



**THE LAW SOCIETY  
of SCOTLAND**  
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# Written Evidence

## **Joint Committee on Human Rights Inquiry: What are the human rights implications of Brexit?**

**The Law Society of Scotland's response  
October 2016**

## 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<sup>1</sup>, 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.

We welcome the opportunity to respond to the Joint Committee on Human Rights inquiry on the human rights implications of Brexit.

## General Comments

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. Other changes including accession to the European Economic Community in 1972, the development of devolution to Scotland, Northern Ireland and Wales in the 1990's, the adoption of the Human Rights Act in 1998 and the creation of the Supreme Court in 2005 were important constitutional changes most of which have affected the lives of many millions of people living across the UK. However the UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and has as much potential to affect many people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have depth, breadth and far reaching effect for the immediate future and for several years to come.

Even the specific issue of how leaving the EU will impact on human rights touches on an extremely wide range of areas, from rights to family life for those currently exercising right to free movement, to data protection and privacy rights relating to how our information is handled and used, and the underlying structure of our equalities law. In general, the rights that are enjoyed in the context of the

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<sup>1</sup> Solicitors (Scotland) Act section 1

EU are often found in a variety of sources, but may vary slightly in the detail and options for enforcement and remedy.

The EU is not a signatory to the European Convention on Human Rights (ECHR) and is not subject to the jurisdiction of the European Court of Human Rights. The Court of Justice of the EU however does apply the Convention and Strasbourg jurisprudence as general principles of human rights law, and Article 6 of TEU states that fundamental rights, as guaranteed by the ECHR, “shall constitute general principles of the Union’s law”. The rights which arise from ECHR are also supported by the EU’s Charter of Fundamental Rights (the Charter). The Charter sets out the civil, political, economic and social rights of European citizens and other persons resident in the EU. These rights are derived from the ECHR and other international treaties.

The Charter will most likely cease to apply, subject to any other negotiated outcome, when the Withdrawal Agreement comes into effect and the UK is no longer a member of the EU. That would result in a loss of EU specific rights which Dr Tobias Lock in his paper 'The Human Rights implications of the European Referendum'<sup>2</sup> details such as the right to be forgotten, guarantee of human dignity, physical and mental integrity, the prohibition on trafficking, the right to conscientious objection, a broader right to marry, a right to asylum and a broader fair trial guarantee not limited to civil and criminal cases and the social principles contained in the Charter.

However, following the UK’s exit the ECHR would still apply and the UK would remain bound by it. The Secretary of State for Justice has confirmed that the UK government does not intend to withdraw from the ECHR at this stage, but is still pursuing a repeal of the Human Rights Act 1998 and replacement with a British Bill of Rights.<sup>3</sup> However, at this stage, we have not had detailed proposals on what a new Bill of Rights would contain, and so it is difficult to comment on the potential role that this would play in either maintaining EU rights in the UK, or in developing the UK’s human rights laws in a different direction.

## Specific Comments

We have the following comments to make in relation to the areas noted as of particular interest to the Committee.

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<sup>2</sup> *The Human Rights Implications of the European Union referendum*, Dr Tobias Lock, University of Edinburgh, prepared for the Scottish Human Rights Commission (May 2016)

<sup>3</sup> Rt Hon Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice in evidence to the Justice Committee of the House of Commons, 7 September 2016

## Privacy and family life

Leaving the EU unavoidably raises the issue of the rights of EU nationals living in the UK and UK nationals living in other EU member states. It will be an issue for the negotiations between the EU and the UK, and potentially between the UK and each of the EU member states to determine the rights of citizens residing outwith their country of citizenship.

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, the best example of which is the Schengen Accords which create the common European area and framework for visas and border control. The Schengen system has come under significant pressure in the recent past due to the Middle East migrant crisis.

EU Law concerning rights of EU citizens to move and reside freely within member states encourages movement across internal borders. 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.

UK immigration law is reserved to the UK Parliament under the Scotland Act 1998 and although the UK is bound by treaty to the principle of free movement it has retained control over some aspects of border and visa policy.

If the UK adopts a WTO position the right of freedom of movement under the EU Treaty would not apply and the UK would control its own immigration law and policy, borders and visas. There is a debate about the accrued rights of EU citizens and their families. It is desirable that there is early certainty about the status and rights of citizens of other Member States and their families' resident in the UK who do not fulfil the current criteria for permanent residence or who move to the UK before the exit is completed. It is likely that citizens of EU states living within the UK would have to regularise their immigration, residence and visa status. Clarity is needed about the residence, housing and work rights to such individuals and their families.

Similarly, UK citizens living in other member states would have to comply with the immigration, residence and visa requirements imposed by those member states.

An EU citizen can apply for a permanent residence card after 5 years residence in the UK. This document proves the right to live in the UK permanently. Eligibility arises if the applicant has lived with an EEA family member for 5 years and the EEA family member is a qualified person throughout

5 years or has a permanent right of residence. The UK Government has stated that when the UK leaves the EU it fully expects that the legal status of EU nationals living in the UK and that of UK nationals in EU member states will be properly protected. The UK Government has also stated that EU nationals who have lived continuously and lawfully in the UK for at least 5 years automatically have a permanent right to reside. This means that they have a right to live in the UK permanently in accordance with UK law. There is no requirement to register for documentation to confirm this status. Furthermore a person can apply for a permanent residence card after that person has lived in the UK for 5 years. The card will prove that person's right to live in the UK permanently.

In respect of acquired rights, Article 50 (3) of the TEU provides that the Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification of the intention to leave unless the European Council in agreement with the UK unanimously decides to extend this period. The EU Treaties make no specific mention of acquired rights nor are there any provisions which seek to protect acquired rights, notwithstanding the fact that EU law and the Treaties give individuals rights.<sup>4</sup>

Some commentators have claimed that the Vienna Convention on the Law of the Treaty is supportive of the idea that acquired rights do attach to EU citizens in the UK following the UK leaving the EU, however, the Vienna Convention provides that the termination of a Treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination". The misinterpretation which has arisen concerns the use of the word "parties" these are the "states parties" which are signatories to the Vienna Convention rather than those states' citizens. Therefore the Vienna Convention does not provide a basis for stating the EU citizens have acquired rights in relation to the UK nor that UK citizens have acquired rights in other Member States of in the EU.

The UK will continue to be subject to the right to family life provided by Article 8 ECHR, but this does not confer an automatic right to remain in the UK. There continues to be a degree of case-by-case assessment of whether someone's situation will engage Article 8 and, even in that situation, the UK is entitled to interfere with the right to family life in situations where it is provided by law, necessary in a democratic society, and proportional. However, the trend in the UK government's approach to immigration law has been to restrict the use of Article 8 to confer a right to remain. This was seen in the 2012 Immigration Rules, and in the impact of some parts of the Immigration Act 2016, such as extension of the requirement for appeals to be from outwith the UK or the implications of the right to rent provisions.

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<sup>4</sup> Case – 26/62 Van Gend en Loos

However, the UK (and perhaps Scotland in particular) is making positive efforts to further implement both the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. Strengthening the rights of people covered by these Conventions to enjoy family life in the UK may in turn impact on the ability for their family members to remain in the UK.

### **International trade**

We would expect that the UK would continue to promote human rights internationally through a wide range of mechanisms, including trade agreements. However, we would not comment at this stage on the extent or precise means by which this should be achieved. We do note that there has been considerable progress in recent years in the development of principles around business and human rights, and support this going forward.<sup>5</sup>

### **Other human rights protected by EU law**

We refer again to the paper by Dr Lock, which explains some of the key areas where EU law offers protections beyond that which would remain covered by the ECHR and domestic law.<sup>6</sup> However, subject to the terms of the Withdrawal Agreement or the post-withdrawal UK/EU relationship, EU law rights will cease to apply in the UK upon withdrawal from the Treaties.

### **Scotland, human rights and EU law**

The Scotland Act 1998 sets out the legislative competence of the Scottish Parliament (s 29) and the administrative competencies of the Scottish Ministers (s 54). Both are required to act in compliance with Convention Rights under the ECHR and with EU law. Subject to the terms of the Withdrawal Agreement the post withdrawal UK/EU relationship and the ratification legislation there is likely to be a need to amend the Scotland Act.

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<sup>5</sup> See for example the UN Guiding Principles on Business and Human Rights (2011); International Bar Association, Practical Guide on Business and Human Rights for Business Lawyers (2016).

<sup>6</sup> *The Human Rights Implications of the European Union referendum*, Dr Tobias Lock, University of Edinburgh, prepared for the Scottish Human Rights Commission (May 2016)

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