

Brexit and the Challenge of Citizenship: British passports for EU citizens living in the UK?

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The task of finding a solution to the legal status of non-British EU citizens living in the UK after Brexit is exercising the best minds in the European Union at the moment. As the European Council (Art. 50) guidelines for Brexit negotiations rightly underline, “The United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption,...Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights”. These guidelines also place special emphasis on the priority to ensure reciprocal guarantees in safeguarding the rights derived from EU law of EU and UK citizens and their families affected by Brexit, effective from the date of withdrawal.

The latest idea floating in the media is that the UK should naturalise the non-British EU nationals living there (possibly numbering 3 million) as British citizens. This solution has been commonly called “giving them all passports”, but for an individual to qualify for a passport, s/he must hold the nationality of the state of issuance. Is this a serious policy option? It is certainly original and has the benefit of shifting the burden of dealing with this question back onto the UK – enlarge your population and keep good relations with your neighbours. But there are at least four challenging questions that deserve careful consideration.

First, which EU citizens would be entitled to receive British citizenship as a right and a UK passport?

At the moment, the European Commission's non-paper for the negotiations is proposing that the answer would be all non-British EU citizens who are physically in the UK on the date of the UK's exit from the EU (probably not before or long after 30 March 2019). This would include visitors, students and people who arrived the day before. Their acquisition of rights would, according to the Commission's non-paper, not be affected by Brexit, but they must continue to be covered by EU rules and subject to the jurisdiction of the Court of Justice of the EU in the event of disagreement.

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To offer citizenship to such a wide group of people, some of whom will have not spent much if any time in the UK before becoming entitled, is likely to put the UK Prime Minister in a very difficult position. All the other proposals for granting residency rights to non-British EU nationals under a Brexit deal suggest other cut-off dates, such as the date of triggering Art. 50 (29 March 2017) or the departure itself (in principle, two years later).

Second, dual nationality

Many EU states do not permit dual citizenship – if a national citizen acquires citizenship of another country, that person may automatically lose his/her citizenship of birth. The German authorities have moderated their position on dual citizenship for EU citizens and now permit it. For the purposes of the German constitution, it seems that the oath of allegiance to the UK required by the UK government is the key event. If a German national who is seeking to become a naturalised citizen in the UK takes this oath before Brexit happens, then it seems likely that s/he or she will be able to retain his or her German citizenship. But if the oath takes place after Brexit, then loss of German citizenship will be automatic. Other member states, however, have not been as open-minded regarding their citizens' retaining their birth citizenship on the acquisition of another.

Unless all remaining EU member states were able to change their constitutions to permit dual nationality, at least in the case of Brexit, non-British EU nationals who acquired British citizenship in this way would lose their birth right citizenship. This means that they would also lose all their EU citizenship rights to move, reside, work, study, etc. in the EU of the 27.

Many of the estimated 3 million EU citizens in the UK may already have British citizenship. Since a substantial number of the 3 million are Irish nationals, many of these individuals may have acquired British citizenship at birth by reason of being born in Northern Ireland or having a parent who was born in the UK (including Northern Ireland). For those who are already dual nationals – whether they are aware of the fact or not – this further conferral of citizenship would not do much for them.

Third, family reunion rights

The UK has introduced very strict rules intended to prevent British citizens who are dual nationals from using their other EU citizenship to enjoy family reunification rights with their third-country (non-EU) national family members. The UK claims that, since these people are British, the British government is entitled to place more onerous family reunification requirements on them (such as high-income thresholds) than are permitted for non-British EU citizens.

By having British citizenship thrust upon them, non-British EU citizens would lose the right to family reunification with their third-country national family members. If no deal is reached, one might suggest that after Brexit they would be in a worse position anyway regarding family reunification, as they will be third-country nationals who are subject to the same rules as British citizens. But the Commission's non- paper is seeking a better deal for them.

Fourth, social security

The idea of giving non-British EU nationals a passport would solve the issue of the right of residence and work for non-British EU citizens, but it would not solve all the issues related to cross-border social security contributions, benefits and payments. Since many non-British EU nationals in the UK have worked in other member states and built up social contributions records, the loss of the right of non-discrimination, aggregation and export will be very hard indeed. Nor would it deal with the issue of transferring funds from the UK to the 27 member states of the EU or the inverse, which are likely to be caught by high taxes.

And a final stumbling block

In light of the points raised above, we can conclude that the idea of issuing British passports to EU citizens living in the UK may seem appealing and would give non-British EU citizens voting rights in the UK to help control their destinies, but there is likely to be substantial opposition to the proposal. And it would still leave many challenges to be dealt vis-à-vis the standards laid down in the EU Citizen's 2004/38 Directive. Any non-British EU citizen and their family who have acquired residency rights in the UK, according to the Citizen's 2004/38 Directive, should retain those rights together with an EU standard of protection against expulsion. Similarly, British citizens and their families living in other EU member states should continue to be protected after Brexit by an extension of the EU Citizens Directive to cover them.