



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: Citizens' Rights

Tuesday 31 October 2017

10.45 am

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Members present: Lord Cromwell (The Chairman); Lord Cashman; Earl of Kinnoull; Baroness Neuberger; Baroness Shackleton of Belgravia.

Evidence Session No. 1

Heard in Public

Questions 1 - 8

Witnesses

[I](#): Dr Kirsty Hughes, University Lecturer in Public Law, Fellow & Director of Studies, Clare College, University of Cambridge; Dr Dimitrios Giannouloupoulos, College Associate Dean & Senior Lecturer in Law, Brunel University London, Director Britain in Europe; Ms Jane Golding, Chair, British in Europe; Professor Stijn Smismans, Professor of Law, School of Law and Politics and Director of the Centre for European Law and Governance, Cardiff University, Adviser to the3million.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witnesses

Dr Kirsty Hughes, Dr Dimitrios Giannouloupoulos, Ms Jane Golding and Professor Stijn Smismans.

Q1 The Chairman: First, I welcome our witnesses, a very distinguished gathering of legal academics. I will ask you all to introduce yourselves, one at a time, in a moment. I also welcome the scholars at the back of the room from the London School of Economics, who are all studying European law and have come to watch this session. It is very nice to see you all. I hope you find it illuminating and have an opportunity to learn something from the people of great experience who are sitting in front of me. Perhaps you could introduce yourselves. Perhaps Ms Golding could start first. Please tell us where you are from and your area of expertise. We will then move across the line.

Ms Jane Golding: I am the chair of British in Europe, which is a coalition of 10 core UK citizens groups across the EU. I am part of the core advocacy team of British in Europe and a lawyer specialised in EU law, based in Germany.

Professor Stijn Smismans: I am professor of EU law at Cardiff University, where I have been based for 10 years now. I am Belgian in origin. I have been advising the 3million association on how to defend the current rights of EU citizens.

The Chairman: That represents the 3 million people in Britain who are European Union citizens from other parts of Europe.

Professor Stijn Smismans: Yes. The 3million is a bottom-up organisation that tries to represent them. They are all volunteers who have gathered information on the effects of uncertainty. They are trying to put forward some legal answers, and there is a small group of legal advisers.

Dr Kirsty Hughes: I am a lecturer at the University of Cambridge. I am an expert in human rights law, in particular the European Convention on Human Rights and Article 8 of that convention, which protects private and family life. My research examines the role of human rights law in precluding expulsion of EU nationals, and I am also interested in the possibilities of human rights law to do more for migrants in periods of uncertainty. Thank you very much for this invitation.

Dr Dimitrios Giannouloupoulos: I am a senior lecturer in law at Brunel University London. I am a graduate of the Sorbonne law school, where I undertook my PhD thesis on aspects of Article 8 of the European Convention on Human Rights applied in the criminal justice context. I am the founder and director of Britain in Europe, a think tank that brings together academics, legal professionals, former civil servants and members of human rights NGOs. I am also working very closely with New Europeans, a civil rights organisation that represents the rights of European Union citizens in the UK but also defends those of the British in Europe. Thank you very much for having me here.

The Chairman: I am very anxious that we pronounce your surname properly. Could

you help us?

Dr Dimitrios Giannouloupoulos: It is Dimitrios Giannouloupoulos.

Q2 The Chairman: Thank you very much indeed.

I just want to explain the practice here. This session is open to the public and a webcast of the session is made. It goes out live and is subsequently accessible on the parliamentary website so that people can revisit your testimony. A verbatim transcript will be taken of the evidence and it, too, will be put on the parliamentary website. A few days after the evidence session you will be sent a transcript, so you have the opportunity to check it for accuracy. We would be grateful if you would advise us of any corrections as soon as possible after receiving it, so that we have no delay in getting it on to the website. If, after this session, you want to clarify or expand anything—if you feel that you did not give an answer you are satisfied with—please communicate with us and submit supplementary written evidence.

Shortly after the referendum, we on this Committee held an inquiry on the position of European Union citizens' rights: the rights of European Union members living in this country and British citizens living in other parts of Europe. This is really a follow-up inquiry. Our report was published and we had hoped that it would influence the negotiations, but no conclusion seems to have been reached in the negotiations; we had hoped that we might have had some sort of decision by this time. We therefore wanted to hold a follow-up inquiry and speak to people in the know about the experiences of Europeans here and British Europeans living in other parts of Europe, and the impact of this, and to revisit that inquiry so that we might follow up with those who are part of the negotiating team and with government.

I will start by asking about a recent Statement that was made in Parliament by the Secretary of State for Exiting the European Union, David Davis. He suggested that progress had been made. Do you agree with that assessment?

Dr Dimitrios Giannouloupoulos: It is fair to say that some progress has been made on the detail that is being negotiated, and I will elaborate on that. At the same time, I am afraid that this view fails to acknowledge three major flaws in the negotiating approach being taken right now.

First and foremost, everything depends on a deal. With no deal, there is no protection and we risk falling off a cliff. The threat of no deal looms over the lives of EU citizens.

Secondly, we must take note of the fact that as long as negotiations continue, uncertainty continues. The current situation exacerbates it. Irrespective of how much progress we may have made on the technical detail, we continue to face significant uncertainty.

There is a third flaw, which can be broken down into two main oxymorons, and here I will be as concise as I can. The right to stay is protected under international human rights law and is therefore non-negotiable. This is the first oxymoron. We are now negotiating rights that neither the UK Government nor the EU for that matter can

negotiate away. Secondly, the potential expulsion of 3.4 million people from the UK, and respectively British people from the EU, is, from a pragmatic point of view, impossible. Suppose it happened here; it would immediately trigger retaliation on the part of the EU 27. For all these reasons, and despite progress on the technical detail, the current approach is problematic.

As I said, I am happy to focus later on where there has been progress and where there has not, but in a way that is beside the point. To look at the specifics rather than the holistic picture misses the point.

Baroness Ludford: May I quickly explore this oxymoron, as you called it? You say that negotiations are going on, even though the right to stay is guaranteed under international law. Can you tease that out a bit, because if it is true that international human rights law solves all the questions, why have we not realised that before?

The Chairman: No. I think what was being said very specifically was that international human rights law would prevent an ejection.

Baroness Ludford: Yes, it would prevent deportation.

Dr Dimitrios Giannouloupoulos: Let me elaborate, if I may. I am sure that my good colleague Dr Hughes will back me up—recent research that she has undertaken demonstrates this point, as does research undertaken at the Britain in Europe think tank and work that we have done with the New Europeans—when I say that existing ECHR jurisprudence provides a very strong basis for blocking potential deportations. I do not think there is any doubt about that.

Baroness Ludford: Yes, I understand. We said that in our report.

Dr Dimitrios Giannouloupoulos: Equally importantly, perhaps this is more of a grey area, but in my view and that of the experts that I represent today there is good scope for the ECHR triggering potential claims of violation of the right to private and family life on the simple basis of the existing and continuing uncertainty. Some case law in Strasbourg has found that uncertainty in itself—I could mention a number of cases—was a violation of Article 8. So from the point of view of that continuing uncertainty, when so much time has already elapsed since the referendum and we have evidence of the psychological impact on the lives of thousands of individuals, = there is good scope, a good foundation, for such a claim, even though I am not saying that it is a given.

The Chairman: Yes. I do not know whether you had the opportunity to read this Committee's report.

Dr Dimitrios Giannouloupoulos: Of course.

The Chairman: We said that, as a back stop, the European Convention on Human Rights provides some protections with regard to the right to family life, and so on, as you just said, and would probably be protective against sudden expulsion. I do not think that is very likely to happen in any circumstances in this country, but there

is the idea that you would have to litigate it and take it up through legal proceedings before you got to the European Court of Human Rights. I do hope that those who are listening will know—I know that those who are studying law will—that there is a distinction between the European Court of Justice, from which there seems to be a great determination to remove Britain, and the European Court of Human Rights. At the moment, certainly, there is no movement towards taking us out of that, despite that being on the tongues of some people. There are protections that would be available under the European Convention on Human Rights, but the idea that people would have to wait in uncertainty before a case was heard to determine that would be rather unsatisfactory, and I think that is what you are saying.

Dr Dimitrios Giannouloupoulos: I could not agree more with you. What I am saying provides support for a potential claim for the immediate recognition of rights now. Irrespective of whether such a claim is taken to the European Court of Human Rights, there is a human rights argument that the Government need to listen to; they need to proceed immediately on this.

The Chairman: I am just anxious that alarm is not set off around the nation that expulsion is on the cards and that one will have to invoke legal cases before we know it.

Lord Anderson of Swansea: The idea of deportation is certainly an exaggeration that can lead only to alarm.

I would like to come back to your point on Article 8 of the convention, the right to family life. Dr Hughes mentioned this in her excellent article. Article 8 case law is very limited in this field, and even since she wrote that article I think it is fair to say that the judges in Strasbourg have exercised more self-restraint in the interpretation of the living instrument idea, and that following the Brighton declaration there was much greater willingness for subsidiarity and relying on the work of national courts. Would you agree?

Dr Dimitrios Giannouloupoulos: Yes, I would agree that the context has changed, partly because of the debate that we have been having in the United Kingdom for a few years about moving away from the European Convention on Human Rights. I have reason to believe—this reflects discussions with people working very closely to the court—that the court has progressively become more reluctant to interfere with issues that are considered integral to the national interest. So one might argue from that point of view that if the court were asked to tackle issues of great interest to the UK, such as EU citizens' rights, it might still prefer to defer to national authorities. You might well be right there. But there is also a very good chance that the European Court of Human Rights will see what is at stake here, which is potentially the right of 5 million people to private and family life. That is equivalent to the population of Ireland and to 7% of the UK population. A very significant number of people's lives would be substantially interfered with.

From a purely normative point of view, it is quite difficult to assert that the European Court of Human Rights would not necessarily take an active approach here. It might take a very active approach. We will have to wait and see.

Lord Anderson of Swansea: But surely that is unlikely, given that current case law is unlikely to be expanded, and given the current climate in the court, the margin of manoeuvre and the greater subsidiarity.

The Chairman: At this point it might be useful to hear from Dr Hughes, who has written extensively on this. Perhaps you would like to express a view on Article 8, Dr Hughes.

Dr Kirsty Hughes: Thank you for the opportunity. I would not dissent from your view that the court could adopt a more conservative approach. It would depend on the specifics, on the particular issues that it is alleged could give rise to a violation under Article 8.

I think we all recognise that the court's jurisprudence goes as far as saying that deportation, expulsion, would inter with Article 8. However, the court's jurisprudence also says that there are other elements to that and that those rights have to be genuine and effective, and therefore that other issues might come into play that fall into the realm of Article 8. Therefore, cases in which there is prolonged uncertainty in establishing residency can give rise to issues under Article 8, and the court has said that as a minimum step it recognises that residency status.

They are very difficult cases to draw parallels from in this context, in part because this context is unique, so we are in uncharted waters, and in part because the cases in which the court made those statements were also unique situations for various reasons.

Lord Anderson of Swansea: But you would agree that the current climate is against the expansion of the interpretation of Article 8?

The Chairman: Hold on a minute. We have limited time and I do not want to spend it all on a discussion about Article 8 of the European Convention on Human Rights. Limitations were put on the right to family life in those circumstances because people had committed crime or were believed to be inciting terrorism, and it was felt that domestically there should be a right to support. That is rather different from people working in the National Health Service or the City of London who are working and paying their taxes in Britain and who have not committed crime. There might be rather different considerations for a court, but I will stop that now and bring in the second question.

Q3 Lord Cromwell: The last debate raises an interesting issue. If uncertainty is a breach of rights, does that mean that citizens have a right to certainty? That is a rhetorical question. I do not know that certainty is a right, but can we move on a little?

We keep hearing that we are in touching distance of an agreement, whatever that means, and some of the hurdles that have been referred to are the recognition of

qualifications, voting in local elections, the treatment of future family members, and onward movement. What in your view is causing the delay in closing this touching distance, and which of the issues touted as hurdles is actually the most difficult? Perhaps we could hear first from someone who has not spoken yet.

Ms Jane Golding: British in Europe was set up to safeguard the rights of British citizens in the EU and of EU citizens in the UK, and we work very closely with the 3 million. From the beginning, our position has been very similar to that of this Committee; we currently have a complex bundle of indivisible rights that can be guaranteed only through the negotiation of a withdrawal treaty. There is no comprehensive legal solution to guarantee those rights outside of that, which is why we are pressing for this solution through the negotiations.

Although we do not see a solution as within touching distance, we think that some progress has been made on technical issues, particularly with regard to non-economically active people and reciprocal healthcare and social security. Much less progress has been made as regards working citizens—on both sides, obviously. It is a little known fact that around only 21% of British citizens in the EU are over 65, so this is a very important issue for us.

You mentioned free movement, but I would not refer to it as onward free movement because I see free movement as a continuous right of free movement across the territory of the member states, not as exercising one right of free movement and then moving to another country and exercising a separate onward right. This is a very difficult issue on the EU side; the EU sees this as a very important concession to give us. Recognition of professional qualifications is also a key issue; and the current position on free-movement rights has a knock-on effect in a range of other areas including this and other economic rights such as the right to run a business.

Lord Cromwell: Can I touch on the future family members point? From the negotiators' point of view I can understand that we might reach agreement in the current situation, but hang on a minute; these people might have children. I can imagine that starting to unravel. Do you have that feeling? Is that a key stumbling block?

Ms Jane Golding: It is a key stumbling block, as are direct effect and the Court of Justice of the European Union's jurisdiction. There was no real progress during round 5. I believe that those issues were discussed in detail during round 5 but that no solution has been found yet. Certainly we are pushing for a very detailed explanation and implementation of our rights in the withdrawal agreement, which would then have direct effect.

Lord Cromwell: So we are within shouting distance, not touching distance.

Ms Jane Golding: That might be more accurate.

Professor Stijn Smismans: Obviously human rights are the fall-back position and can help with litigation, but we need an agreement.

The Chairman: We need something better than that and sooner than that, rather than people being left with uncertainty.

Professor Stijn Smismans: Why are we not there yet? I think we are far from that. Despite what one says about there being convergence and progress on the two positions, and there is, there is deadlock because the premise of both sides is different. The UK proposal is based on offering settled status, which is a status under UK immigration law. The idea is that some issues can be dealt with in the agreement with the UK, particularly those that require co-ordination, such as health and the transferability of social entitlements. Obviously from the EU's perspective that is not sufficient. The European Union wants a clear deal that completely sets out the rights of EU citizens in this country and British citizens in Europe, which are the right to reside, and all that brings with it, and the transnational rights that come with the transferability of social benefits and entitlements. From that position, the UK has started to adopt more of the language of EU law to ease the negotiations, so there has been some progress on that. But the position is still substantially that the UK offers settled status, which is UK immigration law status, and the EU says that it needs the status set out in an individual agreement and that that status would then have to be implemented. They are speaking two different languages.

One can start to colour the boxes green, as they do in their comparative table after each negotiation, but these issues relate to transnational rights. The UK has said that within the withdrawal agreement we will adopt concepts of EU law, but we do not know what that will mean once those are translated into national law. It will still be called settled status. It will still be a status of UK immigration law, with the jurisprudence that comes with it. That settled status does not carry the same rights as permanent residence status does under EU law. For the moment, that status will be less than permanent residence under EU law.

The conditions to acquire settled status are not clear at all; we still do not know what the Government are offering on how one would acquire that status. The procedure through which to acquire it is even less known. There will have to be a registration procedure, because we need to identify those who had residence prior to Brexit and those European citizens who came to the country later. For the moment, we do not have a clear proposal on how that will be applied. What that procedure might be will affect people massively. As long as we do not know the procedure, 1 million out of 3 million will be excluded in practice. We do not know. There is a lot of uncertainty, which can have a dramatic effect on people, and people are very anxious.

From the European Union side, it insists on having a solution. There can be a way forward only if the UK is clearer about what it offers on the registration procedure and focuses as little as possible on residence and various other criteria of candidates. If the UK advanced on that, and not only on the transnational rights issues, which attract so much attention, the European Union would probably be willing to offer free movement to the British in the European Union. The European Union's starting position seemed much more promising on that. It was once the UK

came up with the settled status that the European Union stepped back and said that it would not offer freedom of movement in the entire European Union to the British in Europe. It is probably a negotiation technique, but that is where we are at the moment. If the UK is not clear about that and does not accept that the entire status has to be set out in the withdrawal agreement or a separate citizens' rights agreement, there will be deadlock.

Lord Anderson of Swansea: There must be problems in representing the views of those in the UK. How representative do you think the relevant organisations are? Perhaps linked to that, we know that there are concerns, but when we look at migration flows we see that the number of EU citizens in the UK is falling. Is that due to uncertainty? Is that due to the fall in the value of sterling? Is that due to the success of the Polish economy? How do we ascertain the real reasons for these migration flows?

Professor Stijn Smismans: There are a lot of issues involved. We do not say that is only the offer of settled status. People make judgments on the place they are living and whether there might be uncertainty around their status. There is obviously general uncertainty about what is going to happen to the UK economy. People have moved here and built up their lives. The most highly skilled might think, "It's not as nice a place as it used to be, so maybe I will consider going elsewhere". Personally, I do not know a single European citizen in academia who is not reflecting on this.

The Chairman: Are they reflecting on their status and whether they should return?

Professor Stijn Smismans: Yes, or on whether they should go elsewhere in the European Union. That does not mean that they will do that, because they have built up their personal lives and might have their kids in school. But they might well go, particularly the highly skilled, who will have opportunities elsewhere at some stage. That might not be today, because the position of professor does not come up every day in a university, so you have to build up to it. But people are thinking about it. From what we see on the 3million association website—

The Chairman: That is true of doctors, nurses, and so on.

Professor Stijn Smismans: It is true of doctors. There is a lot of anxiety, whatever position you are in. We try to represent the 3 million. Obviously, there are people who are more vocal, there are people who are more informed, there are probably people out there on temporary contracts and very insecure conditions who are not informed about it who we cannot reach. That does not mean that we cannot represent them, and we definitely try to, because after all it is the most vulnerable who will be most at risk here.

Ms Jane Golding: I cannot point to numbers, but I can give you anecdotal evidence of UK citizens coming to Germany, where I live. British in Germany is one of the founding groups of British in Europe, which I represent. I am based in Berlin, and on anecdotal evidence it is interesting that we have new members arriving in Berlin from both the younger and the older demographic: retired people who are deciding

to retire before Brexit in the hope that they will therefore be able to secure their rights to stay.

Q4 Baroness Ludford: I am not sure how much this adds to the previous question. The Office for National Statistics has suggested that the Brexit referendum result may be influencing people's decision to migrate in and out. Do you think there has been a specific impact from the delay in agreeing citizens' rights in the negotiation? Is it possible to separate out those factors, or do they merge into one? The referendum was perhaps a shock, but, 16 months on, is that the worst element of it, or not?

Professor Stijn Smismans: Obviously it is difficult to get any data on that, but from the information we get through the website I would say that people seem much more anxious today than after the referendum. There was quite aggressive debate during the referendum that affected us—it was not pleasant—but the reaction afterwards, when our status was not dealt with, is perceived as even worse.

One can understand that people who are not well informed are angry for some reason and they take it out on us. Okay, fine. But the Government not dealing with our status and us having this uncertainty and getting very different messages from the Government makes people really anxious and angry.

Lord Polak: You are surmising a little. I feel for you, because you are commentating on a set of negotiations that you do not know the real details of. I wonder whether that also plays into the uncertainty that is going on. We are all on the sidelines, because the Government are negotiating. I have been in business negotiations, and often you do not share what is really going on. All the commentaries that are coming in may add to the confusion. I say that as a general point.

I notice, Dr—I am not going to say your second name in case I get it wrong—that you do not think much of the Government's paper, *Safeguarding the Position of the EU citizens Living in the UK and UK Nationals Living in the EU*. You have suggested in your paper that rather than achieving calm it has had the opposite effect. I go to my first point: it is difficult because one does not know exact details.

You talk about the cut-off date being no earlier than the trigger of Article 50 and no later than the UK's exit, and you say that that is making uncertainty worse. Can you tell us how many people already in the UK are likely to be impacted by this issue?

Dr Dimitrios Giannouloupoulos: Thank you very much. Perhaps you would allow me to give a quick reaction to your introductory comments.

Lord Polak: I was not sure that they would be ignored.

Dr Dimitrios Giannouloupoulos: What you are saying is a perfect illustration of why we needed unilateral recognition of rights from the outset. The right thing, morally and practically, for the Government—and the EU; the same applies to the EU—to do within hours of the announcement of the referendum result would have been to offer the categorical assurance that those rights would be protected. We would not have the complexity of the negotiations affecting people's certainty if that had

happened. The two sides could have come together and decided the technical detail, but some categorical reassurance right from the outset would have eliminated the element to which you have rightly pointed.

The situation is getting worse, because the UK Government's initial approach has been that there will be no running commentary on the Brexit negotiations more generally but also more specifically on EU citizens' rights. The EU has been a little more forthcoming—a number of commentators have agreed on that—by providing more detail about exactly what is happening in the negotiations. Then, again, you might be absolutely right and we might have a myopic vision here, because we are obviously not there. We are discussing with parties to the negotiation, but we are not 100% sure what is happening behind closed doors.

On the cut-off point and how many people might be affected, that has added unnecessary complexity, as the European Parliament Brexit steering group has also recognised. The fact that the cut-off point has unnecessarily been determined as potentially being set between 29 March 2017 and 29 March 2019 has worsened the situation by adding uncertainty. The European Parliament Brexit steering group is saying that this point is non-negotiable and creates unnecessary uncertainty. It makes the point that the UK is obviously still a member of the European Union; people are still coming here and exercising their rights as full EU citizens, and they will do so until 29 March 2019. Therefore, it would be good if the cut-off point were not set so early in the process.

Let me add that before the UK Government announced the offer last June, people might have thought in good faith that the cut-off point would be no earlier than the final exit point, whereas the offer came out and people suddenly realised that it could be 29 March 2017, which would mean, to answer your specific question about the numbers, that everyone arriving after that date—the thousands of people who have arrived since then and those who will arrive until 29 March 2019—would be living in a terrible state of uncertainty. They do not know. No matter what we say here about reaching a potential agreement, those people will be left out. They will not even be able to establish permanent resident's status, or "settled status" for that matter. They will be kicked out.

The Chairman: This is people who before the referendum were offered jobs—this is across all sectors; we are not just talking about academia—but took up their post afterwards, or after Article 50 was triggered. They are living in particular uncertainty about their status.

Lord Judd: You all come from the world of higher education. Many of us around this table hold the view that the quality and status of higher education in Britain very much relates to the quality of the international community in our universities. Do you have any tangible anxieties, as of now, as to whether all this will have an adverse effect on the quality of higher education in Britain?

Professor Stijn Smismans: Yes definitely. This is beyond the general perspective here, but I got a grant of €1.5 million from the European Research Council. In the 10

years I have been in this country, I have always had some European funding. That will stop. The chances of getting any European money after Brexit are very low. That is the main reason why I would consider moving from here. From the perspective of me and my status, I will probably be safe, but not having research money is fundamental for me. I see a lot of examples. People do not move immediately because you cannot find the perfect job just like that elsewhere in Europe, but people are really thinking.

My own school tried to set up a new centre last year, and we appointed four new people on a very interesting area of internet regulation. Those people were Europeans or American citizens. A year later and they have all gone back to the US or Europe. Status is only a minor issue for them; it is the general research environment that comes with it that is the problem. There are pressures on the university system, not only in getting European funding but in the teaching environment getting more bureaucratic and so on. That makes British universities less attractive than they used to be. There is very strong pressure in the wrong direction, but that is beyond the limit of the question.

- Q5** **Baroness Neuberger:** Moving on somewhat, assuming that there is a no-deal scenario, what would the legal impact be on UK citizens in the EU and on EU citizens in the UK, and what legal protections would they have if there is a no-deal Brexit? Dr Giannouloupoulos, you have already said that there are protections under international law. Can you expand on that?

Dr Dimitrios Giannouloupoulos: Let me agree with the Committee that international human rights law protections should really be the last resort. We are placing so much emphasis on international human rights law not to argue that we should take cases to Strasbourg now—that is not at all the case—but simply to demonstrate the strength of the argument for unilaterally recognising the rights of EU citizens now or for coming to some sort of agreement.

The Chairman: Can we go back to the question? The question is: what happens if there is no deal? There are people who are saying that there are all these things like the World Trade Organization, but what happens to European citizens, our citizens living in Spain, Italy and so on, and people who are living here? What is the scenario there, before we move on to talking about international law?

Dr Dimitrios Giannouloupoulos: Thank you for correcting my path. I was coming to that.

The Chairman: Keep us strictly on the path and we can then move to back stops, but I do not want to go straight to back stops. I want to deal with the situation then.

Dr Dimitrios Giannouloupoulos: Indeed. As things stand, if there is no deal, a terrible state of uncertainty will be created. People will fall back to third-country national status, which means that existing rights, the rights that EU citizens have enjoyed until we leave, will be lost. It will all depend on unilateral action by the UK Government and the EU 27 at that point. It will depend on what sort of national

legislation is enforced to protect rights, or not. If anything, the uncertainty that is already in place will be heightened. I do not think there is any doubt about that.

The Chairman: But there could be legislation. Rather than getting locked into what is not there, the moment we say there is no deal, we are leaving the European Union, we are turning our back on that, it is possible to legislate here in Britain and create a very specific law that will give protection to those who are already settled in this country, who were here until the date of the referendum, or who have lived here for five years, or who were here at the point of triggering Article 50—or any number of possibilities. There could be British legislation that provided rights to European Union people settled here, but it would not give protections to our citizens over in Spain because it would depend on Spain doing the right thing over there. It is possible that legislation could be passed here to provide protections. Is that not the case?

Dr Dimitrios Giannouloupoulos: It is absolutely the case. The question would then arise of who would oversee the enforcement of those rights and whether there would be international protection, and we know that is a big stumbling block in the existing negotiations.

The Chairman: So if we ended up in a no-deal situation Britain could well say that it would provide very wide protections for everybody who is already here, but that would involve the ultimate court—that being the Supreme Court of the United Kingdom?

Dr Dimitrios Giannouloupoulos: That could be the case.

Dr Kirsty Hughes: That is certainly a possibility, but what would the status of EU nationals living in the UK be at the point at which that decision is reached, and how is that going to be implemented? If it is run up right to the end and there is no deal, and we do not have a system in place for establishing who has established that period of residency during that time, EU nationals will not have a clear status. That is a concern. I think this is the point that you alluded to earlier if a registration process is put in place earlier. We cannot wait until there is no deal and then say, “Okay, we will now recognise you if we do not have the infrastructure for doing that”. We are already encountering all these problems with the Home Office under the system we currently have, which is not dealing with the same volume of applications that it would be faced with then.

Professor Stijn Smismans: To be clear, when we propose a legislation system, we propose it as part of an agreement between the UK and the European Union, and it would be implemented on that basis only. As to what happens if there is no deal at all, we will probably not fall back immediately on third-country national status, because I assume the repeal Bill will still be there. The repeal Bill will say that EU law still applies, so in theory the European Economic Area Immigration Rules of 2006 would apply to us. The problem is that they will apply to us, but for how long, and how will they be revised? The repeal Bill does not say. For the moment, we do not

know whether they have to be revised by primary legislation. They might even be revised without primary legislation. That puts us in a very uncertain situation.

Moreover, that does not provide any solution to all the issues where we need a deal with the European Union. Without one, it will not work. What are we going to do about our healthcare if the agreement applies in one country and not another? What about pension entitlements that we have built up. I have lived in four European countries. I have paid plenty of contributions in all of them. Who will provide the rules for that? What is going to happen to that if there is no deal? So we need a deal. A unilateral solution cannot provide all the rights that we have now, even if you look to the rights that the UK would say it would unilaterally guarantee in this country.

These rules have been set up to function when you are a member of the European Union. Once you are out of it, the logic of the rules is very different. If you tried to apply EU criteria, for instance, you would need to register these people to distinguish them from other European citizens. If you do that with the criteria of EU law—Directive 2004-38, on which the Immigration Rules are based—it would be highly problematic, because you have to do that for 3 million citizens, with all the criteria of EU law, when you have never had a registration system. It is highly problematic to ask people retrospectively to provide all that information.

The Chairman: And supportive documentation.

Professor Stijn Smismans: And supportive documentation retrospectively. This applies to a large number of citizens. We saw what happened with the PR application procedure, but the percentage of people who applied for that is nothing compared to the 3 million citizens who will have to go through a registration system. Most importantly, the consequences of failing to apply successfully in the registration system will be far more dramatic. If I apply today for permanent residence and do not get it, most of the time I will still be able to live in the country and try to build up the proof that I have been here for five years. If we are out of the European Union and we ask people to register who then fail, it is a matter of, “Okay, now you go”. So it is dramatically different. We need an EU-UK treaty to protect these rights. These are transnational rights, but they are also based on the basic principle of having residence and everything that comes with it.

Q6 The Earl of Kinnoull: I wonder if I could briefly go back to a subset of the Article 8 discussion that we started with. I do not want to rerun what was said, but we would be interested to know whether you thought that litigation was likely and, if so, what the starting gun might be. I am mindful of the fact that everyone is hopeful that the December meeting of the Council will produce a pretty final document on this area. Perhaps we could start with Dr Hughes and move on to the others.

Dr Kirsty Hughes: On the litigation point, it depends on the specifics of what the individual’s situation has been as to whether they would seek to pursue such matters in the courts. It would probably be a bit premature to depend on the December round of negotiations if people wished to start invoking Article 8 of the

convention on that basis alone. There might be separate issues concerning what had happened with their individual applications and what their discussions had been with the Home Office, but I would not anticipate there being litigation directly on the back of the December round of negotiations. Our position in relation to human rights law is what protection human rights law would provide in the event that there is no deal and no confirmation of status and in the event that establishing status becomes protracted beyond this period. I would not anticipate December being a trigger for that.

The Earl of Kinnoull: So the tsunami of litigation would begin after the no deal in March 2019.

Dr Kirsty Hughes: That would be my impression.

Lord Lester of Herne Hill: First, I should declare an interest, because I see that Dr Hughes is on my chambers' academic panel. I would like to ask Dr Hughes some practical questions about legal remedies. Do you agree that, before you can use the convention in Strasbourg, normally you have to exhaust your domestic remedies? That means the High Court, the Court of Appeal and the Supreme Court, probably without legal aid. That is the first step.

The second step is to go to Strasbourg. Strasbourg at the moment is drowning in Russian, Ukrainian and Turkish cases. Having exhausted your domestic remedies, you have to persuade Strasbourg to give priority to this issue. I can see that you might use Rule 39, I think, to hold up as an emergency situation a particular action, but although you say in your paper, which I have read with admiration, that the convention is the best system that we have at the moment, I would be grateful if you would deal with the practicalities about access to justice in the real world.

Dr Kirsty Hughes: To be clear, when I say that it is the best system, I am comparing it to other systems for protecting international human rights, not alternatives such as those that are being put forward by fellow speakers; I am not comparing it to what they are campaigning for and saying that human rights law is in any way the best route.

The Chairman: Some of us would think that it is very much not the best route.

Dr Kirsty Hughes: I would not dissent from that view.

I quite agree that there are significant practicalities. One of the problems with human rights law is that you have all these hurdles to go through in exhausting domestic remedies. We do not have effective legal aid for many of the issues that the courts need to consider. There are also issues with the European Court's case load. In recent years, the court has put measures in place to try to address that. It has the pilot judgment procedure to try to prioritise particular cases, so that if there is a flood of litigation it will take a test case forward effectively. But I would not say in any way that human rights law should be seen as the first route towards resolving these matters or that it would necessarily be an effective route towards resolving

these matters. That does not mean that I do not think that we need to be very clear as to what human rights law does and what it does not do. We need to know what it does and does not do. We need to know what these people's rights are where it is part of the negotiation. As a country that is invested in human rights, we also need to know its limitations and think about what we may need to do to resolve some of that, but that is a separate issue.

The Chairman: Thank you. I think that your last intervention is the important point: Britain has a high standing in the world with regard to human rights, and it would be a low moment if we were seen to be disrespectful of the human rights of people who had lived and worked in this country and contributed to it. Lord Cashman has joined us. Welcome. I know that you had to be at another meeting. It is good to see you. Let us move on.

Q7 Lord Judd: To some extent you have covered this already, but I would like to have your observations. If a withdrawal agreement under Article 50 does not prove possible, would it still be possible to reach a special agreement on citizens' rights, or would there have to be 27 different agreements?

Professor Stijn Smismans: We think it would be possible. The first point is that Article 50 talks about an agreement. If the parties negotiating it say, "This is the withdrawal agreement and it alone deals with citizens' rights", that is possible. The alternative, which has already been mentioned, is that one tries to have some guarantee now on citizens' rights, perhaps by the court saying that we should try to agree it before we start dealing with other treaty issues. That would mean that there was a kind of gentlemen's agreement about it, so that if the rest failed, this would still stand. Obviously, that is a gentleman's agreement, and if the debate gets very heated—and it will get heated as soon as we get into much trickier economic areas—it might well fail.

The third option is to say, "We have a separate citizens' right agreement under Article 50 and then we draw up another agreement". Article 50 talks about "an agreement", in the singular. This is about interpretation. In jurisdictions such as this country, there is a general rule that, in a legal text, words in the singular can be interpreted in the plural and vice versa. The European Union does not have that principle; it will interpret the treaty in a theological way. The objective of Article 50 is to have a negotiated solution. At the same time, it creates a balance of power that has shifted in favour of the European Union in negotiations. That means that if the European Union agrees to have a separate citizens' agreement, that should be possible, particularly if you also take into account the broader objectives of the treaty, which normally the Court of Justice will do. If you have a theological interpretation and it looks like the objectives of the European Union, it is up to the European Union to protect its citizens. So a purposive interpretation of Article 50 is possible that would allow citizens' rights agreements even before a withdrawal agreement. Obviously, that is a legal interpretation, so there is always a risk that it might be contested, but I think that that can be read in the treaty.

Ms Jane Golding: I think the most likely scenario of those three is the first: that there would be no agreement on the other areas, but there had been agreement on citizens' rights. Therefore, that would become the sole agreement under the legal basis and procedure of Article 50. That would be the sole withdrawal agreement. I say that, because we are very closely involved in following the negotiations and are debriefed by both sides after each round. It seems very likely to us that this will go right to the wire. Even if there were an agreement on principles by December, that would have to be transposed into the detail that is required in the withdrawal agreement to ensure that our rights will be safeguarded. It will take at least six to eight months to draft that detail, especially given that we are asking that the withdrawal agreement has direct effect. Therefore, we need that detail in the withdrawal agreement.

The Chairman: Thank you. [Professor Smismans] You have had a lot of airtime. Do any of the others have anything to say on this issue?

Dr Dimitrios Giannoulououlos: Even if it is a possibility, a separate agreement does not really solve the issue. It faces the same issues as the withdrawal agreement in its entirety, which is the fundamental risk of reaching no agreement. I would simply point out that the mantra of "nothing is agreed until everything is agreed" has been very strong in Brussels. Therefore, from a pragmatic point of view I am not sure how much flexibility there is to move away from it, at least at this stage.

The Chairman: I have a supplementary question. Is not it most likely that the final deal will be rather similar to the Norwegian agreement or the Swiss position; something that is semi-detached? In those circumstances, what loss of rights would people experience under a Norwegian or Swiss-type deal? What rights deficit is there when it comes to those countries' engagement with Europe? Does anybody know the answer to that?

Professor Stijn Smismans: I think we would be in a similar position to the one we are today, so that would be a convenient status.

The Chairman: So that would be a good way out. A Norwegian or Swiss-style deal would in many ways satisfy the needs and desires of European citizens currently living in this country and our citizens living in other parts of Europe.

Professor Stijn Smismans: Yes. The only problem is whether that is politically likely.

The Chairman: That is for others to decide.

Professor Stijn Smismans: Yes, but it might be more likely that we have something like that for a transition period. That would help us out, but the question is: what comes after that? I will not pronounce on the political decision, but what about the timing? Although that might be a solution for a transition period, I do not expect there to be agreement for a Norwegian-style solution for future UK-EU relations. These treaty negotiations will take much longer than our withdrawal negotiations.

The Chairman: I think that is becoming more and more clear to people.

Lord Cashman: For us to achieve a Norwegian/Swiss agreement would mean that we had freedom of movement for all citizens. Do you think that that would be politically acceptable in the United Kingdom?

Professor Stijn Smismans: That is dicey.

Lord Cromwell: I asked you earlier which stumbling blocks will be biggest, and I am not quite sure that we got to the bottom of that. I would like to ask the same question backwards: if we all believe that a deal has to be reached and a negotiation will take place, and that the end product will be different to what we have now, which area in citizens' rights do each of you think is most likely to be sacrificed in order to reach agreement?

The Chairman: Oh, that is a good one. Which right is most likely to be sacrificed?

Lord Cromwell: Or pruned at least.

Ms Jane Golding: I think that is an easy one to answer for British citizens living in the EU: voting rights in local elections, because that is a matter of national law.

Professor Stijn Smismans: I agree that, from the European perspective, they are not very willing to give local election voting rights. It is a dispute of perspective. They do not offer full citizenship rights.

Lord Cromwell: What are we not going to give EU citizens in order to try to strike a deal? What will we ask them to give up?

Dr Kirsty Hughes: My sense is that the most contentious area is family reunification rights. There is a stark difference between the entitlements under European law and if we were to revert to domestic immigration law, which has been severely curtailed since 2012, and all the elements that come into play with that for spouses, children and other dependent adults such as elderly parents or grandparent.

Lord Cromwell: I am sure that you are largely right.

Dr Dimitrios Giannoulououlos: For me, the biggest obstacle is the jurisdiction of the Court of Justice of the European Union, which is politically toxic.

The Chairman: I think Baroness Shackleton would like to press you all on that.

Q8 Baroness Shackleton of Belgravia: Obviously an agreement is only worth the paper it is written on, because it has to be enforceable. Absent it being enforceable, it is worthless. There seems to be a red line on this country being governed by the European court. Do you see any alternative structure that could provide both ways and that is easily accessible? I do not see a draconian expulsion; I see that somebody will suddenly become an illegal immigrant and will not be able to get a job or will be refused healthcare. That will be a much more brutal infliction of your rights to remain or be ejected when you have to go through the whole business of ejection. I am personally concerned about people's access absent legal aid. The most fundamental rights are being changed. It is not that these rights do not exist

now. I am talking about people who have existing rights. How on earth are they going to get access to justice? Which courts are they going to go to, even in this country? Will they go to the magistrates' courts, the High Court or the local court?

The Chairman: Who would like to come in first?

Baroness Shackleton of Belgravia: Who has a golden bullet?

Ms Jane Golding: I cannot suggest that I have a golden bullet, but perhaps I can come back to you on one point. In order to have good enforcement of the rights in the first place, the rights have to be established in detail and be effective.

Baroness Shackleton of Belgravia: Yes. That is a given. I can conclude, by the fact that we have an agreement, that the rights are enshrined in some sort of agreement, statute or something. But where on earth would we test that when there was a dispute?

Ms Jane Golding: It is very difficult to come up with an easy solution. In lots of ways, the more you look at it, the more the European Court of Justice seems to be the logical choice, because these rights are derived from EU law. There would have to be some sort of consistency. There would probably have to be reference to EU case law. The possibility of a special enforcement mechanism has been mooted, possibly EU 27 judges sitting together with British judges, but that would mean setting up a new body. The question of the EFTA Court has also been raised, but there are downsides to that [not least the question of the basis of its jurisdiction unless the UK were an EFTA state party to the EEA agreement]. It is a very difficult question to solve, and I do not have an easy solution for it.

The Chairman: Do any of the rest of you want to come in on that question?

Professor Stijn Smismans: The rights need to be set out clearly. We agree on that. That means an international treaty to start with.

Baroness Shackleton of Belgravia: We are just talking about enforcement. We are not talking about what we are enforcing, we are talking about how we go about it.

Professor Stijn Smismans: In enforcement there are two different issues. As the 3million we have just made a proposal about what the system can look like. It has to be locally organised, but that implies that there has to be judicial protection. If people have failed your registration, they must have the opportunity to appeal and that must be easily accessible. There is obviously an issue to be organised within the UK judicial system. I agree with Jane that the best protection overall is that the treaty as such is protected by the European Court of Justice and there is a principle of reciprocity so that the British in Europe will get such protection because they are in the European Union. The situation of EU citizens in this country is identical to that of the British in Europe, so we should be able to rely on that.

The Chairman: But you know that there are red lines for some people involved in this process, some of the hardest-line Brexiteers. The Prime Minister has to hold

together a rather difficult coalition, and there are some people for whom anything to do with the European Court of Justice fills them with rage and fury for whatever strange reason. That is a problem. What do you do on that? I have just presented to you the possibility that one of the most likely outcomes in all this negotiation is something special and is not in but not completely out, like Norway or Switzerland. Some special British relationship will be created—less than. Even for those countries, there is the EFTA Court, the special court that deals with issues of conflict between those nations and Europe. We would have to have a court that dealt with matters of contest. The question is what that would be. There are some people who say, “Our courts are the best in the world”. While I have a very high regard for our courts and work in them, it is not right that Europeans living here or our citizens living elsewhere might not have access to a court on which a British judge might sit. What is the answer to that?

Professor Stijn Smismans: I agree that there are red lines. I think the EU is more likely to compromise on the issue of the Court of Justice than on some of the substantive rights of EU citizens. A solution that has been suggested is using the EFTA Court, even if the UK is not part of EFTA, which seems somewhat unlikely. It is possible. The alternative is either the UK Supreme Court or a UK court that has the same function as the EFTA Court, so it will align with EU jurisprudence and the jurisprudence of the Court of Justice on the withdrawal agreement and all the case law that that implies. You could copy the same system as the EFTA Court with another court.

The Chairman: So written into any final negotiated treaty could be a commitment that even if the Supreme Court of the United Kingdom is the final court, it would follow the jurisprudence, the legal decisions that have gone before, of the European Court of Justice.

Professor Stijn Smismans: The EFTA Court is aligned with the Court of Justice now. There is some leeway, and some say that it is more of a dialogue between the two courts than one just following the other. The EFTA Court has its own decisions for EFTA countries, so in a way that interpretation applies there and not in the rest of the European Union, but the European Union wants the coherence of EU law to be respected, so it will say that it has to align with the Court of Justice. A similar system can be created, but the problem from the European Union perspective is that the Court of Justice is not very willing to have additional courts with which it has to go into dialogue. From the EU perspective, the EFTA Court might be a better solution than yet another court with which it has to go into dialogue.

The Chairman: We think that dialogue is good, so let us see.

Lord Anderson of Swansea: If the Luxembourg court is the best option but is ruled out because of these red lines and there is the possibility of the creation of a wholly separate court, although it might be rather like the EFTA Court—now you see it, now you do not, and the EFTA Court draws heavily on the jurisprudence of Luxembourg—what in your view is the range of options from the status quo to a

wholly separate court?

The Chairman: We have just had a suggestion from Professor Smismans that our court is the ultimate court for citizens in Europe, but we oblige ourselves to take the jurisprudence from the European Court of Justice. We have already just run through that.

Lord Anderson of Swansea: That is likely to be unacceptable.

The Chairman: That is one of the alternatives that have been put forward. I am watching the time.

Lord Lester of Herne Hill: Quite. What is your experience and knowledge of the way in which EU citizens have experienced our system in applying for permanent residence?

Professor Stijn Smismans: We have lots of information through the website that we built. The number of people who have applied for permanent residency is minimal compared to the 3 million who would have to go through registration. The rate of failure is very high. I have gone through it. I have been in this country for 10 years on a permanent contract as a professor in EU law, but it has taken me about a week and a half to get the documents together and three full working days to work on it, and I have permanent contract and am well informed. It is not so much the 85 pages but the guidance. My research studies better regulation. I thought the UK was a trend setter on that until I saw those documents. The guidance is appalling. It is impossible to understand what documents you have to provide. If it is impossible for me to understand, obviously a lot of people cannot understand it. It is impossible to use that system. I am sure the Government do not intend that, because by definition that would be appalling, but for the moment we do not know what they intend to do with regard to registration.

Ms Jane Golding: Yes. I just wanted to make a comment on the mirror situation for a British citizen applying for a permanent resident's card in Germany. The application form is two pages long and costs €10. If you are employed, you need to give proof of employment. If you are self-employed, you need to give proof of self-employment and five years' tax returns. If you are not working, you have to give proof of sufficient resources and that you have medical insurance. It is a very straightforward process.

The Chairman: I do hope that the powers that be are listening to what you have just told us.

Dr Dimitrios Giannoulououlos: I think it would be fair to note that there have been a few improvements on the administrative side, such as the ability to submit online. You mentioned the 85 pages, but now you can do it online and it is much more straightforward.

The Chairman: How many pages is it? Go on, tell us.

Dr Dimitrios Giannouloupoulos: It is not even in pages when you do it online; it is quite a different system. But you could do it within a couple of hours, I think.

The Chairman: But it is not as simple as the German one.

Dr Dimitrios Giannouloupoulos: Definitely not. I second that.

Baroness Shackleton of Belgravia: It tends to discriminate against people such as nurses or waiters, who really have difficulty. Their skills might be the complete opposite when it comes to filling in a form, but they are still necessary and they are still entitled to have exactly the same rights. That will be discriminatory.

Dr Dimitrios Giannouloupoulos: I agree. You are absolutely right there. But a couple of things have been improved such as the European passport return service: the fact that your passport will not be taken away for six months, for instance, and you can simply present your documents. But, on the other hand, there is no doubt that there remain significant problems; 28% of applications are still being failed. A one in three failure rate is quite dramatic.

There is something that could be corrected immediately. For those who have obtained permanent residence status in the past few months—who have gone out and spent the money and got permanent residence status—the Home Office guidance is still that this status will not be valid after we leave the European Union. Surely a solution can be found that PR will mean settled status. That could be corrected now.

Lord Cromwell: Very quickly, for information for the Committee, in a situation where, for example, visas are difficult to obtain, what usually happens is that lots of little agencies pop up offering to help you through the process for a fee. Are we seeing that in the UK now?

Professor Stijn Smismans: I am not sure about that. I have no evidence on that.

Ms Jane Golding: There is a gap in the market.

Professor Stijn Smismans: On the point about online applications, you cannot just go to the online system and type in your information; you have still to send certified original documents. There is paperwork to be done.

Baroness Ludford: I cannot remember if you said it was a possibility or a likelihood that the registration scheme would be administered through local authorities. I am not sure I have seen that before. Do we have any knowledge of the Local Government Association's reaction, for example, as to whether it is keen to take on this task? If so, can we be sure that there would be a co-ordinated and coherent application of the rules? It is bad enough dealing with the Home Office, which is one body. If you are dealing with however many local authorities there are, presumably the pitfall is the possibility of uneven application.

The Chairman: Do you have a source for the suggestion that it might be passed to

local authorities?

Professor Stijn Smismans: We have not passed the proposal to local authorities yet.

The Chairman: But you have been thinking of that as a possibility.

Professor Stijn Smismans: The 3 million has suggested it and we have passed that suggestion on to DExEU.

The Chairman: You have to look at the pluses and minuses of that.

Professor Stijn Smismans: Immigration lawyers are working with us who have experience in recognising documents at a local level.

Lord Lester of Herne Hill: Can I just get clarification on one thing? One of you said that even if someone gets permanent status, the Home Office says that it will not be permanent when we leave the EU. Is that right?

Dr Dimitrios Giannouloupoulos: Yes, I made that point. I last checked a few days ago. On the same page on which the advice is given on how you obtain permanent residence, there is a highlighted box that makes it perfectly clear that the PR certificate will not be valid after we leave the European Union.

Lord Lester of Herne Hill: How can that be lawful?

Dr Dimitrios Giannouloupoulos: It says that it will no longer be valid. I could not agree more that it is very problematic.

Baroness Neuberger: We are also very interested in the experience of EU citizens. You said that 28% of people fail in their applications. Are they given reasons for that? Is it because they filled in the huge form wrongly, or is it that they simply are not going to be granted it, and if so, why not?

Dr Dimitrios Giannouloupoulos: It is both. In some instances, to be fair, it is due to administrative mistakes, but that just goes to show the complexity of the process. Much more importantly, we should not lose sight of the forest for the trees. The problem is that if we continue with the PR regime, there will be people who are simply not in a position to establish permanent residence. We have not discussed those people much. There is a gendered approach to that as well. There are significant risks there; people who may have left the country for a period and then come back or those who are not in active work. We will not go into the detail now, but none of those people are in a position to establish PR in the first place. They are excluded from the process.

Dr Kirsty Hughes: I just wanted to respond to the point about the status of permanent residency. My colleague is quite right that the Home Office guidance currently states that. I do believe, however, that it did not state that earlier in the process. I do not know this for a fact, but my impression on the basis of what I have seen is that there are people who applied for permanent residency without being told that, and did so on the basis that their permanent residency status would be

valid. I would have thought that the issue there is one of a legitimate expectation that has been made and is not being upheld.

The Chairman: Yes. There would be legal rights that would flow from that.

Lord Cashman: Given what we have heard about the two different ways of applying, I feel that we should get copies of both the online and physical application so that we can consider it as evidence.

Baroness Shackleton of Belgravia: Is there an appeal process against being rejected?

Professor Stijn Smismans: There is an appeal process, but apparently it takes so long that people are advised just to apply again.

Baroness Shackleton of Belgravia: Then they will have got permanent residence by the time it is heard.

Professor Stijn Smismans: The Government have been giving contradictory information. They say that PR gets settled status without problems while the website says something different. But even in that case, permanent residence and settled status are not the same thing. People get an inferior status if one goes on with the argument of settled status.

Dr Dimitrios Giannouloupoulos: I do not think that family members have the right to appeal, but I am not 100% sure about that.

The Earl of Kinnoull: I have the website here in front of me. It says that a permanent residence card will not be valid after the UK leaves the EU. It goes on to say, "A new scheme will be available for EU citizens and their family members to apply to stay in the UK after it leaves the EU". Have any of your organisations actually asked what that last sentence means?

Dr Dimitrios Giannouloupoulos: I think it means the settled status—

The Earl of Kinnoull: My point was that "to apply" implies that you can be rejected and that it is not automatic. I wondered whether any of you have specifically asked about that.

Professor Stijn Smismans: Definitely, and we are in contact with DExEU and the Home Office about it. It has not proposed to us what registration would mean or how it would be organised practically. What are the criteria? We still do not know. It says that one is about turning permanent residence into settled status.

The other issue is people who do not have permission to stay for five years and do not fit the criteria. The European Union position is that we have to give the people who were here before Brexit the possibility of five years to build up these rights, respecting EU law. We agree, but we have to look at how to do it in practice. The European Union does not provide an exact solution, because it would be impossible

to apply all at once all the criteria of EU law, as in the directive, for 3 million citizens who have never been registered.

Our proposal is that registration can be done on the basis of proving your residence, full stop. We accept that people without five years' residence, those who came later, might have to apply under the criteria of EU law. They would have to prove that they are employed or have sufficient resources, as is the normal criteria for EU law, on which case law rests. But that would not be part of the registration system. You are registered on the basis of residence, but we know that EU law applies some limitations. For example, member states can set limits on the extent to which people can have benefits within a certain first period of residence et cetera. We accept that that can be applied to the people who arrived later, but not as a registration system. As a registration system it would be highly problematic, and a lot of people would get letters saying, "Now you go home". We are talking about hundreds of thousands of people.

The Chairman: Thank you very much. These are matters that we will raise with the Minister, who will be coming before us in a couple of weeks. I am grateful to you all for pointing out the uncertainty that people are left with. I hope we might have some answers for you to use in your arsenal to protect the rights of those whom you represent and are concerned about.

I thank all four of you for coming along and giving us your time today. It has been invaluable and very helpful. As I said, if you want to add or send us anything, or make any corrections to the transcript, please do so as soon as possible.