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Following the 31 October 2017 oral evidence session,¹ and considering the Committee's 'Brexit: Acquired Rights' report,² this submission addresses the potential loss of electoral rights currently enjoyed by UK citizens in the EU27 and by EU27 citizens in the UK,³ a topic which was briefly discussed in the evidence session.⁴ Having extensively researched the area of electoral rights,⁵ I hope to be of assistance.

I shall first address the issue of prolonged uncertainty regarding citizens' status and rights, focussing on the ramifications of the EU institutions' and the UK government's positions. I shall argue that, uncertainty on both sides of the channel is brought about by the EU Council's negotiating mandate and the UK government's conditionality approach to the maintenance of rights of EU27 citizens, including electoral rights.

I shall then contend that, should the UK's withdrawal from the EU result in disenfranchisement, it may give rise to challenges under Article 3 of the First Protocol (A3P1) to the European Convention of Human Rights (ECHR).⁶ The European Court of Human Rights (ECtHR) has considered (local government) elections to the devolved administrations (The Scottish Parliament, the Welsh Assembly, and the Northern Irish Assembly) to fall within the ambit of this provision *qua* 'the choice of the legislature'.⁷ The ECtHR has similarly applied A3P1 scrutiny to the franchise in European Parliamentary elections.⁸ Additionally, exclusion of EU27 citizens from European Parliamentary elections could lead to EU law based challenges against their Member States.

The drivers of prolonged uncertainty

¹ Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-citizens-rights/oral/72727.pdf>.

² Available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/82.pdf>.

³ It is noteworthy that EU24 citizens (citizens of EU Member States other than Malta, Cyprus, and Ireland, resident in the UK) and UK citizens in the EU27 who have resided outside the UK for more than 15 years were excluded from the 23rd June 2016 referendum. For an (unsuccessful) challenge to the exclusion of non-resident UK citizens, see *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 649 (permission to appeal refused, 24 May 2016). For analysis, see Ruvi Ziegler, 'The Referendum of the UK's EU Membership: No Legal Salve for its Disenfranchised Non-resident Citizens' [Verfassungsblog on Matters Constitutional](#) (21 June 2016); Ruvi Ziegler, 'The 'Brexit' Referendum: We Need to Talk about the (General Election) Franchise,' [Verfassungsblog on Matters Constitutional](#) (7 October 2015).

⁴ See Lord Cromwell's question: 'which area in citizens' rights do each of you think is most likely to be sacrificed in order to reach agreement...or pruned at least' (above n1 p17). The premise of the question appears to be that, not dissimilar to the settlement of the UK's financial obligations, negotiations on citizens' rights (including in respect of the scope of material rights) are destined to be a 'give-and-take' process.

⁵ See e.g. regarding the jurisprudence of the European Court of Human Rights: Ruvi Ziegler, '[Voting Eligibility: Strasbourg's Timidity](#)' in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015) 165-191; regarding the franchise in independence referendums: Ruvi Ziegler, Jo Shaw, and Rainer Bauböck (eds), [Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?](#) (Robert Schuman Centre for Advanced Studies EUI, 2014); regarding the disenfranchisement of prisoners: Ruvi Ziegler, '[Legal Outlier, Again? U.S. Felon Suffrage Policies: Comparative and International Human Rights Perspectives](#)' (2011) 29(2) *Boston University International Law Journal* 197-266.

⁶ Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9.

⁷ See e.g. App No. 51987/08 and others, *McHugh v. the United Kingdom* (10 February 2015).

⁸ See e.g. App No. 24833/94 *Matthews v. the United Kingdom* (18 February 1999).

The substantive protection of rights is not in and of itself contingent on an agreement. Had both the UK and the EU institutions committed *ab initio* to the maintenance of existing rights of EU27 citizens in the UK and of UK citizens in the EU27, *irrespective of the outcome of negotiations*,⁹ then as Dr. Giannouloupolous argued before the Committee in response to Lord Polak's question, '[t]he two sides could have come together and decided the technical detail'¹⁰. However, as I have previously illustrated,¹¹ and notwithstanding the Prime Minister's claim in her 19 October 2017 open letter to EU27 citizens¹² that the negotiators are 'within touching distance' of an agreement, substantive protection gaps remain at the time of writing - including in relation to electoral rights.

Now, the European Council 'Guidelines of 28 April 2017 following the UK's notification under Article 50 TEU' stipulate in relation to the Withdrawal Agreement (WA): 'the principle [is] that nothing is agreed until everything is agreed, individual items cannot be settled separately'¹³. It is entirely conceivable that, the European Council in its 14-15 December 2017 meeting will determine that, despite outstanding disagreement over the scope of protection of citizens' rights (e.g. regarding electoral rights), 'sufficient progress' has been made to enable the negotiations to proceed to the next phase. Alternatively, the Council may decide that, hitherto, there has been insufficient progress. In both cases, *absent unilateral guarantees*, the Guidelines entail prolonged uncertainty by design.¹⁴ It has been argued that, in light of the distress and anxiety that it causes, prolonged uncertainty may itself be a ground for an Article 8 ECHR challenge.¹⁵

The EU's default negotiating position: UK citizens in the EU27 as Third Country Nationals

At the time of writing, the EU appears to be self-constrained by the combined effect of the presumption that, on exit day, all UK citizens, *including UK citizens in the EU27*, will become 'Third Country Nationals' (TCNs);¹⁶ and the fact that, at present, EU law considers electoral rights of TCNs in municipal elections to be a matter of national law.¹⁷ Enfranchisement

⁹ As per this Committee's recommendation in [147] of its 'Brexit: Acquired Rights' report '...to give a unilateral guarantee now that it will safeguard the EU citizenship rights of all EU nationals in the UK when the UK withdraws from the EU.'

¹⁰ See also Dimitrios Giannouloupolous and Reuven (Ruvi) Ziegler, 'The rights of EU27 citizens in the UK and UK citizens in the EU27: A Response to Theresa May's 'fair and serious' offer' (*Britain in Europe*, 24 June 2017).

¹¹ For an earlier analysis, see Ruvi Ziegler, 'The EU27-UK Negotiations & Unilateral recognition of citizens' rights' (*Britain in Europe*, 6 September 2017).

¹² Available at: <https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>.

¹³ Available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>.

¹⁴ This state of play was predicted e.g. by the Joint Committee on Human Rights, *The Human Rights Implications of Brexit* (19 December 2016) [53]; available at: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm>.

¹⁵ See Dimitrios Giannouloupolous's argument, available at: <https://theconversation.com/eu-citizens-rights-and-brexit-negotiations-both-sides-could-be-violating-human-rights-law-87030>

¹⁶ This is the conventional wisdom interpretation of the Treaty of the Functioning of the European Union, OJ C 115/47 (29 May 2008) (TFEU), Article 20(1), stipulating that '...[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. Cf two registered European Citizen Initiatives (ECIs): (a) ECI(2007)000003 'EU Citizenship for Europeans'; available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2017/000003?lg=en>; (b) ECI(2017)000005 'Retaining European Citizenship'; available at: <https://ec.europa.eu/citizens-initiative/31/public/#/>. For a pre-Article 50 notification analysis, see Ruvi Ziegler, 'UK Citizens as former EU citizens: predicament and remedies' in Floris de Witte and Rainer Bauböck (eds), *Freedom of Movement under Attack: is it worth defending as the core of EU citizenship?* (EUI, 2016).

¹⁷ Ms Golding, responding to Lord Cromwell's question (n4 above), asserted that: 'for British citizens living in the EU: voting rights in local elections, because that is a matter of national law'. Professor Smismans suggested that, 'from the European perspective, they are not very willing to give local election voting rights. It is a dispute of perspective. They do not offer full citizenship rights'.

practices across the EU are divergent¹⁸. Hence, applying the categorisation of rights in *Miller*, the current EU position is that UK citizens are set to lose ‘category (2) rights’.¹⁹ However, given that loss of electoral rights constitutes a ‘material change’ in their circumstances (see below), it could be argued that, UK citizens in the EU27 should *retain* individual rights that EU Member States can, but are not required to, grant TCNs.

Indeed, on this (and other issues), the EU’s negotiating position is *prima facie* incompatible with the European Parliament’s 2 October 2017 resolution on ‘The State of Play of Negotiations with the United Kingdom’.²⁰ In paragraph [B] of its Preamble, the resolution notes that ‘EU citizens who took up residence in another Member State did so on the basis of rights they enjoy under EU law²¹ and on the understanding that they would continue to enjoy those rights throughout their lives’.

The resolution further stipulates that [C] ‘the European Parliament represents all EU citizens, including UK citizens’. In operative clause [4] it emphasises that [the WA] must incorporate ‘the full set of rights citizens currently enjoy, such that there is no material change in their position, and that it must ensure reciprocity, equity, symmetry and non-discrimination, for EU citizens in the UK and UK citizens in the EU’.²²

The UK’s negotiating position: conditionality

The Department for Exiting the European Union’s 26 June 2017 Policy Paper stipulated that ‘[a]fter we leave the EU...the future rights of EU citizens (and their family members) resident in the UK before our departure will depend on the commitments which we may jointly agree with the EU in the Withdrawal Agreement, or upon unilateral action by the Government’.²³ The paper is silent as to whether, in the event of a ‘no deal’, such ‘unilateral action’ will guarantee all existing rights; more specifically, the Policy Paper is silent as to whether the UK intends to guarantee the maintenance of electoral rights in local government elections.

In a radio interview on 10 October 2017,²⁴ the Prime Minister was unable to unequivocally assure EU27 citizens that, in the event of a ‘no deal’, their rights will be maintained, whereas

¹⁸ See EUDO citizenship, National Electoral Laws; available at: <http://eudo-citizenship.eu/databases/national-electoral-laws>.

¹⁹ *Miller v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] UKSC 5 [69]. The three categories: (1) rights capable of replication in UK law; (2) rights derived by UK citizens from EU law in other member states; (3) rights of participation in EU institutions that could not be replicated in UK law.

²⁰ <http://www.europarl.europa.eu/resources/library/media/20170928RES84907/20170928RES84907.pdf>

²¹ TFEU art 21(1) stipulates that ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States’.

²² See also the Article 50 Task Force’s 12 June 2017 ‘Essential Principles on Citizens’ Rights’ Position Paper, General Principles (1) ‘Same level of protection as set out in Union law at the date of withdrawal of EU27 citizens in the UK and of UK nationals in EU27’. Available at: https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_3.pdf

²³ ‘The United Kingdom’s exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU’ at [14]; available at: <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu/the-united-kingdoms-exit-from-the-european-union-safeguarding-the-position-of-eu-citizens-living-in-the-uk-and-uk-nationals-living-in-the-eu>.

²⁴ LBC radio, 10 October 2017; available at: <http://www.lbc.co.uk/radio/presenters/iain-dale/prime-minister-cant-guarantee-eu-citizens-no-deal/>.

the Foreign Secretary stated on 25 October 2017 (regarding EU27 citizens) that: ‘your rights will be protected whatever happens’.²⁵

In contradistinction, the Explanatory Notes²⁶ to the EU (Withdrawal) Bill²⁷ explain the reasoning behind Clause 7 of the Bill, entitled ‘[d]ealing with deficiencies arising from withdrawal’. The notes suggest that, ‘without a correction, the UK’s law would still include recognition of the EU citizens’ rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement and EU member states are providing no such rights to UK nationals.’²⁸ Unless one or more of the tabled amendments that seek to secure the status and rights of EU27 citizens are successful,²⁹ conditionality will be enshrined in UK law.

The next section considers potential consequences of conditionality regarding the maintenance of electoral rights.

Grounds for challenge to exclusion from the local government franchise

According to the last available ‘Joint Technical Note’ detailing the respective positions of the UK and the EU27, following the Fourth round of negotiations on 28 September 2017, ‘the EU position does not cover UK citizens’ rights to vote and/or stand in local elections because this arises from EU citizenship rights’ whereas ‘the UK wants to protect existing rights of UK/EU citizens to vote and/or stand in local elections in their host state’.³⁰

In the UK, the franchise for local government elections is stipulated in Section 2(1)(c) of the Representation of the People Act 1983.³¹ It includes EU24 citizens *qua* ‘relevant citizens of the Union’ (in addition to Irish, Cypriot, and Maltese citizens otherwise enfranchised). The Secretary of State for Exiting the EU noted in a statement in the House of Commons on 17 October 2017 that, there are ‘some issues outstanding for both sides’ including ‘the rights...to vote in local elections’.³²

In his latest statement, on 13 November 2017, the Secretary of State noted: ‘the Commission has not yet matched the UK’s offer in relation to the right to stand and vote in local elections, which is a core citizen’s right that is nominally enshrined in the EU treaties. I have been disappointed that the EU has been unwilling to include voting rights in the withdrawal agreement so far. As a result, we will pursue the issue bilaterally with member states.’³³

²⁵ Available at: <https://www.youtube.com/watch?v=JQwyVTyKjQ8>.

²⁶ Available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>. The Bill is available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>

²⁷ Available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>

²⁸ above n26 [25].

²⁹ See e.g. Amendment #269 to insert at the end of Clause 7 subsection (6) (‘regulations under this section may not’...) the provision: ‘(g) remove, reduce or otherwise limit the rights of EU citizens resident in the UK.’

³⁰ See: https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en

³¹ The section reads: ‘a person is entitled to be registered in the register of local government electors for any electoral area if on the relevant date he...(c) is a qualifying Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union’

³² Hansard 17 October 2017 vol 629 Col 731; the statement was made following the Fifth round of negotiations.

The Committee may wish to consider the implications of the latest statement in the light of the EU (Withdrawal) Bill. There are EU member states (e.g. Germany) that restrict participation in all electoral processes to their citizens, *except where EU law otherwise requires*. Other states, including states that have ratified the Council of Europe's Convention on the Participation of Foreigners in Public Life at the Local Level,³⁴ extend the local franchise to non-citizen residents. Should the EU maintain its (collective) position in respect of UK citizens in the EU27, the UK government is prepared to exclude German citizens from voting and standing in local government elections, including those currently serving in elected posts, despite having determined that it is proper, in principle, for *all* EU27 citizens to retain these rights. Clause 7 of the EU (Withdrawal) Bill would authorise *a* minister to potentially use the power, *inter alia*, to limit electoral rights.

As noted above, the ECtHR considers elections for the devolved administrations in the UK to fall within the ambit of A3P1. I submit that prospective disenfranchisement of some citizens of other EU Member States who are *currently* exercising both 'passive' and 'active' electoral rights solely due to lack of reciprocity would struggle to cross the 'legitimate aim' hurdle, let alone proportionality,³⁵ absent an identifiable and compelling public interest.

Moreover, the normative case for maintenance of electoral rights of *all* EU27 citizens in the UK, irrespective of reciprocity, is particularly strong. Electoral eligibility signifies membership of the communities in which EU27 have made their home; it demonstrates that they remain equal, in law and in fact. It enables EU27 citizens to continue to contribute to their local communities. EU27 citizens should be able to continue to participate in civic life, and voting is one of the important founding blocks of citizenship. Conversely, disenfranchising EU27 citizens would be detrimental to their standing in society, harm community relations, and send an exclusionary and unwelcoming message.

Grounds for challenge to exclusion from the European Parliamentary franchise

Schedule 9 of the EU (Withdrawal) Bill lists the European Parliamentary Elections Act 2002³⁶ among the Acts to be repealed. Consequently, elections to the European Parliament will no longer be held in the United Kingdom, where 73 members are currently elected across 10 regions.

Article 14(3) of the Treaty on European Union promulgates that '[t]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot'.³⁷ Article 10(3) thereof stipulates that '[e]very citizen shall have the right to participate in the democratic life of the Union'. When citizens of the Union reside in an EU Member State, they can choose whether to vote in their Member State of residence *or* in their Member State of citizenship.³⁸

³³ Hansard 13 November 2017 vol 631 Col 37; the statement was made following the Sixth round of negotiations.

³⁴ Strasbourg, 5 February 1992, ETS No 144 (entered into force 1 May 1997); available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144>, Art 6(1). *Ratifications*: Albania, the Czech Republic, Denmark, Finland, Iceland, Italy, The Netherlands, Norway, Sweden. *Signatures*: Cyprus, Lithuania, Slovenia, and the UK.

³⁵ For the A3P1 tests see e.g. App No 74025/01 *Hirst (No 2) v. the United Kingdom* (6 October 2005) [82].

³⁶ C. 24. Note s. 8 ('entitlement to vote').

³⁷ OJ C 306 (17 December 2007).

³⁸ Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote

According to a 2015 European Parliament Report,³⁹ six Member States (Germany, Denmark, Cyprus, Malta, Ireland, and the UK) deprive their citizens, under varying conditions⁴⁰ of the right to vote in European parliamentary elections due to residence *outside the Union*. Thus, (some) citizens of Germany, Denmark, Cyprus, Malta, and Ireland stand to be disenfranchised in European Parliamentary elections, unless and until their states of citizenship amend their *domestic* legislation to enfranchise their citizens resident outside the Union to vote. In anticipation of the 2019 European Parliamentary elections, given that their states of citizenship are subject to ECJ jurisdiction when implementing EU law (as per the *Delvigne*⁴¹ ratio), such citizens may argue that the case for their enfranchisement is particularly strong: they have not voluntarily moved to a third country, but have resided *in a Member State*, exercising EU treaty rights, and now reside in a former Member State.

Is there also legal salve for UK citizens in the EU27? Unlike local electoral rights, the right to vote and to stand as a candidate in elections to the European Parliament is a *Miller* 'category (3) right'. According to the Supreme Court judgment, 'such rights are by their very nature dependent on continued membership'.⁴² Nevertheless, it is worth reflecting on the fact that, qualifying Commonwealth citizens, save for Maltese and Cypriots, are eligible to vote for the UK's constituencies of the European Parliament, notwithstanding the fact that they are *not* citizens of the Union. Now, this is a rather peculiar feature of the UK franchise (and I am not aware of parallel practice in other EU Member States), but it could serve those who would wish to rebut the strong presumption that only citizens of the Union are eligible to participate in European Parliamentary elections.

Concluding remarks

Starting from first principles, existing rights of citizens on both sides of the channel should not be treated like tradable commodities: they should be guaranteed both to UK citizens in the EU27 and to EU27 citizens in the UK, irrespective of the outcome of the negotiations. While an enforceable WA to that effect is desirable, the substantive scope of protection should not be contingent thereon.

The UK should guarantee all EU27 citizens in the UK that their electoral rights will be maintained in law, and amend the EU (Withdrawal) bill accordingly. The EU institutions should acknowledge that, the principle of 'no material change' necessitates that UK citizens in the EU27 *retain* individual rights that at present EU Member States can, but are not required to, grant TCNs.

and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329 (30 December 1993).

³⁹ Disenfranchisement of EU citizens resident abroad (June 2015); available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/564379/EPRS_IDA\(2015\)564379_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/564379/EPRS_IDA(2015)564379_EN.pdf)

⁴⁰ Ibid table 3.2.

⁴¹ C-650/13 *Delvigne v Commune de Lesparre-Médoc* (6 October 2015). The case concerned the legality, under EU law, of the exclusion from voting in European Parliamentary elections of a French national sentenced to 12 years' imprisonment for murder. The European Court of Justice accepted [33] that, by determining the franchise for European Parliamentary elections, EU Member State 'must be considered to be implementing EU law'. The Court held [45] that the deprivation of the right to vote represents a limitation of the exercise of the right of EU citizens to vote in elections to the European Parliament.

⁴² *Miller* (n19 above) [72].

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