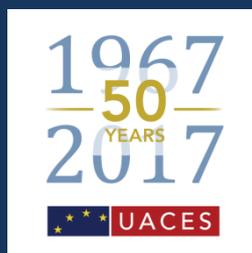


Looking Backwards to Go Forwards? Europe at a Crossroads

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Abstract

The paper treats about legal status of EU citizens according to the current EU provisions and highlights the UK's approaches towards those residents already fully settled in the UK in the view of future Brexit negotiations. The Treaty recognizes the legal status of EU residents according to the time spent in the hosting EU Member State and their activity in one prescribed category, such as worker, self-employed, student, self-sufficient, permanent resident or family member of one of those groups of persons exercising their free movement rights. Moreover, EU citizenship adds significant legal value on the top of those categories. This paper not only explains how can this regime be interpreted, but also it provides further legal grounds for the right to reside in the UK. Special attention is given to the recent UK legislation applied by the Home Office, which presumed an extra power to assess the residency rights of EU citizens in the UK. Finally, the article attempts to address the legal questions about the future status of EU citizens residing in the UK and it provides the way forward after Brexit.

Keywords: EU - citizenship – Brexit - rights - residency

1. Introduction

EU citizenship has varied dimensions depending on discipline and is subjected to regular comments and interpretations in the literature. It is perceived, for instance, as a legal regime giving the social bond, belongingness to the particular territory in time, an access to rights, benefits and duties flowing from membership in the group of people sharing the same space, culture, history and tradition. In this paper, I look at the citizenship as a concept guarantying the legal right to reside and equal treatment of its beneficiaries.

European citizenship gives economic, social and political rights to its holders, regardless of which EU country they reside in¹. Certain fundamental rights conferred by this regime have their source in the four freedoms that stand at the foundation of the common single market

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¹ R. C. A. White, "Free movement, equal treatment and citizenship of the Union" (2005) 54 ICLQ 885-906; R. C.A. White, "Citizenship of the Union, Governance and Equality", 29 Fordham Int'l L.J. 790 (2006); K. Hailbronner, "Union citizenship and access to social benefits", (2005) 42(5), C.M.L. Rev. 1245-1267; S. Giubboni, "Free movement of persons and European solidarity" (2007) 13 (3) European Law Journal, 360-79; M. Dougan "The Constitutional dimension to the case law on Union citizenship" (2006), 31 (5), E.L. Rev. 613-641.

primarily established by the Treaty of Rome, namely free movement of persons, goods, services and capital. The citizenship concept also explicitly strengthens an understanding about the EU territory as one united organism where its residents can freely exercise their rights beyond the national boundaries².

In this meaning, European citizenship plays fundamental role for the European Union since its inception, and is seen as “the abolition, as between Member States, of obstacles to the free movement of ...persons”³ and one of the core objectives and safeguard of successful performance of the Union. According to the Court of Justice, “Union citizenship is destined to be fundamental status of nationals of Member States”⁴.

To have better understanding of rights conferred on free movers by European citizenship, this paper starts with discussion on the concept of European citizenship itself and then, it provides an examination of citizenship and free movement rights flowing from its legal value. At the same time, it reminds about great protection it offers to all EU citizens. Special attention is given to this concept as a guarantee of an access to free movement and residency rights according to Citizenship Directive and in the light of Art 21 TFEU. It also provides interpretation of this regime extended in substantial case law of the CJEU. Furthermore, it looks at the recent practice in the UK while EU law remains unchanged and fully applies. Finally, it provides the way forward for protection of the status of EU citizens residing in the UK after Brexit.

2. Status of European Union citizen under EU legal framework

Significant importance of European citizenship for its holders and the EU itself has been broadly discussed in literature.⁵ It can be understood as a concept, which should be applied

² Etienne Pataut (eds.) *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016).

³ The Treaty establishing the European Economic Community signed in Rome in 1957.

⁴ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, Case C-34/09 *Zambrano* [2011].

⁵ See e.g. Igor Stiks and Jo Shaw, ‘Citizenship rights: statutes, challenges and Struggles’, in: *Citizenship rights*, Jo Shaw and Igor Stiks (ed.), Ashgate, 2013; Jo Shaw, ‘The quintessentially democratic act? Democracy, political community and citizenship in and after the UK’s EU referendum of June 2016’, (2017), *Journal of European Integration*; Jo Shaw, Nina Miller, Maria Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free Movement Law*, (Edinburgh Law School Citizenship Studies, 2013); A. Epiney, ‘The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship’, *European Law Journal* 5 (2007); T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between Past and Future*, 1st edn (Manchester: Manchester University Press, 2001; Reich, Norbert & Harbacevica, Solvita, ‘Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons’, in *CMLRev.* 40, 2003; Vink, Maarten P., ‘Limits of European Citizenship: European integration and Domestic Immigration Policies’, in *ConWEB*, No 4, 2003; Wiener, Antje, ‘Assessing the Constructive Potential of Union Citizenship – A Socio-Historical Perspective’, in *1 EIoP*, No 017, 1997; Kostakopoulou, Theodora, ‘Towards a Theory of Constructive Citizenship in Europe’, in

equally to all members of given society. The status of a citizen reflects the belongingness to a given community, which gives an individual a set of rights and obligations.⁶ The European Commission stated in its third report on Union citizenship, that it ‘is both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity’.⁷ In this meaning, EU citizenship creates European identification of its holders who are having an equal status within the European Union. Those citizens are allowed to freely move, reside and exercise their rights flowing from the Treaty provisions.

European citizenship has been introduced by Maastricht Treaty and is awarded to a person who holds the nationality of the EU’s Member State⁸. However, it is already known from the Treaty establishing the European Economic Community that any person holding nationality of a Member State of the European Union⁹ is, at the same time, citizen of the Union, enjoying all rights listed in the Treaty provisions. It has to be also noted that EU citizenship rights and duties specified in European law do not replace the rights and duties stipulated in the national laws of Member States, but just complement them in the exercise of the statute of “European citizen” conferred following the accession and integration of the respective national state to the European Union.¹⁰

In the primary law, there are several accents on this regime. For instance, Article 20 TFEU stresses that the concept of EU citizenship is automatically afforded to EU nationals and supplements the national citizenship of “every person holding the nationality of a Member State” and “Citizens of the Union shall enjoy the rights and shall be subject to the duties provided by the Treaties¹¹”. The right for EU citizens to move and reside freely within the territory of the Union is further emphasised in Article 21 TFEU.

J. Pol. Phil. 4, 1996; Jessurun d’Oliveira, Hans U., ‘European Citizenship: Its Meaning, Its Potential’, in Monar, Joerg; Closa, Carlos, ‘The Concept of Citizenship in the Treaty of European Union’, in 29 CMLRev., 1992; Kochenov, Dimitry, ‘The European Citizenship Concept and Enlargement of the Union’, in 3 Rom. J. Pol. Sci., 2, 2003.

⁶D. Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’, Columbia Journal of European Law 2 (2009).

⁷COM (2001) 506 final.

⁸Article 9 of the Treaty on European Union provides that: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.

⁹At time – European Community.

¹⁰Anne Pieter van der Mei, Free Movement of Persons Within the European Community: Cross-border Access to Public Benefit, Hart Publishing, 2003.

¹¹Art 20 TFEU.

Furthermore, the Charter of Fundamental Rights of the EU notes that the EU “places the individual at the heart of its activities, by establishing a citizenship of the Union and by creating an area of freedom, security and justice”. Article 15(2) of the EU Charter of Fundamental Rights provides that “every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”. It also emphasises the equal treatment and access to rights, including social security and social assistance.¹²

Rights of EU citizen have been systematically developed in secondary legislation over the time. The main piece of legislation that governs the free movement of EU citizens is Citizenship Directive¹³ that recognises the status of EU citizen as per time of residency, namely: up to three months, over three months and over 5 years, and also, as per the activity fulfilled, such as being a worker, self-employed, jobseeker, self-sufficient, student, permanent resident or family member of one of the mentioned here. All those statuses are defined in that Directive, which also states conditions for its beneficiaries exercising the Treaty rights.

Those privileges of free movement have been regularly assessed by the Court of Justice of the European Union, which is predominantly responsible for ‘giving meaning, specificity, and value to citizenship, thereby establishing new institutional norms that will impact on and modify national legal cultures.’¹⁴

The Court¹⁵ emphasized on numerous occasions that EU citizenship is destined to be the fundamental status of Member States' nationals, enabling those who find themselves in the same situation to enjoy, within the scope of the Treaty the same treatment in law irrespectively of their nationality. Accordingly, EU citizenship has widened individual rights significantly. The Court has ruled, in particular, that citizens are entitled to reside in another Member State purely as citizens of the Union, what was at the same time recognition of EU

¹² Art 34 and Art21 of EU Charter of Fundamental Rights.

¹³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹⁴ D. Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, *The Modern Law Review* 2 (2005); Case C-85/96, *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-269; D. Kochenov, ‘A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe’, *Columbia Journal of European Law* 1 (2012).

¹⁵ See, for example, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, Case *Baumbast and R* [2002] ECR I-7091, etc

citizenship as a source of free movement rights¹⁶, including social security rights subjected to limitations¹⁷.

The citizenship concept has proven to be a very active instrument in the hands of the Court of Justice to guarantee both free movement and equal protection of EU citizens beyond the national laws. The remaining conflict around legal value of citizenship regime points to the limits of solidarity within the Union,¹⁸ which has resulted in critical reactions both from politics and from academia¹⁹. Jo Shaw, for instance, has seen citizenship rather as an integrative that constitutive value, which demands a 'certain degree of solidarity between the Member States'.²⁰ Some of the sources are criticizing the citizenship as a too expansive principle. Others, on the other hand, are seeing it as an advantage of the European Union's citizenship by extending aspects of life beyond national borders to give those, who have undertaken risk associated with a move to different country, a chance to enjoy their rights in full as guaranteed by the Treaties provisions. Consequently, greater accountability of Member States for EU community and joint solidarity is expected to protect those people under umbrella of citizenship.

It has become very challenging for the Member States to be solidary and fully implement the equality principle in the welfare field, as they need to also protect their own social assistance systems²¹ and often create stricter tools towards foreign nationals,²² what leaves European citizenship concept behind.²³

On the other side, the free movement of goods, services and capital, as well as the freedom of people is guaranteed by the Union, which is prohibiting any discrimination on grounds of nationality²⁴. Moreover, the freedom of movement of persons is a one of the core elements of

¹⁶ For example, Cases C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 84, and C-200/02, Zhu and Chen [2004] ECR I-9925, paragraph 26.

¹⁷ The person cannot become 'unreasonable burden on social assistance system', under recitals 10, 16, 20 and 21 in the preamble to Directive 2004/38. Also see cases Dano, Brey, etc.

¹⁸ Chr. Barnard, 'EU Citizenship and the Principle of Solidarity', in: M. Dougan/E. Spaventa, *Social Welfare and EU Law*, 2005.

¹⁹ H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012.

²⁰ J. Shaw, "Citizenship: Contrasting dynamics at the interference of integration and constitutionalism", in P. Craig and G. de Burca (eds) "The evolution of EU law" (Oxford University press, 2011), 575-609.

²¹ Recent Dano or Alimanovic – discussed in Chapter Two or Commission v UK – discussed in Chapter Three.

²² Dano case for instance.

²³ European Commission Report to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States Brussels, 10 December 2008 COM(2008) 840.

²⁴ Title I, Article 4, Fundamental freedoms and non-discrimination, paragraphs 1 and 2, Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on June 13th and July 10th, 2003, presented to the President of the European Council in Rome, July 18th, 2003.

the single market rules. Thus, both at national and European level, the rights and freedoms of the citizens of Member States as European citizens²⁵, need to be respected and exercised in good faith without violating the rights and liberties of others.

2.1. Rights of EU citizen fulfilling (economic) activity

This paper focuses on an access to the right to free movement and to reside²⁶, which is the major question to be answered for EU citizens looking for some assurance about their future. Those persons, who have undertaken the risk to move their home to the UK, made all efforts to integrate into society, and have invested their trust in the EU as a guarantor of their rights, are now facing uncertainty. Those worries are not less in spite of promises made by the EU's and the UK's political leaders declaring that the free movers' rights may be protected after Brexit.²⁷

As noted above, Citizenship Directive 2004/38/EC recognises EU nationals as those, who are economically active citizens and those who are not economically active. In other words, it selects them for those who are either being workers, self-employed persons, students or falling within the scope of any other category prescribed.²⁸ This results in division of rights and entitlements. Those 'free movers' who work or provide the services as self-employed persons²⁹ are holding the strongest status which gives them equal access to free movement rights, and are additionally protected by the Regulation 492/2011 on the right of EU workers to move within the EU.

The rights of persons who are former workers, but now jobseekers or disabled for instance, and claim the welfare payments, remain controversial matter in every Member State as they are fully funded from the public purse.³⁰ Richer countries, such as the UK, which are more attractive due to higher wage level and better social security conditions, are often not in the position to provide financial support for those who are not (longer) contributing to the system and justifying their actions by protection of public finances from abuse.³¹

However, the division of EU citizens undermines EU citizenship as a concept giving equal status of its holders belonging to the same territory and is mostly dictated by national rules.

²⁵ Article 20(2) (a) TFEU.

²⁶ Article 20(2) (a) TFEU.

²⁷ Withdrawal agreement,

²⁸ All those categories have been discussed in the Chapter Two and then some of them examined in Chapter Four.

²⁹ Or can retain the worker status.

³⁰ See recent *Dano* or *Alimanovic*, for instance.

³¹ Case C-308/14. *Commission v United Kingdom*

Whereas, the rest of fundamental freedoms, such as free movement of capital, services and goods, comes under the common Single Market rules applied across the whole EU.

2.2. Citizenship status and those economically non-active

In the light of the above mentioned Citizenship Directive, European citizenship could be seen as only declaratory concept and non-active citizens, in many cases, would not be able to benefit from their status. How EU citizenship can benefit those who are not (currently) economically active?

According to current legal framework, the right for Union citizens to move and reside freely within the territory of the Member States is enshrined in the Article 21 TFEU and in Article 45 of the Charter of Fundamental Rights of the European Union, and is not dependent on economic activity of the Union citizen.

The Court of Justice of the EU has recognised the direct effect of Article 21 TFEU, thus confirming that this right is conferred directly on every citizen of the Union by a clear and precise provision of the Treaty³². The Court of Justice of the European Union has also observed that citizenship of the Union confers on each citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by Union law. Yet, limitations and conditions laid down in EU law must be interpreted restrictively and must be applied in accordance with the principle of proportionality'.³³

The status of citizenship gives European Union nationals more security and what is also important, proof of the right to residence in Member States is not required.³⁴ In *Baumbast*,³⁵ for the Court of Justice, EU citizenship was sufficient to confer a right to residence in another Member State by virtue of the direct application of Article 21(1) TFEU,³⁶ leaving behind the free movement rights – which had originally been granted under the Treaty of Rome essentially to migrant workers – from any need to be economically active. The Court has also highlighted that provisions laying down a fundamental principle

³² Case C-413/99 *Baumbast* ECR [2001] I- 7091, para 84.

³³ Case C-413/99 *Baumbast* ECR [2001] I- 7091, para 91; Case C- 162/09 *Lassal* [2001] I- 9217, paras 29-31.

³⁴ Nicola Rogers, Rick Scannel, John Walsh, *Free movement of persons in the enlarged European Union*, 2012, p. 55.

³⁵ Case C-413/99 *Baumbast* [2002] ECR I-7091.

³⁶ Formerly Article 18(1) EC.

such as that of the free movement of persons must be interpreted broadly and gives its holders full enjoyment of rights.³⁷

Significant contribution represents case *Zambrano*³⁸, where the Court of Justice held that Article 20 TFEU was to be interpreted as meaning that it precluded a Member State from refusing a third country national and therefore, his children, who were Belgian and hence European Union citizens, who were dependent on the claimant, a right of residence in Belgium as the Member State of residence and nationality of those children, and from refusing to grant a Belgian work permit to that third country national, in so far as such decisions deprived those children of the genuine enjoyment of the substance of the rights attaching to their status of European Union citizens. Thus, the Court interpreted the EU citizenship right set out in Article 20(2)(a) TFEU 'to move and reside freely within the territory of the Member States' as conferring — as a matter of EU law — on each and every EU citizen a primary right of residence within the Member State of which the EU citizen was also a national, and from which the EU citizen's relatives could also derive secondary rights of residence within that State without need for any prior exercise of EU free movement rights to other Member States.³⁹

Article 21(2) TFEU gives the legal basis for the EU legislator 'to adopt provisions with a view to facilitating the exercise' of the right 'to move and reside freely within the territory of the Member States'.⁴⁰

In the UK's post-Zambrano context, the Court of Appeal in case *Sanneh & Ors*⁴¹ ruled that Member States must make social assistance available to Zambrano carers when it is essential

³⁷ Case C-408/03 *Commission v. Belgium* [2006] I- 2647, para 40; Case C-200/02 *Zhu and Chen* [2004] I-9925, para 31.

³⁸Case C-34/09 *Zambrano v Office national de l'emploi (ONEM)* 8 March [2011] ECR I-nyr (at paragraphs 41-2):

'[Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. ... In these circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'

³⁹In Case C256/11 *Murat Dereci and others v. Bundesministerium für Inneres* 15 November [2011].

⁴⁰ On the other hand in Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* 5 May, [2011] ECR I-nyr, the CJEU held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his/her right of free movement, who has always resided in a Member State of which s/he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him/her of the genuine enjoyment of the substance of the rights conferred by virtue of his/her status as a Union citizen or of impeding the exercise of his/her right of free movement and residence within the territory of the Member States.

⁴¹ *Sanneh & Ors v Secretary of State for Work and Pensions and Others* [2015] EWCA Civ 49.

to do so to enable them to support themselves and the EU children, who are EU citizens, in their care within the EU.⁴² The Court held that EU law has no competence as to the amount payable to Zambrano carers as this is a matter strictly governed by national law. In the UK, the payment of adequate social assistance to Zambrano carers is achieved through the availability of section 17 of the Children Act 1989, what is sufficient to meet the UK's obligations to provide necessary support to 'Zambrano' carers.

Therefore, as noted in this case, Union citizenship is destined to be the fundamental status of nationals of the Member States and an access to national citizenship of a Member State guarantees an access to Union citizenship. Therefore, rules governing an access to national citizenship are also subject to EU law.

In other words, EU law precludes national measures, which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This specifically concerns those EU citizens exercising free movement rights. Case Dereci⁴³ added the criterion related to the denial of 'genuine enjoyment' of the substance of such rights refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole⁴⁴. EU citizenship entails directly effective rights that is rights, which are enforceable in national courts. These rights, in particular residence rights, may only be restricted subject to the principle of proportionality.⁴⁵

The adopted national measures need to respect EU citizenship accordingly. The national authorities cannot refuse the admittance or proceed with deportation measures towards EU citizens not representing a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Moreover, the citizen cannot be automatically removed from the country of his residency on the basis of being dependant on social security, especially in circumstances where the person is greatly integrated into hosting country. The national measures need to fit into EU law around EU citizenship and should give every chance to its holder for 'genuine enjoyment' of his free movement rights, including right to reside and social protection.

⁴² The fact that *Zambrano* carers do not have a member state of origin to which to return does not justify giving them a right which is better than that of economically inactive EU citizens (under the Citizenship Directive) or TCNs (under the Long-Term Residence Directive).

⁴³ Case Dereci, C-256/11.

⁴⁴ Case Dereci, para 66.

⁴⁵ Case C-413/99 Baumbast [2002] ECR I-7091

In *Konstantinidis v Stadt Altensteig*, Advocate General Jacobs suggested in his Opinion that wherever an EU national goes to earn his living anywhere in the EU, he should be: “treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that status in order to oppose any violation of his fundamental rights”.⁴⁶

The expression ‘*Civis europeus sum*’ means that EU citizens, who are nationals of the Member State, can exercise free movement right. This enables those among such nationals who find themselves in the same situation, to enjoy the same treatment in law within the area of application *ratione materiae* of the Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard.⁴⁷ The citizenship regime, in other words, strictly connects with the rules on the prohibition of discrimination in the exercise of the rights and freedoms conferred on EU national.

Síofra O’Leary⁴⁸ has argued that the rights conferred by EU citizenship—expanded in cases such as *Martínez Sala*,⁴⁹ *Grzelczyk*,⁵⁰ and *Baumbast*⁵¹—are clearly underpinned by European social solidarity. It certainly has, as it extends the rights to free movement and right to social security to non-active citizens. In this meaning, the concept is a guarantee for effective free movement.

Marshall adds on that citizenship means full membership of the community and is based on a triad of civil, political, and social rights. Citizenship entails ‘the right to a modicum of economic welfare and security and the right to share to the full the social heritage and to live the life of a civilised being according to the standards prevailing in society’.⁵² Such rights are strictly linked with the notions of solidarity, which will be required from both, the EU and UK to guarantee the status of EU citizens in the UK and UK nationals living elsewhere in Britain.

⁴⁶Case C-132/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191, at para 46 of the Opinion of the AG Jacobs.

⁴⁷Joined Cases C-76/05 & C-318/05 *Schwarz and another v Finanzamt Bergisch Gladbach*; *European Commission v Germany* [2007] ECR I-6849; C-184/99 *Grzelczyk v Centre Public d’aide sociale d’Ottignies – Louvain-la-Neuve* [2001] ECR-6193; C-413/99 *Baumbast and R. v Secretary of State for the Home Department* ECR I-7091; C-224/98[2002] *D’Hopp v Office national de l’emploi* ECR I – 6191.

⁴⁸ O’Leary, *Síofra*, *The Evolving Concept of Community Citizenship, From Free Movement of Persons to Community Citizenship*, The Hague: Kluwer Law International, 1996.

⁴⁹) Case C-85/96, *Maria Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

⁵⁰ Case C-184/99, *Rudy Grzelczyk v. Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve (CPAS)*[2001] ECR I-6193.

⁵¹ Case C-413/99, *Baumbast, R v. Secretary of State for the Home Department* [2002] ECR I-7091.

⁵² See T. H. Marshall, *Citizenship and Social Class* (1950) and *Social Policy* (1975) at 11.

As emphasises above, the European Union developed substantial legal regime around EU citizenship over the decades and offers good level of protection for its citizens. How will these areas of law be addressed after Brexit? Before I look at the way forward, I briefly present the current practise in the UK.

3. UK law and practice towards EU citizens

The above briefly presented EU legal framework constitutes a substantial supranational protection of ‘free movers’. This regime is to be reformed and perhaps (even partially) included in the future UK legal regime. Some of the political leaders are expressing the option of ‘hard’ Brexit, which can have negative impact on protection of status of EU citizens residing in the UK or UK nationals residing elsewhere in the EU.

In time of uncertainty, it is important to find out about the future status of EU citizens when or if EU law is absent in the UK. The recent practises or assumptions made by the Home Office indicate concerns about the UK’s intentions towards EU citizens in the future.

The Home Office has chosen to assess the right to reside in the UK as assumed through new Immigration (EEA) Regulations 2016, which amended the Regulations 2006 implementing Citizenship Directive. The new Regulation provides stricter approach towards verification of the rights to reside than hitherto.

One of significant changes relates to the wording in the Regulations 2016 and the approach chosen by the Home Office while assessing right to reside in the UK.

Paragraph 23(6) of the Regulations 2016 states:

“(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(a) that person does not have or ceases to have a right to reside under these Regulations;

(b) the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3)."

This presumed an extra power in the hands of the Home Office that can provide for very easy route for removals from the UK, which are allowed strictly on grounds of risks to public health, security and public policy.⁵³

The Regulations can particularly affect those who are not (currently) economically active, due to unemployment, illness or old age, and who are already having difficulties in accessing social security rights after the UK's welfare reforms in 2014.

While the UK's protectionism can be justified on the grounds of prevention of public funds being abused, the stricter measures in social security system adopted in 2014 can be questioned. The introduced rules were meant to affect the 'new comers' only, but in reality fully affected all EU citizens, even those with an over ten-year stay in the UK. Many of them were/are unable to access the very basic welfare payment such as Crisis Grant, Universal Credit, Jobseeker's Allowance or Housing Benefit, what in consequence led/ or leads to social/ financial exclusion or even evictions from home.

In the light of new Regulations 2016, one's often temporary financial difficulties could result in expulsion from the country, which is at the same time, the only home for this person who stayed in the UK for years, and who have no or limited links with the country of origin.

These Regulations can particularly affect: self-sufficient persons or students without comprehensive health insurance; lone parents previously supported by their spouses; family members who lived in the UK for years, but were not working in the past; and also children who already attend the school or nursery in the UK, but their rights can be restricted due to parent's residency rights.

Recognition as a student or self-sufficient person

The big part in the Home Office' assessment can play the requirement of comprehensive health insurance to consider someone as a student or self-sufficient person.⁵⁴ Previously, this criterion was required to access the right to social security or social assistance.

⁵³ Article 27(1) and (2) of Directive 2004/38 provide as follows:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.'

Recitals 23 and 24 in the preamble to the Directive are providing degree of protection against expulsions.

In practice, EU citizens were/are confused with this request, as they did/do not see the point to buy an extra insurance while they were/are entitled to medical help under the National Health Service. This matter was challenged by the European Commission, which launched an infringement procedure against the UK for not treating the NHS as Comprehensive Sickness Insurance in 2012.⁵⁵ The Commission stated that: “Under the Free Movement Directive, EU citizens who settle in another EU country but do not work there may be required to have sufficient resources and sickness insurance. The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law.” However, the case has never been finalised perhaps to ease negative attitudes towards the UK’s membership in the EU, but possibly this matter needs to be recalled.

Recognition of family member or main carer

The next group of people who can find themselves in difficult position are lone parents.

Those persons with the childcare responsibility are/ were often supported by their spouse, who was the economically active person and so called ‘bread winner’ for the family. Thus, this group was most of the time non-active economically and can be under great threat of expulsions through applying the new UK legislation.

According to EU law, the main carer of the child should be able to rely on the case law of the Court of Justice, for instance Ibrahim/Teixeira case⁵⁶, but only if child is in education and the parent was previously working. If the case relates to children not in school age or the parent has not worked, then normally the carer should be able to retain their rights to reside on grounds of family member (being an ex-spouse) anyway. However, there could be potential challenge in confirming the kinship or the ex-partner’s status in the UK, especially if contact between spouses has simply ended or due to domestic violence for instance. In those circumstances, there would be a question about effectiveness of administrative procedures. Would the relevant Decision Makers make an effort to establish the residency rights of the

⁵⁴ The recent media headlines has informed about threat of deportations as a result of new Regulations.

⁵⁵ Commission asks the UK to uphold EU citizens' rights, see: http://europa.eu/rapid/press-release_IP-12-417_EN.htm accessed on 01/06/2017.

⁵⁶ C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim and C-480/08, Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department.

person concerned? The practise has already shown the burden of proof while applying for residency documents or while applying for a welfare payment.⁵⁷

Protection of workers or former workers/ long- term residents

It will be very interesting to see what approach is chosen towards the persons who have already stayed in the UK for a number of years.

Majority of long-term residents, who are coming from EU countries, could be potentially classed as permanent. However, the claimants applying for the permanent residency card are often refused the document despite the long employment history and contributions paid to the UK's system. The claimants often have gaps in employment (in many cases, as short as 5 days of unemployment in total 8 years of work), what prevented them not only from obtaining the permanent residency card, but also from applying for British passport.⁵⁸

More importantly too, the very significant barrier in claiming permanent residency rights in the UK is still created by the Worker Registration Scheme applied to A8 nationals⁵⁹ during their transitional period. The request of the WRS document is still used for the purposes of the Home Office's assessments. The Home Office demands the WRS card and certificate for the period of 2004 to 2011, despite of the fact that the WRS has been found as 'manifestory' and 'unlawful' in the period of 2009 to 2011.⁶⁰ The Home Office claims that the quoted case concerned the access to social security rights only and their procedures assessing the residency rights are not affected by this judgement.

Very large number of persons have been working full-time, but failed to register or re-register their employment for a minimum of one year for varied reasons. Many of them has understood that they do not need to re-register or were misadvised by the public sector advisers or the employers, or were just not issued with the letter proving the employment that was required for the registration. Some of them simply could not afford the fee or simultaneously kept changing a job or address before they settled and found stable employment.⁶¹

Large number of those people (ex-employees)

⁵⁷ The data collected for my PhD purposes.

⁵⁸ Permanent residency card required first to apply for British citizenship as per the British Nationality (General) (Amendment No. 3) Regulations 2015.

⁵⁹ Coming from A8 countries, which joined the EU in 2004.

⁶⁰ TG v Secretary of State for Work and Pensions (PC) [2015] UKUT 0050 (AAC).

⁶¹ See, for instance, case Zalewska v DSDNI [2008] UKHL 67.

are now pensioners who are in receipt of State Pension and Pension Credit. Many of them have been prevented from applying for the British citizenship due to refusal of permanent residency card, which is now necessary to apply for the naturalisation.⁶² In many cases, they had 5 years of employment completed in transitional period, but at least one year work was not registered under the WRS. In many cases, they reside in the UK for as long as 13 years. What is the way forward for them?

The long-term residents or persons, residing in the UK at the time when Article 50 has been triggered, could be potentially accepted for a reason of legally exercising the Treaty rights, or even in many cases, recognised as permanent residents in the light with Article 16 of Directive 2004/38.⁶³ Sadly, the recent UK's practises are not so promising for people concerned. From the legal point of view, the attempts leading to removal of EU citizens from the country on the grounds other than specified in the Treaty provisions can be questioned as EU law still fully applies in the UK.

4. EU citizen in the UK - the way forward after Brexit

Post-withdrawal, EU law would cease to apply in the UK, meaning not only would the EU Treaties cease to apply, but also any national law implementing EU law would have to be repealed, amended, or possibly retained. Therefore, not only individual rights need to be addressed, but also position of businesses enjoying all sorts of rights of freedom to trade within the EU.

The UK's position on the status of EU citizens remains unclear. Some of the UK's political leaders are willing to guarantee residence rights "on reciprocal basis", but they have been vague when or to what extent the law would guarantee the rights of EU citizens living on its territory. The future EU-UK negotiations would need to address the fundamental rights of all EU citizens, such as right to reside or right to equal treatment. The same demand concerns British nationals living elsewhere in the EU.

⁶² Paragraph 2(c) of Schedule 1 to the British Nationality Act 1981.

⁶³ This concerns EU citizens and their family members who have 'legally resided' in another Member State for five years (with some exceptions). Some EEA nationals can acquire permanent residence before five years have elapsed. This includes:

- Workers and self-employed persons who reach state pension age or take early retirement, if they worked in the UK for at least 12 months, and resided in the UK continuously for more than three years, before stopping;
- Workers and self-employed persons who stopped working in the UK because of permanent incapacity, if they had resided in the UK for at least two years or, if regardless of their length of residence if the incapacity was the result of an accident at work or occupational disease; and
- Family members who were residing with a worker or self-employed person immediately before they died, if the worker or self-employed person had resided in the UK for two years immediately before they died, or regardless of their length of residence if the death was caused by an accident at work or occupational disease.

The current uncertainty stops people from making decision about purchasing properties, starting family, progressing with education and employment or setting up businesses. Many of EU nationals residing in the UK are making steps to move to another country, as they are worried that their life can become more difficult even if the residency rights are (partially) granted or they are just losing trust to the UK as a country. These citizens need to know how, and if, their rights are protected to fully understand the implications of Brexit.⁶⁴

The EU citizens, in this paper, specifically UK residents coming from EU countries or UK nationals living elsewhere in the UK, currently rely on their EU citizenship status guaranteeing right to free movement, as briefly discussed above. Will they be able to rely on this legal framework after Brexit?

One way forward for EU citizens residing in the UK and willing to protect their rights is application for British citizenship⁶⁵, which can be granted to those permanent residents satisfying conditions under Directive 2004/38/EC and the UK's Immigration (EEA) Regulations 2006, recently amended by Regulations 2016, and Immigration Act 1971.⁶⁶ However, we have to remember that EU law does not require the document certifying the rights of residence, as per judgments in Royer⁶⁷ and Dias⁶⁸.

Thus, the rights can be guaranteed to those who 'reside legally' not only in the meaning of Art 16(1) of Directive 2004/38, but also in the light of Art 21 TFEU. The persons 'have resided legally' in accordance with Article 16(1) and should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1).⁶⁹ The Article 21 TFEU goes even further and guarantees status of all EU citizens legally exercising their free movement rights.

Second approach towards protection of status of EU citizens perhaps can be the doctrine of protection of 'acquired rights', also described as vested or executed. Those rights are not automatically revoked if a treaty or law no longer applies. If acquired rights are recognised, then once a person has exercised them, they cannot be removed – even in the event of a

⁶⁴ Jo Shaw, The quintessentially democratic act? Democracy, political community and citizenship in and after the UK's EU referendum of June 2016, University of Edinburgh School of Law Research Paper Series No 2017/12.

⁶⁵ British Nationality Act 1981. The total fees (including application, test on culture and history in the UK, English test) is around £1500, see: <https://www.gov.uk/government/publications/fees-for-citizenship-applications>.

⁶⁶ See also section 2(1) of the European Communities Act 1972.

⁶⁷ Case 48-75 [1976].

⁶⁸ Case C-325/09, Secretary of State for Work and Pensions v Maria Dias.

⁶⁹ Joined Cases C-424/10 and C-425/10, Tomasz Ziolkowski and Others and Marlon Szeja V Land Berlin.

change in the ultimate power over a country, such as exit from the EU. In this respect, the crucial question is whether rights already exercised under EU law would be legally recognised as ‘acquired’ and enforceable as noted in case *van Gend*⁷⁰. In this matter EU principle of legal certainty can be helpful. Legal certainty has specific applications, such as non-retroactivity and legitimate expectations, which may be of some relevance. The principle aims to ensure that situations and legal relationships governed by EU law remain foreseeable⁷¹ in that individuals must be able to ascertain unequivocally what their rights and obligations are and be able to take steps accordingly.⁷² Under the principle of legal certainty, retroactive measures shall not be taken except in legally justified circumstances.⁷³

Another route for protection of the status of EU citizens can be potentially achieved under acquired rights as human rights, which can bind successor states under the European Convention on Human Rights.⁷⁴ The ECHR does not directly grant any particular immigration status, but it may provide a basis, for instance, under the right to respect for private and family life under Article 8 of ECHR, on which an EU citizen resident in the UK could seek to rely in order to resist removal from the UK. Some protection of legal status in the UK can be also sought through reference to the Human Rights Act 1998.

Finally, the ‘acquired’ rights can be assumed on the basis of an expectation of reciprocity. The effect of this could be that any benefit the UK might seek for its citizens living in different EU countries would need to be extended to those living in Britain. The government, in its white paper titled ‘The process for withdrawing from the European Union’, raised particular interests in protecting the current status of own citizens. This could bring the same benefits to EU citizens residing in the UK.

5. Conclusions

What should be clear is that existing national and international law does not provide the sufficient protection of the status of EU citizens in the UK after Brexit.⁷⁵ The presented above legal regime on EU citizenship offers a great deal of security where the

⁷⁰ Case 26/62 *Van Gend en Loos* [1963].

⁷¹ Case C-199/03 *Ireland v Commission* [2005] ECR I-8027, para. 69.

⁷² See e.g. Case C-158/06 *ROM-projecten* [2007] ECR I-5103, para. 25

⁷³ Case T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261, para. 98

⁷⁴ the 2009 case *Bijelic v Montenegro and Serbia*; Rein Mullerson, *International Law, Rights and Politics* at p. 154.

⁷⁵ S. Douglas-Scott, ‘What Happens to ‘Acquired Rights’ in the Event of a Brexit?’, U.K. Const. L. Blog (16th May 2016) (available at <https://ukconstitutionallaw.org/>).

EU is the guarantor of the rights to free movement. Post-Brexit laws will need to be repealed or at least amended. Reciprocal agreement would be necessary to protect all EU citizens who already exercise given right to reside and free movement.

Europe stands at a crossroads... Now it is between the United Kingdom and the European Union as a whole to show the solidarity and the 'human face'. The UK is a leader in democracy and moral ethos, which for centuries makes British citizenship so attractive and desirable for most of the population on the globe. Now, Britain is the first country leaving the EU and it is up to the UK to choose the next course of action... Regardless of what it does, it will be the example followed by other countries. Let us hope it is a good example and those who invested their trust in the UK as a country would be proud of what they call home now.

This article represents only brief discussion and provides basis for further discourses on protection of the status of those EU citizens who potentially can be affected by the post-Brexit legislation.