

**A CHALLENGE TO THE INVOLUNTARY LOSS OF EUROPEAN CITIZENSHIP
FOR 64 MILLION PEOPLE AND THE THREAT TO THE RIGHTS OF ALL
OTHER EUROPEAN CITIZENS**

I. INTRODUCTION

Our choice can hide another. In the case of the vote in the referendum of 23 June 2016 on UK membership of the EU, the hidden consequence was to set a course to deprive 64 million people of their European citizenship. If one's state is a member of the EU, one's nationality gives one the status of Union citizen. In terms of Article 20 of the Treaty on the Functioning of the European Union (TFEU): "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union." It follows that every person who is no longer a citizen of a country which is a Member State loses his or her European citizenship. Can, though, such an unprecedented and large-scale loss of a citizenship occur just like that? This article challenges such an assumption by asking three questions:

- (i) Were voters informed in advance of the referendum of the potential loss of European citizenship?
- (ii) Is the loss acceptable when those most affected were disenfranchised in the referendum?
- (iii) Can massive involuntary loss of citizenship occur as a hidden consequence of a referendum?

The official definition of Union citizenship can be found in Articles 18-25 (TFEU) giving 508 million people rights to equal treatment and protection against all forms of discrimination. EU citizens have the right to move freely to work, live or study anywhere in the Union, provided they have sufficient resources and health insurance so as not to become a burden on the host Member State. EU legislation on residence rights of EU citizens and their family members, the co-ordination of social security entitlements, and the recognition of professional qualifications seeks to remove barriers to the citizenship right of free movement. European citizens receive consular protection in countries outside the Union where their own country is not represented. Political rights are attached to the status of European citizenship since European citizens can vote and stand in local and European elections in countries other than their own. Over 1 million citizens from a minimum of 7 of the 28 Member States can also present a demand for a new law to the European Commission. An example of such a European citizens' initiative (ECI) might be one demanding full political rights for European citizens by extending the rights to vote in local and European elections to regional and national elections as well as referenda. To enforce European rights an EU citizen may appeal to a national court which may refer the case to the Court of Justice of the European Union. There are also rights

to be informed, heard, complain to the European Commission, appeal to the European Ombudsman or petition to the European Parliament. Other pieces of this citizenship are scattered across other parts of the Treaties, EU legislation, research, exchange and educational programmes such as Erasmus. Whilst the first right of the European citizen is to move freely around the Union, it is wrong to reduce this citizenship to rights that are triggered by crossing a border. Equality between female and male workers, many standards of health and safety at work and other workers' rights derive from European law. European law also affects our rights to privacy, environmental or consumer protection, which can only be guaranteed by legislators working together across Europe. In its guidelines, ECIT has brought together this scattered citizenship to show both that it is more than the sum of its parts and that reforms are necessary for it to become a citizenship for everyone.¹

And this is not all. For many especially among the younger generation, these rights are simply the translation by the EU of a sense of being European. With the freedom of a continent since the fall of the Berlin wall stretching from Edinburgh to Belgrade, Lisbon to Riga, European citizenship is now a fact of life taken for granted. The first transnational citizenship of the modern era finds legal expression in the EU, whilst being a European citizen runs historically deeper and geographically wider across the continent. It is not just about rights and having a voice in EU affairs. It is also about broadening one's horizons, enjoying a wide range of associative relations with others across national boundaries. It makes another world visible anchored in the values of diversity and non-discrimination, and keeps alive a European dream which seems to be fading from a crisis-ridden EU. What else can hold Europe together? Losing European citizenship is not therefore just about giving up a set of cross border entitlements to move freely around Europe, it is also about losing out on a status which will never replace national citizenship, but which could become much more important in future. It is more than just free movement. When Union citizenship was introduced in 1993 by the Treaty of Maastricht it was not confined to any particular set of rights and as a status which can be developed.

II. OBJECTIONS TO THE DEPRIVATION OF EUROPEAN CITIZENSHIP

The withdrawal of a Member State from the European Union is an unprecedented situation. The EU Treaties are silent on how the impact on citizens in the leaving and remaining states should be considered. As a result, 3.3 million European citizens living in the UK and 1.3 million from the UK have no answers as to whether their acquired rights will be respected and face an uncertain future. Neither the chapter on Union citizenship nor Article 50 on withdrawal of a Member State from the Union provide guidance. The UK government, despite a recent court ruling that the British Parliament must be consulted, in part because individual rights are involved, is determined to trigger Article 50 by end of March 2017. There are then likely to be a minimum of two years of negotiations which ought to be concluded before the next

¹ Guidelines for European Citizens' Rights, Involvement and Trust available at <http://ecit-foundation.eu/ecit-initiatives/ecit-guidelines/>.

European elections in 2019. Until then, UK citizens remain EU citizens, after which they stand to lose that status, unless a way can be found to base European citizenship not only on nationality of a Member State but also on residence.

(i) Were voters informed in advance of the referendum of the potential loss of European citizenship?

If the attention of voters had been drawn to this potential impact on their citizenship before the vote, it would be logical to accept that this was indeed the democratic decision of the majority. No evidence is however available that European citizenship as such was raised in the run-up to the referendum. In retrospect, this is surprising because a feature of the campaign was warnings by the “Remain” side of the consequence of withdrawing from the EU. In the case of European citizenship, the consequences could and should have been clear, since Article 20 is self-explanatory. One answer is that the Treaties, with the exception of Article 50, were absent from this referendum by contrast with others held in France, the Netherlands, Ireland or Denmark on successive Treaty reforms. Despite this, it is surprising that such a clear impact of leaving the EU was not highlighted. It is more surprising since there was an over-abundance of warnings about the risks of leaving the EU. The campaign focussed on forecasts of the economic consequences by the UK Treasury, the OECD, or the IMF. The focus of the campaign was not on the Treaties but on whether the country should remain a member of the EU and the economy.

Another explanation for the failure to inform voters about the potential loss of European citizenship is that this status has little resonance in the UK where most people do not see themselves as part of the European family. Within all countries there is a socio-economic rift with a sense of European citizenship predominating among those with experience of a period studying or working in another country with the necessary knowledge and language skills, whilst those who do not have such advantages see themselves as national citizens only, and they do not see the relevance of a European citizenship. In general, however across the EU a sense of seeing oneself in some sense as a European citizen has progressed, even at a time when support for the EU and trust in its institutions has declined. This is still only a start. Of the 66% who feel that they are European citizens in some way, 28% claim that they are “definitely” European - the largest proportion ever recorded for this question; whilst 6% see themselves as more European than a citizen of their country. A generation after Union citizenship became a formal status, awareness of European rights and support for this concept has increased, but about one third of people on average across the EU still do not see themselves as European, but only as national citizens. In general, European citizenship has however enough support in the EU so that could not simply be so silently and involuntarily lost without any significant warning. In the UK, this was possible because opinion about European citizenship does not follow the EU average consensus, with by contrast two thirds of people seeing themselves only as citizens of their country. When it comes to knowledge of

their European rights, people in the UK are however close to the European average.² There was no strong basis in public opinion to raise the issue of European citizenship. The official discourse applies the term “European citizens” to nationals of other Member States resident in the UK – a kind of shorthand – whereas it is not a term the British apply to themselves. This does not mean however that had they been informed, the voters would have been indifferent to losing the status of European citizens. It is only now that the status risks being lost that it is being raised publicly.³

Was there a duty to inform voters of the potential loss of European citizenship? Even a wide-ranging debate cannot be expected to capture all ramifications of a country’s relationship with the rest of Europe. In this case, however it is different because Article 20 makes it clear that the status of Union citizenship is an automatic consequence of membership of the European Union. The opportunities to draw attention to European citizenship were not lacking, to some extent “the elephant in the room” or the large problem which remains none-the-less hidden from view. A key theme in the last stages of the campaign was opposition by the ‘Leave’ campaign to free movement of people with the EU, linked to migration. Free movement is the first right of European citizenship. In a paper sent to every household entitled “Why the government believes that voting to remain in the European Union is the best decision for the UK”, the central argument is that remaining in the EU is good for jobs and the economy, whilst UK holiday makers benefit from cheaper air fares, roaming charges and access to health care. The document fails to mention European citizenship even when it summarises its substance: “EU membership means you and your family have the right to live, work or study abroad in any of the 27 member countries. It also guarantees many employment rights.” Mention of European citizenship was also absent from the government publications on the consequences of withdrawing from the EU. Moreover, European citizenship is not mentioned either in the 2016 EU referendum voting guide published by the Electoral Commission. EU citizenship as such was not raised during the campaign because the “Remain” camp did not want to give more ammunition to the anti-immigrant stance of the “Leave” camp. Silence on European citizenship has been the policy of successive governments. UK passports include the words “European Union” but not the words “Citizen of the European Union”.

(ii) Is the involuntary loss of European citizenship acceptable when those most directly concerned were disenfranchised?

The failure by the government and campaigners on both sides in the referendum to inform people of the risk of losing European citizenship was compounded by the decision not to give the right to vote to those most concerned. As already pointed out, with the introduction of Union citizenship in the Maastricht Treaty in 1993 the rights to vote and stand in local and European elections in an EU county other than one’s own were established, but not in regional

² Standard Eurobarometer no. 85, Spring 2016.

³ See for example The Guardian of 9 November 2016 “EU citizenship proposals could guarantee rights in Europe after BREXIT”. This refers to a proposal by Luxembourg MEP Charles Goerens for an associate EU citizenship: “The idea is simply to guarantee to those who want it, some of the rights they had as full EU citizens”.

and national elections or referendums.⁴ The UK has no special rules for referendums, the rules and franchise being treated on a case-by-case basis. The government adopted for the referendum of 23 June the same franchise as for a general election, as had been the case in the 1975 referendum on continued EEC membership, despite the introduction in the meantime of EU citizenship. The disenfranchisement of up to three million prospective voters tipped the scales in favour of the vote to leave, which was won by a narrow majority. There were also a number of paradoxes in the franchise. EU citizens from 24 Member States had no right to vote, the exceptions being Cyprus, Malta and Ireland, the latter because of a special Treaty. Citizens from Cyprus and Malta were able to vote as two of the 55 countries making up the Commonwealth, whose residents participated in the franchise, whilst the EU did not. The 16 and 17 year olds able to vote in the 2014 Scottish referendum could not in the 2016 UK referendum where an amendment to extend the vote to them was defeated in parliament. If European citizenship, which was so directly at stake after all under Article 20 TFEU had been considered, could such discrepancies in those eligible to vote have been eliminated?

A further anomaly was that British citizens living abroad could vote in the referendum as they could in a national election, but were not eligible to do so after being resident outside the country for over 15 years. Two claimants, Schindler and MacLennan who had not registered to vote for more than 15 years appealed against their exclusion from the EU referendum on the grounds this restricted their rights to free movement without objective justifications. The Divisional Court examined case law of the Court of Justice of the European Union in Luxembourg and the Court of Human Rights in Strasbourg. The Court concluded that the 15-year rule was justified as a measure in support of a legitimate aim, to secure a relevant connection to the UK, as a qualification for the franchise. The judges did however “acknowledge the very real and personal interests which these claimants have in the outcome of the EU referendum”. It is coming to be recognised that cheaper travel and the internet make it easier for expatriates to remain connected to politics back home and that in democracies exceptions to the right to vote should where possible be eliminated. Ironically when this case was heard the conservative party had already promised a “votes for life” bill to abolish the 15-year limit, a commitment which was re-affirmed by the government after the referendum.

In a majority of EU Member States, citizens retain rights to vote irrespective of their place of residence. The European Commission has recommended that disenfranchisement in national elections should be phased out in the minority (Cyprus, Denmark, Ireland, Malta as well as the UK). These countries and a further group of other countries restrict the franchise in referendums. In this respect there is a patchwork of discrepancies for expatriate voters⁵, which in some cases would make a difference to the outcome. This was certainly the case with the referendum of 23 June. This is not just though an exercise in statistics or speculation as to how people might have voted if they had had the opportunity to do so. Political rights are the

⁴ At the ECIT Summer University on European citizenship participants agreed to explore launching a citizens’ initiative demanding full political rights for European citizens (29-31 August 2016 at the Maison des Associations Internationales in Brussels).

⁵ European Commission recommendations of 21.1.2014 “Addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement” (COM (2014)311 final).

defining rights of citizenship not just because people have a formal right at the ballot box to decide on a particular issue or who should represent them. Disenfranchisement also means being excluded from the campaign leading up to the vote. European citizens living in the UK were certainly made to feel that a decision affecting their future was not for them and were understandably reluctant to voice their concerns. If they had had the right to vote as a sizeable proportion of the franchise, would the deafening silence about European citizenship have continued? The government and the ‘Remain’ and ‘Leave’ campaigns would have had to explain their positions on the future of European rights much more clearly.

(iii) Can massive involuntary loss of citizenship occur as a hidden consequence of a referendum?

The answer to this question depends on how this status is regarded. Is European citizenship merely a complementary status to national citizenship, in which case the decision on its future lies solely with the UK when applied to its own citizens? A declaration attached to the Maastricht Treaty stated that “the question of whether an individual proposes the nationality of a Member State shall be settled solely by the reference to the national law of the Member State concerned.” The most obvious answer is that the involuntary loss of EU citizenship can be imposed by the exiting state. Certainly, Union citizenship is not a post-national status in its own right, but it has developed significantly since Maastricht from “citizenship light” to “real citizenship”. In a series of landmark judgments from *Maria Sala* (Case C-85/86) to *Ruiz Zambrano* (Case C-34/09), the Court of Justice of the European Union has made free movement a right of citizenship which can be invoked in a court. The Court has declared repeatedly that “Union citizenship is destined to be the fundamental status of the nationals of the Member States, enabling those who find themselves in the same situations to enjoy the same treatment in law, irrespective of their nationality, subject to such exceptions as are explicitly provided for.” European citizenship has developed to the extent that it must be taken into account by Member States when they take decisions on nationality, rather than just being the result of those decisions. (cf. *Rottmann*, Case C-135/08). In terms of the status given to Union citizenship by the European Court, does the UK have an obligation to clarify how it sees its future for its own citizens after withdrawal from the EU? The fact that Union citizenship has become more than just an automatic tributary of national citizenship raises further questions. Since the status involves transnational rights, can its future be decided unilaterally by one Member State without reference to the EU Institutions or the Member State of residence? The fact is that in an unprecedented situation no one knows the answer. Guidelines could not be established only from applying principles of EU law; international law therefore becomes relevant.

As a “fundamental status” and no longer a symbolic or second-order status, it can be argued that similar tests can be applied to the acquisition, enjoyment or loss of European citizenship as to national citizenship. For example, there is a presumption in international law that where possible loss of citizenship should be avoided or forbidden. This is reflected in Article 15 of

the Universal Declaration of Human Rights according to which nobody shall be arbitrarily deprived of his nationality, nor deprived of the right to change his nationality. The concern of the international community is to avoid statelessness, which does not apply to deprivation of European citizenship. None the less, some people identify as strongly with European as they do with national citizenship. Loss of citizenship should only occur as a last resort and where it does, it should be possible to challenge such a decision in a court. There should be effective remedies provided against violations of the right to a citizenship, including European citizenship.

Whilst the status of European citizenship derives solely from being a national of a Member State, its practice goes beyond the border. The rights to transfer social security benefits or the guarantee that professional qualifications will be recognised in another Member State on equal terms with their nationals gives this citizenship a bilateral and European dimension. Moreover once a citizen and his or her family are established in another Member State, they will have organised their lives, careers and children's education. They will have done so on the assumption that being European citizens, they will be able to remain European citizens for the rest of their lives. In a case *Kuric v. Slovenia* (Application no. 26828/06 of 26 June 2012) the European Court of Human Rights in Strasbourg found that over and above such practical considerations, there is a strong link between the right to reside in a certain territory and the human right to private and family life as laid down in Article 8 ECHR: "It must be accepted that the totality of social ties between migrants and the community in which they are living constitute part of the concept of private life". The applicants in this case were nationals of the former republic of Yugoslavia with, in the opinion of the Court, "a stronger residence status than long-term migrants" in Slovenia, and which could not be annulled on the basis that they now had to have Slovenian citizenship. The key sentence in *Kuric* is "once you have lawfully established residency, you keep the rights of residence, even if the legal status of either your home state or your host state changes and, as a result of this change, your new nationality would no longer give you a right to residence."⁶ In a different context EU law has also come to recognise that divorced or widowed third country nationals who are part of an EU family have a right to remain (Directive 38/2004 on the rights to free movement of EU citizens and their family members). If European citizenship is seen as a "fundamental status" it is because it is one linked to and affected by the Union and not only by one's Member State of origin. Whilst a main focus of concern must be on people who are long-term residents in a country other than their own, there are millions of others who are also affected. The practice of European rights goes well beyond this core group: there are those who study or work across borders physically or virtually. There are also those who make use of their European rights at home and still feel they are just as much European citizens.

III. CONCLUSION

In the aftermath of the UK referendum of 23 June 2016, any questioning of the process is interpreted by the 'Leave' campaign as an attempt to overturn the results of a democratic

⁶ European citizenship after BREXIT by Patricia Mindus. The *Kuric* doctrine pages 13-14.

decision.⁷ There is however no basis for claiming that the loss of European citizenship was decided democratically: it was simply absent. Can anyone seriously claim that 48.1% of voters who opted to stay in the EU voted for EU citizenship whereas the 51.9% voted against? That would be an insult to many who voted against the EU who regard themselves as European. Attitudes to European citizenship and in particular the promise it holds out for future generations may not be the same as attitudes to the EU. Sociological Europe may be very different from political Europe. The consequence of the referendum was involuntary loss of a citizenship status on a massive scale. The consequence occurred because voters were not informed in advance despite the automatic link between membership of the EU and Union citizenship as well as countless opportunities to clarify the issue, notably in the document sent by the government to every household. There was a duty on the part of the authorities and the campaigners to inform, and collective failure to do so.⁸ This failure was compounded by the disenfranchisement of those most concerned by the result as regards their European citizenship status. Since Union citizenship has developed to become “a fundamental status of nationals of Member States” whilst going beyond their jurisdiction, involuntary loss of the status should not be decided just as the hidden consequence of a referendum in which those most concerned had no part. Is European citizenship so meaningless that it can continue to be ignored in the aftermath of the referendum? Should citizens from other EU countries resident in the UK and UK citizens resident in the rest of the EU simply become bargaining chips in negotiations among governments and EU Institutions under Article 50?

Faced with a very uncertain situation for themselves and their families, many European citizens from the UK are not waiting for an outcome of the negotiations and finding their own solutions. More and more people are making inquiries with the town hall about acquiring the citizenship of their Member State of residence but often the conditions and paper work involved are a deterrent. The conditions for naturalisation differ markedly across Member State with a ten-year period of prior residence demanded in Spain, Austria, France or Italy going down to five in France, Belgium or the Netherlands. In other cases, whether or not they have practiced their rights as European citizens, UK citizens are taking advantage of the relative ease by which they can become Irish citizens if they can show a family connection.

Another possibility could be for European citizens in the UK and UK citizens in the rest of the EU to apply for a status of long-term resident for which the five year period to qualify is the same under both European laws on free movement and residence of EU citizens and third country nationals. Proving this status and processing the applications could be a major challenge for the administration leading to considerable blockages and delays. A likely outcome of the negotiations, particularly in the case of a “hard” BREXIT will be to leave a majority of former EU citizens in as well as European citizens resident in the UK in a state of limbo. Beyond the two-year period of the negotiations, it is likely that a long transitional period

⁷ See for example the press attacks on the claimants and the judges following the high court judgement in the UK on the role of Parliament in the application of Article 50.

⁸ A duty to inform can be derived from principles of international law “European citizenship after BREXIT” by Patricia Mindus (Draft – August 2016) page 11 and footnote 26 quoting the International Law Commission “Articles of nationality of natural persons in relation to the succession of states”.

will be necessary to absorb the consequences for European citizens resident in the UK and UK citizens resident in the EU and establish their future status and rights.

A possible solution advocated in the petition prepared by ECIT to the European Parliament would be to allow UK citizens who practiced their rights as European citizens before the 23 June referendum to keep this status provided the UK upholds reciprocal rights for European citizens in its territory. The petition proposes that the European Parliament should organise a public hearing of experts in European and international law related to citizenship, particularly since the loss of EU citizenship was an involuntary and hidden by-product of the referendum. Moreover, BREXIT creates an unprecedented and complex situation in which the best course for the defence of European rights must be to involve parliaments. The referendum was not a vote against European citizenship and the status cannot be so easily swept aside. The petition is asking the European Parliament to consider whether in the unprecedented situation of a Member State withdrawing from the Union, the status of European citizenship can be preserved. Ever since Union citizenship was introduced by the Maastricht Treaty, human rights, migration organisations and civil society in general have advocated a more inclusive European citizenship based not only on nationality of a Member State but also long-term residence. This demand, which in the past was also supported by the European Parliament, should be revisited.