

## **Culture, Tourism, Europe and External Relations Committee**

### **EU Citizenship**

#### **Briefing by Professor Sionaidh Douglas-Scott**

Generally speaking, citizenship involves being a member of a particular national community. It usually includes certain rights or privileges not accorded to non-members, such as the right of political participation in a community, including voting, participating in government, and receiving state protection. Citizenship usually also involves obligations, such as the duty to pay taxes, or to fight in time of war.

The legal concept of EU citizenship was formally introduced in 1993 by the Treaty of Maastricht. It is now addressed in Part II of the Treaty on the Functioning of the European Union (TFEU) (Articles 20-24). Citizenship is also given formal constitutional status in the EU legal order, through its inclusion in Article 9 of the Treaty of European Union (TEU) which provides that 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' The Citizens' Rights Directive (Directive 2004/38) also spells out and gives further details on the ways in which EU citizens and their families may exercise rights of free movement and residence, and the permitted restrictions on those rights on grounds of public policy, public security or public health.

EU citizens acquire a bundle of legal rights by virtue of their status. The majority of these rights are enjoyed by EU Citizens who have exercised rights of free movement throughout the EU. A limited number of rights may be relied on by EU Citizens against their Member State of nationality in the absence of cross-border movement.

When the UK leaves the EU it will cease to be an EU member state. As a result of this, UK nationals will lose their EU citizenship, and non-UK EU citizens who wish to live/work in the UK will lose their EU-derived rights to do so.

Until the UK leaves the EU, EU law continues to apply and should be enforced in the UK. Notably, however, although provisions on EU citizenship apply to the UK, the UK has opted out of most EU immigration law, including the Schengen Accords, which create a common European area and framework for visas and border control.

At present, as a result of the UK's EU/EEA membership, EU/EEA/Swiss nationals, and dependents, are exempted from the need for immigration leave<sup>1</sup>. After 5 years continuous residence they acquire a permanent right to reside in the UK under the EEA Regulations.<sup>2</sup>

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<sup>1</sup> Immigration Act 1988 s.2.7, subject to s.2(2) ECA 1972.

<sup>2</sup> Immigration (EEA) Regs 2006 reg 15.

As the law stands at present, immigration control and EU treaty negotiations are reserved matters for the UK Government under the Scotland Act 1998. Therefore, absent further devolution of immigration policy, there is only limited scope for Scotland to obtain a differentiated settlement from the rest of the UK on EU citizenship. (However, there are some past precedents for Westminster approval of differentiated immigration policy such as the past post study visas scheme).

***There are 3 different situations to consider post Brexit:***

- 1. EU/EEA citizens from elsewhere in the EU who reside/work in the UK**
- 2. UK nationals resident in other EU states post Brexit**
- 3. UK nationals who have not exercised free movement rights**

**1. EU/EEA Citizens from elsewhere in the EU who reside/work in the UK**

At present, there are almost 3 m EU/EEA nationals in the UK, of whom circa 2.1 m are working.<sup>3</sup> It is unclear what their situation will be post Brexit. It is protested that such citizens should not be used as 'bargaining chips' in the UK's EU withdrawal negotiations, but the UK Government has not given any binding assurances as to their situation.

In contrast to the situations of UK nationals examined in sections 2 and 3 below, EU citizens in the UK post Brexit will not, of course, have their EU citizenship removed. Instead, their rights under EU citizenship will be unenforceable post Brexit, as the UK will no longer be bound by the EU and its laws on EU citizenship.

If EU citizens can prove they have been present in the UK for 5 years prior to Brexit<sup>4</sup> then they are likely to have a right to remain under *UK law* (ie a different, distinguishable right from their current right to remain under EU law). However, many cannot provide documentation to prove they have been in the UK for 5 years – this is especially a problem for the self-employed who do not have work contracts, or other documentation as evidence of their situation. Nicola Sturgeon has said on a number of occasions that the situation of these EU nationals should be assured, but so far the UK government has failed to act.

The impact of Brexit on EU citizens in the UK depends on the future relationship between the UK and EU. If the UK joins the EEA (European Economic Area), free movement of persons would still continue under Part III EEA agreement. However, EU citizenship is not protected under the EEA, which could affect eg residence rights for family members of the EU citizen

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<sup>3</sup> According to the Office of National Statistics, 2016:  
<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/employmentbycountryofbirthandnationalityemp06>

<sup>4</sup> the exact date is unclear at present – it could be from 23 June 2016, but is more likely to be the actual date of the UK's withdrawal from the EU, which is expected to be sometime in 2019.

(see for further elaboration e.g. the *Ruiz Zambrano* case of the European Court of Justice<sup>5</sup>).

If there were no provision made for the situation of EU citizens in the UK in the Withdrawal Agreement, then free movement and citizenship provisions under the EU treaties would not apply and the UK would control its own immigration (although there is a debate about the extent to which 'acquired rights' would apply – see further below.)

The situation of non-UK EU citizens in the UK post Brexit is of concern to Scotland, as it has been said that Scotland would welcome further immigration, and would also want to reassure those EU nationals already in the UK in, for example, the university sector and financial services. But given the lack of clarity from the UK Government, it is difficult to give any reassurance at present. It is essential that clarity is provided, and this should be a major objective of any Withdrawal negotiations.

In November 2016, several articles were published in *The Herald*, suggesting ways in which immigration to Scotland of EU nationals might continue in spite of Brexit, through e.g. 'regional visas' or special use of Scottish NI numbers, although Whitehall has stated it would not devolve immigration as a policy area to Scotland. So there is investigation of how to continue to admit EU citizens post Brexit. This is also an aspect of the sort of differentiated arrangements with the EU that Scotland is currently considering. Of course, if Scotland were able to have a Norway style EEA arrangement, then the question of EU citizens' rights would be much less problematic for Scotland. But at present it is uncertain if this will be the case.

However, some issues concerning EU citizens' rights in Scotland fall within the current competence of the Scottish Parliament. EU citizens have the right to vote in Scottish Parliament and local government elections, and these are areas of devolved competence. The Scottish Parliament could decide to continue the voting rights of resident EU citizens. The Scottish Parliament could also decide to continue the current status of EU citizens regarding higher education (not charging fees for example).

*The situation may be broken down into further scenarios:*

#### **a) EU nationals who qualify for permanent residence**

The UK Government has stated that EU nationals who have lived continuously and lawfully in the UK for at least 5 years 'automatically have the permanent right to reside'.<sup>6</sup> The UK law concept, 'indefinite leave to remain', is in effect similar to EU permanent residence. However, the indefinite leave

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<sup>5</sup> In [Ruiz Zambrano v Office National de L'emploi](#), Belgium was required to grant a work permit to the 3<sup>rd</sup> country national carer of an EU Citizen who had yet to exercise his right of free movement throughout the EU, so as not to deprive the EU Citizen of the genuine enjoyment of the substance of his rights (the family might otherwise have had to leave the EU altogether).

<sup>6</sup> Gov.UK, 'Statement: the status of EU nationals in the UK', <https://www.gov.uk/government/news/statement-the-status-of-eu-nationals-in-the-uk>

to remain criteria set out in the UK Immigration Rules are very complicated, and dependent on individual circumstances.

EU citizens in the UK may qualify for 'indefinite leave to remain' if working, self-employed or if self-sufficient and have comprehensive sickness insurance or if they fall under other relevant categories. (A further requirement is a level of competence in English and knowledge of the British way of life.) After 5 years continuous residence in one or more of these categories, they can apply for indefinite leave to remain. However, while EU permanent residence is automatically acquired, 'indefinite leave to remain' must be applied for and is not automatically available after 5 years, as in the case of the EU right. Applicants must be able to document activities in UK, providing evidence such as payslips or letters from an employer.

In contrast, at present, EU nationals do not need to register for any documentation in order to enjoy their free movement rights under EU law. So there is no obligation on EU nationals to register residence, even since the Referendum. No record is made of UK or EU citizens entering or leaving the UK. Passports are not stamped. So it will be very difficult to determine who is living legally in the UK on the cut-off date.

#### **b) EU nationals who do not qualify for permanent residence**

There are an estimated 600,000<sup>7</sup> EU nationals from other EU Member States living and working in the UK who by 2019 will not be entitled to permanent residency rights. The UK Government has given no indication of what will be their approach to these persons.

Not all of these are recent entrants to the UK. For example, there exist long term resident EU nationals in the UK who have never worked, or are self-employed and do not have comprehensive sickness insurance and so do not qualify for a right of permanent residence under UK law.

Also problematic is the situation of third country nationals who derive a right of residence through a family member who is British or other EU citizen. In cases such as *Baumbast* and *Zambrano* the European Court of Justice expanded residence rights beyond those set out in the Citizens Rights Directive, but this would not apply in the event of Brexit.

#### **c) A further distinction needs to be made (regarding EU citizens who do not qualify for permanent residence) between those who arrived before/after 23 June 2016**

The situation is complex. The Government might argue that EU citizens who moved to the UK after the Referendum result of 23 June 2016 could have had no legitimate expectation of building a life in the UK, although given no official announcement has been made regarding their status, so the situation is ambiguous.

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<sup>7</sup> see Social Market Foundation Briefing Paper, Ben Richards, 'Here to stay? Residency and EU migrants after the referendum' (July 2016).

## Further Remedies and possible legal actions

- a) As discussed above, some EU citizens in the UK may have acquired a permanent right to residence under UK law. However, the UK Home Office is reporting difficulties in processing claims. If loss were suffered (for example to business, or family life, due to lack of recognition of the right to remain) then litigation might be expected.

b) *Acquired rights*

It has been suggested that the doctrine of 'acquired rights' in international law may be of use in protecting these EU citizens' rights. However, the acquired rights doctrine in fact does not give very much protection, and where it does offer protection, it is usually only where property or contract rights are at issue – eg where an EU national has bought property in Scotland, that right might be assured.

The EU Treaties make no specific mention of acquired rights, notwithstanding the fact that EU law and EU Treaties give individuals rights.

Some have claimed that the Vienna Convention on the Law of Treaties is supportive of the idea that EU citizens may claim acquired rights. However, the Vienna Convention provides termination of a Treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination'. These are 'state parties' which are signatories to Vienna Convention rather than those states' citizens. Therefore the Vienna Convention is not a basis for EU citizens' acquired rights in the UK nor UK citizens' acquired rights in other member states.

For further insights into the relevance of the doctrine of acquired rights to Brexit, I recommend the committee to my post on this specific issue:

<https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/>

- c) *Human rights, and principally the ECHR*, may be of some use. The right to family and private life (Article 8 ECHR) may be violated if EU citizens are threatened with deportation post Brexit. EU citizens whose businesses are affected by Brexit may also have human rights claims, for eg interference with their property (under Article 1 Protocol 1 ECHR) or violations of their rights to private life (Article 8 ECHR) which also includes the office and work.

Article 14 ECHR prohibits discrimination within the ambit of other ECHR rights. It requires justification for different treatment of two apparently similar groups. Given that no official announcement has been made concerning freedom of movement, using 23 June as cut-off point for residence rights might be considered unlawful discrimination

between groups of EU citizens who should be treated in same way up and until UK actually exits EU in 2019.

Article 8 ECHR does not confer an automatic right to remain in the UK. There would need to be case-by-case assessment of whether Article 8 is engaged.

The right to remain derived from Article 8 ECHR is also not absolute, meaning a state can justify expulsion in some circumstances. The UK is entitled to interfere with the right to private and family life in situations where it is provided by law, necessary in a democratic society, and proportional. As most deportation cases involve the expulsion of those convicted of criminal offences, the state usually relies on national security or prevention of disorder or crime. However, neither of these grounds would be applicable to general expulsion of EU nationals.

The UK might defend human rights actions using arguments based on 'economic wellbeing of the country' or 'protection of the rights and freedoms of others' (ie respecting the democratic result of the referendum). However this might not be accepted by the European Court of Human Rights (or national courts). Nonetheless, it is notable that Courts have been somewhat deferential when the state acts in pursuit of legitimate aim, and states do not generally fail on this ground.

d) *English law*

Applicants might also seek to rely on the principle of legitimate expectations in English law. They might argue that, by being a longstanding EU member, the UK had created a legitimate expectation, and on that basis an applicant should be entitled to a grant of indefinite leave to remain. For example, in 2002, the UK Government introduced the Highly Skilled Migrant Programme, to encourage skilled workers to come to the UK. However, in 2006 the Government introduced changes, making it harder to qualify for settlement, even for those who had already moved to Britain. Judicial review challenges were successfully brought (*R (HSMP Forum) v Home Secretary* [2008] EWHC 664). A determinative factor for the Court was that the Government's publicity for the scheme stated that if the scheme were suspended or closed those persons already in the UK as skilled migrants would continue to benefit from the programme's provisions. So the Court found an enforceable legitimate expectation that such rights would be maintained.

It has been [claimed](#) that the British government has the unilateral power to grant 3m EU citizens in the UK continued rights in the UK post-Brexit, (as their rights are not legally tied to 1.5 m British living abroad) and that this should be done as soon as possible. But this raises questions about how this could be done and whether it is likely. It also raises the following questions—

- What, if anything, could the Scottish Government do to assure the position of EU nationals currently resident in Scotland?

- Should EU citizens in the UK post Brexit be recognised as having a different status than that accorded to 3<sup>rd</sup> country nationals under the ‘indefinite leave to remain’ provisions?
- What, if anything, could be done to protect the situation of those EU residents who do not qualify for permanent residence in the absence of any agreement with the EU?
- Might the UK government allow some EU citizens to remain legally and how might that be determined

Also, Michel Barnier (EU Commission negotiator for Brexit) has stated that rights of EU citizens in the UK should be part of the UK’s withdrawal negotiations. This raises the question of whether EU citizens’ rights likely to be negotiated as part of the Article 50 negotiations? Or are citizens’ rights more likely to be left to be discussed in the context of a later UK/EU trade or broader relationship? Could there be merit in the UK trying to persuade other EU countries to enter into bilateral deals concerning EU citizens’ rights?

## **2. UK nationals resident in other EU states post Brexit**

There are currently circa 1.2 million UK citizens<sup>8</sup> in other EU member states. Post Brexit, they will lose their EU citizenship (unless they have another EU nationality) and will be treated as 3<sup>rd</sup> country nationals, unless the UK agrees their status as part of the Withdrawal Agreement. Again, we have no clarity from the UK government as to what their status will be, although, given that the UK nationals are resident in other EU states, the UK is not in a position to give legal guarantees as to their future status. If their situation is dealt with as part of the exit negotiations under Article 50, then unanimity of all EU states will not be necessary, as the Article 50 deal will be concluded on a majority basis.

Not only are UK nationals elsewhere in the EU in some cases in danger of losing residence rights in other EU states, but even if they can continue to reside, on loss of EU citizenship they may well suffer loss of pension and other benefits which they currently enjoy in EU law.

Their treatment by these member states would appear to depend on the terms of Brexit. Were the UK to take a harsh approach to EU nationals here, it is likely that UK nationals in other EU states may be treated similarly, although EU institutions and EU member states are bound by EU law in shaping the Withdrawal Agreement.

Upon becoming 3<sup>rd</sup> country nationals, unless more generous instruments were created as part of Withdrawal negotiations, relevant UK nationals would fall within the EU’s Common Immigration policy (from which the UK, Denmark and Ireland have opt-outs) which covers the rights of 3<sup>rd</sup> country nationals to live, work and study in the EU, and their rights as long-term residents. Because some rights of British nationals in the EU are governed by EU law, there is only limited scope for bilateral agreements with other member states.

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<sup>8</sup> See ‘Brits abroad: how many people from the UK live in other EU countries?’ available on the Full Fact website at <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>



The Long-Term Residents Directive (Directive 2003/109) grants long-term resident status to 3<sup>rd</sup> country nationals who have resided legally and continuously within EU member states for 5 years. However, applicants must provide evidence of stable and regular resources, without recourse to social assistance schemes, and meet certain integration conditions, such as language requirements. This status is less likely to be available to UK residents who exercised free movement rights via lower paid professions, as they are less likely to be able to provide evidence of stable and regular resources. Long term residence status might also have an impact on family life as it provides far stricter family reunion rules than at present.

Those UK citizens who wished to remain working in an EU State, but did not yet benefit from long-term resident status, could face quotas and discrimination against them as non-EU citizens. Following Brexit, the EU could impose visa requirements on UK citizens. Although the EU does not currently impose visa requirements on wealthy 3<sup>rd</sup> country nationals such as the USA, it expects reciprocity, so to benefit from visa waiver, the UK should exempt EU citizens from visa requirements.

Under the EU's Returns Directive (Directive 2008/115/EC) those British citizens who had no right to stay in the EU could be expelled, by force if necessary, and could be detained pending removal.

### **Further Remedies and possible legal actions**

1. **EU Law:** Unlike non-UK EU citizens in the UK, UK nationals in other EU states post Brexit may have actions under EU law, including the common immigration policy, to protect their status. However, as stated above, the common immigration policy provides much less protection for 3<sup>rd</sup> country nationals than is currently enjoyed by EU citizens who exercise the right of free movement under EU law. UK nationals may also be able to rely on other relevant aspects of EU law (for example, general principles of legal certainty, and legitimate expectations) however again, this will be much less than current protection enjoyed by EU citizens.

2. **Acquired rights.** Once again, the doctrine of 'acquired rights' is of little use, outside of property and contract law, ie it has little impact on migration and residence rights. See my comments under section 1 above.

3. **Human rights.** Other member states are also signatories to the ECHR so it will apply to the situation of UK nationals in the EU, as it applies to EU citizens in the UK – see under section 1 above.

However, the ECHR is also enforceable against the UK for actions taken by the UK government which had an impact outside the UK. For example, any business or property losses suffered to British nationals elsewhere in the EU, as a result of Brexit, might still be actionable under the ECHR.

**Further,** should British nationals lose residence rights in other member states as a result of Brexit and return to the UK, the UK will need to consider family ties formed between those UK nationals and EU citizens or 3<sup>rd</sup> country nationals whilst in another EU state. Under current EU law, UK citizens are



able to return with 3<sup>rd</sup> country or EU citizen family members, under EU law, without having to satisfy UK immigration law (Case C-370/90 *Singh* 1992). Once EU law protection is lost, might Article 8 ECHR be relied on?

**4. National law of other EU states:** remedies might also be available under the national law of the EU state concerned.

A number of questions arise in consideration of UK nationals resident in other EU states following Brexit—

- Is the situation of UK nationals in other EU states likely to be determined as part of withdrawal negotiations overall?
- Will bilateral deals with other EU states be possible given the existence of the EU's common immigration policy (e.g. the UK might be more concerned about the situation of UK nationals in Spain or France than in the Central/Eastern EU)?
- What is the likelihood that British people may find have to apply for visa to live, work, or retire in other EU states?
- Will it be possible to ensure healthcare and pension rights for British nationals present/resident in other EU countries post Brexit?
- Might exit negotiations result in the rights of UK citizens being diluted rather than maintained in other EU countries?

### **3. UK nationals who have not exercised free movement rights**

One does not need to migrate to another member state to benefit from EU citizenship. All UK nationals are EU citizens by virtue of being a citizen of a member state of the EU (i.e. the UK). This will be lost when the UK leaves the EU. Indeed, in the absence of further negotiated rights, UK nationals could be in a worse situation than some other 3<sup>rd</sup> country nationals for whom there exist non-discrimination clauses in EU agreements (eg Russia, Morocco). UK nationals may have to apply for visas on each trip to the EU.

This is an underexamined area of Brexit, but it is ripe for consideration. What does it mean to deprive UK nationals of EU citizenship? It is a very valuable benefit. This loss has been described as a 'bonfire of rights'. Human rights protections and prohibitions exist if a person is deprived of national citizenship – indeed in some situations international law prohibits the deprivation of national citizenship.

But what might be the ramifications of loss of EU citizenship? Is deprivation of EU citizenship to be likened to loss of national citizenship or to government expropriation of a valuable property? Might the government be financially liable for this loss? Does it involve the violation of human rights?

[The European Movement](#) have argued that Brexit risks being the first time that the whole population of a modern state loses citizenship without that nation being involved in armed conflict or ceasing to exist.

UK nationals risk losing the following rights as a result of losing EU citizenship:

- a) Rights of free movement, residence and the right to work and study in other EU states.
- b) Rights to vote/stand for the European Parliament will be lost, as well as the right to vote/stand in European Parliament and local elections while resident in other EU states.
- c) Also rights to do business with other EU states without barriers, even if not personally leaving the UK (e.g. selling insurance/financial services over the phone to another EU state from the UK).
- d) There are also many other rights which accrue from EU membership, such as workers' rights (i.e. equal pay for work of equal value for men and women, working time measures and so on). Although the UK Government has stated that it will initially ensure the status of these in UK law through the 'Great Repeal Bill', it has also said that it will decide whether to repeal or amend them. Due to Parliamentary sovereignty it could repeal whichever it chose. There would be no guarantee (of the sort that currently exists through our membership of the EU) that they will be maintained.

### **Associate citizenship?**

A Luxembourg MEP, Charles Goerens, recently suggested that the EU should make an 'associate citizenship' available to those UK nationals who wished to maintain it. [Amendment 882](#), was brought before the European Parliament by Goerens, to offer citizens from a former member state "[associate citizenship](#)". The Goerens' proposal was for opt-in with payment of a membership fee - in return, individuals would have some rights currently guaranteed by Treaty A 21-22 TFEU. As Goerens recognised, this would need EU treaty amendment before it could become reality.

However, this proposal may now have been superseded by that of European Parliament 'chief negotiator' Guy Verhofstadt, who has recently put forward a proposal for UK nationals to keep 'associate' EU citizenship after Brexit if they individually want to. Mr Verhofstadt wishes this proposal to be an element of the UK's withdrawal negotiations, and in this way it would not need to go through the usual treaty revision procedures.

It should be noted that dual nationality is already possible in the UK, although associate EU citizenship (or indeed EU citizenship as it currently stands) is not identical with possessing nationality of another state.

It should also be noted that other states have granted citizenship in bulk to citizens of other states. For example, Russia has offered passports to Russian-speaking residents of eastern Ukraine and Georgia.

What might be the position of Scotland in this context? Nicola Sturgeon recently [stated](#) that she 'would not rule out associate citizenship of the EU for

Scotland'. Is there any way in which Scotland might insist on the retention of 'associate' EU citizenship?

### **Alternative routes whereby EU citizenship could be maintained?**

#### **a) EU Law: *Rottmann* case**

One alternative means of retaining EU citizenship was suggested by [Gareth Davies](#). Davies' argument is based partly on the European Court's [C-135/08 \*Rottmann\*](#) decision. In that case, the claimant risked losing their EU citizenship because they were likely to become stateless. In that context, the European Court ruled that: *'it is for the Court to rule on questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.'* (paragraph 46). Therefore, because the claimant was in danger of losing EU citizenship, the situation fell within the scope of EU law and had to be subject to proportionality assessment.

Applied to the Brexit context, might *Rottmann* mean that the Court would have jurisdiction to consider whether the decision to withdraw from the EU and remove EU citizenship is proportionate? However, it seems unlikely that the ECJ would wish to be involved in a decision possibly seen to 'block Brexit' by enabling effective limitation on British withdrawal in this way.

#### **b) Human rights law**

It has been acknowledged that, while the right to citizenship is not protected under the ECHR and Human Rights Act, situations affecting it may nonetheless fall within the scope of the Convention. In [Genovese v Malta](#) (2011) the European Court of Human Rights held (33) that:

*'While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that article.'*

Further, in a case decided in 2016, ([R \(on the application of Johnson\) \(Appellant\) v Secretary of State for the Home Department \(Respondent\)](#), UKSC 19/10/16) Baroness Hale (24-27) explored the ambit of Article 8 ECHR and citizenship and stated (27): *'It is clear, therefore, that the denial of citizenship, having such an important effect upon a person's social identity, is sufficiently within the ambit of Article 8 to trigger the application of the prohibition of discrimination in Article 14.'*

Therefore it may be possible to argue that removal of EU citizenship interferes with Article 8 ECHR given that many people may be profoundly affected by the loss of EU identity as well as by loss of the rights that accompany EU citizenship.

Further, there is potential for claims under Article 8 ECHR accompanied by Article 14 ECHR. Article 14 of the ECHR states:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

Loss of EU citizenship may have a discriminatory impact on UK nationals. Because British citizenship law permits dual nationality, some British citizens may acquire nationality of another EU Member State and thus maintain their EU citizenship. Therefore, while some British citizens will lose EU citizenship, others will not. However, the determination of whether a British citizen should retain their EU citizenship should not depend on prohibited grounds for discrimination, such as national origin or other status. Arguably, however, the ability of a British citizen to retain EU citizenship following Brexit will depend precisely on this type of ground.

### **c) International law**

Loss or deprivation of *nationality* must meet certain conditions in order to comply with international law, in particular the prohibition of arbitrary deprivation of nationality. These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected. For example, Article 15 Universal Declaration of Human Rights states that everyone has the right to a nationality and no one shall be arbitrarily deprived of his or her nationality. The 1961 Convention on the Reduction of Statelessness establishes a set of basic rules which prohibit loss or deprivation of nationality where the result is to leave an individual stateless.

These international instruments relate to nationality but would they be of any relevance in the context of loss of EU citizenship?

A number of questions arise for consideration in relation to UK Nationals who have not exercised free movement rights—

- Would the grant of ‘associate’ EU citizenship be possible without treaty amendment and could it be agreed as part of the exit negotiations as suggested by Verhofstadt? Would other EU Institutions be likely to agree to it becoming part of exit negotiations? Is it likely that the UK Government would agree to it?
- Are there alternative routes whereby loss of EU citizenship may be legally scrutinised? Is the *Rottmann* decision relevant?
- Might human rights law, especially Article 8 ECHR, have an impact on the loss of UK nationals’ EU citizenship? Are any other aspects of international law relevant?
- Are there any other remedies, or legal avenues, that might be pursued, such as expropriation of property

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