

## **Meijers Committee**

standing committee of experts on international immigration,  
refugee and criminal law

### **CM1903 Note on the Position of UK nationals living in the EU in the case of a No Deal Brexit**

4 February 2019

#### **SUMMARY**

The Meijers Committee wishes to bring to the attention of the EU Institutions the position of UK nationals living in the EU in the case of a No Deal Brexit. These UK nationals used their rights as citizens of the European Union. Under EU law, Union Citizenship is destined to be the fundamental status of nationals of the Member States.

The Meijers Committee takes the view that the EU legislator should do its utmost to respect this fundamental status, in a situation where these individuals lost their Union citizenship due to circumstances which are completely out of their control. Many UK nationals living in other Member States did not have the right to vote in the 2016 referendum.

It is therefore suggested that the EU legislator adopts a Regulation granting protection of acquired rights of UK nationals who used their free movement rights before Brexit. This regulation should guarantee the same level of protection in accordance with the objective of Articles 9-29 of the draft Withdrawal Agreement, agreed between the EU and the UK at negotiators' level in November 2018.

#### **1. Introduction and background**

The Meijers Committee submits that the treatment of the approximately one million UK nationals living in the 27 Member States after a No Deal Brexit is a test case on whether the Union takes its own principles seriously or not.

On several occasions, the EU has underlined that safeguarding the position of these citizens is one of its main concerns.

On 29 April 2017, one month after the UK officially notified its intention to withdraw from the Union, the European Council adopted guidelines for the negotiations with the UK. Paragraph 8 of these guidelines underlines:

“The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures.”

## Meijers Committee

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refugee and criminal law

The Union's overall aim of the negotiations with the UK was to preserve the interests of these citizens. Accordingly, the draft Withdrawal Agreement<sup>1</sup> provides for a transition period of two, possibly even four years, during which the rules on free movement of Union citizens remain fully in force between the EU and the UK. After this transition period, the draft Agreement provides for a lifelong continuation of almost all acquired rights of Union citizens in the UK and British ex-Union citizens in the 27 Member States. The implementation of this part of the draft Agreement in the UK should be supervised for eight years by an Independent Authority and by the Court of Justice to which UK courts can continue to make references. Since the Agreement would be Union law, the Commission and the Court will play their normal role in supervising its implementation in the 27 Member States. In December 2018, the European Council endorsed the Withdrawal Agreement.

Equally in December 2018, the European Commission issued a communication with its contingency planning in case of a No Deal Brexit.<sup>2</sup> This communication contains a paragraph on "Citizens," but proposes a level of protection with regard to UK nationals in the 27 Member States which does not reflect the principles mentioned above.

### 2. The Commission takes a minimalist approach

The Commission refers to its proposal of June 2018 to amend the EU Visa Regulation exempting UK nationals from visa requirements for short stays, "provided that all Union citizens are equally exempted from UK visa requirements".<sup>3</sup> The Commission also acknowledges that UK nationals with five years of lawful residence in a Member State may apply for the EU long-term resident status under Directive 2003/109. It repeats its opinion that "periods of legal residence of UK nationals in a Member State before the withdrawal should be taken into account for these purposes".

For the rest, the Commission calls upon Member States "to take a generous approach" to UK nationals who are already resident in their territory and issue them with temporary residence and work permits under their national law. The protection of acquired residence rights of these UK nationals, their right to family reunification or their right to equal treatment are not mentioned in this Communication. The Commission only calls upon Member States "to take all possible steps to respond" to the concerns of UK nationals fearing the loss of social security rights" and "to ensure legal certainty and protection of the social security entitlements acquired by UK citizens who exercised their right to free movement before Brexit".

The Commission's communication does not reflect the high aims proclaimed by the European Council in relation to the protection of acquired rights of citizens with UK nationality living in the EU.

This minimalistic position of the Commission towards the consequences of involuntary loss of Union citizenship by a million persons, many having been Union citizens since birth, may have serious negative consequences for how Member States and the 450 million remaining Union citizens will perceive that status.

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1 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en).

2 COM(2018)890.

3 COM(2018)475.

## Meijers Committee

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The Commission's position is also minimalistic as compared to the promises of the UK government in a policy paper of early December 2018, granting the 3.5 million nationals of other Member States present in the UK in case of a No Deal Brexit the same protection of acquired rights regarding residence and employment, as provided for in the draft Withdrawal Agreement. This, for instance, includes continuation of the high EU deportation threshold for those who committed crimes before Brexit.<sup>4</sup> However, the paper also stresses that the UK government cannot do much for UK nationals in the EU-27, except for providing a diplomatic representation.

An example of the risk these UK nationals run in the absence of guarantees provided at EU level comes from The Netherlands. In December 2018, the Dutch immigration service ("IND") announced in a digital newsletter that early in 2019 an information letter will be sent to British citizens living in the Netherlands about the way in which the IND will provide for "a decent solution" for their further residence in the Netherlands after Brexit.

The content of that "decent solution" was specified in a letter from the Dutch Minister of Foreign Affairs to the Dutch Parliament of 7 January 2019. That letter only mentions a few special protective measures during a transitional period of 15 months.<sup>5</sup> Acquired rights and the long-term perspective of UK nationals in the Netherlands are not addressed. The position of UK nationals in the Netherlands is far less clear than the position of Dutch nationals in the UK after a No Deal Brexit.

In short, the EU should do more to protect the acquired rights of UK nationals in the EU-27 in case of a No Deal Brexit.

### 3. The assessment of the Meijers Committee

The Commission's delegation of this issue to Member States will result in widely different solutions in the 27 Member States.<sup>6</sup> The treatment of these former Union citizens, especially but not only those with less than five years of residence in a Member State, will be based primarily on national law. There will be no control by the Commission, the Court of Justice or the Parliament.

This will create (legal) uncertainty, for several reasons:

- There is no certainty that rights under the *acquis* will remain valid. Sometimes, these rights have been acquired decades ago.
- The same goes for the recognition of certificates of studies and professional qualifications acquired in the UK.
- More in general, Member States will have a wide margin of manoeuvre. There is no guarantee that they will include in domestic law effective, enforceable, non-discriminatory and comprehensive safeguards, including the right to acquire permanent residence after a continuous period of five years of legal residence.

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4 Department for Exiting the European Union, *Citizens' Rights – EU citizens in the UK and UK nationals in the EU*, Policy Paper, 6.12.2018.

5 Tweede Kamer 2018-2019, 23987, no. 299.

6 See [www.thelocal.de/tag/Brexit](http://www.thelocal.de/tag/Brexit), [www.thelocal.es/tag/Brexit](http://www.thelocal.es/tag/Brexit), [www.thelocal.fr/tag/Brexit](http://www.thelocal.fr/tag/Brexit) and [www.thelocal.it/tag/Brexit](http://www.thelocal.it/tag/Brexit).

## Meijers Committee

standing committee of experts on international immigration,  
refugee and criminal law

- There are administrative concerns. For instance, it might take considerable time to issue requests for residence permits, especially in those regions where many UK citizens are staying.
- Also other stakeholders, such as employers or administrative bodies, have an interest in a secure legal status of these citizens.
- The citizens concerned will feel insecure about their future, for instance about their pensions, with possible consequences for their integration.
- This will even be more crucial for third country family members of UK citizens.

Moreover, for a number of subject matters relevant to these former EU citizens (such as social security, pensions and health care) bilateral agreements with the UK would be needed. This has already taken place between the UK and Switzerland and some of the EFTA states. It would be not in line with the current EU approach on Brexit - based on a unity of the EU 27 - if individual EU Member States were required to negotiate bilateral agreements with the UK.

### 4. Possible way forward

Article 79(2) TFEU creates a legal basis for the EU legislator to adopt a Regulation granting protection of acquired rights of UK nationals who used their free movement rights before Brexit to the same extent as Articles 9-29 of the Withdrawal Agreement. Article 79(5) TFEU is no barrier for such a measure, since the regulation would apply only to UK nationals already lawfully resident in the EU.<sup>7</sup>

The Commission has already published a series of proposals for EU legislative measures in case of a No Deal Brexit.

It should urgently add another proposal on the rights of UK nationals and their family members now living, working or studying in the EU. This proposal:

- Should have the form of a binding instrument. A recommendation to the Member States does not ensure protection.
- Should have the form of a regulation to minimise legal uncertainty and to avoid the delays resulting from transposition of directives into national law.
- Should protect the rights of UK nationals and their family members living in the EU 27 on 29 March 2019, under the same conditions as those included in the draft Withdrawal Agreement.

### 5. Conclusion

It is possible that the absence of an EU wide approach to effectively protect UK citizens in the EU-27 reflects the disappointment in Brussels about the political developments in the UK. That frustration, however understandable, cannot justify the minimalistic approach of the Commission which simply leaves this problem to the discretion of the Member States.

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<sup>7</sup> See also S. Peers, Staring into the Abyss: Citizens' Rights after a No Deal Brexit, EU Law Analysis blog of 6 December 2018.

## **Meijers Committee**

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This public and visible indifference of the EU to the rights of a million Union citizens will reduce the credibility of the principle formulated by the Court of Justice in 2001 that Union citizenship is destined to be the fundamental status of nationals of the Member States.<sup>8</sup>

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<sup>8</sup> CJEU 20 September 2001 in case C-184/99 (Grzelczyk), ECLI:EU:C:2001:458.