



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Relations Committee

Thursday 15 December 2016

Session 5



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Pàrlamaid na h-Alba

Thursday 15 December 2016

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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
15th Meeting 2016, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Jackson Carlaw (Eastwood) (Con)

*Ross Greer (West Scotland) (Green)

*Rachael Hamilton (South Scotland) (Con)

*Emma Harper (South Scotland) (SNP)

*Richard Lochhead (Moray) (SNP)

*Stuart McMillan (Greenock and Inverclyde) (SNP)

Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Catherine Barnard (University of Cambridge)

Brendan Donnelly (Federal Trust)

Sunder Katwala (British Future)

Professor Dimitry Kochenov (University of Groningen)

Professor Eleanor Spaventa (Durham University)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 15 December 2016

[The Convener opened the meeting at 09:03]

Decision on Taking Business in Private

The Convener (Joan McAlpine): Good morning and welcome to the 15th meeting of the Culture, Tourism, Europe and External Relations Committee. I remind everyone to turn off their mobile phones. Will any members who are using electronic devices to access committee papers please ensure that they are turned to silent mode?

Our first item of business is a decision on whether to take agenda item 4, on committee expert support, in private. Are members content to do that?

Members *indicated agreement.*

European Union Referendum (Implications for Scotland)

09:03

The Convener: Our second item of business is an evidence session on the implications for Scotland of the European Union referendum. Today the focus is on the rights of EU nationals. I welcome our witnesses: Professor Eleanor Spaventa of Durham University; Professor Dimitry Kochenov, chair in EU constitutional law at the University of Groningen; Brendan Donnelly, director of the Federal Trust and former member of the European Parliament; Sunder Katwala, director of British Future; and—via video conference—Professor Catherine Barnard, professor of EU law at the University of Cambridge.

This is obviously a very big subject and the committee has been studying the European single market membership in some detail. I think that it is fair to say that in Scotland, quite a large part of the debate around the referendum has focused on the single market. Probably what struck many members from the briefings from some of the witnesses—and from our adviser, Sionaidh Douglas-Scott—is that even membership of the single market will not address any of the issues relating to EU citizenship.

I have a general opening question. What are the biggest challenges of the EU citizenship issue for EU citizens living here in Scotland and the United Kingdom and for Scottish and UK citizens living in Europe?

Brendan Donnelly (Federal Trust): I am afraid that I have to give a rather evasive answer, which is that the problem is the problem of Brexit. Citizenship, it seems to me, cannot be distinguished from the general question of leaving the European Union or, more precisely, what Britain's relationship with the EU will be once it has left the EU.

There have been complaints and criticisms that the Government lacks a Brexit strategy. I think that that is a misstatement. The Government has a Brexit strategy, which is to leave the EU. The problem is what it will do in the post-Brexit environment. You have raised a number of specific questions that have been put to witnesses about the rights of citizens. Obviously, those rights will not still be there post Brexit as the rights of European citizens because we will have left the EU under the Government's hypothesis.

The question is, what future rights and obligations can be negotiated in the post-Brexit phase? We do not know the answer. I am sure

that it will come up in the testimony that there are many barriers, both intellectual and political, to getting a clear picture of that.

Professor Dimitry Kochenov (University of Groningen): These are sad times for EU citizenship, but we should not stick to the name too much. I would support the previous claim, in that the core focus should be on rights. Whatever the relationship is called, the rights in question are fundamental. In that respect, I have tried to look at the implications of Brexit in the context of citizenship.

I co-authored a report on the quality of nationality, which includes a quality of nationality index based on transparent numerical data. If no agreement is reached with the EU on free movement of persons, the quality of British citizenship that Scots enjoy is likely to drop by 30 per cent according to the available data. It is all very transparent. That means that a British passport will be at the level of an Argentinian passport in the index. There will be a drastic drop in the quality of the rights that UK citizens enjoy. In that sense, all kinds of alarm bells should be ringing.

We should realise that Brexit creates a new context of engagement between Europe and the UK. Before, it was a context of loyalty, where self-help was prohibited by the European Court of Justice, so there was no reciprocity. Once the UK moves towards Brexit, we are speaking about reciprocal relations, where retaliation is possible. In that context, it is the UK versus the European Union—a relationship in which the UK is overwhelmingly weak, because of the comparative importance of the two parties.

The Convener: I mean no offence to the people of Argentina, but that statement about the British passport and the Argentinian passport is really quite striking. Can you define what you mean by that?

Professor Kochenov: Yes. I designed the quality of nationality index together with Henley & Partners, which is a leading firm dealing in citizenship matters. We looked at the economic strength of the parties concerned and at the territory associated with the citizenship, plus free movement for tourism reasons—in terms of short-term stays that are visa free—and settlement abroad with your passport, which entitles you to work and to reside abroad for as long as you want to without applying for any authorisations.

In that sense, the fact that UK citizens will not be able to benefit from free movement in the EU drastically reduces the quality of the rights that they enjoy. The main added value of EU citizenship is that it extends the same rights that

national citizenship already provides to passport holders but multiplies them by a factor of 28.

Although UK citizens, by virtue of UK law, can reside in the UK, enjoy non-discrimination in the UK and work in the UK, by virtue of EU law before Brexit they can enjoy exactly the same rights in 27 more states. The issue of scale is fundamental here. The loss of scale and the loss of the territory in which rights can legitimately be claimed based on EU citizenship, which corresponds to 27 other EU member states, leads to the drastic decrease in quality.

Lewis Macdonald (North East Scotland) (Lab): You have no idea what the terms of Brexit will be, so how can you make any—

Professor Kochenov: The mechanical exercise was done on the assumption that there will be no free movement, so we are speaking about very hard Brexit. As far as I understand it, the purpose of the meeting is to see what alternatives there are. In my view—the view from across the Channel—it should be fundamental and imperative to ensure that British citizens do not lose the extra rights multiplied by a factor of 28 that EU citizenship now allows them to enjoy.

Jackson Carlaw (Eastwood) (Con): I would like to clarify something. You mentioned Argentina. Are there other nations as well as Argentina? Would the list include the United States, Japan or Australia? Would it include every nation in the world other than the European nations?

Professor Kochenov: I will explain. The index measures the quality of nationality of all the nations in the world over the past five years. There are several tiers of quality of nationality. The highest tier is the range between the quality of German nationality, which is the highest quality, and Argentinian nationality, which is the lowest in the highest tier. That tier is the top 50 per cent of quality available at all if we count the best nation, which is Germany, as the maximum, which is 100. The US, Japan and Brazil—all the leading wealthy nations—are above the UK. A 30 per cent decrease is quite unprecedented. We also looked at the dynamic relationship between citizenships around the world, which shows where citizenship quality has decreased over the past five years. The nations with the fastest decrease are Ukraine, Syria, Libya and Bahrain, so they are all those that undergo conflict or are in economic trouble. In those cases, we are speaking about decreases in the range of 10 per cent, not 30 per cent, which will be the case with the UK, so the UK is an absolute outlier, if we are speaking about the possibility of a hard Brexit.

The Convener: Goodness me. Your index has not been submitted to the committee. Would it be

possible for us to see some written evidence on your index?

Professor Kochenov: Yes, absolutely.

The Convener: Thank you very much.

Sunder Katwala (British Future): We will have some very complex negotiations. Those have not begun yet, so we do not know the starting positions or the outcomes. However, they will affect everyone in Scotland and in Britain in lots of ways. The most pressing and urgent issue is the 3 million Europeans who now live in the UK—150,000 of them in Scotland—and over a million Brits around the EU.

In the case of European nationals living in Scotland and across the UK, having or beginning the negotiations presents no barrier to the UK determining their future status beyond Brexit. The only thing that requires to be negotiated is the protection of the UK nationals around the EU.

A decision could be made to link those questions or to separate them, but it is entirely up to the UK Government whether it wants to give European nationals in Britain assurance of their status. That is a political decision and what would have to happen, as the current status of permanent residence is linked to our EU membership, is that we would have to invent a new status that is identical to the current status. It would be a very similar proposition to the overall repeal act. The repeal act will incorporate everything that currently exists in European law into UK law and we will start from there. We would need to invent a version of what is currently permanent residence. We could call it ex-EU status and we should give it all the same rights that EU nationals currently have. The UK Government could do that right now or say that it would do that. The biggest barrier to the provision of such an assurance is a political decision to give those people that commitment.

09:15

Professor Eleanor Spaventa (Durham University): I very much agree with that point. There are two issues. First, do not underestimate the cooling effect that the current situation is having on the migration of very skilled people. There is evidence in my institution of that having happened in the past six months. For us, that is obviously a real problem. If the UK Government were to clarify as soon as possible the rights of those people who might come and those who are already here, universities and businesses, and other sectors that rely on people to fill very high-skilled jobs, would find that very helpful.

My second point covers two issues. European law already protects UK citizens who are now

resident in the EU and it will do so even after Brexit, so the real problem is for EU citizens who are living in the UK. However, those who are most vulnerable, such as pensioners—both EU pensioners who are in the UK and the UK pensioners who are living abroad—are at real risk. We know that there are almost 400,000 UK pensioners—

The Convener: Will you drill down into that a little? In practical terms, how exactly will those pensioners be affected?

Professor Spaventa: Although Governments can decide that there are mutual rights, an overarching structure is needed to ensure that pensioners have those rights. There is a lot of secondary legislation, for instance, that enables people to have their pension paid when they are living abroad and for that pension to be index-linked as it would be if they were living in the UK.

Crucially, such legislation allows people to have the national health service pay their expenses abroad. Private medical insurance is perhaps not so expensive for someone who is young and fit, but it is incredibly expensive for a pensioner. Once the medical arrangements are no longer in place, even if equality of rights is maintained, those pensioners simply might not be able to continue to live abroad. Special attention should be given to replacing those co-ordinated arrangements, but the problem is that they will have to be negotiated with all the member states once the UK is out of the EU. That will take a long time, which is why pensioners are particularly vulnerable.

The Convener: Does Rachael Hamilton have a supplementary question?

Rachael Hamilton (South Scotland) (Con): Yes—I have a question for Professor Kochenov. You highlighted the issue of scale with regard to the territory that is covered by EU nationals' rights of access to 27 other member states. Was that why you said that the UK's position was "overwhelmingly weak"? Can you expand on that?

Professor Kochenov: The idea of the index that I mentioned is that nationalities get extra points for access to other states outside the sovereign territory corresponding to the state granting the status of citizenship.

With a hard Brexit, UK nationals would lose rights in 27 states—and possibly more, if the change in free movement extended to European Economic Area nations such as Norway, and European Free Trade Association countries, by which I mean Switzerland. There would be a drastic reduction in the territory in which those rights—including, crucially, non-discrimination on the basis of nationality—would be guaranteed. Suddenly, the context would change to such an extent that it would become legal, and sometimes

imperative, for European nations to discriminate on the basis of nationality against the holders of UK passports. The presumption that everybody is on an equal footing in Europe would suddenly not apply at all, unless serious steps were taken in the negotiations to ensure that that was addressed.

In that respect I disagree most respectfully with Sunder Katwala, because it is not up to the UK to give grace to those EU citizens or to decide what happens with them. That is bound to become a fundamental issue in the negotiations between the UK and European Union. The issue of free movement is essential for a large number of European member states, especially eastern and central European countries, and the leaders of those countries have already made it quite clear that they will put that issue on the agenda.

Sunder Katwala: You are conflating two separate issues. The British Government can make any decision that it wants to make on what the rights and status of people who live in Britain and who happen to be Europeans will be, starting from the day after Britain has left the European Union.

The EU Governments can make any decisions that they want. We will come on to this later but, if the EU27 decided to offer associate citizenship or something—however likely or unlikely that is—I do not see how the British Government could refuse it. You are of course right that the question of the future of free movement, the future policy on immigration to the UK and the future policy of EU Governments towards immigration will be an issue of negotiation, in which future immigration policy and future market access will be linked.

The point about separation matters here, because we do not know the outcome of the immigration discussion, the market access discussion or anything else. If we were to guarantee the status and rights of the EU nationals who are already here or who arrive up until article 50 is used—that is the legal moment when there is a notification that something has happened and Britain is leaving—that guarantee would stand whether we continue free movement, join the EEA, have a transitional arrangement of five or 10 years, or have the hardest possible Brexit. We would not then be asking the people who are already affected to wait for a two-year period to find out what their status is, with the anxiety that would be caused by that hanging over them. We are making everybody else around Europe and Britain wait for two years to find out what future rules will apply.

The Convener: I would like to bring in Professor Barnard, who has been sitting patiently down in Cambridge. Would you like to comment on what you have heard, Professor Barnard?

Professor Catherine Barnard (University of Cambridge): Thank you very much. As far as EU citizenship is concerned, there is quite a lot of misunderstanding about some fairly rudimentary points. The first point is that everyone who holds a nationality of a member state is an EU citizen. Following Brexit, UK nationals will no longer hold the nationality of a member state of the EU and will therefore no longer be EU citizens. Deprivation of citizenship is a serious matter. It is less serious legally than it might otherwise be because, of course, UK nationals will retain the nationality of the UK, so they will not be rendered stateless. Nevertheless, they will be deprived of the rights that we have heard about such as the rights of free movement.

As far as those who enjoy the rights of free movement are concerned, in 1957, when the Treaty of Rome was drafted, only those who were economically active had the rights of free movement. Only those who were employed workers, those who were self-employed or those who provided services had those rights. If we scroll forward to the early 1990s, added to that mix were people who were semi economically active—students and persons of independent means, which included the retired. Those two groups had the rights of free movement, provided that they had sufficient resources and medical insurance.

In 1992, everyone who held the nationality of a member state became an EU citizen. The question then was about who else fell under the net of the rights of free movement. The group who had been left out of the analysis that I have just given were those who are essentially economically inactive. There was a period when it looked as though the European Court of Justice was going to give quite significant rights to people who are economically inactive—people who are not contributing to the economy of the host state—but, in a major decision a couple of years ago in a case called *Dano*, the European Court of Justice seemed to have clamped down on that. Basically, it said that, as a minimum, people have to have sufficient resources and health insurance to live in another member state. Therefore, those who are on the margins of society, although they are citizens, probably do not actually have the rights of free movement.

On Brexit, those rights for the groups that I have just identified will be removed, unless we join the European Economic Area as an independent state and not qua a member of the European Union. Of course the advantage of joining the European Economic Area is that it is as close as possible to the position that we have at present, but it is worth noting that the European Economic Area does not recognise the concept of EU citizenship. If we were to rejoin the EEA, in which case our position would be much the same as that of Norway or

Iceland, there would be rights of free movement for those who are economically active, such as workers, the self-employed and service providers. The so-called assisted rights directive would also apply, so that students and persons of independent means would have rights. However, any rights under the more general principles of citizenship that those who are economically inactive might previously have had would not apply. The EFTA court does not give an expansive reading of citizenship rights for economically active people.

The Convener: What about the rights of, for example, a Spanish spouse of a British citizen who spends her time as a mum bringing up children? What kind of rights, if any, would she have if she has always been economically inactive?

Professor Barnard: That is the interesting question. Under EU law as it stands, and under what would be EEA law, she would have independent rights of free movement if she is a person of independent means, that is, with sufficient medical insurance and resources, which might have come from her British husband. Where there is a stumbling block at the moment is the question of what constitutes sufficient medical insurance. Does a person have to have a private medical insurance policy for which they are paying, or is it enough, as at present, that they can rely on the European health insurance card or have access to the national health service?

That is where the matter is not clear, and that feeds into broader discussion of what will happen to those spouses if there is a hard Brexit and they want to stay in the UK but they cannot show that they have sufficient medical insurance, so they do not benefit from permanent residence. In order to get permanent residence under EU law, at the moment a person has to have done five years under one of the categories that I have mentioned, including being a person of independent means and having medical insurance.

We have already heard that there is quite a lot of political will that people who have done five years should be given some sort of equivalent of indefinite leave to remain, but only if they can show that they have medical insurance and that they have been here for five years, so there are going to be practical problems with proof.

The Convener: We know, from third-party citizens and from our work as members of the Scottish Parliament, that indefinite leave to remain is a complex thing to achieve. In our written briefings there has been talk of a more streamlined version of leave to remain, but is it not the case that it is still a complicated process?

Professor Barnard: It is also expensive. The great advantage for migrants under EU rules is that the process is cheap. At the moment, it is very cheap to get a permanent residence card. That is why the Immigration Law Practitioners Association has advocated that there should be a status a bit like indefinite leave to remain but that it should be given a different name so that individuals are not caught by the significant fees that are currently charged to third-country nationals.

The Convener: Thank you very much. I know that Mr Katwala and Professor Kochenov want to come in, but I would like to hand over to Lewis Macdonald.

Lewis Macdonald: Perhaps they might also have views on the question of how that is applied. People who have been resident here for more than five years will be a very large part of the 3 million across the UK and of the population of EU citizens here in Scotland. By definition, some of them will have no categorical documentary evidence that they have been here for three years, if they have been self-employed, as many tradespeople, for example, might be. Also, many of those who have been here for five years—and, indeed, a lot longer—will never have considered applying for documentary evidence of that, for the simple reason that they did not foresee the possibility that they would need it.

I would be very interested in hearing views on that. Perhaps we should start with Mr Katwala, given his report on the matter and others, on the practicalities of how that five-year status, or how the right to remain, could be recognised, and then on how it could be applied without the fees that were referred to.

09:30

Sunder Katwala: That is completely right. If the decision is made to grant the status, implementing it will be the biggest administrative task that the Home Office has carried out in its history. The group of people who have five years' residence and so have an entitlement to permanent residence now is probably about two thirds of the 3 million—about 2 million—or about 100,000 in Scotland. UK Government ministers occasionally talk about that, if asked about it, as simply a formality. It is quite a complicated formal process, but it costs £65. Indefinite leave to remain for a non-EU citizen costs £1,875, so there is very big gap. We propose that it is very important to do it properly and well and that people should have the minimum of inconvenience, cost and hassle. We think that the cost of applying for the bespoke status should be capped at the level of a UK citizen applying for a first passport, which is £72. That would be fair and reasonable.

There is also the problem of sheer scale. The comprehensive health insurance requirement is the biggest barrier. Between a third and 40 per cent of the applications, which are supposed to be just a formality, are refused. According to our evidence, that requirement is one of the biggest reasons for refusal. Our proposal is not to refuse on the ground of not having comprehensive health insurance. In particular, many people from the initial EU countries were never aware that that requirement had been brought in if they were students. Simply not requiring it would make a big difference. The Immigration Law Practitioners Association has also suggested treating the legal right to use the national health service as meeting the requirement, but taking away the comprehensive health insurance requirement would work as well.

The other issue is how to make the process more practical. There are about 120 local nationality-checking services around the UK, six of which are in Scotland. That means that you can go in with your documentation and they can check whether you have the right things. If you do not, you can go home and get what you need—you have not sent in a pile that is not opened for six months and then you find that you have not sent something.

The Convener: I read that in your written evidence. That is a huge burden on the local authorities that administer it.

Sunder Katwala: They could charge. They could be allowed to charge, say, the £70 to do it, and the simple cases would go. They also have access to data and documentation that the state holds from Her Majesty's Revenue and Customs, the Department for Work and Pensions and others. It would be possible for them to green-light simple cases but not to refuse cases. If they could not green-light a case, it could go into the Home Office pile. That would get the Home Office pile down to hundreds of thousands from 3 million, as we have 2 million cases of people with five years of residence and another several hundred thousand who will have five years by Brexit day. We could let people do it nearer their homes. The local authorities should be able to keep the cost of providing the service.

There is another burden that will come in. Not only will people be trying to find their gas bills from five years ago, but employers, who are already looking at this for their current employees, might have everybody they have employed since 2004 suddenly coming back looking for the evidence of that employment, even if an employer has gone out of business. Where we can use the state's systems to prove that people have a footprint, we should do so. Everybody who has been exercising their free movement rights has a footprint in

systems that the Government holds. We should try to access those systems to give people their status, in the simple cases.

The Convener: That is still a lot.

Professor Spaventa: It is bizarre that European students have never been told about the comprehensive health insurance requirement. Now we have the situation that third-country nationals, who pay £150 per year for a healthcare surcharge, are potentially in a much better position than EU citizens.

It is true that the Home Office accepts the European health insurance card. The problem is that the state of origin gives you that card only for the time that you are a resident there, so although students who are still residents at home would have it, graduate students, PhD students and others who have settled in the UK with families and so on would not. We know from Durham University that that is a real problem. We have graduate students who have been here for a long time and yet do not manage to fulfil the criteria.

The other problem is that, although there is a fee that could be paid, the fee applies for every single family member. For a family of five, multiply £1,875 times five. That is a lot of money to ask of low-skilled workers, and we know that there are a lot of low-skilled workers. They came in good faith when it was a right to come here, so we must be very careful that the rules do not turn out to be incredibly punitive.

The last problem that I would like to highlight is third-country-national family members of EU citizens, which we have not touched on. If, for example, there has been a divorce or a death in the family so that the main right holder—say, the Italian spouse who is here—has departed, you might have a US citizen or a Somali citizen, perhaps with her children, who has a right to stay here until Brexit but who loses everything after Brexit because they are no longer going to be protected. The particular risk is that negotiations or mutual agreements will focus on EU citizens and forget that those citizens might have family members who came here legitimately and with an expectation of being treated in a certain way. It is possibly not fair to push them towards a normal immigration status, because it is so expensive to be an immigrant in the UK. Also, if they were to become normal immigrants, they would have to fulfil the income requirement and it is not obvious that they would manage to do that.

Lewis Macdonald: What is the alternative for somebody in that position? What is the alternative way for the Government to deal with those cases?

Professor Spaventa: I think that whatever framework we create has to include third-country-national family members. Currently, they are

treated almost as if they were EU citizens. They have to be included explicitly, so that, if they can prove a family tie or that they have matured a right under the citizenship directive, which includes that they should have been married for three years of which one has been in the UK, that they are a widower or similar, that there are domestic violence issues or that they are a child—because there are children involved as well—they should get exactly the same rights. That is very important because, in EU law, a child in education of, say, an Italian worker and an American mother, keeps their rights if the Italian worker goes away, dies, divorces the mother or is an abusive partner. That means that the mother or father—the person who is caring for that child—also has a right to reside. That is not the same in British immigration law. There are lots of bits that need to be considered.

Lewis Macdonald: Right. Could we accommodate that in the sort of thing that Mr Katwala was proposing?

Professor Spaventa: Yes, I think so.

Lewis Macdonald: Would it require agreement with the EU or could it be done unilaterally by the UK Government?

Professor Spaventa: It could be done. We have to remember not to talk only about EU citizens but to include third-country-national family members. They have also come here exercising their rights.

Professor Kochenov: It makes sense to say that the derived rights of family members of EU citizens used to be derived rights of family members of EU workers before 1992—before the creation of citizenship—just to add to what Professor Barnard described. From the very beginning of the EU in the 1950s, the framework of free movement obviously included more vulnerable individuals who were not economically active, as long as they were attached. Their rights were secondary and derived from the rights of EU workers. Those people should definitely be protected in the UK after Brexit as well.

We should realise that the EEA framework, if the UK opts for that, will in part protect those people because the EEA applies to all the persons moving freely, as if the 1992 Maastricht treaty had not happened. The EEA court is obliged to interpret the directive on the free movement of citizens, including the rights that it grants to family members who are not economically active, as if citizenship was not created by the Maastricht treaty; that covers all the family members of people who are economically active. In this sense, ILPA's proposals are great and they would add a great deal to the EEA framework, if that is chosen.

On a different point, if the UK started checking the health insurance requirement after leaving the

EU, it would look like a new condition introduced randomly and applied retroactively, compared with the conditions that new citizens had to satisfy throughout the time of the UK's EU membership. The cut-off for satisfying the conditions of permanent residence should be, as Mr Macdonald said, precisely the practice that applied during the UK's full membership of the EU. If in practice the health insurance condition was not checked, say, 10 years ago when permanent residence cards were issued to EU citizens, that practice should remain as a valid reference point. If we suddenly started interpreting the EU free movement framework as if it required EU free movers to provide some proof of health insurance, we would clearly be adding a new requirement. That is something that is unfortunately omnipresent in the UK debate; there is no realisation at all that a new requirement is being sold to us as something that was classically present, when that is not the case.

Brendan Donnelly: That last point about adding an extra duty or responsibility illuminates an important part of the overall negotiations, which it seems to me are taking place at a number of levels: between the United Kingdom and the EU; between the Prime Minister and her party; and between the Prime Minister and those people who voted to leave. Many of the people who voted to leave voted precisely for the idea of something being very different and more onerous. There will always be a tension between continuity on the one hand, which on grounds of equity and good will might point in one direction, and the need of the Prime Minister and other ministers to demonstrate that Brexit means Brexit and is something very different from the position up to now—that will be an important categorical imperative for the Prime Minister and her ministers.

Sunder Katwala: But, at the same time, there is a very clear distinction to be drawn in a legitimate debate between political and policy choices for the future and retrospective changes for people who are already here. There is a clear public consensus about that, because over three quarters of leave voters, 90 per cent of remain voters and 84 per cent of people in general think that the right to remain of people who have already settled here should be upheld. There are no voices in the political debate opposing that view, so we could act on it.

The health insurance requirement was changed in 2004. What we have found is that, if someone is an A8 or A2 national, they know about the change because the requirements were introduced at a time when they were coming here; but if someone is an EU15 or 14 national, they do not know about the change because nobody told them there was a change in 2004—it therefore feels like a new requirement. Finding a way in which to waive that

would deal with a lot of the administrative problems.

The Convener: I am keen to bring in Jackson Carlaw at this point.

Jackson Carlaw: I want to return to what Mr Donnelly said. We have heard quite an intense exchange between our academic professors and think-tank advisers. In fact, I wondered at times whether members needed to be here, as it was getting very direct between them.

I note that in your career, Mr Donnelly, you have worked in the Foreign and Commonwealth Office, the European Parliament and the European Commission. Given that experience, how do you feel the dynamics in the exchange that we just listened to will be being assessed and taken into account? How will that intensity and the contradictions that arise within it be assessed, even in the slight vacuum, which you identified at the start, of our not knowing what the position will be beyond our position that we want to leave?

Brendan Donnelly: Do you mean how that would be assessed by our EU partners?

Jackson Carlaw: I mean also within the Foreign Office—so, both aspects. I was struck by how intense and complicated some of the exchange was, but I was watching you throughout it and you had almost the rather phlegmatic appearance of a diplomat who was listening to it all with a kind of bemused detachment, thinking “Well, I can see all that, but there will be people thinking of a way through that.” Is that your view?

09:45

Brendan Donnelly: I must in the future adopt a better poker face if it is so easy to read at least a part of my thoughts.

I absolutely welcome, on the ground of equity, the discussions that have gone on, but I have the sense that the overarching political question will be decisive, even to quite a micro level.

I mentioned part of the public perception that Mrs May and her ministers want to create, but I would go further. I do not think that what we are debating is at the heart of what our partners are interested in. I agree entirely that a generous gesture towards the 2 million EU nationals would be very welcome and would help our negotiating position, but the fundamental problem at the beginning is that those who are running Brexit in this country believe that we can have a better adjustment of rights and responsibilities than we currently have, and the specific and stated aim of our partners is to give us a worse deal. It seems to me that those two things can be brought together only by something that is rather like where we currently are, which would undermine entirely the

proposition that Brexit will bring about something useful. I am not sure how that circle will be squared, and I am not sure that a diplomat could tell members how to do that. A diplomat would certainly look at the important issues that have been raised, but it seems to me that a diplomat in the Foreign and Commonwealth Office has no more idea about how that circle is to be squared than I or—I suspect—members do, with respect.

Jackson Carlaw: Thank you.

Professor Barnard: I absolutely agree with that. The fundamental issue is what to do with the people who are already in the UK and what the future relationship will be. I understand from the political debate that I have seen that among politicians even the most ardent leavers are very willing to give recognition of rights to EEA nationals who are already here. That could be dealt with through proposals that British Future and others have put forward. I think that the circle will be squared somewhat in respect of what the situation will look like for new migrants. The question then is this: should we join the EEA and, essentially, have migration on much the same terms for those who are economically active, plus students and people who have independent means, or should there be a much more dramatic curtailment of immigration?

It is interesting that the EEA agreement has an emergency-brake provision in—I think—article 112. The Treaty on European Union does not have such a provision. There has been no experience of using the emergency-brake provision, but it exists in case of significant need by a member state that wants to interfere with the operation of free movement, for example.

However, rejoining the EEA may be too sensitive because the political downsides of doing so are great. We would be bound by EU rules that we would not have a formal say over, although we would have a say in their drafting. The EEA states are consulted at early stages in drafting those rules. We would also have to continue to pay into the EU budget, of course. Norway, for example, is currently the 10th largest contributor to the EU budget. Those things could be just too politically unpalatable.

Should there be a bespoke deal, which may be sector specific? A deal could, for example, recognise that there is a need in the care sector or a need for the introduction of a seasonal workers arrangement in the agricultural sector, as there used to be. The Government could work on having a sector-specific deal rather than there being a general right of free movement. However, that would be for the future; it would not deal with people who are already in this country.

The Convener: I will move the discussion on to the rights of UK citizens. Would the members of the panel care to comment on the proposal by Guy Verhofstadt about buying associate membership of the EU?

Professor Kochenov: Unfortunately, under the current conditions, I do not think that it would be possible, legally speaking, to have such an arrangement in place. It would be absolutely impossible not to change the treaty in that respect, because part 2 of the Treaty on the Functioning of the European Union, which deals with citizenship, does not allow for such status.

If all the member states of the EU agree and the idea is seen as being politically palatable for them, it will be possible to talk about it, but there is a fundamental problem in that it is likely that post-Brexit relations between the UK and the EU will be reciprocity-based. Associate citizenship would be a one-way provision of rights, as opposed to a reciprocal arrangement. All EU citizens who did not lose their status as a result of Brexit but who find themselves in the UK for one reason or another would not benefit at all from such a grant of rights to those who had exercised their full political sovereignty to leave the EU.

There are several problems with the idea of associate citizenship. First, it involves the EU being asked to grant rights to people who have decided to leave the EU. Secondly, the EU would not thereby grant any rights whatever to its own citizens, so it might even be contrary to the idea of non-discrimination as it is understood in EU law. For that reason, I do not think that associate membership could possibly go through.

The Convener: I understand that Guy Verhofstadt was suggesting that individuals might want to buy in.

Professor Spaventa: I agree that it is necessary to change the treaty. Let us remember that the eastern bloc is not impressed by the political rhetoric of not wanting EU workers, for the obvious reason of the migration that has taken place post-2004. Therefore, there might be a political unwillingness.

I disagree with Professor Kochenov's view that associate citizenship might conflict with principles in the treaty, but treaty modification would be necessary. The issue will open up a long-standing historical debate that has been around since 1992, which is about the need for the EU to give some sort of Union citizenship to third-country nationals who reside in EU territory. It could be said that that is not connected, but it will be politically connected. It would not just be a case of deciding to treat UK citizens better, because then there would be a legitimate claim by third-country nationals who have been in EU territory for more

than 10 years that they should receive similar treatment.

I think that the idea is wonderful in theory but, in practice, it has been misrepresented by the media, which have suggested that the European Parliament would make it a condition for any deal, which is not true.

Brendan Donnelly: For some of our partners, associate citizenship is a proposal that would have some attractions, because it is not the people who voted for Brexit who would apply for associate European citizenship, but those who, in the view of certain of our continental colleagues, are the downtrodden minority. I think that the proposal might well fly, and it will be an interesting element of the negotiations.

The Convener: I would like all our witnesses to comment on the idea.

Sunder Katwala: I think that the proposal is, at this stage, a symbolic political gesture. Politicians make symbolic political gestures—that is part of politics. That risks raising expectations—particularly in Scotland, London and the other more strongly pro-EU parts of the country—that associate membership will be implemented or that the European Parliament has a way of doing it.

It is a catch-22 situation. The EU27 Governments are very unlikely to offer associate membership, setting aside the fact that a treaty would be needed to do so. The UK Government could be entirely indifferent about the symbolic gesture and say, "Please offer it if you would like to." It could take offence at it for symbolic reasons, too, but it could just say that it was happy for its citizens to be offered things on an optional basis. The catch-22 is that it would make sense to offer it to individual citizens only if free movement was in place, at which point the content of the offer would be diminished.

The idea of the EU27 Governments offering the chance for 1 million, 2 million or 5 million Britons who might like to live and work abroad to opt in unilaterally to one-way free movement would be a very curious thing for them to do at the start of a negotiation.

Professor Barnard: I rather agree with that analysis. For remainers, the proposal has raised hopes that people on the other side of the Channel are listening to their position. Some remainers feel that the leave campaign has been very successful in running the show, so it has at least showed a recognition that there were quite a lot of people who did not vote in favour of Brexit.

On the other hand, so much is left unsaid. In particular, what annual payment would be needed to enjoy that associate citizenship—would it be £100 or £1,000? If it were to be accompanied by

the right to access to the benefits system or the healthcare system—for emergency treatment, assuming that the European health insurance card disappears—in another member state, it would start to become quite costly for those other member states. There might be quite a strong political imperative on the part of the EU27 to say, “No way”, because the arrangement is not reciprocated.

That said, it is worth bearing it in mind that although all the benefits under EU law at present are reciprocal—if I go to France and get sick, I get treated in a hospital there; the same is true for a French person in the UK—in fact, migration has not been evenly spread across the EU for very obvious reasons that we know about, and that might be at the root of why so many people voted to leave. For example, if we look at universities, there has been a significant influx of EU migrants—often to the benefit of British universities. The same numbers do not go to, for example, Latvia, Lithuania or Poland as the number of Poles that come to the UK.

There is a perception of an uneven burden and spread of migration across the European Union. If associate citizenship were to be adopted, it would mean that—in reverse—large numbers of UK nationals would be able to take advantage of that.

Stuart McMillan (Greenock and Inverclyde) (SNP): I have found that area fascinating. I was going to come to Mr Donnelly first, but he pre-empted my question.

On Mr Katwala’s point regarding the catch-22 situation with associate membership, if a proposal for associate membership were put on the table, there would be clear benefits for UK nationals. However, I could also foresee benefits for the 27 member states in terms of the financial sector, academia and researchers—the committee has received evidence on that. Issues have been raised about industry and workers being enticed to relocate from the UK to elsewhere in the EU when the UK comes out of the EU. Would associate membership make that easier, or would it not have much of an impact?

Sunder Katwala: That is another way of restating the catch-22 issue. The proposal would have an impact if there was a very distant and cold Brexit in which Britain was to the European Union what it is to anywhere else in the world, such as South Korea or Japan. The closer the partnership with the EU, the less impact it would have. The political willingness would be strong if there was a very close partnership, but very weak if relationships totally broke down. At that point, it would become rather a one-way offer for people to opt in.

One of the features of attitudes in the UK—including Scotland, although following the referendum this might change—is that people’s level of identification as European is distinctly lower in the UK in comparison with that of people in all the other EU member states. In the NatCen evidence, the level of people choosing European among all the other identities was running at about 15 per cent. It might be that, after June and into the future, the people who voted remain feel much more European. The symbolism might not be as effective as some people feel that is.

The identity issue affects why the debate in Britain about free movement, which is a big issue in the negotiations, is different from the debate in the rest of the EU. If you have an idea of national citizenship that involves European citizenship and a European identity—which is, basically, the norm in the other countries—free movement will be seen as a hybrid of migration and internal mobility. In the UK, free movement looks much more like a form of immigration than a form of internal mobility, because the salience of European citizenship in the UK was low, ahead of the referendum.

10:00

Brendan Donnelly: I can confirm what Sunder Katwala just said about European identity. At the time of the debates around the European constitutional treaty, I remember German friends talking about the reassurance that they believed that many German citizens derived from having a European level at which their rights were defended. There are many fewer people in this country who perceive their rights as being European rights, which is the basis of the question. Instead, they believe that rights should come from the United Kingdom, and there is a perception that rights that come from a united Europe may be in conflict with the rights of British citizens as decided by the UK Parliament. That is a debate that is much more salient in this country than it is in most continental countries.

The Convener: What might be Scotland’s position in that context, given that Scotland voted by 62 per cent to remain? The First Minister has said that she is looking for some kind of differentiated deal for Scotland. Would it be possible for Scotland, as somewhere that voted to remain, to have associate rights?

Professor Spaventa: It depends on what associate membership means. Does it involve free movement? If you interpreted it as a symbolic gesture, whereby you simply removed the need for a visa in order to travel to the EU, of course it is possible. However, if you interpret it as implying a proper and substantial status that involves free movement of workers in a way that gives people

the right to work and engage in the economic life of another member state, you again have the problem of reciprocity. It is difficult to see how you would carve out a deal just for the Scottish people. For example, you cannot say that, in the realm of economic activity, workers can exercise self-employment rights but not employment rights. That risks bogus self-employment, which evidence shows is a disaster for working standards in the affected countries. I do not see how, even if we wanted to, we could legally or politically carve out a deal that would have any significance beyond a symbolic element in relation to travelling in and out.

The Convener: We know that quite a lot of work is being done with regard to a visa for London. Last week, the committee took evidence that suggested that we have a similar issue to that in London with regard to our skilled workforce. However, we also have an additional challenge, in that, without more migration, Scotland has bigger challenges with regard to our demographics than the rest of the UK has. The UK Government has acknowledged that and has made noises that suggest that it understands that that is an issue for Scotland.

Professor Spaventa: Yes, but how would you prevent someone with a Scottish visa or a London visa—if you had such things—from moving somewhere else? Italy is a funny country, because, even after we became a member of the European Community, people from the south of Italy required a visa to gain the right to work in the north—that was because the northerners did not like the southerners. How would you enforce that? If I, an Italian, came to Scotland with a visa such as the one that you are talking about, how would you make sure that I did not end up in Durham? It would be okay if I was employed, because the Government would impose a visa check on my employer, but what would happen if I said that I was self-employed? How would that be policed? Such a system would be very difficult. How could we reconcile it with the basic idea that people should be able to move around their own state without checks? That is not so easy.

Sunder Katwala: There is international evidence of regional systems, often in larger geographical territories, but the evidence is very mixed with regard to the precise question of control in a UK context after Brexit. In the UK, the public's confidence in the Government having an immigration system that works and is well managed is very low in comparison with levels of confidence elsewhere. Until there is that confidence, the public would struggle with the idea of such a system. As the international evidence shows, people move very easily from the area in which they have a right to be.

There are exceptions, as with the fresh talent post-study scheme, where a graduate of a Scottish university who has ties in Scotland receives a job offer from a Scottish employer for a limited period of time—two or three years, say. The attraction of such a system is that we could make their future eligibility for other forms of visas or settlement dependent on their having been seen to play by the rules.

That might be a system that could win trust and which people could feel assured about, as it seems rather likely that people who are offered a place on it will play by the rules and not go and work somewhere that they are not meant to. However, the UK Government is very sceptical of regional schemes because it likes to keep the powers to itself, and there would be a problem with political and public concern until it could be shown that something that is very hard to enforce is actually enforceable.

Professor Barnard: On the point about employers having to carry out enforcement, a common misunderstanding is that immigration is all about border control—that numbers are controlled at the border. That is absolutely not the case. Border control is largely for keeping out undesirable people; it is not about controlling immigration. Immigration control is now undertaken much more by employers.

I declare an interest, wearing my employer hat, because I am senior tutor at the largest college in the University of Cambridge. The implications of a requirement for any EEA national who is working in the UK to have a visa are significant. The burden of administering tier 2 and tier 4 visas is really quite substantial, and the process is highly complex and very expensive for the individuals concerned. The prospect that employers may have to do much more of that for every EEA national is really quite concerning. That point is not unique to Cambridge; it applies to any employer who employs non-British nationals. The enforcement is done by employers, not by border guards—there is a common misunderstanding on that point.

It is also worth bearing in mind that, although we know that a lot of people were motivated to vote leave because of their concerns about immigration from the EU, immigration from third countries—non-EEA states—is in fact higher than immigration from EU states. We still have complete control over immigration from those third states, yet the numbers are higher. The difference is not significant—last year, approximately 270,000 people came from EU states and 285,000 came from third countries—but the fact is that, at present, we have complete control in that respect.

Brendan Donnelly: I agree that the cases of Scotland and Ireland are in some ways similar with

regard to possible separate visa regimes. I agree with Professor Spaventa, but I will add one further point. Traditionally—or for a long time—the British labour market has been highly deregulated. That makes it rather more difficult to police visas in a geographic area, such as a region in Spain, or London. It is very easy for people to set themselves up as self-employed, and I am not sure that all employers would be as scrupulous as the University of Cambridge in checking obligations with regard to people from the European Union who hold a Scottish or London visa.

The Convener: Of course, as of this year, Scotland will have full powers over income tax. There will be a Scottish rate of income tax. Will that make a difference?

Brendan Donnelly: It would need to be very different from what it is now for that to be a significant factor. People come from continental Europe, particularly from what we regard as central and eastern Europe, because of much higher salaries in this country, and that will not be greatly changed by changes in income tax unless they are radical.

The Convener: I say that because it will be possible to identify where a person lives because of the rate of income tax that they pay. Residency has to be determined—

Brendan Donnelly: Yes, but people from Scotland will easily be able to go to England, and my thought is that perhaps English employers and authorities might not be as stringent as might be the case in Scotland.

Professor Kochenov: I just want to throw in a basic idea that is sometimes forgotten. The EU is extremely flexible in the way that it extends rights to its own citizens outside its territory. The EU territory does not entirely overlap with the territories of the member states. We have plenty of examples from New Caledonia, French Polynesia or the Dutch overseas territories in the Caribbean where EU citizens have self-employment rights only, and no unlimited right to stay otherwise. EU workers would need to apply for a residence permit to stay there and so on. The same applies to the Greenland. There is special status for the Faroe Islands and Gibraltar—the UK participates in that.

If we draw on examples from overseas of boundaries between full membership and associate membership that are quite blurred, we see that the EU is ready to go the extra mile to meet the requirements of those territories that are rooted in their special status or their geographical and economic position. In that sense, a lot of non-reciprocal relationships apply to EU citizens in particular territories outside the EU. Something of

that kind could, theoretically, inspire negotiations. That is uncharted territory in many respects, but such negotiations could result in a special relationship between the EU and Scotland or the EU and Northern Ireland, for example.

There are some studies on that. For example, Dr Nikos Skoutaris of the London School of Economics and Political Science wrote a detailed paper on potential points of inspiration from the application of EU law overseas creating flexible relationships between the EU and different regions of the UK.

The trouble is that the majority of those countries or overseas territories that have an asymmetrical relationship benefit from the goodwill of the EU to contribute to their wellbeing and development. If the country is not as developed as the EU, it can be entitled to impose extra border controls or special rules that limit EU citizens' involvement in the local labour market while, at the same time, its residents are given full rights in the EU. You would need to prove that Scotland is, in some sense, so special that the EU is convinced to apply the same deviations from its own idea of equality.

The Convener: You are saying that it is a matter for negotiation.

Professor Kochenov: Yes. In theory, legally speaking, if you designed the relationship in a sound way, it would be possible to ask for some kind of really special treatment for certain regions, and the inspiration for that could come from overseas territories.

Ross Greer (West Scotland) (Green): My question is a bit more about political speculation than legal theory, I am afraid. A lot of the discussions that we have had so far seem to come back to the political position of the EU27 on the UK. We have touched on the breakdown in goodwill that we have seen so far. Colleagues in Brussels and Berlin have said that they realised that their side, such as it is, was going to be playing hardball when Angela Merkel dismissed Theresa May's attempts to resolve some of the citizenship issues early on.

Would you care to speculate on the potential effect on the collective negotiating position of the EU27 of the elections that are taking place across the member states next year? I realise I am largely talking about western European nations, but they are the big ones—France, Germany and, to a lesser extent, the Netherlands. Will the elections significantly affect the position? We have already seen how the issue began to creep into the French primary debates.

10:15

Professor Kochenov: The fundamental principles will not change, no matter what Government is in charge. No Government will easily accept the idea of diminishing the rights that its own citizens enjoy somewhere, so I do not see any connection or correlation between a change in Government and the idea of protecting the rights of EU citizens, post Brexit, in the UK in the context of the negotiations. In addition, the institutions of the EU will definitely play a significant role, and they are much less affected by political change in particular member states.

Sunder Katwala: We have a 12-month period, or perhaps a six-month period, after article 50 is invoked during which, if we want to check the polarisation of the British debate and the European debate, some things will have to happen in the UK. Both the UK side and the EU side have talked about their red lines, but neither side has talked very much about solutions that might fit within them. I do not think that, because of the elections, we can expect European Governments to say anything very different until after the German elections, or perhaps the French or, more likely, the Dutch elections, which might give another significant and disruptive shock. People are obviously still watching how the UK debate plays out around article 50 and whether people are sure about leaving. We cannot know what the EU Governments will actually be thinking in the last six to 12 months of the negotiations because we do not know who will be involved—for example, we do not know who will be President of France, or what the prevailing political situation will be.

There will be a period of time between the run-up to article 50 and the autumn of 2017 when we will either change or not change the UK debate, and if we hear UK voices saying that there is an appetite for a constructive future partnership, that we want to negotiate that and that we have ideas about what that looks like, we might find that there is a response in the spirit of reciprocity. At the moment, however, having two sets of debates about incompatible red lines means that, whether you want it or not, you are heading towards a harder, colder Brexit.

Professor Kochenov: Building on what Catherine Barnard has already said, I point out that migration flows in the EU are very asymmetrical, so the challenges that the UK is facing in the negotiations are very different from what France or the Netherlands would face. The UK needs to protect its own citizens in Europe and to think about those EU citizens who are present in the UK. That would not be the case in France or Poland. There are almost no UK citizens in Poland, so there is only one concern for the Polish

Government: the protection of Poles in the UK. That will definitely affect how negotiations unroll.

Sunder Katwala: You could read that differently. The Polish Prime Minister came to London and said clearly that neither the Poles or other Europeans in Britain nor the Britons in Poland want to feel like hostages to the negotiation. The Polish Government is a strong ally of the UK Government in getting the agreement of all the Governments, because it stands to benefit most from the UK Government moving its position. I continue to think that, if we could separate out the moral force of the legitimate expectations of the people who are already experiencing anxiety about those complex future political negotiations, we could get somewhere.

Brendan Donnelly: It would be only in the event of Mrs Le Pen winning the French presidential election that that election would make a significant difference. There is a desire in this country to believe that the cards will fall in the British Government's direction. They are not falling in that way at the moment, but the thinking is that there are going to be elections, so perhaps that will change, and perhaps it will change in Germany, too. However, I do not think that it will, and I agree very much that the underlying principles will be the same.

In the context of short-term timetables, it is important to differentiate between the article 50 negotiations and the long-term relationship. It is possible that the lack of a German Government until December—because, with an election in September, it might well be a little while before the Government is in play—might make the article 50 negotiations marginally more difficult, but the long-term relationship will not be decided in the next couple of years anyway. In that context, elections make even less of a difference.

Ross Greer: I am not at all optimistic about the relationship getting better; I am more concerned about how it might get worse under various post-election scenarios. I do not think that there is much optimism going round here at the moment.

Brendan Donnelly: Perhaps there is more realism in Scotland. In London, there is sometimes a view that French and German politicians of course have to talk tough about Britain for domestic audiences, but they will change their minds when they are safely re-elected. I do not believe that.

Professor Spaventa: From reading some of the European media, it seems that there is really no appetite to be nasty to UK citizens abroad. In fact, the issue is not covered at all; I think that it is taken for granted. We should remember that most member states have written constitutions with

fundamental rights enshrined. In Italy, whose legal system I know quite well, migrants would probably be protected anyway under doctrines of fundamental rights and legitimate expectations. Therefore, it is politically very unlikely that the EU will use the issue as one of its cards; legally, it would not be possible to do so because those citizens are still protected under EU law, and they would be protected by the constitutions and judicial systems of the member states. I am not very anxious about the issue, apart from in relation to the pensioners, who are a different problem, because some co-operation is needed. I do not know whether Dimitry Kochenov agrees, but—

The Convener: I am keen to move on, because we have another question from Lewis Macdonald.

Lewis Macdonald: My questions are for Catherine Barnard in the first instance. Does the European convention on human rights and in particular article 8, on the right to privacy and family life, have any implications for the position of EU citizens in the UK or UK citizens in the EU? Might that influence the approach by the UK or the European Commission to negotiations?

Professor Barnard: Article 8 certainly will help EU nationals here and UK nationals elsewhere. Of course, as Professor Spaventa said, most other member states have not just the ECHR but national constitutions, which have fairly robust fundamental rights protection that is sometimes better than that provided by the European convention.

In the UK, we still have the Human Rights Act 1998, which gives effect to article 8, although that protection is not always as robust as people might think. It is stronger in respect of deportation than it is in respect of family reunification. However, it certainly gives some rights, even in the worst-case scenario, which I think we would all agree is that two years expire, there is no deal at all and the article 50 period has not been extended, as that would require unanimous voting. That would be not just a hard Brexit but a disorderly and chaotic Brexit, but the Human Rights Act 1998 would apply, and there are also public law doctrines that are based on legitimate expectation. Were there suddenly to be a desire to deport all the EU nationals who live in the UK, the courts would be swamped with challenges based on the ECHR and traditional British public law doctrines.

The Convener: Professor Kochenov is nodding.

Professor Kochenov: I fully agree. The ECHR will play a decisive role in protecting those who would otherwise be left without any protection, should a disorderly Brexit happen. I agree entirely that article 8 will play a fundamental role there.

Sunder Katwala: It is important to point out that such a scenario would be shocking. As Professor

Spaventa said, there is a legal backstop, but that is very much a second or third-best approach. That would be a slow, costly and uncertain way of finding out that some people have article 8 protections and others do not.

A shocking scenario of mass deportations could be successfully challenged legally in more than two years' time—if someone started trying to do that—but in the meantime we have 4 million people who would like to hear something before we settle all the questions. That is where the civic pressure should be. It is in nobody's interests to end up with a large, irregular group of people who could have had their rights protected.

Aside from being part of the pressure to get a guarantee, as Scottish opinion in general has been, the Scottish Government can play a specific role in providing advice to people who have not previously needed it, such as EEA nationals. Employers are eager to help if they know what to say but, at the moment, they have anxious employees and cannot reassure those employees because they are not sure what to say. There will need to be targeted advice for the self-employed and those who are in vulnerable employment. Local authorities and the Scottish Government will have a big role in getting advice to people who might not hear what the processes are.

Brendan Donnelly: A few years ago, there was substantial pressure in the Conservative Party to at least redefine and possibly even abandon British agreement to the European convention on human rights. All that we have discussed in the past few minutes is predicated on the assumption that we will continue to be a signatory to the ECHR, which I would like to point out is not necessarily a cast-iron assumption.

Professor Spaventa: From a legal viewpoint, it could be argued that until the UK leaves the ECHR—if we come out—the relationship before that moment will continue to be regulated by the ECHR. If, for example, the Home Office said that Eleanor Spaventa needed to go back to Italy, my relationship until the moment that we left the ECHR would be regulated by article 8, so I would be able to rely on that in respect of everything that happened before then.

I am slightly less optimistic about the beauties of article 8, because the European Court of Human Rights has given a huge margin of appreciation to member states in immigration matters. That is very strict and there is nowhere near as much protection as might be expected. As we said, the idea that every EU citizen in the UK would have to go to court to seek recognition of basic rights would be very disappointing and very costly.

Lewis Macdonald: That is so, but my question was partly about the decisions that the UK

Government has to make about its treatment of citizens from other countries who are already here and its approach to negotiations. I was suggesting that the rights under article 8 could influence the approach that the UK Government takes because, if it took an unhelpful approach, it would run the risk of judicial chaos and courts filled with applicants claiming their rights under the ECHR.

The Convener: What does the panel think of the possibility of the UK Government reaching bilateral agreements with individual EU states? We have talked about the number of UK citizens in Spain, for example, so is there any possibility of a bilateral agreement happening there?

Sunder Katwala: If EU member state Governments made an agreement to uphold the rights as they were—if there were a permanent-leave-to-remain status for ex-EU citizens that was reciprocated at EU level—there would be a commitment to implement that in national law. Exchanges about and scrutiny of pension systems would then be needed. Bilaterally, we uprate some pensions—pensions for those who retire to Canada are not uprated, for example, but they are uprated in other countries.

Agreement would be needed at the European level on the principle that was being applied, so some adjudication would be needed to ensure that everyone did what they were meant to do at the national level. The bilateral discussion should be about implementation; a more dispersed bilateral agreement would be rather difficult to work through.

10:30

Professor Kochenov: Bilateralism would imply throwing away the idea of EU citizenship for the member states of the EU. Once we go bilateral, the presumption is that different EU citizens will get different rights that depend on their association with the EU member state, while all the ones who interest us are here in the UK. There would be an extremely strong aversion to that in the European Union, at least until the Brexit agreement was reached. The Brexit agreement will necessarily have a lot to say about free movement and how the situation of those who have moved is regulated. Bilateral arrangements will probably be possible in the future, once the agreement is in place, but they will not happen until all the key questions have been answered. In that sense, I fully agree with what has been said.

Brendan Donnelly: I agree that there is no chance of bilateral arrangements before Brexit. There is always a temptation for negotiators who are negotiating with a large group of other people to try to split some of them off, and I would be amazed if the hope of doing that does not reside

somewhere in the Foreign Office, where I used to work. However, I think that that is a vain hope.

It will be a question of what happens in the final exit negotiations. It might well be envisaged that there will be bilateral arrangements afterwards, or it might be envisaged that, on the contrary, bilateral relations will be forbidden because the EU has decided that negotiations must be with the bloc even after Brexit. However, I cannot see the question being on the table until Brexit has occurred.

Professor Barnard: I broadly agree, but I would like to make two points. First, although immigration from third countries used to be a matter for the domestic law of the individual member state, there is a growing body of EU rules that regulate immigration from third countries. For example, there are rules on long-term residents, on family reunification, on highly skilled so-called blue card workers, on seasonal workers and on intracorporate transfers. There is an increasing volume of EU law on the position of third-country nationals. Paradoxically, those rules will apply to the UK once we leave the EU, albeit that we have opted out of them while in the European Union.

Secondly, we must remember the capacity issues that would relate to any bilateral agreements. As the committee knows, the UK is determined to engage in free-trade deals if we come out of the customs union, and negotiating a free-trade deal is a hugely demanding exercise. The most recent trade deal with Canada has taken up to nine years to negotiate, depending on how the time is counted. If trade deals are going to be negotiated, that will require a vast civil service resource, and it is important to remember that the civil service—certainly at Westminster—is probably at its lowest level since the end of the second world war. There are serious capacity issues.

The Convener: We will have to wind up soon. Professor Spaventa, could you please clarify something? You said that you think that EU law will protect UK nationals who live in EU countries. How exactly will that happen?

Professor Spaventa: At the moment, UK citizens are protected as EU citizens because they have exercised a right that is granted directly by EU law. For me, it is unthinkable that somebody who has EU citizenship at the time of exit will be treated as a third-country national, because there is quite a complex body of case law. When the person exercised the right, they had that right, and a person who has lost that right should be treated differently under European law from how a Canadian or whatever would be treated.

That is particularly true because third-country national family members—the spouse or the

children of a worker—keep the right to reside in the host member state in certain circumstances, even including when the main right holder has left. Here is an example. I am Italian and I bring my Canadian husband here. I then decide that I do not like the UK any more—and neither do I like my husband any more—and I go back to Italy. In European law, my husband will keep rights. He will be protected as a special person; he will not be treated as a third-country national.

Because of Brexit, rights will change, but it is unthinkable that UK citizens who have exercised their EU rights would be treated worse than my Canadian husband. That is because of a series of constitutional constraints and principles that the European Court of Justice and the European institutions have elaborated on in the past 20 years.

I am happy to elaborate more, but the matter becomes awfully complicated.

The Convener: Does Professor Barnard agree with that?

Professor Barnard: Yes. The situation is not straightforward. As a fallback position, British nationals who are in, say, France and have been living there for some time would as a minimum be able to take advantage of the long-term residents directive, which gives rights to third-country nationals who have resided for a long time in an EU country.

Professor Kochenov: Unfortunately, the Netherlands has sad examples where formalism has prevailed. The Netherlands went through a similar process of decolonisation to the UK. At the beginning of the 1980s—I think that it was on 1 January 1981—Suriname nationals suddenly discovered that they were treated as third-country nationals who came from nowhere, and the history of their Dutch citizenship throughout their lifetime was ignored. Not a single Netherlands court has done anything to alleviate that pressure. We had to wait for the European Court of Human Rights to comment, and a body of case law has come from Strasbourg that reminds Dutch courts to take into account the history of those people's status. If it were not for that court, the national system would not protect them.

I do not say this to disagree with Professor Spaventa, because I believe that EU law will have a lot to say, but that belief should be a bit qualified. To build on what Professor Barnard said, the directive on third-country nationals who are long-term residents will help to regularise the status of UK nationals who are resident in the EU. They cannot lose their status as EU citizens, but the trouble is that they can lose their status as long-term residents of the EU. That may be as a result of absences; there are conditions in the directive

on that. Therefore, the status is not absolute and it provides a lower grade of protection compared with EU citizenship. In that sense, a priority of the negotiations—this is probably where I disagree with Professor Spaventa—should be to come up with better protection in the leave agreement, which will need to be granted to UK citizens who are present in the territory of the 27 EU member states.

The Convener: To finish off that point, will our panellists say in a couple of sentences whether the issue of rights will be settled under the article 50 timescale or whether a transition period will be required?

Sunder Katwala: The question for the people who are resident in the EU can be settled under article 50, which is important, because the decision would be taken by qualified majority voting in the European Council of Ministers and could not be held up unreasonably by one partner acting tactically. The key point is to press for the matter to be settled right at the start—by declaration and on day 1. At the moment, there is a block on the sequencing of something that everyone should and can agree on: what the etiquette and the dance for getting there should be. If the block is no negotiation without notification, the big point that people want to hear about can be settled on day 1. If the principle is that nothing is agreed until everything is agreed, everybody will be waiting another two and a half years to get clarity on something that is causing a lot of anxiety now.

Professor Spaventa: I entirely agree that this is an article 50 matter. Indeed, it is one of the main article 50 matters, because it is about what to do with people who are exercising their rights at the moment of exit. There is no one among my academic and non-academic colleagues, as well as among employers and so on, who would not wish for this to be settled as soon as possible. It would be sad if the EU or the UK did not get it out of the way as the first issue, but we live in sad times, so I am not sure that I can foresee what will happen.

Professor Kochenov: I fully agree. The follow-up question is: how much will article 50 be used to define the future relationship? It seems as though, among the EU institutions, the prevailing opinion is that article 50 is only step 1 and the real agreement comes at step 2. However, plenty of member states disagree with that. In that respect, article 50 clearly can be used to define the future relationship. If that is done, we can also have a long-term vision of what citizenship will entail for UK citizens in the EU and EU citizens in the UK by granting their rights under article 50.

The Convener: Professor Barnard, can the issue be settled in two years?

Professor Barnard: Resolving the situation for those who have moved can be done within the two years, but it is worth remembering that the period will not be two years: the negotiations will be for only about 15 to 18 months, because time will be needed to get the agreement through the European Parliament.

As a footnote, we have talked quite a lot about the position of people who have been here for a long time—for five-plus years. What will be much trickier to negotiate on is the people who have been here for fewer than five years—particularly those who are here on a rather peripatetic basis and who do not have a consistent profile of work or self-employment—and on how we will operationalise recognition of them. Perhaps we will take a simple approach and say that everyone who is an EU or EEA national who is here on a particular date will enjoy the rights of free movement, irrespective of how long they have been here. That would go against the grain of trying to control migration, but it would reduce the bureaucracy quite considerably.

Brendan Donnelly: Most of the questions about future rights will not be solved under the strict article 50 negotiations—that is, they will not be concluded in two and a half years' time. Elements might be fished out—perhaps we have identified some of them today—but they will be the exceptions.

On the EU and the British sides, there are enormously powerful political constraints that might well lead to the sense that nothing can be agreed until everything has been agreed. Paradoxically, that would reflect the strength of the EU position and the weakness of the British position but, by different processes of reasoning, the sides may come to a similar conclusion.

The Convener: I thank all our witnesses very much.

10:43

Meeting continued in private until 11:20.

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