



## ARTICLES

### SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

# RESIDENCE RIGHTS FOR EU CITIZENS AND THEIR FAMILY MEMBERS: NAVIGATING THE NEW NORMAL

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ABSTRACT: One of the fundamental pillars of the European Union is the right of EU citizens and their family members to move freely between and reside in the different EU member States. In recent case law, the Court of Justice has made it abundantly clear that EU citizens derive these rights directly from their EU citizenship status, whereas their family members have only “derived” residence rights, which are dependent on the EU citizen having exercised his freedom of movement. The impact of Brexit on the free movement of persons between the UK and the remaining EU Member States has remained one of the most controversial and politically sensitive issues ever since the British people voted to leave the EU. This *Article* tries to shed some light on the legal arguments underlying this debate. On the one hand, it provides an overview of a number of arguments deriving from EU law or international law on the basis of which, according to some scholars, EU citizens and their family members would continue to enjoy the residence rights attached to citizenship after Brexit. On the other hand, it will analyse a number of legal principles which would, according to some scholars, have to be respected by any withdrawal agreement between the EU27 and the UK and which, arguably, provide a basis for continued residence rights after Brexit.

KEYWORDS: Brexit – Court of Justice – EU citizenship – residence rights for family members – acquired rights – withdrawal agreement.

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## I. INTRODUCTION

On 1 January 2017, around six months after the Brexit referendum on 23 June 2016, there were around 3.6 million citizens from other EU Member States (hereinafter “EU27 Member States”) living in the United Kingdom (UK)<sup>1</sup> and likely around one million UK nationals living in other EU Member States.<sup>2</sup> Until Brexit happens, all these citizens are EU citizens and enjoy, in that capacity, together with their family members, far-reaching rights of free movement and residence. In this connection, it is not required that EU citizens are economically active. EU citizenship grants even non-economically active EU citizens and their family members the right to reside in another Member State under certain conditions. A well-known example are the numerous British pensioners residing in southern Europe: according to recent estimates, there are currently around 247,000 UK nationals aged 65 and over living in other EU countries, around 121,000 of which are living in Spain alone.<sup>3</sup>

The fate of these EU citizens and their family members after Brexit is most uncertain, and has been intensely debated in academic and political circles ever since the Brexit referendum was announced. In this *Article*, I will try to shed some light on the legal arguments underlying this debate. On the one hand, I will set out a number of arguments deriving from international law or EU law, as it currently stands, on the basis of which, according to some scholars, EU citizens and their family members would continue to enjoy the residence rights attached to citizenship after Brexit. On the other, I will analyse a number of arguments according to which these rights can be protected under an agreement to be negotiated between the UK and the EU27 and, in particular, legal principles the parties to such an agreement would have to take into account.

Throughout my *Article*, I will use the expression “EU27 citizens” to refer to persons having the nationality of one or more of the EU27 Member States and the expression “UK nationals” to refer to British nationals having EU citizenship.<sup>4</sup> Since I will be specifically examining the situation of UK nationals who may lose their EU citizenship after Brexit, I will not analyse the situation of UK nationals who also have the nationality of one or more of the EU27 Member States. Moreover, as far as the family members of EU

<sup>1</sup> Based on Eurostat figures: see [appsso.eurostat.ec.europa.eu](https://appsso.eurostat.ec.europa.eu).

<sup>2</sup> A precise estimate is not, to my knowledge available. According to the Office for National Statistics (ONS), around 900,000 UK citizens were long-term residents in other EU countries in 2010 and 2011 ([www.ons.gov.uk](http://www.ons.gov.uk)). More recent figures from the United Nations show that, in 2017, around 1.3 million people born in the UK were living in other EU Member States ([fullfact.org](http://fullfact.org)). See also the discussion in S. CARRERA, E. GUILD, N.C. LUK, *What Does Brexit Mean for the EU's Area of Freedom, Security and Justice?*, in *Center for European Policy Studies*, 11 July 2016, [www.ceps.eu](http://www.ceps.eu).

<sup>3</sup> Office for National Statistics, *Pensioners in the EU and the UK*, 5 September 2017, [www.ons.gov.uk](http://www.ons.gov.uk).

<sup>4</sup> Due to the complexity of British nationality laws, not all categories of UK nationals have EU citizenship. See in this regard, the declaration by the United Kingdom of Great Britain and Northern Ireland on the definition of the term “nationals”, annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

citizens are concerned, I will be mostly concerned with family members coming from third countries, in order to clearly distinguish their situation from that of EU citizens.<sup>5</sup>

## II. EU CITIZENS AND THEIR FAMILY MEMBERS: “AUTONOMOUS” VS. “DERIVED” RESIDENCE RIGHTS

The rules on EU citizenship, as first introduced by the Maastricht Treaty, are set out in Part Two of the TFEU. It follows from Art. 20, para. 1, TFEU that every national of a Member State is also an EU citizen.<sup>6</sup> That provision also sets out the rights enjoyed by EU citizens, the most prominent of which is without a doubt the right to move and reside freely, subject to certain limitations and conditions, within the territory of the Member States.<sup>7</sup>

Not only EU citizens themselves, but also their close family members enjoy a right of free movement and residence in the EU Member States, regardless of whether those family members are EU citizens themselves or not. The categories of family members which enjoy these rights are listed in Art. 2, para. 2, of Directive 2004/38.<sup>8</sup> There are three categories of such “privileged family members”: *a*) the spouse or the registered partner of the EU citizen; *b*) the direct descendants of the EU citizen who are under the age of 21 or are dependent and those of the spouse or partner; and *c*) the dependent direct ascendants and those of the spouse or registered partner.<sup>9</sup> Besides, Art. 3, para. 2, of Directive 2004/38 provides that the Member States have to facilitate entry and residence for what one could call “non-privileged family members”, i.e. *a*) other family members 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 and *b*) the partner with whom the Union citizen has a durable relationship, duly attested.<sup>10</sup> In this *Article*, I focus exclusively on the category of “privileged family members”.

<sup>5</sup> Some family members of EU citizens are, obviously, EU citizens themselves.

<sup>6</sup> See also Art. 9 TEU.

<sup>7</sup> See, e.g., Court of Justice, judgment of 13 July 2017, case C-193/16, *E*, para. 16.

<sup>8</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>9</sup> There is some scope for discussion about the precise extent of this category. For instance, according to some authors, the category of ascendant-primary carer could be interpreted broadly to cover non-biological ascendants such as a stepparent or an adoptive parent or even foster parents or unmarried partners. See G. BARRETT, *Family Matters: European Community Law and Third-Country Family Members*, in *Common Market Law Review*, 2003, fn. 81; H. TONER, *Partnership Rights, Free Movement and EU Law*, Oxford, Portland: Hart, 2004, pp. 81-82 and 229-231.

<sup>10</sup> See, in this regard, Court of Justice, judgment of 5 September 2012, case C-83/11, *Rahman and Others*. See also Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman and Others*, paras 83-84.

The conditions governing the right of residence for EU citizens and their family members are further fleshed out in Directive 2004/38. In the most basic terms, every EU citizen is entitled to move to another Member State and reside there, together with his family members for periods exceeding three months if he can prove that he is either economically active or has sufficient financial resources at his disposal.<sup>11</sup> Essentially, therefore, the right to free movement and residence of EU citizens is subject to two main conditions.<sup>12</sup> First, it can only be invoked by EU citizens once they leave their Member State and move to another Member State.<sup>13</sup> Second, EU citizens can only reside in another Member State for longer periods of time if they are self-sufficient, i.e. if they have a job or can fall back on sufficient personal means to support themselves and their family members.

However, in its seminal *Ruiz Zambrano* judgment,<sup>14</sup> the Court of Justice held that Art. 20 TFEU, in exceptional circumstances, grants even residence rights to EU citizens who do not satisfy these conditions. Indeed, the Court ruled that Art. 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of an EU citizen, which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as EU citizens.<sup>15</sup> Accordingly, an EU citizen can derive family reunification rights from EU law where the denial of such rights would deprive him of the genuine enjoyment of his EU citizenship rights even in a situation where he has not left the territory of its Member State and even where he is not economically active or self-sufficient. The Court of Justice has confirmed and clarified this principle in a number of follow-up cases.<sup>16</sup>

<sup>11</sup> See Art. 7 of Directive 2004/38, cit.

<sup>12</sup> For a discussion, see N. CAMBIEN, *Union Citizenship and Immigration: Re-thinking the Classics?*, in *European Journal of Legal Studies*, 2012.

<sup>13</sup> See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 34.

<sup>14</sup> Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*. For a detailed discussion of the case see K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, in *Common Market Law Review*, 2011, pp. 1253 *et seq.*

<sup>15</sup> There is an abundant literature on this case law. See, e.g. the contributions in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017.

<sup>16</sup> Some of these cases deal with (third country) family members of adult EU citizens: e.g. Court of Justice: judgment of 5 May 2011, case C-434/09, *McCarthy*; judgment of 15 November 2011, case C-256/11, *Dereci and Others*. For a discussion, see N. NIC SHUIBHNE, *Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and Others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011*, in *Common Market Law Review*, 2012, pp. 349–379, and S. ADAM, P. VAN ELSUWEGE, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci*, in *European Law Review*, 2012, pp. 176–190. Other cases deal with minor EU citizens and their primary carer: e.g. Court of Justice: judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*; judgment of 10 October 2013, case C-86/12, *Alokpa and Moudoulou*.

In this connection, the Court has made an important distinction between the nature of the free movement and residence rights of EU citizens, on the one hand, and those enjoyed by their family members which are not EU citizens themselves, on the other hand. While the Treaties confer autonomous rights on EU citizens, the rights conferred on third-country family members are not autonomous rights but rights derived from those enjoyed by the EU citizen.<sup>17</sup> The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with an EU citizen's freedom of movement.<sup>18</sup> This distinction is also relevant in the context of the debate about the residence rights that will be enjoyed by EU citizens and their family members after Brexit.

In the following, I will first analyse arguments according to which the residence rights enjoyed by EU citizens and their family members could be considered to be "inalienable" rights which, as such, "survive" Brexit. Next, I will analyse the possibility of protecting these rights under an agreement negotiated between the UK and the EU27.

### III. RESIDENCE RIGHTS ENJOYED BY EU CITIZENS AS INALIENABLE RIGHTS?

The first question to ask is whether or to what extent the residence rights currently enjoyed by EU citizens and their family members can still be enjoyed after Brexit in the absence of any agreement regulating these rights. In this context, it is necessary to make a distinction between, on the one hand, the residence rights enjoyed by UK nationals and their family members in the EU27 Member States and, on the other hand, the residence rights enjoyed by EU27 citizens and their family members in the UK.

#### III.1. RESIDENCE RIGHTS OF UK NATIONALS AND THEIR FAMILY MEMBERS IN THE EU27

A number of scholars have argued that the rights attached to EU citizenship are of such a fundamental nature that, once acquired, they can no longer be taken away.<sup>19</sup> This would mean that the rights enjoyed by UK nationals residing in the EU27 Member States, would continue to exist after Brexit. Consequently, UK nationals and their family members would continue to have a right of residence in these Member States under the same conditions as those applicable before Brexit.

Two lines of argument have been put forward to defend this point of view. In the first place, it has been pointed out that EU citizenship is, according to settled case law of

<sup>17</sup> See, e.g., Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 33.

<sup>18</sup> Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others*, para. 62 and case law cited.

<sup>19</sup> See, e.g., the arguments discussed in the report by V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit, a Study for Jill Evans MEP*, 2017, [www.jillevans.net](http://www.jillevans.net).

the Court of Justice, the “fundamental status” of nationals of the Member States.<sup>20</sup> In its *Rottmann* judgment, the Court has famously held that a Member State cannot under EU law withdraw its nationality if such withdrawal entails the loss of EU citizenship, unless that withdrawal is in line with general principles of EU law, such as the principle of proportionality.<sup>21</sup> Hence, it could be argued that once EU citizenship has been acquired, it can no longer be withdrawn, and that, consequently, Brexit cannot entail, for UK nationals, a loss of EU citizenship.<sup>22</sup> However, according to other authors this argument fails to convince. One principal reason for this is that, after Brexit, UK nationals will no longer be nationals of a Member State, and will, as a logical consequence, no longer be EU citizens.<sup>23</sup> That consequence would not derive from the action of a Member State, but would flow directly from the Treaties. Indeed, in accordance with Art. 20 TFEU, “[e]very person holding the nationality of a Member State shall be a citizen of the Union”. Moreover, it has been argued that there is nothing in Art. 50 TEU which provides that, in the event of a withdrawal, the rights attached to EU citizenship should continue to be guaranteed. As Eeckhout and Frantziou point out, at the Constitutional Convention, a number of delegates had proposed amendments that safeguarded existing rights, but these were not adopted.<sup>24</sup> It can be concluded, therefore, that, considered purely from the perspective of EU law as it currently stands, it is doubtful whether the residence rights enjoyed by UK nationals in the EU27 will survive in the event of Brexit.

It should be remarked that there is a possibility that the Court of Justice will have the opportunity to pronounce itself on the legal consequences of Brexit for the rights enjoyed by UK nationals and their family members residing in the EU27 Member States, if questions for a preliminary ruling on that matter were referred to it. With this purpose, a group of UK nationals living in the Netherlands had seized a Dutch court, which, initially, had agreed to questions to ask the CJEU if Brexit would lead to an automatic loss of rights attached to EU citizenship, in the absence of a negotiated solution agreed between the EU and the UK.<sup>25</sup> However, after an appeal by the Dutch government, the Dutch court even-

<sup>20</sup> See, for an early example, Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

<sup>21</sup> Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*, paras 41-59. For an analysis, see N. CAMBIEN, *Janko Rottmann v. Freistaat Bayern*, in *Columbia Journal of European Law*, 2011.

<sup>22</sup> See the discussion in G. DAVIES, *Union Citizenship – Still Europeans’ Destiny After Brexit*, in *European Law Blog*, 7 July 2016, europeanlawblog.eu.

<sup>23</sup> See, e.g. D. KOCHENOV, *Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris*, in *Verfassungsblog*, 24 June 2016, verfassungsblog.de.

<sup>24</sup> P. EECKHOUT, E. FRANTZIOU, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 718. See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, “Part I of the Constitution: Article 59”, european-convention.europa.eu.

<sup>25</sup> Court of Amsterdam, judgment of 7 February 2018, C/13/640244/KG ZA 17-1327.

tually decided not to refer the said questions.<sup>26</sup> The possibility cannot be ruled out, however, that the matter will come before the Court in the context of a different case<sup>27</sup>.

In the second place, it has been argued that the rights attached to EU citizenship, such as the residence rights for EU citizens and their family members, are covered by the international law doctrine of “acquired rights”.<sup>28</sup> In accordance with that doctrine, international law protects certain rights acquired under a Treaty, notwithstanding the termination of the Treaty.<sup>29</sup> This doctrine is not only vested in customary international law,<sup>30</sup> but is also codified to some extent in Art. 70, para. 1, let. b), of the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides as follows: “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, does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. There is little doubt that the VCLT applies to a Member State withdrawing from the EU Treaties under Art. 50 TEU.

Some authors argue, on this basis, that certain EU citizenship rights, such as the right of permanent residence, are protected acquired rights.<sup>31</sup> Most commentators agree, however, that the rights enjoyed by EU citizens under the Treaties are not protected under the doctrine of acquired rights.<sup>32</sup> On one view, this is because Art. 50 TEU forms a *lex specialis* which contracts out on international rules on acquired rights, rendering the latter inapplicable in the case of a Member State withdrawal from the EU. In this connection, it has been observed that Art. 70, para. 1, VCLT explicitly states “Unless the treaty otherwise provides or the parties otherwise agree”.<sup>33</sup> Another reason relied

<sup>26</sup> For a discussion, see O. GARNER, *Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244/KG ZA 17-1327 of the Rechtbank Amsterdam (“The Amsterdam Case”), in European Law Blog*, 19 February 2018, europeanlawblog.eu.

<sup>27</sup> For a more detailed discussion, see the A.-P. VAN DER MEI, *EU Citizenship and Loss of Member State Nationality*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu, p. 1319 *et seq.*

<sup>28</sup> See, on this issue, European Parliament, Committee on Constitutional Affairs, *The Impact and Consequences of Brexit on Acquired Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27*, 2 May 2017, www.europarl.europa.eu; the arguments discussed in the report by V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit*, cit., the arguments discussed in the report of House of Lords, *Brexit: Acquired Rights*, 14 December 2016, publications.parliament.uk.

<sup>29</sup> For a discussion, see, e.g., K. SIK, *The Concept of Acquired Rights in International Law: A Survey*, in *Netherlands International Law Review*, 1977, pp. 120-142.

<sup>30</sup> See P.A. LALIVE, *The Doctrine of Acquired Rights*, in M. BENDER (ed.), *Rights and Duties of Private Investors Abroad*, New York: International and comparative law center, 1965, p. 183.

<sup>31</sup> M. WAIBEL, *Brexit and Acquired Rights*, in *AJIL Unbound*, 2018, pp. 440-444.

<sup>32</sup> See, e.g., R. REPASI, *Die Rechte der Unionsbürger und ihr Fortbestehen nach dem Brexit*, in *ifo Schnelldienst*, 2017, pp. 30-33; S. DOUGLAS-SCOTT, *What Happens to “Acquired Rights” in the Event of a Brexit?*, in *UK Constitutional Law Blog*, 16 May 2016, ukconstitutionallaw.org; J.-C. PIRIS, *Should the UK Withdraw from the EU: Legal Aspects and Effects of Possible Options*, in *European Issues*, 2015, p. 10.

<sup>33</sup> See, e.g., House of Lords, *Brexit and the EU Budget*, 4 March 2017, publications.parliament.uk.

on to support this view is that under the VCLT, EU citizens are third parties with respect to the EU treaties, while Art. 70, para. 1, let. b), of the VCLT only applies to the rights, obligations, or legal situations of the State parties to the EU Treaties. In this connection, it can be pointed out that the International Law Commission, in its commentary on the scope of the identically worded predecessor to Art. 70, para. 1, let. b), (Art. 66 draft Vienna Convention) clarified that: "On the other hand, by the words 'any right, obligation or legal situation of the parties created through the execution of the treaty', the Commission wished to make it clear that paragraph I(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the 'vested interests' of individuals".<sup>34</sup>

It follows that, according to most scholars, it is unlikely that the international law doctrine of acquired rights could be successfully relied upon after Brexit by UK nationals and their family members residing in the EU27 Member State in order to preserve the full spectrum of residence rights attached to EU citizenship.

### III.2. RESIDENCE RIGHTS OF EU27 CITIZENS AND THEIR FAMILY MEMBERS IN THE UK

The situation, at the moment of Brexit, of EU27 citizens residing in the UK is different from that of UK nationals residing in one of the 27 other Member States. Indeed, in contrast to the latter group, EU27 citizens preserve their EU citizenship, in accordance with Art. 20 TFEU and Art. 9 TEU, even after Brexit. However, the arguments for considering that they could preserve the full spectrum of their residence rights in the UK would not appear to carry more weight.

First of all, since the UK would no longer be a Member State after Brexit, it would no longer be bound by EU law, neither by primary law provisions on EU citizenship nor by secondary EU law, such as Directive 2004/38. Consequently, EU27 citizens residing in the UK will no longer be able to rely on their EU citizenship rights on the UK, which would, in effect, have become a third country.

Second, it is not evident, for the same reasons as those outlined above, that the international law doctrine of acquired rights could be successfully relied upon after Brexit by EU27 citizens and their family members residing in the UK in order to preserve the full spectrum of their residence rights attached to EU citizenship.

### III.3. INTERMEDIARY CONCLUSION

It follows from the analysis above that it is far from certain that the various arguments discussed in order for EU citizens and their family members to be able to continue to rely (fully) on the residence rights would not succeed if they were invoked before a na-

<sup>34</sup> International Law Commission, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, Vol. II, 1966, p. 265.



tional court, for instance by a UK national who wanted to continue to enjoy his residence rights as an EU citizen in one of the EU27 Member States after Brexit. If, indeed, the residence rights attached to EU citizenship cannot be considered to be “acquired” rights, which continue to be enforceable after Brexit, these rights will only continue to be enjoyed if that is provided for in an agreement negotiated between the EU27 and the UK. This possibility will be analysed in part 0, below.

For the sake of completeness, it must be pointed out that, if no negotiated solution is reached between the EU27 and the UK, UK nationals and their family members, residing in the EU27 Member States, would, in any event, still enjoy the rights conferred by the EU on third country nationals. More in particular, they would enjoy the residence rights governed by a number of directives, such as the Family Reunification Directive,<sup>35</sup> the Long Term Residence Directive<sup>36</sup> or the Blue Card Directive.<sup>37</sup> The conditions laid down in these directives are, however, less beneficial than those governing the residence rights of EU citizens and their family members.<sup>38</sup> EU27 citizens residing in the UK, by contrast, would no longer have a claim to any rights derived under EU law. As third country nationals, they could still derive residence rights under UK law, but the conditions governing these would likely be stricter in many circumstances than those governing their prior residence rights as EU citizens.<sup>39</sup>

Moreover, both groups of citizens could still derive rights from the European Convention on Human Rights (ECHR), since both the UK and all the EU27 Member States are party to that convention and will continue to be parties for the foreseeable future. In this connection, some scholars have argued that the rights enjoyed by EU citizens up until Brexit will be “cemented” and protected after Brexit under the ECHR.<sup>40</sup> More particularly, as far as residence rights are concerned, reference is made to the judgment of the European Court of Human Rights in case *Kurić and Others v. Slovenia*,<sup>41</sup> which concerns the rights of former nationals of Yugoslavia in Slovenia. In that case, that Court held that Slovenia had breached Art. 8 ECHR by suddenly taking away the rights of cer-

<sup>35</sup> Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification.

<sup>36</sup> Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>37</sup> Directive 2009/50/EC of the Council of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>38</sup> For an analysis, see *inter alia* P. MINDUS, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence*, Basingstoke: Palgrave Macmillan, 2017, ch. 3.

<sup>39</sup> See the discussion in A. SCHRAUWEN, *(Not) Losing Out from Brexit*, in *Europe and the World: A Law Review*, 2017, hdl.handle.net, pp. 8-13 and in M. KILKEY, *Conditioning Family-life at the Intersection of Migration and Welfare: The Implications for “Brexit Families”*, in *Journal of Social Policy*, 2017, pp. 797-814.

<sup>40</sup> See, e.g., G.M. GONZÁLEZ, *“Brexit” Consequences for Citizenship of the Union and Residence Rights*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 796-811.

<sup>41</sup> European Court of Human Rights, judgment of 26 June 2012, no. 26828/06, *Kurić and Others v. Slovenia*.

tain groups of these nationals. In this connection, it pointed out (at para. 355 of the judgment) that “measures restricting the right to reside in a country may, in certain cases, entail a violation of Art. 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned”. However, it is well-known that Art. 8 ECHR allows Member States a rather broad margin of discretion and it seems fair to say that the residence rights enjoyed by EU citizens and their family members are not entirely protected under Art. 8 ECHR.<sup>42</sup> In addition, specifically as regards UK nationals, it is sometimes argued that the ECHR can be relied upon, in certain circumstances, to prevent the withdrawal of EU citizenship. While it is true that the European Court of Human Rights has held that, in certain circumstances, the loss of citizenship may fall within the ambit of Art. 8 ECHR,<sup>43</sup> it cannot be inferred with certainty from that case law that the loss of EU citizenship would be in breach of Art. 8 ECHR, especially given the fact that the said case law is concerned with national citizenship. Accordingly, according to the House of Lords European Union Committee it may be concluded that Art. 8 ECHR cannot be relied on to prevent the status of EU citizenship from being removed as a consequence of Brexit.<sup>44</sup>

In conclusion: while arguments derived from the ECHR would perhaps be more successful than arguments relying exclusively on EU law or the international law doctrine of acquired rights, it is not certain that these arguments provide solid basis to fully protect the residence rights currently enjoyed by EU citizens and their family members. A comprehensive solution would, therefore, have to be hammered out in an agreement between the UK and the EU<sup>27</sup>.

#### IV. BREXIT AND RESIDENCE RIGHTS: AN ESSENTIAL ISSUE FOR ANY NEGOTIATED SOLUTION

The idea of negotiating a new set of rules to resolve some of the UK’s concerns regarding the EU legal framework is not a new phenomenon, of course. It is well-known that the UK has managed to negotiate so-called “op-outs” in important areas of EU law, including in the so-called Area of Freedom, Security and Justice. When then Prime Minister David Cameron decided to hold the “Brexit” referendum, his idea was to achieve a new “deal” with the EU before the date of that referendum, a deal intended to sway many of the UK concerns regarding the impact and working of the EU, and, as a conse-

<sup>42</sup> See A. SCHRAUWEN, (*Not*) *Losing Out from Brexit*, cit., p. 6: “Thus in any event the doctrine would not apply to those who have not yet acquired the right to permanent residence, and might imply a weaker position for those who recently decided to move abroad, arguably for the most part young people”.

<sup>43</sup> See, e.g., European Court of Human Rights, decision of 7 February 2017, no. 42387/13, *K2 v. the United Kingdom*.

<sup>44</sup> House of Lords, *Brexit: Acquired Rights*, cit. P. MINDUS, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence*, Basingstoke: Palgrave Macmillan, 2017, ch. 7, p. 108.

quence, to convince a majority of voters to stay in the EU. Not surprisingly, the new deal focused to a large extent on free movement and EU citizenship related issues. The European Council conclusions of February 2016 stated, *inter alia*, that the references in the Treaties and their preambles to the process of creating “an ever closer union among the peoples of Europe” would not apply to the United Kingdom, and they proposed to amend the existing rules on EU citizens and their family members in order to make them somewhat more restrictive.<sup>45</sup> Annexed to these conclusions was a declaration in which the Commission set out its intention to adopt a proposal to complement Directive 2004/38 in order to exclude from the scope of free movement rights certain third country nationals resorting to an abuse of rights.<sup>46</sup>

However, the proposed settlement was rejected when, on 23 June 2016, a small majority of British votes was cast in favour Brexit. On 29 March 2017, the United Kingdom officially notified the European Council of its intention to leave the European Union. In accordance with Art. 50 TEU this notification is followed by negotiations to set out the precise arrangements for withdrawal. These negotiations could last, in principle, no more than two years,<sup>47</sup> but they could in practice be followed by a so-called “implementation period” or “transition period” in order to avoid an abrupt change of the legal regime applicable to the UK and the EU27 Member States.

As far as the EU is concerned, it was apparent from the outset that EU citizenship would have to play a central role in these negotiations, as is clearly stated, for instance, in the guidelines for Brexit negotiations of the European Council<sup>48</sup> and the negotiation directives of the Council.<sup>49</sup> In fact, the Council, the European Parliament and the Commission have repeatedly stated that one of the first priorities for the negotiations is to agree on guarantees to protect the rights of EU citizens, and their family members, that

<sup>45</sup> See the European Council Conclusions of 18-19 February 2016, *A New Settlement for the United Kingdom Within the European Union* and the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18-19 February 2016.

<sup>46</sup> See the Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, in Annex 7 of European Council Conclusions of 18-19 February 2016. For a more in-depth analysis, see the E. MUIR, *EU Citizenship, Access to “Social Benefits” and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit*, in *European Papers*, Vol. 3, 2018, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1353 *et seq.*

<sup>47</sup> See Art. 50, para. 3, TEU, which provides: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”.

<sup>48</sup> European Council Guidelines of 29 April 2017 following the United Kingdom’s notification under Art. 50 TEU.

<sup>49</sup> Directives of the Council of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union.

are affected by Brexit. For instance, the Council's press release of 22 May 2017 explicitly states that the first priority for the negotiations is to agree on guarantees to protect the rights of EU and UK citizens, and their family members, that are affected by Brexit.<sup>50</sup> At the same time, the UK has made it clear from the outset that it wants to limit the rights of EU citizens and their family members in the UK, in particular their right to free movement and residence. Accordingly, a white paper published in February 2017 by the UK government stated unequivocally: "We will design our immigration system to ensure that we are able to control the numbers of people who come here from the EU. In future, therefore, the Free Movement Directive will no longer apply and the migration of EU nationals will be subject to UK law".<sup>51</sup>

It is inevitable, therefore, that, in the context of the Brexit negotiations, the concept of EU citizenship, which was destined to be the fundamental status of all Member State nationals, will be deeply challenged. It remains to be seen how the concept of EU citizenship and the rights attached to it emerge from the negotiations.

The aim of this section is not to provide a critical analysis of the current state of negotiations, and neither to predict their outcome. At the moment of writing this *Article*, it is impossible to know what the outcome of the negotiations will be, or even to know whether a negotiated solution will be reached, in particular since, in order to do so, a number of important hurdles must still be overcome.<sup>52</sup> Rather, this section purports to examine, from a legal point of view, different possible options for dealing with the issue of the residence rights of EU citizens and their family members after Brexit. In this regard, I will examine, in particular, some of the legal principles that such negotiations would have to take into account.

#### IV.1. CHANGING CITIZENSHIP STATUSES AT THE EU LEVEL

One radical way of dealing with the issue of residence rights for EU citizens after Brexit would be to change the status of citizenship at the EU level, or the access to it, in such a way that after Brexit, UK nationals remain citizens of the EU, and preserve the current rights associated to that status. Various options can be considered in this connection.<sup>53</sup> I will limit myself to discussing the three most important ones.

<sup>50</sup> Council (Art. 50) authorises the start of Brexit talks and adopts negotiating directives, in European Council Press Release 286/17 of 22 May 2017, [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>51</sup> See, Government of the United Kingdom, *The United Kingdom's Exit from and New Partnership with the European Union - White Paper*, 2 February 2017, [www.gov.uk](http://www.gov.uk), para. 5.4.

<sup>52</sup> For a discussion of some of these hurdles, see Editorial Comment, *Polar Exploration: Brexit and the Emerging Frontiers of EU Law*, in *Common Market Law Review*, 2018, pp. 1 *et seq.*

<sup>53</sup> See the discussion in D. KOCHENOV, *EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?*, in *LEQS Europe in Question Paper*, no. 111, 2016.

The first option would be to turn EU citizenship into a truly independent form of citizenship, by decoupling it from Member State nationality.<sup>54</sup> In other words: having the nationality of a Member State would no longer be required in order for a person to be an EU citizen. Such an arrangement could allow UK nationals to remain EU citizens after Brexit, and hence to continue to enjoy the residence rights attached to that status in the EU27 Member States. This first option might be very interesting from an academic point of view, but may be more difficult from a political perspective, for a number of reasons. First of all, implementing this option would require changing the Treaties, and in particular Art. 9 TEU and Art. 20 TFEU. However, it is clear from the available documents that the Member States, at the time of the conclusion of the Maastricht Treaty, were not prepared to have an independent form of EU citizenship which would potentially become more important than their own nationality. Hence the clear wording of Art. 9 TEU and Art. 20 TFEU to the effect that “Citizenship of the Union shall be additional to and not replace national citizenship”. It is unlikely that in the current context, in which anti-EU feelings have grown in intensity compared to past decades, Member States would change their mind on this issue. Moreover, even in the implausible event that Member States would be willing to make the said Treaty changes, those changes would not do anything to guarantee the residence rights of EU27 citizens in the UK, which will become a third country after Brexit.

A second option would be to create a form of “associate citizenship” for UK nationals, which would allow UK nationals to keep (some of) the rights associated with EU citizenship after Brexit.<sup>55</sup> This option would be less far-reaching than the first one, as it would not change the EU citizenship status as such, but would entail the creation of a separate status, with possibly more limited and a more static set of rights. Moreover, acquiring this status could be made subject to an individual opt-in, by UK nationals satisfying certain conditions, such as, for instance, the payment of a fee.<sup>56</sup> This second option, while it would most likely also require an amendment of the Treaties,<sup>57</sup> would not require an overhaul of the existing EU citizenship concept, as interpreted in the case law of the European Court of Justice. Still, from a political level, granting associate citizenship to (certain) UK nationals would likely be acceptable only if the UK reciprocated,

<sup>54</sup> This idea has been suggested for a long time by some legal scholars. See the literature referred to in D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2017, p. 5.

<sup>55</sup> See the discussion in V. MILLER, *Brexit and European Citizenship*, in *House of Commons Briefing Paper*, no. 8365, 2018, pp. 24 *et seq.*

<sup>56</sup> See e.g. European Parliament, Draft Report of 9 November 2016, *Possible Evolutions of and Adjustments to the Current Institutional Set-up of the European Union*, Amendment no. 882 by Member of the European Parliament Charles Goerens, [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>57</sup> See the discussion in V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit, a Study for Jill Evans MEP*, cit.

for instance by granting a form of associate British citizenship.<sup>58</sup> However, such reciprocal commitments are considered to be problematic by many observers,<sup>59</sup> for the same reasons as outlined above.

A third option would be to facilitate access to EU citizenship for UK nationals after Brexit, for instance by granting the right to UK nationals residing for more than five years in a given Member State to obtain the nationality of that Member State – and, therefore, EU citizenship – by mere registration or declaration.<sup>60</sup> This option, while again interesting from an academic perspective, is problematic for a number of reasons. First, it would require harmonisation, to some extent, of Member State nationality laws, something that is unlikely to be accepted by the Member States. Indeed, so far the Member States have always resisted any interference of EU legislation in their nationality laws. This has led the Court of Justice to hold that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, while at the same time, Member States must unconditionally recognize each other's nationality.<sup>61</sup> Second, this solution could be problematic in Member States which do not allow dual nationality, because in those Member States UK nationals would lose their UK nationality upon acquiring the nationality of their host Member State, which would present them with a difficult choice between two less than satisfactory options. Third, there is, again, the political issue of the necessary reciprocity on behalf of the UK.

#### IV.2. PRESERVING RESIDENCE RIGHTS FOR EU27 CITIZENS/UK NATIONALS AND THEIR FAMILY MEMBERS

If the (access to the) citizenship status at EU level is left unchanged, the residence rights of EU27 citizens and UK nationals after Brexit may be the subject of an agreement between the EU27 and the UK. The content of that agreement would be based to a large extent on political considerations. Yet, the negotiators would also have to take into account a number of legal principles which are, arguably, relevant for the subject of residence rights after Brexit, as I will examine in what follows. The agreement would, arguably, have to deal, on the one hand, with the situation of EU27 citizens who have moved to the UK or UK nationals who have moved to another Member State before Brexit (or before the end of the transition period) and, on the other hand, of those EU27 citizens or UK nationals who will move after Brexit (or before the end of the transition period). In this section, I am dealing mostly with the situation of persons who have moved be-

<sup>58</sup> See the discussion in V. ROEBEN, J. SNELL, P. MINNEROP, P. TELLES, K. BUSH, *The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit*, cit.

<sup>59</sup> See, e.g., A.-P. VAN DER MEI, *EU Citizenship and Loss of Member State Nationality*, cit.

<sup>60</sup> D. KOSTAKOPOULOU, *Scala Civium*, cit., p. 8.

<sup>61</sup> Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*, para. 10.

fore Brexit (or before the end of the transition period), as, in my view, this group has the strongest claims on the basis of the said principles.

EU citizens and their family members who move to another Member State can enjoy three different types of residence rights, which are subject to different conditions. First, EU citizens and their family members can move to another Member State and reside there for periods up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport (see Art. 6 of Directive 2004/38). Second, for periods of residence longer than three months, they must, as was pointed out above, be economically active or self-sufficient (see Art. 7 of Directive 2004/38). Third, the strongest, most complete form of residence right is the so-called “permanent residence”, which is acquired, in principle, after the Union citizen has resided legally for a continuous period of five years in the host Member State.<sup>62</sup>

As I will analyse in what follows, there are a number of legal principles which the withdrawal agreement would have to respect and which, according to some scholars, could provide arguments to the effect that EU27 citizens who reside in the UK or UK nationals having a right of residence in one of the EU27 Member States, especially those having acquired a right of permanent residence, would be entitled to preserve this under the agreement. Some of these legal principles could be binding on both the UK and the EU27 Member States, whereas other legal principles only bind the latter.

First of all, the withdrawal agreement would have to respect fundamental rights as laid down in the ECHR, to which both the UK and the EU27 Member States are a party.<sup>63</sup> The right to protection of family life laid down in Art. 8 ECHR precludes, under certain circumstances, residence rights being taken away. In this regard, the degree of integration in the host State certainly is a relevant consideration in assessing whether deportation is allowed under Art. 8 ECHR. Hence, this argument might be said to work in favour, especially of UK nationals having acquired a right of permanent residence in one of the EU27 Member States or EU27 citizens who are integrated in the UK.

Second, one could argue that “integration” itself is a guiding legal principle of EU law. In this context, one could refer to the objective stated in the preamble to the TEU of continuing “the process of creating an ever closer union among the peoples of Europe”. The free movement of EU citizens plays a very important role for the achievement of this objective, and one could argue that respecting this principle requires to some extent guaranteeing residence rights for UK nationals in the EU27 Member States after Brexit. Again, this argument seems to be most convincing with regard to UK nationals having acquired a right of permanent residence. In this connection, it should be pointed

<sup>62</sup> See Art. 16 of Directive 2004/38, cit. See also the derogations laid down in Art. 17 of the Directive 2004/38, cit.

<sup>63</sup> See also *supra*, section III.3. for an analysis of the implications of the ECHR even in the absence of a withdrawal agreement.

out that recitals 17 and 18 of the preamble to Directive 2004/38 make it clear that permanent residence is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union and that in order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions. As such, this legal principle could provide some support for the view that, UK nationals who are sufficiently integrated in the society of one of the home Member States should be entitled to residence in the EU even after Brexit. A similar argument could not be made in favour of EU27 citizens residing in the UK, since the UK will no longer be bound by any “integration” principle.

Third, the negotiators should, according to some scholars, take into account the principle of legitimate expectations to claim a continued right of residence.<sup>64</sup> According to settled case-law of the Court, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union and must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives. The right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him.<sup>65</sup> It could be argued, on this basis, that UK nationals and their family members who had acquired a permanent right of residence in one of the EU27 Member States or were on track to acquire this, have a legitimate expectations that they would be able to continue to reside there. However, it would seem that the principle would not have to be taken into account by the UK as regards EU27 citizens residing in the UK. This argument is implicit in the policy paper of the UK Government, entitled *Safeguarding the Position of EU Citizens in the UK and UK Nationals in the EU*,<sup>66</sup> which states that “those EU citizens who arrived after the specified date will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances – *but this group should have no expectation of guaranteed settled status*”.

Fourth, one could add that by not guaranteeing the continued right of permanent residence after Brexit for UK nationals in the EU27 Member States under the same conditions as currently applicable, the *effet utile* of that right would be compromised. Admittedly, that right, as such would no longer be applicable to them. However, one could argue that, by suddenly taking away this right, one would compromise the *effet utile* of

<sup>64</sup> See in this regard the discussion in O. GARNER, *Does Member State Withdrawal from the European Union Extinguish EU Citizenship?* C/13/640244/KG ZA 17-1327 of the *Rechtbank Amsterdam* (“*The Amsterdam Case*”), in *European Law Blog*, 19 February 2018, europeanlawblog.eu.

<sup>65</sup> Court of Justice, judgment of 26 July 2017, case C-560/15, *Europa Way and Persidera*, paras 79-80.

<sup>66</sup> UK Government, Policy Paper of 26 June 2017, *The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, www.gov.uk.



the build-up of that right which happened *in tempore non suspecto*, i.e. before Brexit. Indeed, UK nationals who moved to one of the EU27 Member States with a view to residing there in accordance with the conditions laid down in Directive 2004/38 will have done so with a view to settling in that Member State and to creating and strengthening family life in that State.<sup>67</sup> This whole purpose, which was in most cases undertaken before any realistic prospect of Brexit came about, would, arguably be defeated if, after Brexit, the said nationals would be stripped of their right of residence. The *effet utile* of EU law is, therefore, another principle which the negotiating parties would have to take into account when reaching an agreement on the residence rights of EU citizens and their family members. As was the case for the second principle discussed above, this principle could be invoked by UK nationals living in the EU27, but not, conversely, by EU27 citizens in the UK, as the UK will arguably no longer have an obligation under EU law to respect the *effet utile* of provisions of EU law.

In this connection, it must be pointed out that, since Directive 2004/38 will no longer apply to UK nationals after Brexit, they could be made subject to certain administrative formalities in order to have their permanent right of residence as an EU citizen transformed into a similar right on the basis of the withdrawal agreement. However, those formalities should not be overly burdensome, in order not to compromise the *effet utile* of the right of permanent residence. Interesting to note in this regard is that para. 23 of the joint technical notes on EU-UK positions on citizens' rights that have been published after the second and third round of negotiations<sup>68</sup> states: "In order to obtain status under the Withdrawal Agreement by application, those already holding a permanent residence document issued under Union law at the specified date will have that document converted into the new document free of charge, subject only to verification of identity, a criminality and security check and confirmation of ongoing residence". Similarly, Art. 17, para. 1, let. h), of the draft withdrawal agreement of 15 March 2018 provides that

"persons who, before the end of the transition period, are holders of a valid permanent residence document issued under Arts. 19 or 20 of Directive 2004/38/EC or a valid domestic immigration document conferring a permanent right to reside in the host State, shall have the right to exchange that document within two years of the end of the transition period for a new residence document after a verification of their identity, a criminality and security check [...] and confirmation of ongoing residence; such a document shall be free of charge".

<sup>67</sup> Court of Justice, judgment of 12 March 2014, case C-560/15, *O.*, para. 54. For a discussion, see N. CAMBIEN, *Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the Inter-state Requirement for EU Citizens?*, in *European Law Blog*, 11 April 2014, [europeanlawblog.eu](http://europeanlawblog.eu).

<sup>68</sup> These joint technical notes are available at [ec.europa.eu](http://ec.europa.eu).

It could be wondered whether, in order to fully preserve the *effet utile* of the right to permanent residence, this exchange of documents should not happen in a more automatic fashion.<sup>69</sup>

Fifth, another principle which would arguably have to be taken into account, by the EU side, is the principle of equal treatment and non-discrimination, which is a general principle of EU law, and which is also laid down in Arts 20 and 21 of the Charter of Fundamental Rights of the European Union (Charter). More in particular, the arrangements governing the residence rights for UK nationals and their family members should obviously not be more disadvantageous than those applying to other third country nationals, except where these nationals can benefit from certain advantageous arrangements in, for instance, association agreements with the EU.<sup>70</sup> As such, the principle of equal treatment and non-discrimination provides a sort of lower limit: negotiating residence rights for UK nationals after Brexit which fall short of those already enjoyed by third country nationals, would clearly violate that principle does not seem to be possible.

## V. CONCLUDING REMARKS

The precise arrangements governing the residence rights of EU citizens and their family members after Brexit will possibly be laid down in a withdrawal agreement to be concluded between the EU27 and the UK. According to some authors, that agreement would have to respect a number of legal principles which seem to provide some support for the view that UK nationals and their family members who have moved to the EU27 before Brexit, will be entitled to preserve their residence rights, in particular those UK nationals and their family members who have acquired a right to permanent residence. EU27 citizens who have moved to the UK before Brexit cannot rely on equally convincing arguments, since the UK will no longer be bound by EU legal principles after Brexit. However, the withdrawal agreement may only be accepted by the EU27 if the UK reciprocates and grants equal residence rights to EU27 citizens who moved to the UK before Brexit. This *Article* has not examined the situation of EU27 citizens and UK nationals who move after Brexit. It would seem that they cannot, or not to the same extent, rely on the said legal principles to continue to enjoy the same residence rights as those applicable before Brexit and it is possible that their rights will be considerably restricted by the withdrawal agreement compared to the current residence rights enjoyed by EU citizens.

<sup>69</sup> See the criticisms voiced by S. PEERS, *EU27 and UK Citizens' Acquired Rights in the Brexit Withdrawal Agreement: Detailed Analysis and Annotation*, in *EU Law Analysis*, 13 March 2018, eulawanalysis.blogspot.lu.

<sup>70</sup> See the examples given in D. KOCHENOV, *Brexit and the Argentinianisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris*, in *Verfassungsblog*, 24 June 2016, verfassungsblog.de.

This *Article* has mostly dealt with the issue of residence rights. For the sake of completeness, it should be out that, besides residence rights, there is, of course, the issue of the free movement between Member States. The most pressing question in this regard, is the following one: will UK nationals and their family members who enjoy a right of residence in one of the EU27 Member States after Brexit, equally have the right to freely move between and reside in other EU27 Member States? It would seem that the arguments examined above are not conclusive in this regard. Obviously, the principle of equal treatment precludes granting UK nationals more restrictive free movement rights than those generally enjoyed by third country nationals. Yet those rights are considerably less in scope than those enjoyed by EU citizens. Moreover, as Kochenov has pointed out, the UK is not in a position to reciprocate on free movement rights, since it is leaving the EU on its own.<sup>71</sup> Interesting to note in this connection is that Art. 32 of the draft Withdrawal Agreement of 15 March 2018 provides as follows: “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”.

One option that could be envisaged as a solution to the residence and free movement-related issues after Brexit is a carefully tailored most favoured nation clause and a requirement of reciprocal treatment. In international law, reciprocal treatment is primarily envisaged as a means of protecting nationals or things,<sup>72</sup> although most-favoured-nation clauses are nowadays primarily used in the WTO context, as well as in the bilateral trade and investment treaties.<sup>73</sup> The said clauses are defined in the broadest of terms<sup>74</sup> which is why they should be used with caution.<sup>75</sup> When it comes to the EU, these types of clauses are often found in bilateral cooperation agreements, such as the one between the EU and the member parties to the Cartagena Agreement.<sup>76</sup> If this type of a clause were to be introduced into a withdrawal agreement, UK citizens living in the EU, but also EU27 citizens living in the UK could be granted preferential treatment in

<sup>71</sup> D. KOCHENOV, *Misguided “Associate EU Citizenship” Talk as a Denial of EU Values*, in *Verfassungsblog*, 1 March 2018, [verfassungsblog.de](http://verfassungsblog.de).

<sup>72</sup> International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, Yearbook of the International Law Commission, Vol. II, part two, 1978, p. 17.

<sup>73</sup> International Law Commission, Final Report of the Study Group on the Most-Favoured-Nation Clause, Yearbook of International Law Commission, Vol. II, part two, 2015, p. 2.

<sup>74</sup> Y. RADI, *The Application of the Most-favoured-nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the “Trojan Horse”*, in *European Journal of International Law*, 2007, p. 758.

<sup>75</sup> Draft Articles on most-favoured-nation clauses with commentaries, 1978, p. 20.

<sup>76</sup> Regulation 1591/84 of the Council of 4 June 1984 concerning the conclusion of the Cooperation Agreement between the European Economic Community, of the one part, and the Cartagena Agreement and the member countries thereof – Bolivia, Colombia, Ecuador, Peru and Venezuela – of the other part.

certain respects (e.g. free movement and residence rights similar to those enjoyed by EU citizens in the EU Member States) while no longer being entitled to the rights currently enjoyed by EU citizens in others.