

## FAQ: Update on EU Citizens' Rights

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This FAQ outlines the main provisions on EU citizens' rights post-Brexit in the [Joint Report](#) from the negotiators of the EU and UK Governments, which was published on 8 December 2017. It is intended to serve as an update to our earlier FAQ on [EU migrants' rights post-Brexit](#) and does not purport to present a full analysis of the contents of the Joint Report.

#### This FAQ discusses:

- Which EU citizens and family members will be protected in the Withdrawal Agreement
- The conditions under which such protection will be granted
- The implementation and enforcement of the rights of EU citizens in the UK and UK nationals in the remaining EU Member States, including the role of the Court of Justice of the EU

The term 'EU Citizens' as used in this FAQ is to be interpreted as including UK nationals, unless expressly provided otherwise.

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### Introduction

On 8 December 2017, a [Joint Report](#) was published from the negotiators of the EU and UK Governments on the progress of negotiations during phase 1 under Article 50 TEU. The Joint Report addresses a number of different issues, including Ireland and Northern Ireland (paras 42-56) and financial settlement (paras 57-86), but this FAQ focuses on the provisions concerning the rights of EU citizens after the UK's withdrawal from the EU.

Though the Joint Report includes a caveat that "nothing is agreed until everything is agreed" (see the cover remarks), the intention is for the commitments therein to be set out in the future Withdrawal Agreement.

#### Q: Which EU citizens will be permitted to remain in the UK or host EU Member State after withdrawal?

**A:** The Joint Report provides that Union citizens who, under EU law, legally reside in the UK or another host Member State at the date of withdrawal (referred to as 'the specified date' in the report) will come within the scope of the future Withdrawal Agreement.

#### Q: Can family members of EU citizens reside in the UK or host EU Member State?

**A:** Yes, as long as they are legally resident at the date of withdrawal. The determination of who is a family member will be in accordance with the [Directive 2004/38/EC](#). See also our first FAQ on [EU migrants' rights post-Brexit](#) for more discussion of who is a family member under EU law.

If a family member was not residing in the UK or host EU Member State at the time of withdrawal, they may still be permitted to join family if they are family as defined by Article 2 of [Directive 2004/38/EC](#), were related to the primary right holder on the withdrawal date, and continue to be related when they wish to join their family member.

In addition, children born or legally adopted after the withdrawal date (no matter where they were born) may join their family if:

- The child's parents are both protected by the Withdrawal Agreement, or
- One parent is protected and the other is a national of the UK or host Member State, or
- The child's parent is protected by the Withdrawal Agreement and has sole or joint custody under the applicable national family law.

Finally, post-withdrawal entry and residence of partners in a durable relationship as defined by Article 3(2)(b) of [Directive 2004/38/EC](#) will be facilitated under national law if the durable relationship existed at the time of withdrawal and continues to exist when the partner wishes to enter and reside the UK or host Member State.

The rights of family members not covered by the above will be governed by national law.

### Q: Who else may benefit from the citizens provisions in the future Withdrawal Agreement?

A: The Joint Report provides that those working in the UK or a host Member State as a frontier worker ([as defined under EU law](#)) at the time of withdrawal will fall within the scope of the Withdrawal Agreement's provisions.

### Q: How will those entitled to reside in the UK or a host EU Member State evidence that they fall within the Withdrawal Agreement's provisions on citizens' rights?

A: The Joint Report provides that the UK and remaining EU Member States can require those concerned to apply for the residence status conferred by the Withdrawal Agreement. In determining which procedures will apply, the UK and remaining EU Member States may continue to use the current system in which proof of rights can be given by means other than a residence document. This is not given further explanation in the Joint Report.

However, the Joint Report does specify that **administrative procedures** associated with this process must be "transparent, smooth and streamlined" (para 17). In particular, the state cannot require as proof "anything more than is strictly necessary and proportionate" to determine entitlement to rights. The state must also avoid imposing any unnecessary administrative burdens, and should use brief and simplified forms, as well as be flexible and proportionate in its decision making. For example, missing a deadline should not automatically void the application. The Joint Report also provides that applicants for this status must have at least **two years** to submit their applications and, until they do so, they can continue to enjoy residence rights. In terms of **costs**, the report provides that the process must either be free of charge or priced in accordance with comparable procedures for the state's own nationals.

EU citizens can benefit from the citizens' rights provisions of the Withdrawal Agreement pending a final decision on their status applications. However, the UK or the host EU Member State can remove applicants who have made fraudulent or abusive applications (under Article 31 and 35 of [Directive 2004/38/EC](#)), even before a final decision has been made on their application.

### Q: How will decisions on residence status be made by the UK or host EU Member State?

A: The Joint Report provides that decisions will be made based on **objective criteria** that will be established in the Withdrawal Agreement, where the decision-maker will have no discretion unless it can be exercised in favour of the applicant. In addition, the Withdrawal Agreement will provide for **fair procedures**, including mechanisms for redress and judicial control, as provided for in Articles 30 and 31 of [Directive 2004/38/EC](#).

The conditions for acquiring rights of residence under the Withdrawal Agreement will be derived from Articles 6 and 7 of [Directive 2004/38/EC](#), and rights of permanent residence will be determined in accordance with Articles 16-18 of the Directive. However, the UK and host EU Member States may apply more favourable national provisions, instead of those included in the Directive (see Article 37 of the Directive, which mirrors this option).

**Q: What if an individual already has evidence of permanent residence, such as a residence permit?**

**A:** Such individuals can apply to have their status converted free of charge into the new status established by the Withdrawal Agreement. However, they will be subject to checks on identity, criminality and security, and their ongoing residence will be confirmed.

These individuals are also entitled to retain their residence rights even if they were absent from their host state for five consecutive years. This is an improvement on the two-year maximum in Article 16(4) of [Directive 2004/38/EC](#).

**Q: How will EU citizens' rights in the Withdrawal Agreement be implemented?**

**A:** The Joint Report states that both parties agree that the Withdrawal Agreement will include provision regarding the legal effect of citizens' rights post-Brexit and that UK domestic law should be enacted to ensure that this occurs. It also states that the Withdrawal Agreement should enable EU citizens to rely on it directly to enforce their rights, and should include a statement to the effect that any "inconsistent or incompatible rules and provisions will be disapplied". Thus, it looks as though the citizens' rights provisions in the Withdrawal Agreement will have primacy over all conflicting national law. The constitutional feasibility of this has been questioned by Professors [Mark Elliott](#) and [Steve Peers](#). This primacy is to continue in the UK unless and until the UK Parliament expressly repeals the Withdrawal Act in the future.

**Q: Will there be a role for the Court of Justice of the EU in the determination of citizens' rights post-Brexit?**

**A:** Yes. Paragraphs 37-41 of the Joint Report emphasise the importance of consistent interpretation of EU and UK citizens' rights and the need for mechanisms to ensure that this occurs. Therefore, the Joint Report provides that:

- UK courts must take into consideration relevant CJEU decisions in the interpretation and application of citizens' rights, even after withdrawal (this is contrary to the current text of clause 6 the [Withdrawal Bill](#), which does not require UK courts and tribunals to take post-Brexit CJEU case law into account in their decision-making);
- The UK should create a mechanism permitting UK courts or tribunals to ask the CJEU for its interpretative assistance if they determine it is necessary to give judgment in the case before them. This mechanism should be available for cases brought within 8 years of the date of application of the part of the Withdrawal Agreement concerning citizens' rights (again, the [Withdrawal Bill](#) does not currently provide for the continuation of this sort of preliminary reference procedure);
- There should be a regular exchange of case law and a judicial dialogue between the UK courts and the CJEU; and
- The EU Commission and the UK Government may intervene in relevant cases before UK courts or tribunals or the CJEU, and the two should communicate regularly.

The Joint Report includes provision for the creation of an **independent UK monitoring authority** which, in addition to the EU Commission, would ensure that the citizens' rights provisions in the Withdrawal Agreement are being correctly implemented and applied. Details regarding its operation will be determined in the Withdrawal Agreement itself.

### Q: What happens next?

**A:** Some experts question the extent to which it will be possible to achieve the goals of the Joint Report via the Withdrawal Agreement. For example, [Professor Elliott questions](#) whether it is possible to give primacy to the Withdrawal Agreement over domestic law passed both before and after withdrawal (see also [Peers](#)). At a political level, there has been debate over the legal status of the Joint Report, with Secretary of State for Exiting the EU, David Davis, having [remarked](#) that the Report only represents an intent and is not legally binding. Assuming that it is, and that the intention remains to give effect to the provisions of the Joint Report in the Withdrawal Agreement, the citizens' rights provisions are yet to be drafted and must still be, along with the Withdrawal Bill itself, debated in Parliament.