



The rights of EU nationals to bring other people to the UK in the future

European Union: MW 419



Summary

1. In addition to their own right to live and work in the UK, EU nationals currently enjoy the right to bring dependants to the UK without restrictions that are applied to British citizens. The EU wants them to continue to have the right to do so even after Brexit. Granting EU nationals permanent 'super rights' would be profoundly unfair and would contravene the general principle, laid out by both sides, that the agreement on citizens' rights be non-discriminatory.

Introduction

2. The UK government is offering to secure almost all of the rights that EU nationals (already present in the UK) currently enjoy, including their rights to benefits, housing, pensions and healthcare, enforced by British courts and enshrined in an international treaty.¹ The EU is demanding that EU citizens in the UK should have rights enforced by the European Court of Justice (ECJ) and monitored by the Commission, that British citizens in the UK will not have.

3. Aside from enforcement and oversight of the agreement, a key difference between the UK and the EU is on the future right to bring other people into the UK. The EU wants all rights derived from Union law to be preserved after Brexit, allowing EU nationals already present in the UK to have rights in the future to bring partners, children and other dependent relatives, such as elderly parents and grandparents, with no restrictions. These would include people who they have not even met yet. The British Government would therefore have no control over the number of partners and children who could come to the UK, and little control over other dependant relatives, including family members of their new partners. The exact number of family members who arrived in the last year is not known, however an indication might be given by the issue of 33,000 EEA family permits in 2016. There is little information to enable an estimation of future numbers, in particular due to the relatively recent arrival of large numbers who might not have a family or dependants now, but who might well in the future.

1 For those EU nationals already in the UK, the government proposal will bring an end to the right to bring in family members with no restrictions. In addition, those who obtain settled status could have that status withdrawn if they spend more than two years out of the country, as is presently the case with non-EU nationals who have obtained ILR. EU nationals who obtain British citizenship will be treated in exactly the same way as British nationals.

4. The effect of the EU proposals would be to require the UK to admit people who currently have no connection whatsoever with the UK or with any EU citizen in the UK with potential burdens on the taxpayer which could continue for many decades. As UK citizens would not have equivalent rights, this could well become a running sore in our future relationship with EU citizens resident in the UK.

The EU Position on future family migration in the Brexit Negotiations

5. The position of the EU is that all rights 'derived from Union law' should be preserved under the Withdrawal Agreement on citizens' rights.² At present this includes the right to bring in family members and dependants (regardless of nationality) where EU nationals exercise their right to free movement and move to another EU member state.

6. The Directive 2004/38/EC relating to free movement of EU citizens across the bloc states: 'The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.'³

The UK Position on future family migration in the Brexit Negotiations

7. The UK takes the position that, up until the date that the UK leaves the EU, those exercising their right to free movement can continue to bring in their family members as at present. However, after the UK's departure, the right to bring family members should be governed by the existing arrangements (or future arrangements) that apply to British nationals (and non-EU nationals with Indefinite Leave to Remain) wishing to bring a non-EU family member to the UK. These involve a minimum income of £18,600 for those wishing to sponsor a partner and a requirement to show that, in the case of parents or grandparents, they are dependent on the sponsor, that care cannot be provided for in their home countries and that they will not be a cost to the taxpayer.

8. The EU and the UK clearly disagree on this issue. The UK government is of the view that there should be equal treatment of EU and UK nationals alike in post-Brexit Britain.

2 See EU Commission, ANNEX to the Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, May 2017, URL: https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf

3 EU Directive 2004/38/EC, URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

Who is a family member in EU law?

9. Family members are defined in EU law as a spouse or partner and their direct descendants under the age of 21 as well as their dependent direct relatives in the ascending line. These family members have the right to enter and reside with their EU family member. There is also provision for other dependents or members of a household of the Union citizen for whom entry and residence should be facilitated. These cases are to be decided by national governments which have to justify any denial of entry or residence. Case law so far has leaned in a liberal direction as to who can qualify under these provisions, including half-siblings and nephews. Fuller details are at Annex A.

Implications

10. An agreement on citizens' rights which creates a class of people with 'super rights' would go well beyond the rights accorded to British citizens. EU nationals would be able to bring a wide range of family members to the UK with no restriction whereas British citizens would have to fulfill a minimum salary requirement of £18,600 if they wished to bring in a partner and a larger sum if children are involved. Franklin Dehousse describes this situation as the creation of a 'super-privileged caste' and goes on to say that, were this to be enforced by the ECJ, it would be comparable to the situation in 1930s Shanghai whereby British citizens were not subject to the jurisdiction of local courts.⁴

11. Quite apart from the fairness aspect, Britain would have no control over the level of family migration for decades to come. This would have significant implications for a range of policy areas and for population growth more generally.

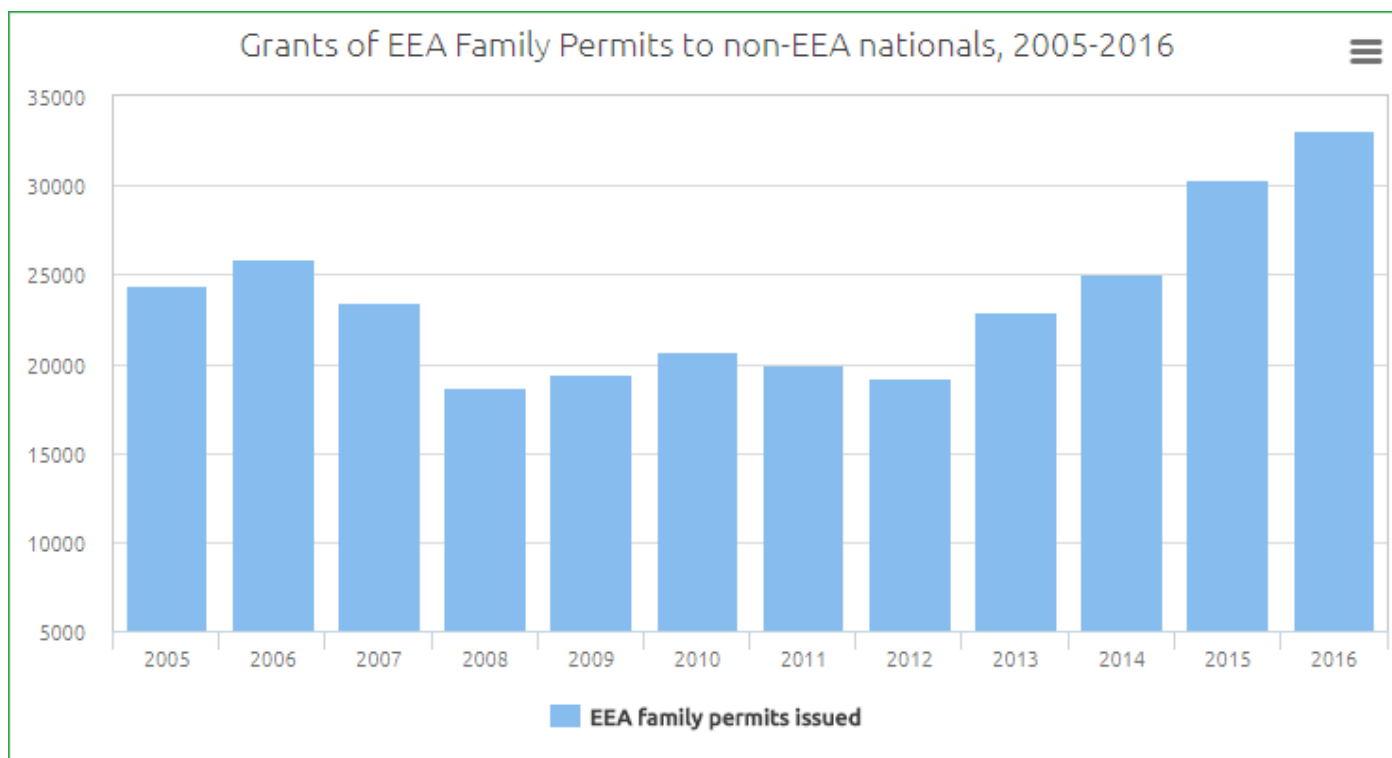
Family migration from the EU – The recent past

12. The number of EU migrants who have previously relied on the provisions of Directive 2004/38/EC to move to the UK accompanied by their family members who are also EU nationals (but who are not exercising a treaty right themselves as a worker, job seeker, self-employed, student or self-sufficient) is unknown as no visa or permit is required for EU nationals wishing to enter the UK.

13. The UK does however require that non-EU family members who are accompanying their EU family members to the UK first obtain an EEA family permit in order to enter the country (although the ECJ ruled against this requirement in 2014). In 2005 over 24,000 were granted, falling to under 19,000 in 2008 before rising again to 33,000 in 2016. See Figure 1 below.

4 <http://www.egmontinstitute.be/eu-exaggerating-in-its-demands-for-brexite/> and <http://www.lawyersforbritain.org/files/eu-citizens-privileged-caste-foreign-court.pdf>

Figure 1. Grants of EEA Family Permits to non-EEA nationals, 2005-2016.



14. These EEA family permit holders will be the non-EU family members of both new EU arrivals to the UK and EU citizens already resident in the UK. After Brexit, new arrivals from the EU should fall if the government restricts the right to work to those offered skilled jobs. However, over three and a half million EU residents are currently in the UK and could bring family members to join them in the UK after Brexit if the EU proposals were to be accepted in their present form. The UK government would have no control over the numbers. The EU also wish the ECJ to have jurisdiction over the agreement, which would be very likely to come down in favour of the EU citizen, rather than the UK government in cases where entry/residence was denied.

Implications for Public Services and Welfare

15. There would also be implications for the public purse if the right of existing EU migrants to bring future family members to the UK was to be preserved.

NHS

16. At present, EU nationals below pensionable age living in the UK are entitled to NHS healthcare on the same basis as a UK national if they can demonstrate that they are 'ordinarily resident'. This will be the case for most workers and their families. Those who are living in the UK but who become entitled to a state pension in their home country at the same time also become 'insurable' by their home country (or more generally the country in which they spent the greater part of their working life) for the purposes of healthcare provision. Such people should then obtain an S1 form which allows the UK government to reclaim the costs of healthcare from their home country (or the country which is insuring them). For those visiting or studying, the European Health Insurance Card (EHIC) allows them to access NHS

healthcare, the cost of which is then reclaimed from their home country by the UK government.

17. The government has stated in its policy document on citizens' rights that it wishes 'to protect the healthcare arrangements currently set out in EU Regulations and domestic UK law for UK nationals and EU citizens who benefit from these arrangements before the specified date.'⁵

18. This suggests that the government envisages that all of those EU citizens already living in the UK will continue to access healthcare in the UK, either paid for by the UK government in the case of those below pensionable age, or paid for by the country from which they draw their state pension.

19. It also suggests that there will be new arrangements for the healthcare provision of new EU migrants although the UK government has not indicated what these new arrangements might be. Were the agreement on citizens' rights to reflect EU demands, then presumably this new arrangement would apply to future family members, including elderly parents/grandparents.

20. However, because access to the NHS system is based on 'ordinary residency', it is possible in practice for EU nationals who are not entitled to healthcare provision paid for by the UK to access such care anyway without their home country being charged. This is because such patients must be identified by individual hospitals where treatment is accessed in order for the hospital trust to charge their home country under either the S1 or EHIC system. Some hospitals will no doubt be better than others at identifying such patients but clearly not all patients are being identified at present. In an answer to a Parliamentary Question in January 2017 the Parliamentary Under-Secretary at the Department of Health stated: 'Since its inception in 2013, the Department of Health's Visitor and Migrant NHS Cost Recovery Programme has been working to design and implement key improvements to ensure that those people who should pay for National Health Service care in England are identified and charged. The Department has also been working closely with the NHS to improve rates of recovery where these healthcare costs are the responsibility of other member states of the EEA via the European Health Insurance Card, S1 and S2 mechanisms.'⁶

21. Average annual spending on health services across all age groups was £2,069 in 2013/4. However, spending on the elderly is considerably more with spending on those over 80 years of age, treble the average spend at over £6,000 a year.⁷ The right to bring elderly people, who could include the elderly grandparents of someone an EU national has not even met yet, could therefore impose considerable costs on an already tight NHS budget. Even if just 1,000 elderly parents/grandparents came to join the family member of an EU national in the UK, this could potentially cost the NHS up to £6 million if Visitor and Migrant NHS Cost Recovery Programmes failed to identify and charge their home countries for their care.

5 The 'specified date' is a date between the referendum and the UK's departure from the EU, after which new migrants cannot expect to have their rights protected.

6 PQ Lord Laird, January 2017, URL: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-01-10/HL4559/>

7 Guardian, 'Ageing Britain: Two-fifths of NHS budget is spent on over-65s', January 2016, URL: <https://www.theguardian.com/society/2016/feb/01/ageing-britain-two-fifths-nhs-budget-spent-over-65s>

Pensions and Welfare

22. At present, EU nationals living in the UK who do not qualify for a pension from the country in which they worked, or have only a small pension entitlement (whoever pays it) are likely to be entitled to UK pension credit. Pension credit tops up the income of those whose weekly income is below £160 per week for a single person and £254 for a couple. EU nationals who are dependants of EU workers and self-employed people are also entitled to pension credit.⁸ If an EU dependent relative of an EU national is not entitled to a pension in their home country and has no other income then they could receive the full value of pension credit of £160 per week or £8,300 a year in the UK. They may additionally be entitled to social housing or Housing Benefit.

23. The EU and the UK have stated that they wish to protect the rights of EU nationals currently living in the UK (and UK nationals living elsewhere) in respect of social security provisions set out in EU legislation. This is likely to mean that they are agreed that dependants already resident in the UK should continue to be entitled to pension credit after withdrawal if they qualify. These rights are clearly personal to those already here at any cut-off date. However, this leaves open the question of whether someone who is not in the UK at the cut-off date (for example someone's 50-year old parent who has lived all their life in another EU country) should effectively have the right in, say, 15 years time to come to the UK and be entitled to UK residency and benefits.

24. Were the citizens' rights agreement to allow entry of other people on the current basis, and were dependants of EU nationals to continue to be eligible for pension credit and other benefits in the UK, this could act as an incentive to bring elderly family members to the UK and could have significant implications for the public purse.

20th September 2017

8 See page 65 of URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640785/pension-credit-detailed-guide-pc10s.pdf

Annex – Family members in EU law and Case law

1. 'Family members' are defined in EU law in Article 2 (2) (a), (b), (c) and (d) of EU Directive 2004/38/EC. A family member is defined as:

- a. Spouse
- b. a partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- c. direct descendants who are under the age of 21 or are dependants of the spouse or partner as defined in point (b);
- d. dependant direct relatives in the ascending line of the spouse or partner as defined in point (b);

2. All of these immediate family members enjoy the right to enter and to reside in the Member State.

3. In addition, Article 3 (2) (a) and (b) of the Directive states that a Member State shall 'in accordance with its national legislation, facilitate entry and residence' for the following:

- a. Any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen.
- b. a partner with whom the Union citizen has a durable relationship, duly attested.

4. The extended family members listed above in Article 3 (2) (a) and (b) do not have an automatic right to enter and reside however Member States must '*facilitate entry and residence*' according to their national legislation. The legislation in question is actually an EU Directive. The Treaty on the Functioning of the EU requires the following: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' This means that national governments have the right to decide the terms under which entry and residence is allowed. However, the Directive states that 'The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

5. All of the EU legislation outlined above was transposed into UK legislation by the Immigration (European Economic Area) Regulations 2006, as amended by the Immigration (European Economic Area) (Amendment) Regulations 2009 ('the Immigration Regulations').

Case Law

6. Article 3 (2) (a) which widens the definition of a family member is vague. Its remit was considered by the ECJ following a referral from the Upper Tribunal (Immigration and Asylum Chamber) for a preliminary ruling. The case concerned an Irish national living in the UK who was married to a Bangladeshi national and who wished to obtain first, EEA family permits, and later, residence permits for the brother, half-

brother and nephew of the Bangladeshi partner of the EEA (Irish) citizen.

7. The ECJ judgement made clear that in light of the vagueness of Article 3 Member States could select their own criteria to determine which family members should be covered by Article 3 (2) (a), but that the criteria should not be so restrictive that they 'deprived that provision of its effectiveness.'

8. The Court also highlighted Recital 6 of the Preamble to the Directive which refers to family members who do not have an automatic right to enter and reside i.e. extended family members other than partners/spouses and their dependent children, which states that Member States should consider the 'financial or physical dependence on the Union citizen'. The implication of this is that many other family members could qualify under Article 3 (2) (a) if the conditions are met, such as family members on the horizontal line (siblings) and diagonal line (Aunts/Uncles, Neices/Nephews)

9. The Court was asked for its opinion on very specific questions on the application of Article (3) (2) (a) however made no remarks about the closeness of the blood relation in respect of the nephew, suggesting that the degree of dependence was key, rather than the closeness of the blood tie. Thus family members can be defined far more widely than the immediate family unit.