

Family members not welcome: hostile post-Brexit rules can separate EU citizens from their loved ones

*Europeans who relocate to the UK, and marry a foreigner, by 31 December 2020 will be entitled to stay in the country without difficulties. For those who wish to move to the UK with their loved ones from 2021 onwards, the future is bleak. The Brexit reality is about to cause hardship for the families of EU citizens, writes **Aleksandra Jolkina** (QMUL).*

In 2018, Agnieszka relocates from Poland to the UK where she finds a job as a sales assistant. Soon after arrival, she falls in love with Arben, a failed asylum-seeker from Albania who she meets at a party. The two ultimately move in together and dream of starting a family in their new home. However, their plans are jeopardised by Arben's insecure immigration status. As his pending appeal is unlikely to succeed, he fears he would need to return to Albania, leaving Agnieszka behind.

But is there any way to avoid imminent separation? Fortunately, the answer is yes. As an EU citizen who has exercised her free movement rights, Agnieszka can rely on EU law to enjoy family life with her spouse in the host Member State. The couple gets married in 2019 and subsequently applies for the [EU Settlement Scheme](#), designed to confirm the right of EU citizens and their family members to stay in Britain post-Brexit. Their application is successful, and Arben can now live and work legally in the UK without constantly worrying about the couple's future and putting their family life on hold.

Agnieszka's situation would have been very different, however, if she met Arben a couple of years later and did not manage to marry him by 31 December 2020, when the post-Brexit transition period ends. In this case, the couple would lose the protection guaranteed to them by EU law and become subject to British national family reunification rules, which are among the most restrictive in Europe.

EU free movement law: a generous approach to family reunion

Since the very inception of free movement, every EU citizen moving to another Member State has always had a right to live there with his or her family members, irrespective of their nationality. EU decision-makers reasonably believed that EU citizens would not be ready to leave their countries of origin if their close ones could not join them, a situation that would hamper intra-European mobility.

Under the [Citizenship Directive](#), non-EU family members of mobile EU citizens acquire residence rights in the host Member State automatically, without having to satisfy any further conditions, such as income requirements or language tests. The scope of these rights has also been continuously broadened by the Court of Justice of the EU (CJEU). In its case-law, the Court strove to eliminate all possible barriers to family reunion, which was supposed to ensure that EU citizens can move freely across Europe.

As early as 1992, the CJEU extended the generous rights to family reunion to EU citizens who return to their country of origin from another Member State, bringing with them their non-EU national family members ([Surinder Singh, Case C-370/90](#)). Further, in its landmark ruling in [Metock \(Case C-127/08\)](#), handed down in 2008, the Court held that the non-EU spouse benefits from the Citizenship Directive irrespective of his or her previous immigration status in the Member State concerned, as well as of where and when the marriage took place. The judges reasonably argued that the refusal of the state to admit the EU citizen's new spouse, even if the latter was an irregular migrant, would discourage the EU citizen from continuing to reside there and encourage them to leave for another country where they could lead a family life.

This logic is more than convincing. Many mobile EU citizens in the UK work, study and socialise with people from all over the world. It is thus indeed unsurprising that some Polish, German or Portuguese nationals start a relationship with migrants who happen to possess a short-term or irregular status and have no chance to regularise their position in the UK. To people like Agnieszka, the judgment in *Metock* offers extra protection and security: she would not get separated from her husband even if his appeal had already been rejected or, for instance, if he had overstayed his visa.

UK immigration law: logic of exclusion and control

Yet, over the past decade, the generous EU approach has become a major point of friction between the EU and the British authorities. The UK has a long history of the so-called 'reverse discrimination', subjecting its own nationals to more restrictive family reunification provisions than mobile EU citizens. Aiming to reduce the numbers of family migrants who could not be selected in the same way as foreign labour force, the UK government significantly tightened up the rules for the entry and residence of family members of British nationals and settled persons.

The most far-reaching measure has been the introduction of the onerous financial requirements for mixed-status couples. To sponsor a foreign spouse, a UK national now needs to earn at least £18,600 per year (plus extra for sponsoring children), [a threshold that has been impossible to meet by a significant part of the country's adult working population](#). Furthermore, spouses of British nationals with short-term leave to remain are prohibited from switching to the marriage category within the UK. Unlike spouses of Polish or German nationals, they need to leave the country and apply for family reunification from abroad, which may prove a complicated, lengthy and expensive journey with an uncertain outcome.



What happens after the cut-off date?

Since the restrictive measures could not be applied to family members of mobile EU citizens, the UK began to denounce the Citizenship Directive as a 'loophole' enabling otherwise undesirable non-EU nationals to sidestep the country's immigration law. Together with a few other Member States, the British authorities have continuously attempted to persuade EU institutions to narrow down family reunion rights. After Brexit, the UK government has ultimately succeeded in its endeavours.

Under the [EU-UK Withdrawal Agreement](#), EU citizens who relocate to the UK and marry a foreigner by 31 December 2020 will be entitled to stay in the country on the same terms as under the Citizenship Directive. By contrast, all those who meet or marry their partners after that date will need to comply with the UK domestic family reunification provisions, such as the minimum income requirement and the 'no-switching' rule, as well as pay a high application fee. Similar, including financial, [requirements](#) will also apply to EU citizens who move to the UK after the cut-off date and who themselves will be treated as foreigners under the new [points-based immigration system](#) (PBS).

Worse still, the new rules are expected to cover not only non-EU national but also EU citizen family members who may no longer be able to obtain residence rights on their own capacity. If, after the cut-off date, a German national with a settled status in the UK marries another German national who lives in Germany, the UK resident party will need to earn at least £18,600 per year to bring their spouse to the UK (provided that the latter does not qualify under PBS). The [Surinder Singh](#) route in the UK will also be effectively abolished. This will deprive British nationals of the ultimate opportunity to avoid the restrictive national rules by moving with their loved ones to another EU Member State and bringing them back to the UK under EU law.

In addition, UK authorities will no longer need to respect EU law safeguards when targeting perceived marriages of convenience. After the end of the transition period, marriages involving EU citizens will become subject to much more intensive scrutiny. At present, EU law offers mobile Member State nationals a relatively high level of protection against state interference in their family life. First, the non-EU spouse is entitled to a residence permit even if the couple does not live under one roof, as long as they have not officially divorced. This approach is commendable, given that many couples may choose to live separately for a variety of reasons, such as different job locations. Moreover, even if the relationship between the spouses has deteriorated, it is not for the state authorities to decide whether reconciliation is still possible.

Secondly, and most importantly, the state authorities are only allowed to examine the nature of marriage on a case-by-case basis, and systematic checks are prohibited. Currently, to prove a family relationship, spouses of EU citizens only need to present a marriage certificate. By contrast, UK immigration law requires all applicants to provide extensive evidence that their relationship is 'genuine and subsisting', such as joint tenancy or mortgage agreements, utility bills, photos, correspondence, and bank statements. The burden of proof in these cases remains on the applicant, and refusal of the Home Office to admit family members is not subject to appeal.

Last, but not least, the definition of family members in British law is narrower than it is under EU law. Under the Citizenship Directive, the category of direct family members includes spouses, civil partners, children under the age of 21 and dependent parents and grandparents. In UK immigration law, this group is limited to spouses or civil partners, children under 18 and unmarried partners, provided that the latter submit extensive evidence of living together in a relationship 'akin to marriage' for at least two years. Other relatives may qualify for admission only if they need long-term care because of illness, disability or old age, and if such care is not available or affordable in their country.

Conclusion

For those who may wish to live with their close ones in the UK, the future seems rather bleak. The post-Brexit developments are likely to create significant hardship for the families of EU citizens and may effectively result in their separation, or alternatively, prompt them to relocate to another country. If Agnieszka had to choose between her life in the UK and a relationship with Arben, it is quite likely that the couple would have eventually decided to move to another EU Member State where Arben would acquire residence rights automatically. The harsh family reunification rules will thus add to the extensive list of changes that leave EU citizens feeling unwelcome in Brexiting Britain.

This article gives the views of the author, and not the position of LSE Brexit, nor of the London School of Economics.