to Germany. A sole trader whose business operates in Italy and Spain cannot use their rights under the Withdrawal Agreement to expand their business into Portugal. By contrast, a Union citizen resident in the UK whose business operates in Italy and Spain would be able to expand their business to any of the other Member States.

60. The 28 February 2018 Draft Withdrawal Agreement made this explicit. Article 32 stated:

*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.*

61. Although this has been removed from the 19 March 2018 Draft, this is of no legal effect since this wording simply made explicit what was already implicit.

62. The restriction this imposes is considerable. It may be that a UK citizen lives close to the border between two countries (say France and Belgium) and which particular country they live in for the time being is happenstance. However, such people will be ‘locked in’ to one or the other following the end of the Transition Period if they wish to retain their rights under the Draft Withdrawal Agreement.

63. Similarly, a UK citizen may have commenced university studies in Spain in the hope, after their studies, to work in France.<sup>15</sup> If their studies do not conclude until after the transition period ends (which could easily be the case if they have already started) they may not have the right to move to France as they hoped.

64. This applies equally as regards the recognition of qualifications as covered by Chapter 3 of Part Two. Qualifications where application for mutual recognition has commenced before the end of the transition period will continue. But there will be no right under the Withdrawal Agreement to have qualifications further recognised by a new Member State where a UK citizen wishes to practice their profession.

#### **D. LEGALITY OF PROPOSED WITHDRAWAL AGREEMENT**

65. Given the “gaps” in protection identified above, the questions arise: (a) whether the failure of the Withdrawal Agreement to protect these identified rights or interests may be unlawful either under EU Law and/or UK law; and (b) what remedies may exist for affected individuals to challenge such illegality. We now turn to consider these issues.

##### **I. Compatibility with General Principles of EU law**

66. The Withdrawal Agreement must be interpreted in accordance with, and be compatible with, various ‘general principles’ of EU Law. These principles include non-discrimination, the general prohibition on retroactivity, the principles of legal certainty and legitimate expectations,

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<sup>15</sup> The example is adapted from: <https://www.bindmans.com/insight/brexit/the-millions-in-the-margins>

as well as EU fundamental rights. An agreement between the EU and a (putative) third state which fails to satisfy these principles will not be valid as a matter of EU Law (see C-122/95 *Germany v Council* [1998] ECR I-973).

67. In addition, as a matter of EU law, agreements with third states must be interpreted and applied in a manner which is consistent with the general principles of EU Law (see Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-0000 [§ 174 *et seq*]; C-402/07 *Sturgeon* ECLI:EU:C:2009:716). The Withdrawal Agreement must therefore be interpreted in accordance with general principles of EU Law so far as possible. This is also clear from the wording of the Agreement. Article 4 (1) provides that: “*where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States*”. Moreover, Union law is specifically defined so as to include general principles of EU Law (Article 2 (a) (ii), Draft Withdrawal Agreement).
68. With these points in mind, we turn to consider concerns regarding the compatibility of the Draft Withdrawal Agreement with certain general principles of EU Law. As regards the application of each of these principles to the circumstances of individuals under the Withdrawal Agreement, a great deal will depend on the precise factual circumstances of individual cases. We cannot, therefore, reach a definitive view as to the legality or validity of the Draft Withdrawal Agreement as currently formulated, in respect of any particular category of individual. Nevertheless, we are firmly of the view that, as presently drafted, there are real concerns that the Withdrawal Agreement is incompatible with general principles of EU Law as regards various groups of British nationals, including the fundamental rights of certain groups of individuals, and the duty of non-discrimination. As such, there is a question-mark over the eventual legal validity of the Withdrawal Agreement in various respects under EU Law.

***a. Non-Discrimination and the Duty of Consistency***

69. Article 21 of the EU Charter of Fundamental Rights provides:
1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
  2. *Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.*

70. Article 8, TFEU provides “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”, while Article 10, TFEU provides “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.
71. As well as finding manifestation in the Treaties and EU legislation, the principle of non-discrimination is also a general principle of EU Law. The general principle of equal treatment requires that “comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified” (Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055 [§57] and Case C-227/04 *Lindorfer* [2007] ECR I-6767 [§63]; (Case C-344/04 *IATA and ELFAA* [2006] ECR I-403 § 95). In C-402/07 *Sturgeon* ECLI:EU: C:2009:716 the CJEU explained the principle in the following terms:
- all Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.*
72. This principle has been applied in many other cases (*see e.g.* Case C-210/03 *Swedish Match* [2004] ECR I-11893 [§ 70] and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403 [§95]). Importantly, non-discrimination as a general principle of EU Law encompasses, but is not limited to, distinctions (or, as relevant, an absence of an appropriate distinction) grounded on a protected characteristic. In effect, the principle is a broader duty of consistency (*see e.g.* C-122/95 *Germany v Council* [1998] ECR I-973; and Case C-162/91 *Tenuta il Bosco Srl v. Italian Ministry of Finance* [1992] ECR I-5279).
73. As regards the legal effect of this principle:
- a. It is a condition for the lawfulness of EU action; EU measures which violate the principle of non-discrimination are illegal (and void) (Case C-25/02 *Rinke v. Arzteammer Hamburg* [2003] ECR-I 8349 [§§ 26-28]);
  - b. In addition, EU Law requires that measures and instruments be read in light of the principle of non-discrimination and equal treatment (*see e.g.* Case C-401/11 *Blanka Soukupova* EU:C:2013:223).

74. These principles are also applicable with regard to agreements concluded between the EU and Third States by the EU Council. In *C-122/95 Germany v Council* [1998] ECR I-973, the CJEU held that the EU may not conclude an international agreement which breaches the general principle of non-discrimination (although found that the principle was not breached on the facts of that case). Differences in treatment as between third countries (and distinctions for individuals resulting from such differences) are, of course permissible (*Germany v. the Council* [§ 56]). Whereas discrimination as between EU nationals is generally impermissible, this is not so in respect of distinctions either between EU and third country nationals or as between the nationals of third states.

*Concerns regarding non-discrimination*

75. As explained above, there are identifiable gaps in the protection of existing rights afforded by the Draft Withdrawal Agreement. In particular:
- a. There are significant inconsistencies in the Withdrawal Agreement between the treatment of different types of relationship or categories of person who, ostensibly, appear to be similarly situated.
  - b. In some instances, apparently neutral rules created by the Withdrawal Agreement impose a disproportionate burden on certain vulnerable groups (children, the disabled, the elderly).
76. Each of these categories gives rise to particular concerns with regard to the principle of non-discrimination under EU Law. As highlighted above, a number of the distinctions in treatment afforded to similarly situated individuals seem *prima facie* arbitrary. To take a small number of examples:
- c. **Example A:** The Draft Withdrawal Agreement establishes a sharp difference in protection afforded to the non-EU parents of children whose derived right to reside is contingent (for example) on a child's education in an EU27 state, in contrast to non-EU parents whose derived right to reside is recognised by EU law as necessary to enable the child to continue to live in the Member State in question. As explained above, the latter category has been recognised in *C 34/09 Zambrano* and subsequent cases. Yet this group does not receive protection under the Draft Withdrawal Agreement.
  - d. **Example B:** Under the Withdrawal Agreement a spouse or someone in a durable relationship may join an EU citizen in their host state so long as they were married or

in a durable relationship prior to the end of the transition period (Article 9(1)(e)(ii) and 9(4)). Such persons need not have applied for residence prior to the end of the Transition Period. By contrast, ‘where serious health grounds strictly require the personal care of the family member by the Union citizen’, such a family member must have applied for the right to reside in the host state before the end of the transition period (Article 9(2)-(3)). Persons who have not applied before this date will lose their right to reside. This may prevent, for example, a UK national who becomes ill after the Transition Period, joining family in other EU Member States so that they can care for him or her (or vice versa).

77. These three examples illustrate the kinds of situations in which the distinctions created by the Draft Withdrawal Agreement gives rise to concerns regarding non-discrimination and consistency of treatment in like situations.
78. Looking more closely at each of these examples, a number of points are clear. First, the persons in Example A and B are in comparable situations. As regards Example A, each category presently enjoys derived rights of residence under EU Law. In one instance, the derived right stems from the child needing his/her carer’s presence “*in order to pursue and complete his or her education*”. In the other instance, the derived right stems from the (arguably greater) need of the child not to be removed from their Member State of nationality, with all the disruption which that would entail not only for his or her education but other aspects of his private and family life too). Yet, notwithstanding the fact that the child in the latter instance arguably has the greater need for a carer to be afforded a derived right of residence, he or she, in fact, receives much less protection under the Withdrawal Agreement.
79. A similar point can be made in respect of Example B where one group’s need for reunion stems from the fact of them being in a durable relationship, whereas the other group’s need stems from the serious ill-health of the family member who requires personal care. At present, the Citizens Directive affords both of these a right of reunion subject to the same conditions. As regards the first group, the right of reunion continues after the end of the Transition Period, whereas in the former case, it ends at the ends at that point. In practice, such distinctions may well give rise to indirect discrimination on grounds of age.
80. Second, there is no doubt that the Draft Withdrawal Agreement establishes a significant difference in treatment as between these various (similarly situated) groups. Moreover, these differences in treatment are not minor. In each case, one group is treated in a manner that is (at the very least) substantially more favourable than the other. Indeed, the personal consequences for the individuals concerned may be immense. In Example A, for instance, vulnerable, elderly

or disabled persons may be faced with the possibility of living in serious ill-health, prevented from obtaining family support which would otherwise be available. We also note the real degree of arbitrariness in the protection afforded to such persons. Those whose family members happen to fall seriously ill during the Transition Period may be eligible. Those who fall ill subsequently will not.

81. These are substantial differences in treatment, which call for objective justification. Such justifications would have to be sufficiently strong to justify the personal hardship likely to be caused through the creation of these differences in treatment, in particular, bearing in mind the substantial impact on various categories of vulnerable person (children, the disabled, the elderly among others). Cogent justification would be required for such differentiation. So far as we are aware, no such justification for the difference in treatment exists.
82. In assessing whether the purported objective justification for a distinction is sufficient, it is necessary to consider the aim sought to be achieved by the difference in treatment, as well as the proportionality of achieving that aim through differential treatment, including the impact of distinction on the rights and interests in question. We note the following points:
  - a. Insofar as Examples A and B are concerned, the distinctions appear largely arbitrary. As noted above, the impact on *Zambrano* children of removing a carers' derived right of residence in Example A, is likely to be greater than removing the derived right of the carer of a child in education. The purpose of the derived right in the latter case is to enable the child to complete his or her education. The purpose of the *Zambrano* derived right is to prevent that child from being compelled to leave their country altogether (e.g. a British national child with a non-EEA parent). Similarly, as regards a person whose family member is suffering from serious ill-health, the application of a blanket cut off at the end of the Transition Period, regardless of circumstances, also has the appearance of arbitrariness. This is reinforced by the fact that a more flexible approach is adopted in other contexts. The "objective" aim sought to be achieved by removing *Zambrano* protection and adopting a much harsher approach to those who need family unification for reasons of serious illness is not clear.
  - b. Even if one or more legitimate aims could be identified to justify the distinctions in treatment created, this, in itself, is not sufficient. The justification for the differential treatment must be proportionate. In this regard, it is significant that many of these distinctions in treatment risk causing very real personal and financial hardship for vulnerable groups. For example, by definition, *Zambrano* is concerned with those who lack the ability to care for themselves. This includes children, the elderly, or persons

suffering from ill-health who need the presence of their primary carer. In some instances, Zambrano protection may be the only way in which a British citizen, who has lived in the United Kingdom throughout their lives, can remain in the country of their birth.

83. Given all of the above, we consider that there are real concerns that the Withdrawal Agreement discriminates against different categories of individuals without sufficient justification, i.e. unlawfully. The analysis above applies equally to UK citizens in EU27 states who are subject to similar forms of arbitrary treatment by EU27 states as a result of the operation of the Withdrawal Agreement. Such discriminatory treatment could form the basis of a decision by the EU Court of Justice that the EU lacks authority to enter into such an agreement.

***b. Non-retroactivity, Legal Certainty and Legitimate Expectations***

84. The Withdrawal Agreement, as currently formulated, is also of questionable legality when other general principles of EU Law are considered. These “general principles” of EU Law include the principles of non-retroactivity, legal certainty and legitimate expectations. The three principles are closely related and, again, must be respected by the EU when entering into agreements with third states (C-122/95 *Germany v Council* [1998] ECR I-973).
85. In C 98/78 *A. Racke v Hauptzollamt Mainz* [1979] ECR 69, the Court of Justice held [§ 20] “*[a]lthough in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*”. Moreover as a matter of interpretation, the court has consistently held that (in contrast to procedural rules) substantive rules “*are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them*” (C 2-2/80 *Salumi* [1981] ECR 2735 [§§ 9-10]; C-110/03 *Belgium v. Commission* [2005] ECR I -2801 [§ 73]; C-331/88 *Fedesa* [1990] ECR-I 4023).
86. This jurisprudence on non-retroactivity must be understood alongside the concept of legitimate expectations. The principle of the protection of legitimate expectations is among the fundamental principles of the EU (see, in particular, Case 112/80 *Dürbeck* [1981] ECR 1095 [§ 48]). In T-347/03 *Branco v Commission* (2005) ECR II-255 [§ 102] the Court of Justice laid down three conditions for the creation of a legitimate expectation within the sphere of EU Law, namely:

*Three conditions must be satisfied in order to claim entitlement of the protection of the legitimate expectation. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules*

87. In addition, reliance must be “justifiable”<sup>16</sup>, which can include reliance induced by a valid legislative act (Case 120/86 *Mulder v. Minister van Landbouw en Visserij* [1988] ECR 2321; Case 170/86 *Van Deetzen v. Haptzollanbt* [1988] ECR 2355).

88. The mere fact that an individual is affected by a change in the law, or in administrative practice, will not give rise to a legitimate expectation from which it is necessarily impermissible to resile. In Case T-65/01 *Afrikanische Frucht-Compagnie GmbH v. Internationale Fruchtimport Gesellschaft Weichert & Co* [2004] ECR II-521:

*It is settled case-law that since the Community institutions enjoy a margin of discretion in the choice of the means needed to implement their policy, operators cannot claim to have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained (Case 52/81 *Faust v Commission* [1982] ECR 3745 [§27]; and Case C-280/93 *Germany v Council* [1994] ECR I-4973 [§80]).*

89. The same position applies *a fortiori* in legislative or treaty changes. This is not, however, the end of the matter. It is settled that, even in this context, individuals may have a legitimate expectation that an entitlement or benefit that was understood to be conferred on them cannot permissibly be revoked (absent an overriding public interest justifying doing so). In Case 74/74 *CNTA SA v. Commission* [1975] ECR 533, the Claimant challenged the lawfulness of EU legislation which abolished “Monetary Compensation Amounts”, which compensated firms, in certain sectors, in respect of currency fluctuations. In CNTA the Court observed that the existence of the compensatory regime meant that a prudent trader may omit to cover itself from the effects of currency fluctuations [§ 42]:

*In these circumstances, a trader may legitimately expect that for transactions irrevocably undertaken by him because he has obtained, subject to a deposit, export licences fixing the amount of the refund in advance, **no unforeseeable alteration will***

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<sup>16</sup> For example, reliance cannot be placed on an unlawful commitment.

*occur which could have the effect of causing him inevitable loss, by re-exposing him to the exchange risk (emphasis added).*

90. Thus, insofar as legislative or policy changes are concerned a key question for the court in assessing whether a legitimate expectation exists is whether, at the moment an individual adversely relied on a justifiable expectation, change was foreseeable or, put another way, the individual was “on notice” as to the risk of a change in the legal situation at the time they relied adversely on the commitment or legal entitlement. This foreseeability approach has been adopted in many other situations (*see e.g. Case C-148/04 Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio* [2005] ECR I-11137 [§ 104]), the Court of Justice held:
91. Where such a legitimate expectation arises, it may be defeated where there is an overriding public interest justifying departure from the expectation (Case 74/74 *CNTA SA v. Commission* [1975] ECR 533; C-104/89 *Mulder and Heinemann v. Council* [1992] ECR I-3061). In *CNTA* [§ 43], the Court held that the EU would be liable in damages where, absent an overriding public interest justification for defeating the legitimate expectation, such an expectation was frustrated.
92. In our view, there are justifiable and weighty concerns – in light of the above principles – that the Draft Withdrawal Agreement impermissibly infringes the legitimate expectations of a number of groups of individuals. Two examples serve to illustrate these concerns (non-exhaustively):
- c. **Example A:** individuals or a couple who purchase a property in another EU Member State for use after the end of the Transition Period (for example, for early retirement or for a change in professional or personal direction) will be able to use that property (and fulfil their life plans) exercising their rights as EU Citizens. Yet, the Withdrawal Agreement provides them with no protection. They have no guarantee of being able to live or work in that state, unless they are able to move to that country and/or work there prior to the end of the Transition Period.
  - d. **Example B:** A further example concerns that of a UK citizen in professional training (or a couple one of whom is in professional training) in another EU Member State. That individual, or the couple, may well have invested time and money in professional training in another Member State (in the expectation that they would have their qualification recognised by the United Kingdom enabling them to return to work in the United Kingdom). Although the Withdrawal Agreement provides for the mutual recognition of “recognition” obtained “before the end of the Transition Period”, no

arrangements are put in place for persons in the process of obtaining professional qualifications and who will not have the opportunity to have them recognised prior to the end of the Transition Period. This gap in protection may affect numerous UK nationals, given the large numbers of students who embark on lengthy professional and vocational training courses in fields such as medicine or architecture in other EU Member States, with a view to returning to the United Kingdom upon completion of necessary professional and vocational training.

93. Each of these examples illustrates the failure of the Withdrawal Agreement to respect, or pay proper regard to, the legitimate expectations of different categories of citizens. In our view, the persons identified in Example A and in Example B both have valid claims to a legitimate expectation that their right to reside and to obtain recognition of professional qualifications as a citizen of the EU in another Member State would not be abrogated without affording them protection.
94. Famously, the C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I the Court of Justice held:

*The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. **Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.** These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.*

95. Article 20 (1) TFEU provides:

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

96. Citizenship is a “fundamental” right. In C-184/99 *Greczyk* [2001] ECR I -6193 [§ 31] the Court of Justice held:

*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are*

*expressly provided for.*

97. This observation has been repeated by the court in many other subsequent cases (e.g. Case C-413/99 *Baumbast and R* [2002] ECR I-7091, [§82]; *Garcia Avello* [2003] ECR I-11613 [§22]; *Zhu and Chen* [2004] ECR I-9925 [§ 25]; and *Rottmann* [2010] ECR I-0000 [§43]). In view of this case law, we consider that EU Citizens were entitled to make personal and financial plans on the basis of an expectation that there would be an on-going entitlement to exercise their citizenship rights (which were conferred on them as part of their “common legal heritage” and which are of “fundamental status”) prior to a change in such rights becoming foreseeable. Given the fundamental nature of these rights, there can be little doubt that the bundle of EU citizenship rights, in our view, gave rise to a legitimate expectation in cases such as those in Examples A and B.
98. It would therefore fall to the EU institutions to justify frustrating these expectations in the manner proposed by the Withdrawal Agreement. In assessing whether there exists an “overriding public interest” justifying frustration of the legitimate expectation, a range of factors are relevant. We note, in particular, the following points.
- a. The impact of the change of position on affected individuals in each of the above examples. In both cases, the individuals relied on their citizenship rights – to their substantial detriment (financial and personal). For instance, in Example A, the British couple will have entered into a potentially costly property transaction and may have made other irrevocable professional commitments in the full expectation that they would continue to enjoy citizenship rights during their retirement etc. Similarly, in Example B, the individuals in question may, in practice, be precluded from pursuing the profession of their choice, with significant personal and financial consequences. Considerable sums may have been spent on vocational education and training.
  - b. A further important consideration concerns whether the manner in which the change in position is implemented is proportionate. This includes consideration as to whether safeguards are available, such as the availability of compensation for those adversely affected by the change in position or a residual discretion to confer continuing entitlement on individuals who would otherwise experience substantial hardship. The Withdrawal Agreement has no such safeguards to protect persons falling within the scope of Examples A or B. In addition, we note that the Withdrawal Agreement lays down blanket rules and cut-off dates, with no flexibility to confer entitlement on those who, in reliance on their citizenship rights, entered into commitments.

- c. Other relevant considerations, in this context, include whether the change was implemented in an arbitrary or discriminatory manner (see discussion above on non-discrimination).
99. This analysis would also apply, *mutatis mutandis*, in a range of analogous situations, for example: where a UK national had returned to the United Kingdom having been resident in an EU27 country for a lengthy period of time and who had purchased property there, retaining it in the expectation of having access to it. Much would depend on the individual facts of a case – an issue of legitimate expectations also arises in this context too.
100. Finally, the strength of the justification for revoking the entitlement of those who had adversely relied on the right would require careful scrutiny. As to this, there is no doubt that Member States are entitled to withdraw from the EU. This will inevitably prospectively remove rights to which individuals would otherwise be entitled (with all the consequences which that entails for the individuals in question). However, on its own this is no justification for defeating a legitimate expectation which is concerned with the protection of those who relied on citizenship rights at a time when a change to such rights was not foreseeable. It is the failure to protect this group which must be justified by overriding public interest. In our view, there is no obvious “overriding” public interest justification in failing to protect such groups. Absent such protection, this failure is arguably unlawful as a matter of EU Law and could form the basis of a challenge to the validity of the Withdrawal Agreement.

## **II. Fundamental Rights**

101. Respect for fundamental rights is a condition for the legality of EU acts (including as regards the conclusion of an agreement with a third state) (Case C-25/02 *Rinke v. Arztekdammer Hamburg* [2003] ECR-I 8349 [§ 26]; *Opinion 2/94* [1996] ECR I-1759 [§ 34] and Case C-249/96 *Grant* [1998] ECR I-621 [§ 45]).
102. The EU’s competence to negotiate a withdrawal treaty with the UK arises under Article 50(3) of the Treaty on the European Union (TEU) and Article 218 of the Treaty on the Functioning of the European Union (TFEU). Article 21(1) TEU provides:

*The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity,*

*the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*

103. The two most important instruments of human rights protection in the EU legal order are:
- a. The Charter, which is directly binding on the institutions of the Union and has “*the same legal value as the Treaties*”; and
  - b. The ECHR, which while not part of EU law, is recognised as a source and aide to interpretation of the Charter and as providing general principles of EU law.
104. Many rights are, in principle, potentially engaged by withdrawing the rights, entitlements and benefits conferred by EU citizenship. We do not seek exhaustively to describe, or analyse, all of the human rights implications of the arrangements envisaged in the Withdrawal Treaty, and the strength of any claim would depend on individual facts and circumstances. Nevertheless, the following appear to us to be among the most significant rights which are engaged for British citizens.
- a. The right to private and family life (Article 8, ECHR and Article 7, Charter of Fundamental Rights)***
- (i) Deprivation of EU Citizenship*
105. The deprivation of EU citizenship, in itself, engages rights under Article 8 ECHR and Article 20 of the Charter.<sup>17</sup> As noted earlier, the CJEU has consistently held that “*Union citizenship is destined to be the fundamental status of nationals of the Member States*” (e.g. Case C-413/99 *Baumbast and R* [2002] ECR I-7091, [§82]; *Garcia Avello* [2003] ECR I-11613 [§22]; *Zhu and Chen* [2004] ECR I-9925 [§ 25]; and *Rottmann* [2010] ECR I-0000 [§43]). Moreover, “*independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*” (the C-26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1).
106. The EU Member States are not precluded from depriving individuals of citizenship. However, in C-135/08 *Rottmann*, the CJEU held that Member States must have due regard to EU law

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<sup>17</sup> The Amsterdam District Court, in its reference to the CJEU of February 2018, asks whether the UK’s withdrawal from the EU under Article 50 TFEU “automatically” results in the loss by UK nationals of their citizenship under Article 20 TFEU <https://waitingfortax.com/2018/02/13/decision-of-the-district-court-in-amsterdam/>.

when depriving a national of his citizenship causing him also “*to lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.*”<sup>18</sup>

107. In contrast, the Withdrawal Agreement makes no attempt to preserve any form of citizenship rights, for any category of UK national, regardless of their circumstances. Insofar as the ECtHR’s jurisprudence on the deprivation of citizenship is concerned, the court examines, in particular, two overarching questions, namely whether the revocation was arbitrary; and the nature and severity of the foreseeable consequences of revocation for the affected individuals.
108. While we do not think that it could be said that the general removal of EU citizenship from UK nationals after the end of the Transition Period is necessarily contrary to Article 20 TFEU or the right to private and family life of UK nationals, we consider that there may be particular circumstances where the blanket deprivation of citizenship by the Withdrawal Agreement is arbitrary and/or disproportionate. We note that the consequences for some groups of the deprivation of citizenship rights may be especially harsh.
109. To take one example, a number of European Member States do not permit naturalised citizens to retain dual nationality (including Germany, for non-EU citizens, and the Netherlands). Many thousands of UK citizens have made their homes, established families and a professional life in these countries. In many cases, they will have done so in the expectation that they would never be forced to relinquish their British citizenship and could, as a result, enjoy the benefits of that citizenship, including the possibility of return to their country of birth later in life. In addition, the loss of nationality will often have significant knock-on effects in other areas of life, including, for instance, with regard to tax liability, inheritance law or other matters such as liability for national service or conscription. The nature and extent of these knock-on effects will, of course, depend on the national law of the states, but in many cases the consequence of the loss of nationality may be profound. The fact that the Withdrawal Agreement provides no discretion to retain EU citizenship and no safeguards to protect EU citizens from the effects of deprivation gives rise to a strong argument, in our view, that such deprivation is arbitrary and incompatible with both Article 8, ECHR, Article 7 of the Charter and contrary to Article 20 TFEU.

**(ii) Deprivation of Certain Citizenship Rights**

110. The Draft Withdrawal Agreement provides no right of residence to partners with whom UK nationals form a durable relationship after the Transition Date. Article 9(4) merely provides for residence where the relationship was “*durable before the end of the transition period and*

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<sup>18</sup> C-135/08 *Rottmann v Bayern* ECLI:EU:C:2010:104 at §45.

*continues at the time the partner seeks residence.*” In C-578/08 *Chakroun*, the CJEU found that EU law precluded national legislation which draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State. The Court reasoned that “*that interpretation is consistent with Article 8 of the ECHR and Article 7 of the Charter, which do not draw any distinction based on the circumstances in and time at which a family is constituted.*”

111. We also note that, to a large extent, many of the concerns raised above with regard to general principles of EU Law may also give rise to an analogous issue under either the Charter or the ECHR. For example, deprivation of certain citizenship rights in a fashion which is arbitrary or discriminatory may give rise to an issue under Article 8 ECHR in conjunction with Article 14, where the discrimination is said to relate to a ground protected by Article 14. In addition, however, the Draft Withdrawal Agreement also gives rise to a number of additional issues of fundamental rights.

*(iii) Proportionality and Legality*

112. As a general point, the deprivation of continuing rights of residence (or the imposition of additional restrictions on such rights) will, in principle, give rise to an interference with Article 8 and must therefore satisfy the requirements of non-arbitrariness and proportionality.
113. As noted above, the Draft Withdrawal Agreement fails to make provision for carers who have a derived right of residence in accordance with *Zambrano* or for those who have a right of residence in accordance with the cases of *Surinder Singh*, *Lounes* and *Carpenter*. States are, of course, permitted by Article 8 ECHR to amend the rules on eligibility for leave to remain, however, the deprivation of a right of residence must be proportionate and comply with the conditions of non-arbitrariness (*Berrehab v The Netherlands* (1989) 11 EHRR 322 [§§ 28-29]; *Moustaquim v. Belgium* (1991) 13 EHRR 802 [§43])). While it is not possible to advise in the abstract on the proportionality of changes in immigration arrangements in other EU Member States or in the UK post-Brexit, a number of general observations are possible.
- a. First, the deprivation of existing *Zambrano* and *Singh* derived rights of residence is likely to have a severe impact on those affected. Children, the elderly and disabled persons may be among the most seriously affected. Such effects are likely to weigh heavily in any proportionality assessment and point towards the disproportionality of depriving those already exercising derived rights of residence (for example, as *Zambrano* carers) of this status.

- b. Second, the fact that the Withdrawal Agreement adopts a blanket exclusion of *Zambrano* and *Singh* protection from its scope, and affords no safeguards to these groups, also raises a serious issue as to proportionality.
  - c. Third, as earlier noted, in many cases, individuals will have made life choices based on existing rules, premised on the understanding that the entitlements conferred were a function of the “fundamental” status of EU citizenship. Although amendment of existing entitlements is not necessarily contrary to Article 8, ECHR or Article 7 of the Charter, the fact that deprivation of these rights was not reasonably foreseeable to beneficiaries adds weight to the concern that depriving UK nationals of rights in these circumstances may be disproportionate and therefore contrary to Article 8, ECHR.
  - d. Finally, refusing a continued right of residence to those who already have such a right raises a separate issue as to the conditions of legality/proscription by law, for purposes of Article 8, ECHR and Article 7 of the Charter.
114. We also note that, insofar as subsequent UK legislation purported to remove *Zambrano* derived rights of residence, such legislation would have to be read in accordance with the presumption against retrospectivity, taking into account the unfairness which may be caused to different categories of individuals (*Odelola v Secretary of State for the Home Department* [2009] UKHL 25).
- (b) Deprivation of Voting Rights (Article 3, Protocol I, ECHR and Article 39, Charter of Fundamental Rights)*
115. The Withdrawal Agreement makes no arrangements for any ongoing voting rights in European Parliamentary elections. Many individuals in Northern Ireland will have Irish citizenship, or have both British and Irish citizenship. The effect of withdrawal will be to deprive those persons living in Northern Ireland who are entitled, by birth, to Irish citizenship of the right to participate in European Parliamentary elections.
116. In our view, the absence of any arrangements or provisions in respect of this group of persons raises an issue under Article 3, Protocol I, ECHR. While municipal councils generally do not constitute a “legislature” for the purposes of Article 3 Protocol 1 ECHR, the European Parliament does. A similar right is laid down in Article 39 of the Charter.<sup>19</sup>

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<sup>19</sup> A claim under Article 39 of the Charter may not be as strong as under Article 3, Protocol 1, ECHR as Article 39 refers to a right of citizens to vote “elections to the European Parliament in the Member State in which he or she resides”.

117. In *Matthews v. the United Kingdom*, the ECHR held that the refusal to provide a Gibraltar resident with the right to vote in European Parliament elections breached Protocol I. It held [§ 63] that any conditions on the right to vote must:

*“not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they [must be] imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart “the free expression of the people in the choice of the legislature”.*

118. The Court noted [§ 53] that “[e]ven when due allowance is made for the fact that Gibraltar is excluded from certain areas of Community activity...there remain significant areas where Community activity has a direct impact in Gibraltar”. Notwithstanding the fact that Gibraltar did not form part of the metropolitan territory of the United Kingdom, the Court found that the United Kingdom had breached the convention by “completely den[ying the applicant] any opportunity to express her opinion in the choice of the members of the European Parliament” even though she was “directly affected by it”. On the basis of the special arrangements currently envisaged, it appears likely that residents of Northern Ireland will continue to be affected – perhaps substantially – by decisions made by the European Parliament. Although these arrangements are very much still in contention, the EU proposes that Northern Ireland continues to be bound by many rules of the internal market and customs union. In these circumstances, the failure by the EU to make provision to ensure the continued representation of those living in Northern Ireland who have Irish citizenship, or have both British and Irish citizenship, is arguably contrary to relevant fundamental rights principles.

**E. “ACQUIRED” OR “EXECUTED” RIGHTS UNDER INTERNATIONAL LAW AND EU LAW**

119. For reasons explained below, we think that in various situations the failure of the Withdrawal Agreement to make arrangements for, or to address, the position of certain categories of rights which may properly be categorised as “acquired” or “executed”, is legally questionable. For the purposes of international law, such rights will continue in force and, for its part, EU law must be interpreted and applied in accordance with international law. The result is that, in certain specific situations, a failure to respect the “vested” or “acquired” rights of EU nationals may be unlawful under EU Law.

120. Article 70 (1) of the Vienna Convention on the Law of Treaties 1969 (“VCLT 1969”)<sup>20</sup> deals with the consequences of the termination of a treaty as between the parties to the treaty. It states:

Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

121. Article 70 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (“VCLT 1986”) contains, *mutatis mutandis*, the same terms.<sup>21</sup>

122. The scheme of Article 70 is that states can abrogate rights or obligations (including “acquired” obligations or those “executed” prior to the termination of the treaty) but this must be done either by agreement or on the face of the instrument by which the termination is given effect. A failure to address the situation of acquired or executed rights, obligations or “legal situation” will result in such rights, obligations or the “legal situation” continuing to have effect. A failure by a state or international organization to respect an executed right, obligation or “legal situation” not abrogated in accordance with Article 70 would breach both Article 70 and the international obligations in question (which by virtue of Article 70 remains in force for purposes of international law).

123. Aside from the VCLTs 1969 and 1986, customary international law also provides for the protection of “acquired rights” following the renunciation of a treaty. This has been recognised by the Permanent Court of International Justice (“PCIJ”) (the predecessor of the International Court of Justice) (*Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926 PCIJ Series A No 7, p 42; *German Settlers in Poland*, Advisory Opinion, Judgment, 10 September 1923 PCIJ Series B No. 6 p. 36). In the former case, the PCIJ held that “... *the principle of respect for vested rights forms part of generally accepted international law....*.” The principle has also been recognised in international arbitral awards. In *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 I.L.R. 136 the tribunal

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<sup>20</sup> The VCLT 1969 entered into force in respect of the United Kingdom on 25 June 1971. It is a very widely ratified treaty (116 States Parties) and many of its terms, including Article 70, are considered to reflect customary international law.

<sup>21</sup> The United Kingdom became a State Party to the VCLT 1969 on 20 June 1991. The European Union is not a Party to the Convention.

held that “the principle of respect of acquired rights is one of the fundamental principles ... of Public International Law...”

124. The effect of both customary international law and the VCLTs 1969 and 1986 is that the EU and UK will each remain bound as a matter of international law to continue to respect (and give effect to) “acquired rights” conferred by the EU Treaties. Insofar as the VCLT is concerned, they similarly remain bound to respect “executed” rights, obligations or a “legal situation” created by the EU Treaties, save where they agree not to do so.

***a. Whether EU Law Requires Acquired or Executed Rights to be Respected***

125. The position under international law is one matter. A distinct question is whether, as a matter of EU Law, the EU can act to deprive individuals of “acquired rights” or remove rights or obligations falling within the scope of Article 70, VCLT, absent agreement with the UK to do so.

126. A number of contextual points are important in addressing this question:

- a. According to Article 3(5) of the Treaty of the European Union (‘TEU’), “*in its relations with the wider world, the Union shall contribute to ... the strict observance and development of international law, including respect for the principles of the United Nations Charter*”.
- b. It is well established that the EU must respect international law, including the established rules of customary international law, in the exercise of its powers. *See* Joined Cases C 584/10 P, C 593/10 P and C 595/10 P *Commission v. Kadi* [2013] ECLI:EU:C:2013:518, ECJ at [19]; and Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755, ECJ at [101]. In the latter case the ECJ held that in light of Article 3 (5) TEU:  

*[W]hen it adopts an act, [the European Union] is bound to observe international law in its entirety, including customary international law, which is binding on the institutions of the European Union.*
- c. The CJEU can review the validity of enactments or measures adopted by EU institutions, by reference to principles of international law (both treaty and customary international law) and has done so in a number of prominent cases: e.g. *Air Transport Association of America* (supra).

- d. Insofar as the (EU-Law) interpretation of the Withdrawal Agreement is concerned, it is well established that provisions of EU Law must be interpreted and, where necessary, their scope limited, in light of the relevant rules of international law: Case C-286/90 *Anklagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019, ECJ at [9].
  - e. In any event, the withdrawal agreement (and any underpinning EU Secondary legislation which gives effect it) must also respect fundamental rights both in its interpretation and implementation, as a matter of EU Law (T 512/12 *Front Polisario v. Council of the European Union* ECLI:EU: T:2015:953).
127. Bearing these points in mind, we think it would be contrary to EU Law (interpreted in accordance with relevant international law) for the EU's institutions to fail to respect the "acquired rights" of UK (or EU) citizens after Brexit, absent agreement as to how such rights were to be addressed in the Withdrawal Agreement. Absent agreement, the rights continue to have legal effect under international law and a failure on the part of the EU to respect those rights would be contrary international law providing protection for acquired rights.
128. We note that some have taken the view that, because Article 70 VCLT or, for that matter, the customary international law principle protecting acquired rights, does not confer rights or obligations on individuals, neither Article 70 (as reflected in customary international law) or the customary international law protection of acquired rights bites insofar as the Withdrawal Agreement is concerned.
129. We disagree with that view, in the light of the following:
- a. The EU Law obligation – enshrined in Article 3(5) TEU and reflected in the settled jurisprudence of the CJEU (as explained above) obliging EU institutions to "strictly observe" international law – is not limited to rules of international law conferring rights or obligations of individuals. This obligation applies to the entire corpus of international law which is binding on the EU, including the rules of customary international law (see Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755). As a matter of EU Law, the EU institutions (in particular, the Council) will act unlawfully by entering into an agreement which contravenes international law obligations binding on the EU.
  - b. There is a separate question as to whether, for example, in a preliminary reference procedure, individuals or NGOs have standing for purposes of EU Law to raise such illegality, notwithstanding the fact that the Withdrawal Agreement does not confer

rights or obligations on them. As regards citizenship rights, Article 4(1) of the Agreement provides that where the Withdrawal Agreement “*provides for the application of Union Law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States*”. It further states “[i]n particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two. Any provisions inconsistent or incompatible with that Part shall be *disapplied*”. So there can be no doubt that, in various respects, the UK will be bound to give direct legal effect to the Withdrawal Agreement insofar as it confers directly effective rights on individuals.

- c. Furthermore, even as regards provisions not conferring directly effective rights, in C-266/16 *WSCUK v. HMRC and SoS for Environment, Food and Rural Affairs*, the Advocate General was of the view that WSCUK had standing to challenge the validity of EU legislation giving effect to the Fisheries Partnership Agreement between the EU and Morocco (“FPA”) as being incompatible with international law, notwithstanding the fact that the WSCUK have no rights or interests pursuant to the FPA. For its part, the CJEU Grand Chamber had no hesitation in interpreting the FPA to ensure its conformity with international law, notwithstanding the fact that WSCUK did not contend that it had any rights or obligations under the challenged international agreements between the EU and Morocco.

130. We therefore think it is possible for individuals in possession of “acquired rights” for purposes of international law to challenge a failure on the part of EU Law to respect the continued effect of such rights, save where they are expressly curtailed by the Withdrawal Agreement.

***b. Identification of “Acquired” or “Executed” Rights***

131. The concepts of an “acquired right” for purposes of customary international law or a “right, obligation or legal situation ... created through the execution of the treaty prior to its termination...”, are not well-defined. One of the clearest statements of principle was in the *Saudi Arabia v. ARAMCO* 117 International Law Reports (1963), where the Tribunal held:

*“Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights. Such rights have the character of acquired rights ....”*

132. It follows that rights, interests or a “legal situation” established by the terms of a treaty in circumstances where they are meant to endure, cannot be revoked, save by the agreement of

the states in question. It is settled that proprietary rights which have been transferred to individuals (including a right to bring a claim which is treated as a “possession” for purposes of fundamental rights) are archetypal examples of rights which are “acquired” or “executed” through operation of a treaty and which cannot lawfully be removed under international law, save by the consent of the states in question.<sup>22</sup>

133. Executed rights are not, however, limited to proprietary rights. This is clear from the use of the broad term “legal situation” by Article 70 of the VCLT 1969. Determining whether other rights have the character of being “executed”, depends on the terms of the treaty and, crucially, on whether the disposition created by concession was intended to endure. In our view, this position cannot be answered simply by saying that it was always open to the United Kingdom to leave the EU legal order. The same is true of almost any treaty system. This fact alone does not prevent the creation of an “acquired right”. Whether rights or a legal situation is “executed”, depends on the terms by which the grant of a concession is made and whether it is to be regarded as a position intended to endure or to which a degree of permanence attaches. A great deal depends on the facts of each case.

*c. Gaps in Protection and Acquired Rights*

134. With these points in mind, the key issue is whether the EU law rights or “legal situations” not dealt with by the Withdrawal Agreement can be regarded as acquired or executed for purposes of international law, such that international law imposes an on-going obligation to respect such rights.
135. In addition, we consider that consent on the part of the EU states or on the part of the United Kingdom to remove vested or executed rights is not to be lightly inferred (for instance, from ambiguous language in the Withdrawal Agreement). As such, in our view, the Withdrawal Agreement should not be interpreted as removing vested or executed rights unless this is the effect of clear language in the agreement.
136. In our view, a number of the “legal situations” not addressed by the Withdrawal Agreement can properly be regarded as “vested” or executed rights.
- a. **Example A:** At present a person primarily cared for by a non-EU national has the right to have that person’s continued residence accommodated (both by that person having leave to remain and the right to work). The continuation of derivative residence and

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<sup>22</sup> In addition, a separate question arises as to whether, in any event, such a deprivation is compatible with fundamental rights given that both Article 1, Protocol 1, ECHR and Article 17 of the EU Charter of Fundamental Rights gives imposes constrains on the circumstances in which it is permissible to deprive individuals of proprietary rights.

working rights is not provided for in the Draft Withdrawal Agreement. But neither are such rights expressly extinguished by the Withdrawal Agreement. For purposes of Article 70 of the VCLT, neither party appears to have consented any particular arrangement in respect of such rights. We consider that, in particular where UK or EU citizens rely on such rights prior to the end of the Transition Period, there is a strong argument that such rights are “vested” or “executed” and therefore continue in force absent agreement between the UK and EU to the contrary.

- b. **Example B:** The Withdrawal Agreement contains no specific arrangements to deal with future interpretative developments in EU citizenship law, where the Court of Justice recognizes citizens as having rights not yet articulated in the case law. While it may be possible to interpret the terms of the Withdrawal Agreement so as to accommodate such developments, it is quite possible that in various situations, it will not be possible to “read in” such rights to the Withdrawal Agreement.

137. In each of these situations, the UK and EU have **not** consented to waiving such rights for purposes of Article 70 of the VCLT 1969. Such obligations will, strictly speaking, continue in force for purposes of international law. For its part, a failure to interpret and apply EU law in accordance with these requirements in respect UK nationals would in our view be unlawful.

**F. CHALLENGES CONCERNING THE INTERPRETATION, APPLICATION OR VALIDITY OF THE WITHDRAWAL AGREEMENT IN THE UK**

138. The UK, and the EU27 Member States, will have to put in place domestic legislation to implement the Withdrawal Agreement when it is finalised. For the UK this will happen in part (but only in part), through the European Union (Withdrawal) Act 2018. But, further detailed legislation will be required to give effect to the many substantive provisions of the Withdrawal Agreement.

139. We note the following:

- a. In line with ordinary principles of statutory construction, such legislation should be interpreted in a manner compatible with the international agreement it is intended to implement (unless a compatible interpretation is not possible);
- b. In addition, legislation giving effect to the Withdrawal Agreement will have to be interpreted so far as possible with the rights enshrined in the European Convention of

Human Rights. In the case of the UK this will have to be in line with Section 3 of the Human Rights Act 1998 (“**the HRA 1998**”);

- c. In addition, EU Law is of continuing relevance to the interpretation and application of the Withdrawal Agreement in the United Kingdom. Following exit day, it will remain possible for persons resident in the United Kingdom to bring claims as to the interpretation of the Withdrawal Agreement (or aspects of it) or as to its validity either during the Transition Period or, as regards citizenship rights under the Withdrawal Agreement, 8 years after the end of the Transition Period. In addition, Article 4 of the Agreement makes provision for the interpretation of the Agreement. Article 4 (1) makes clear:

*Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in and in respect of the United Kingdom the same legal effects as those which it produces within the Union and its Member States.*

*In particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provision contained or referred to in Part Two. Any provisions inconsistent or incompatible with that Part shall be disapplied.*

140. The effect of this is that - subject to limits set out below – individuals or groups based in the United Kingdom will be able to bring domestic proceedings raising issues as to the interpretation or validity of the Withdrawal Agreement (or aspects thereof) for purposes of EU Law, premised on EU Law arguments. British nationals in EU27 states will also, of course, continue to be able to bring proceedings relying on EU Law (including the various EU Law challenges identified above).
141. Much of the proposed text for the settlement of disputes after the end of the Transition Period is white backgrounded, meaning that this text represents proposals by the EU which are not agreed with the United Kingdom and where there is an underlying policy dispute as to the agreement. A number of relevant provisions, however, appear in green text and so are in principle agreed between the parties (subject only to minor technical change). As to these provisions:
  - a. The United Kingdom remains bound by EU law throughout the Transition Period (currently designated as ending on 31 December 2020 under Article 121 of the Withdrawal Agreement); see Article 122 (1);

- b. Insofar as Union Law is applicable, it must be interpreted and applied in a manner consistent with the way in which Union Law is applied (and remains subject to the general principles of EU Law), subject to certain limited exceptions; Article 122 (3) and (6);
  - c. Arrangements for preliminary references during the Transition Period are not yet fully agreed. On the one hand, Article 82(2) provides that the CJEU shall have jurisdiction to give preliminary rulings on requests from courts and tribunals in the United Kingdom referred to it before the end of the Transition Period. This text is not yet agreed. On the other hand (in text marked in green indicating agreement) Article 126 provides that during the Transition Period “the Court of Justice shall have jurisdiction as provided for in the Treaties”). The outstanding dispute therefore appears to relate to the cut-off point. Proceedings can be initiated by UK nationals in the United Kingdom (subject to the conditions set out in the Withdrawal Agreement) or, if relevant, in an EU27 country where the conduct said to be unlawful affects them in that state.
  - d. Finally, insofar as Part II of the Withdrawal Agreement is concerned (e.g. provisions concerning citizens rights) Article 151 of the Withdrawal Agreement, provides that a UK court or tribunal “may” request that the CJEU give a preliminary ruling.
142. As a result of these arrangements, it appears that it will be possible for individuals to bring cases as to the interpretation (or insofar as EU Law is concerned) the validity of the Withdrawal Agreement (for example, its compatibility with the Charter on Fundamental Rights) throughout the Transition Period.
143. Moreover, insofar as Part II of the Agreement is concerned, in accordance with Article 151 of the Withdrawal Agreement, a preliminary reference “may” be sought from the CJEU in domestic UK proceedings within 8 years of the end of the transition period. The legal effect of a ruling in respect of Part II of the Agreement shall be the same for the UK as for other EU Member States under Article 267 TFEU (Article 151 (2), Withdrawal Agreement).
144. Drawing these strands together, where individuals in the United Kingdom or UK citizens elsewhere consider that either provisions in the Withdrawal Agreement, or the interpretation and application of the Agreement by the United Kingdom or another Member State is unlawful, it will be possible for individuals to rely on EU law arguments (including general principles of EU Law and arguments based on the Charter of Fundamental Rights) to challenge such an approach. In addition, individuals may seek reference to the CJEU both during the Transition Period and, insofar as citizenship rights are concerned, for 8 years after the end of the Transition

Period. Such a reference could relate to the interpretation of the Withdrawal Agreement or, even, its validity as a matter of EU Law.

**G. CONCLUSION**

145. Our views are summarised at paragraph 2 above.

146. We would be happy to advise further in relation to any aspect of the content of this Advice.

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