



Law Society
of Scotland

Safeguarding the position of EU Citizens living in the UK and UK Nationals living in the EU

The Law Society of Scotland's Response to the UK Government's Paper

July 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law and Immigration and Asylum Sub-committees have considered the UK Government's paper: *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*.

Our paper submitted to DEXU in November 2016 entitled "*Negotiation Priorities for leaving the EU for the UK Government*" emphasised that we believe clarity was needed as a matter of urgency about the residence, housing and work rights of EU Nationals in the UK and their families and how this can be regularised with the minimum of bureaucracy.

The Free Movement Directive (2004/38) deals with the ways in which EU citizens and their families exercise the right of free movement, the right of residence and the restrictions on those rights on the grounds of public policy, public security or public health. The UK (as noted in para 13 of the Government paper) is currently bound by Treaty to the principle of free movement.

Although the UK is bound by the Treaty obligations to respect the free movement of persons it has opted out of most EU Law on immigration, such as the Schengen Accords which create the Common European Area and framework for visas and border control.

UK immigration law is reserved to the UK Parliament under the Scotland Act 1998 and the UK has retained control over some aspects of border and visa policy.

It is helpful that the UK Government has published this paper and has given some detail on its proposals for safeguarding the position of EU Citizens within the UK and UK Nationals living in the EU but many questions concerning the interpretation and operation of these proposals remain.

Detailed Proposals

We agree with the assertion that until the UK withdraws from the EU, EU law will continue to apply and so the rights of EU Citizens and their family members to live and work in the UK remain unchanged. We also agree that after the UK leaves the EU it will no longer be subject to EU law and that free movement rights

and those rights dependent upon free movement will come to an end, subject to what is agreed with the EU in the Withdrawal Agreement. Subject to that Agreement the fact that EU law will no longer apply enables the Government to legislate in any way it thinks appropriate regarding EU citizens' rights. It should do so informed by concepts such as fairness, non discrimination, avoidance of retrospective effect and consistency with the rule of law.

We note that the Government expects equivalent guarantees to be put in place for UK residents in EU Member States. Although issues of reciprocity between the UK and the EU 27 and the EU Institutions are matters of political negotiation, it is however important that the agreed reciprocal position should be backed by legal rules that are enforceable across the EU and the UK. For the agreed rights of UK nationals in the EU and of EU citizens in the UK to be safeguarded on a consistent, reciprocal basis, there should ultimately be a court mechanism, at a level higher than that of national courts (see the final paragraph of these comments under the heading of "Dispute Resolution") to ensure that the agreed rights of UK and EU citizens can be vindicated as envisaged. Without such a mechanism, there would be considerable scope for divergence in approach and, in effect, failure in reciprocity.

The concept of reciprocity has also been noted by the EU in the guidelines for the negotiations published in 29 April (EUCOXT20004/17) at paragraph 8: "The right of 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."

The EU Institutions also maintain that citizens should be able to exercise their rights through smooth and simple administrative procedures.

The EU Council has gone further, in its negotiating positions, by indicating who are the persons (and their families), and what are the rights (including their recognised professional qualifications) which should be safeguarded and guaranteed in the Withdrawal Agreement and how these rights should be able to be enforced by EU Citizens – see paragraphs 20 to 22 of the Annex to EU Council decision (EU/Euratom) 2017 dated 22 May 2017 (XT 21016/17). The EU clearly wants EU citizens in the UK and UK nationals in the EU to have the same rights and level of protection which currently applies - EU Commission Negotiating Position Paper on "Essential Principles on Citizens Rights" dated 12 June 2017.

New Status in UK Law

However, the UK do not appear to be offering the continuity of the existing rights of EU citizens residing in the UK, as the EU propose. This might have been done in the way proposed with other EU acquired rights by converting them into UK law in the Repeal Bill. Instead, what is proposed is to replace them with new rights arising from the new settled status, in immigration law. These rights will only be enforceable by the

UK courts and may only be guaranteed as a matter of international law. The UK offer is dependent upon reciprocal arrangements being made in the EU countries for UK nationals resident in them.

The approach proposed by the UK Government gives rise to various questions such as:

- (a) whether the new rights arising from the settled status diminish the rights currently enjoyed by EU citizens under EU Treaties in the UK (and, if reciprocated, by UK nationals in EU countries)?
- (b) whether it is lawful to deprive EU citizens (and UK nationals) of rights which have already vested in them under EU law?
- (c) whether it is sufficient to guarantee the new rights arising from the settled status to rely only upon UK courts and international law in view of the facts that, under the principle of parliamentary sovereignty, any future Parliament could alter those rights and rights under international law are not enforceable in the UK unless they are incorporated into UK law?
- (d) how is it envisaged that similar reciprocal arrangements will be made in EU countries?

In view of these questions and uncertainties, the Government should explain why the proposal made by the EU that there should be an agreement that existing rights of EU citizens in the UK and UK nationals in the EU should simply be continued is not acceptable.

Settled status

The basic outline of the UK proposal is that, after the UK leaves the EU, only qualifying EU citizens will be entitled to apply for settled status which will give them indefinite leave to remain in the UK and the new rights.

In order to be a qualifying EU citizen and to be entitled to apply for settled status, an EU citizen:

- (a) has to be resident in the UK before a specified date (which will be some date between 29 March 2017 and Brexit);
- (b) must have completed a period of 5 years continuous residence in the UK before Brexit (but see also below); and
- (c) must be resident in the UK at the time of their application for settled status.

Those EU citizens who were resident in the UK before the specified date but who have not completed 5 year continuous residence in the UK at the time of Brexit will be able to apply for a temporary status in order to remain in the UK until they have completed 5 years continuous residence (paragraph 28);

Only those family members who join an EU qualifying citizen (i.e. who has settled status) before Brexit will be able to apply for settled status after 5 years continuous residence. Therefore if the qualifying EU citizen

wishes to bring to the UK a future spouse after Brexit, the spouse would be subject to the same rules as apply to EU citizens after Brexit (see below) or to non-EU nationals joining British subjects (paragraph 30). The status of Zambrano carers and elderly dependent relatives needs to be clarified.

An EU citizen may lose their settled status if they fail to meet certain requirements. These have not been specified but the essential ones will appear to relate to their conduct and criminality or if they leave the UK for 2 years unless they have strong ties there.

If an EU citizen has already obtained a certificate of permanent residence under the existing EU rules, they will still need to apply for settled status but the process should be as streamlined as possible (paragraph 10 and 37);

It is not clear what is meant by “residency” or “continuous 5 year residency” nor what evidence an EU citizen is required to produce in order to establish either residency.

It would be simpler if a certificate of permanent residency was simply treated as a grant of settled status and it is not clear why it is necessary to require an EU citizen, who has already obtained such a certificate, to apply for settled status. This suggests that there may be some difference intended as to what is meant by “residence” and “continuous residence” under the proposals from that which currently applies.

Avoiding a cliff edge

Paragraphs 23 – 26 concerning the blanket permission and protection for EU Citizens to be given time to make an application for settled status of up to two years are welcome. As referred to earlier this is a practical and helpful provision.

EU Citizens who were resident before the specified date

We note the terms of paragraphs 27 and 28.

Family members

We note that in paragraph 22 of the paper that it is envisaged that the scheme to be established will deal with applications from “EU residents (and their families)”.

We are concerned about the definition of the family member (spouse/civil partner, direct descendants in the descending line) (under 21 or dependent) direct dependents in the ascending line (including those with retained rights and extended family members whose residence has previously been facilitated by the Home Office. There is a need for clarity about non EEA family members and extended family members whose current leave to remain is recognised by the Home Office under current EEA Rules including Zambrano carers and elderly dependent relatives.

EU citizens will no longer have an automatic right to bring family members (including dependent relatives) to the UK and future EU citizens will require to apply under rules similar to current immigration rules. These requirements will put EU citizens on a par with third country applicants applying for leave to remain.

Application Process

It is proposed that it will be mandatory after Brexit for an EU citizen to apply to the Home Office to establish their residency status in order to continue to live in the UK (paragraph 39). It was also proposed that it should be possible for an EU citizen to apply before Brexit under a voluntary scheme (paragraph 38).

It is not always clear whether, when reference is made to an application for a residency document, this also refers to an application for settled status or whether there have to be two applications made, one to establish that the EU citizen was resident before the specified date and the other to establish that they have 5 years continuous residence and meet the other criteria for having settled status. It is hoped that this can be clarified.

It is also noted that it is proposed, in order to avoid a cliff edge after Brexit, that there will be a period of grace of up to 2 years after Brexit to enable an EU citizen to make their application. During this period, all EU citizens lawfully resident in the UK at the time of Brexit will be entitled to continue to be resident under a blanket residence permission (paragraphs 23-26).

This is a helpful and practical proposal. It is however not clear how it will be established that an EU citizen is lawfully resident in the UK at the time of Brexit without some kind of a residence document nor whether the blanket permission will apply to an EU citizen who was not resident in the UK before the specified date (assuming that to be before Brexit)

There is an issue about how the Home Office will be able to deal with the applications from a large number of EU citizens in the UK in that 2 year period.

It is noted that it is proposed that the application process and administrative procedures for the residency document will be different and separate from the existing one under EU law and will be “kept as smooth and simple as possible” (paragraph 22 and 35). Recently the Government has introduced a simplified online application and the European Passport Return Service. These are welcome innovations which are good precedents to follow.

We note that in paragraph 20 those with settled status and six years’ residence may apply for citizenship and we note that obtaining settled status under paragraph 21 is subject to meeting eligibility criteria. The essential conditions of which are:-

- (a) A requirement of residence in the UK of five years and
- (b) An assessment of conduct and criminality, including not being considered a threat to the UK.

Conduct and criminality are the general grounds for refusal set out in the Immigration Rules paragraphs 320-322 which allows an Entry Clearance Officer to consider refusing a person on general grounds if there is any evidence in their background behaviour, character, conduct or associations that shows they should not enter or remain in the UK. It would be helpful to know whether the reference to the assessment of conduct and criminality referred to in paragraph 21 in connection with an application for settled status will be framed in terms such as those of the Immigration Rules, paragraphs 320-322.

Cost is an issue and the Government must publish details before the legislation creating these arrangements is introduced.

Voluntary Scheme to obtain settled status before the UK departure

Subject to the outcome of the negotiations this seems to be a sensible proposal.

Benefits Pensions and Social Security Contributions

We note the Government's intention that those with settled status will be treated in the same way as "Comparable UK nationals for benefits purposes". The need for reciprocity with the EU is noted but what is the proposal if reciprocity is not achieved? Can the Government detail exactly how future EU citizens with settled status will be treated as opposed to how EU citizens are currently treated?

We have no comments on paragraphs 42-44.

Public Services

In connection with healthcare we note the Government's intention in paragraph 49 regarding the negotiations. As healthcare is a devolved matter in Scotland it will be important to ensure that the views of the Scottish Government are considered.

Economic and other relevant rights

We agree with the provisions of paragraph 55 to 57 that the exercise of rights which are derived from EU law include economic rights such as setting up and running a business and the mutual recognition of professional qualifications and other matters. In particular in terms of paragraph 56 we welcome the Government's intention to seek to ensure that professional qualifications obtained prior to the date of the UK's withdrawal from the EU continued to be recognised after the UK's exit from the EU. We also note that the UK will also seek to ensure that where a person has begun an associated process that has not concluded by the withdrawal date, arrangements will be made to allow that process to continue and that the UK will give due regard to these professionals' ability to practise without unfair detriment or discrimination.

We believe that the Government should negotiate with the EU specifically concerning the transnational practice of law and the preservation of legal professional privilege in the Withdrawal Agreement. It is important when creating rights that the rights holder should be able to obtain advice about their vindication and enforcement. Therefore enabling EU Citizens and UK Nationals to be able to consult UK lawyers on a transnational basis is key to the prospective rights structure and assists in complying with the rule of the law and maintaining the interests of justice.

Free movement of lawyers

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another Member State have been in force for a number of years. There are three key pieces of legislation that affect the legal profession:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)

Recognition of Professional Qualifications Directive (2005/36)⁴

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession.

The Lawyers' Services Directive (temporary provision)

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another Member State - a 'migrant' lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practises before the Judicial Authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

Permanent establishment under home title

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a Member State to practise on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the Member State in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

Recognition of professional qualifications

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home Bar.

The Member State where the lawyer is seeking to re-qualify may require the lawyer to either:

- complete an adaptation period (a period of supervised practice) not exceeding three years, or
- take an aptitude test to assess the ability of the applicant to practise as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host Member State and it must take account of the fact that the applicant is a qualified professional in the Member State of origin).

It is also worth bearing in mind that a number of our future lawyers take advantage of programmes to broaden their horizons during their studies, which rely on reciprocal arrangements with other EU universities. The ERASMUS programme, the best-known EU student exchange programme established in 1987, has a number of participants from Scottish law schools.

Legal professional privilege

The CJEU decided the case of *AKZO NOBEL Ltd and AKCROS Chemicals Ltd v The European Commission (C-550/07)* in September 2010. The judgement concerned the application of legal professional privileged communications between a client and in-house Counsel. The Court also decided to exclude all lawyers qualified outside the EU from the application of legal professional 16 privilege. The case proceeded on the precedent of the ECJ in *AM&S Europe v the Commission* [1982] ECR 1575 paras 25-26 which also excluded non-EU lawyers from the application of legal professional privilege. The Court acknowledged that legal professional privilege applies to communications between a client and his independent lawyer but limited the definition of lawyer to “a lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which that client lives... but not beyond”. The apparent basis of the exclusion of third countries from the benefit of legal professional privilege within the EU is the difficulty of the Court being able to “ensure that the third country in question has a sufficiently established rule of law tradition which would enable lawyers to exercise the profession in the independent manner required and thus to perform their role as collaborators in the administration of justice”. *Opinion of Advocate General Kokott, 29 April 2010 para 190*. Legal professional privilege and Confidentiality of Communications is a key aspect of the rule of law in the UK and is acknowledged by the Courts and Parliament as central to the administration of justice. Recently legislation such as the Investigatory Powers Act 2016 and the Policing and Crime Act

20 17 specifically acknowledge the requirement to protect legal professional privilege and confidentiality. The doctrine is upheld under human rights law in *Campbell v UK (1992) 15 EHRR 137*.

The loss of legal professional privilege and confidentiality will have a negative impact on the rights of clients and on the ability of lawyers in the UK to provide a full service to their clients when acting in EU legal issues or on matters which relate to EU Law or business in the EU. The UK legal systems clearly meet the test which Advocate General Kokott identified in respect of the rule of law and the independence of the lawyers in those systems and should therefore have legal professional privilege accorded to the lawyer/client relationship when EU Law is an issue.

This should be a priority for the UK Government in the negotiations in order to ensure that UK Lawyers can function fully when acting for British clients in the EU and third countries who wish their legal services and advice.

Dispute Resolution

The issue of dispute resolution is a vexed one with diametrically opposite positions being adopted by both the UK and the EU concerning the role of the CJEU.

This issue must be resolved so that those subject to post withdrawal rules know to which court they must apply for resolution of a dispute or vindication of their rights. This is an issue which raises deep questions about the rule of law and is too important to be treated as a matter for regular negotiation in the context of the Withdrawal. A court composed of both EU and UK judges may be the most reasonable way forward.



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