1. This submission focuses on the following aspects of human rights implications of Brexit: A. The impact of Brexit on rights of EU citizens in the UK and UK citizens abroad; B. Human rights currently protected by EU law; C. Human rights protection in international trade.

The analysis was prepared with input from Professor Countouris (Professor of Law, UCL), Professor Eeckhout (Professor of EU Law, UCL), Professor King (Professor of Law, UCL), Dr Mantouvalou (Reader in Human Rights and Labour Law, Co-Director of Human Rights Institute, UCL), Dr McCrea (Senior Lecturer in Law, UCL) and Professor O’Cinneide (Professor of Constitutional and Human Rights Law, UCL).

2. Executive Summary

i. Brexit may have grave implications for residency and employment rights of EU citizens in the UK and UK citizens in other member states. The appropriate means by which the UK Government may act to lawfully restrict these rights is unclear.

ii. Legal developments post-Brexit may expose EU citizens in the UK and UK citizens in other member states to risk of violations of Article 8 of the European Convention on Human Rights, especially if they result in deportations or denial of leave to remain.

iii. Brexit may result in protective and enforcement gaps in the context of UK labour rights.

iv. Leaving the EU creates a legal situation where protection against discrimination could be reduced or eliminated.

v. Compliance with EU Fundamental Rights is likely to be an indispensable part of the Brexit process.

vi. The UK should include human rights clauses in its own trade agreements, post-Brexit.

A. Impact of Brexit on Rights of EU Citizens in the UK and UK Citizens Abroad

i. Residency/Employment Rights

3. Leaving the EU may have grave implications for residency and employment rights of millions of EU citizens in the UK and millions of UK citizens in other member states.

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1 The views expressed are those of the authors.
4. The first issue of major concern is the attempt to use the prerogative power to remove the large range of statutorily recognised rights flowing from EU law for this population. These include the right to reside and move between member states (Arts. 20(1)(a), 21 and 45 Treaty of the EU (TEU)); seek employment; vote in local and European elections in the host state (Art. 21, 22 TEU); equal pay (Art. 157 TFEU); and several rights under the Charter of Fundamental Rights (CFREU). These are given domestic legal effect through the European Communities Act 1972. While the removal of such rights may have been contemplated as the outcome of the referendum, the manner in which they are interfered can only reasonably be understood as requiring an Act of Parliament, as both a matter of law and policy.

5. Second, residency and employment typically engage a suite of interrelated rights under the European Convention on Human Rights (ECHR). Some of these are more obvious than others. For example, the right to hold property (ECHR, Article 1 of Protocol No.1) and the right to education of children (ECHR, Article 2 of Protocol No. 1).

6. Third, under UK statute and common law, too, other rights are recognised and given protection. For one example, the European Parliamentary Elections Act 2002 confers a right on UK citizens to vote and stand in European elections. At common law, there are a range of possible legitimate expectations as well as serious and judicially recognized, if at times controversial, arguments about the existence of basic common law rights - such as a common law right of abode and to engage freely in a trade. While each is quite naturally qualified by statutory prohibitions and permissions, the well-recognised principle of legality requires that the authority for statutory interference in such rights be express or plain: Ex p Witham [1988] QB 575, 581; Ex p Simms [2000] 2 AC 115, para 131; HM Treasury v Ahmed [2010] 2 AC 534, para 61.

7. In the present situation, there is no statutory authority for the purported power to carry out Brexit. It is not contended here that any reliance on prerogative powers for authority to interfere with rights would not be ‘in accordance with law’ as required under various provisions of the ECHR. However, the extent to which the executive’s prerogative powers are structured by policy plans and procedures is relevant: R (X and anor) v SSSHD [2016] EWHC 1898 (Admin); R (Purdy) v DPP [2009] UKHL 45. In the present situation, the Government contends for a legal prerogative power to do all of the above with no restriction whatsoever, and with no set of policies regulating the way it should be done. That on its face seems inconsistent with the requirement that interferences be in accordance with law. Whether the proposed Great Repeal Bill will provide sufficient legal security for these rights remains to be seen. While it proposes to give such EU-related rights statutory recognition, it also envisages making each liable to repeal by recourse to Henry VIII powers. Notably, the ability of Parliament to control the policy content of statutory instruments (and notably the powers of the Joint Committee on Statutory Instruments) is very limited in practice. Before the courts, there is established and recently affirmed authority for the proposition that the executive power to modify legislation must be regarded as an ‘exceptional course’ and any doubt should be resolved in favour of a ‘restrictive approach’: R (on the application of Public Law Project) v Lord
Chancellor [2016] UKSC 39. This is particularly so where human rights are at issue: Ex p Witham [1988] QB 575, 581; R v. Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants [1996] 4 All ER 385. It is thus, putting the point at its lowest, unclear whether the scheme envisaged in the Great Repeal Bill will provide much parliamentary oversight over the eventual repeal or interference with the range of rights affected by Brexit.

8. For all the above reasons, it would be advisable, at the very least, to carry out a careful investigation of the impact of the proposed course of action on these groups and to insist upon a legislative framework that addresses the legitimate expectations and concerns, not least through the provision of transitional measures that ensure proper respect for the common law, statutory, ECHR and EU law rights at stake.

ii. Privacy/Family Life

9. Legal developments post-Brexit that upset legitimate expectations and lead to a sudden inability to plan one’s life for months and years to come, with possible devastating implications for personal, professional and social relations, and particularly, the significant implications of any future deportations may violate the right to private and family life of EU citizens in the UK and UK citizens in other member states under article 8 ECHR.

10. The protection of private life in the ECHR is not limited to activities performed in one’s own home. That the right to private life may protect a right to a specific way of life, for instance, is an established principle in the case law, which emerged in a line of cases on Roma rights. In Chapman v UK (2001) a majority of judges in the European Court of Human Rights ruled that the eviction of the applicants from their land interfered with article 8, but on balance did not violate it. It was influenced in this by the fact that the applicants initially established their homes unlawfully: ‘If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move’, explained the majority (Chapman v UK (2001), para 102). The principle of Chapman can apply to EU citizens who have developed a way of life, and established their homes and lives lawfully in the UK and other member states. The effects of uncertainty on professional relations can also bring claims in the scope of article 8. In Niemietz v Germany (1992) the Court explained that private life is a broad concept: ‘[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings’, and in Sidabras and Dziautas (2004) it ruled that work is a central element of a person’s private life and can fall within the ambit of article 8 (see also IB v Greece (2013)). Examples where the Court may be particularly willing to protect individuals whose private life is affected by the present situation may include, for instance, those involving parents who cannot plan their family lives and education of their children. That the negotiations on Brexit may last at least two years may also have a weighty role to play in any test of proportionality employed by the Court.
11. Furthermore, there is direct authority on the capacity to deport and article 8 ECHR. If removal of a person results in separation from close family members, it may lead to a violation (Al-Nashif v Bulgaria (2002)). Particularly when there are children involved, the best interests of the child have to be taken into account (ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4). Removal from a country may also lead to interference with article 8 if those removed ‘had developed, uninterruptedly since birth the network of personal, social, and economic relations that make up the private life of every human being’ (Slivenko v Latvia (2003), para 96). The fact that all EU citizens in the UK and UK citizens in other member states settled lawfully makes their case even stronger. The Government has to provide firm reassurance to EU citizens that their legal status in the UK is secure.

B. Human Rights Currently Protected by EU Law

iii. Labour Rights

12. Withdrawal from the EU could have far reaching consequences on labour rights. A number of UK labour rights are derived from EU Directives. Some of them, e.g. in the area of equality law or in the area of redundancy related consultation rights, have been enshrined in Statutes (e.g. the Equality Act 2010, or TULRCA 1992), so withdrawal would not immediately affect them. Some EU Directives in the labour and social law sphere however, have been implemented by Statutory Instruments, a number of which draw their authority from the European Communities Act 1972 (e.g. The Working Time Regulations 1998, or The Posted Workers (Enforcement of Employment Rights) Regulations 2016). A repeal of the ECA 1972, would have to factor in this element for domestic regulation in these areas to remain in place. Indirectly, however, a full withdrawal from the EU legal order could result in a progressive erosion of such rights regardless of whether they are contained in statutes or regulations, as future Governments and Parliaments would not be bound by EU legislation and by rulings of the Court of Justice of the EU (CJEU).

13. Withdrawing from the EU would also deprive the CFREU of legal effect. The CFREU contains a number of provisions that protect labour rights as fundamental rights (e.g. rights and principles contained in Title IV ‘Solidarity’, and provisions in Titles II ‘ Freedoms’ and III ‘Equality’). The UK would still have to respect some rights and principles contained in the Charter by virtue of its membership to the Council of Europe (and as a signatory party to the ECHR and the European Social Charter) and by virtue of its membership to the ILO (and as a ratifying party to a number of its Conventions). However, not all rights and principles protected by the Charter are protected by other international instruments (e.g. Article 17 on information and consultation) and on a number of occasions, UK legislation has been found to fall short of ESC and ILO standards by the supervisory bodies of these organisations, without successive UK Governments taking action to reform domestic provisions with a view of meeting the required supranational standard of protection (cf. European Committee of Social Rights Conclusions XIX-3 (2010) on Articles 2, 4, 5 and 6 of the ESC; or the International
Labour Organisation CEACR 2010 Observations on the UK and C-87). EU membership has hitherto provided for the protection of labour rights, including some categorised as fundamental rights, and for highly effective mechanisms of enforcement, mostly through the joint action of the Commission and the CJEU. Leaving the EU would result in protective and enforcement gaps.

iv. Discrimination law

14. The impact of Brexit on discrimination law is uncertain. EU law has historically exerted strong influence on the development of UK discrimination legislation. For example, discrimination in employment on the basis of age, sexual orientation and religion or belief was only prohibited in 2003 because of the need to give effect to the EU Framework Equality Directive 2000/78/EC - while judgments of the CJEU of the EU have frequently reinforced and strengthened British legislation in this field. The Equality Act 2010 now incorporates the relevant EU standards into UK law, and provides protection against discrimination. However, the 2010 Act does not make anything unlawful which is authorised by other primary or secondary legislation. EU law did impose constraints in this regard, as a result of the obligation for national law to conform to EU requirements. Post-Brexit, this constraint will no longer exist. Furthermore, the common law provides little or no protection against discrimination, while the case-law of the European Court of Human Rights on discrimination issues is relatively under-developed. As a result, while Brexit need not lower protection against discrimination, it creates a legal situation where protection against discrimination could be reduced or eliminated in the future.

v. Compliance with EU Fundamental Rights

15. Compliance with EU Fundamental Rights standards will be an indispensable part of the Brexit process. Any agreement under Article 50 of the Treaty on EU will be an agreement between the UK and the EU and not an agreement between the UK and the remaining states. Article 50 provides that the agreement will be negotiated and concluded by the Council and will need consent of the European Parliament. The CJEU has been clear that agreements between the EU and third countries or international organisations are subject to compliance with the fundamental elements of the EU legal order (Opinion 2/13, ECLI:EU:C:2014:2454). This includes respect for fundamental rights recognised by EU law (See Joined Cases C-402/05 and P and C 415/05P Kadi and Others v Council and Others, 2008) and the ‘specific characteristics and effectiveness’ of EU law (Opinion 2/13, ECLI:EU:C:2014:2454, para 188) and for the powers of the CJEU itself. An agreement under Article 50 will therefore have to comply both with EU Treaties and fundamental rights recognised by EU law. Such an agreement will not be considered to have implicitly amended the EU Treaties as it will rank below the Treaties in the hierarchy of EU law norms.
16. The Treaties, and the fundamental rights commitments they contain, are the highest form of EU law (Opinion 2/13, ECLI:EU:C:2014:2454; Joined Cases C-402/05 and P and C 415/05P Kadi and Others v Council and Others, 2008). The Union’s agreement with the UK will constitute an agreement with a third party that is part of EU law but which ranks below the Treaties. Allowing such an agreement to qualify or amend the EU Treaties has been explicitly ruled out by the CJEU which has stated in terms that an agreement with a third party cannot affect the ‘allocation of powers fixed by the Treaties’ (Opinion 2/13, ECLI:EU:C:2014:2454, para 201). Moreover, as agreements under Article 50 are concluded by a Qualified Majority Vote (unlike Treaty amendments which must be agreed by all Member States), to allow the former to amend or qualify the latter would involve unlawfully circumventing the veto on Treaty change held by all member states. If the agreement is concluded without agreement of all states, a disgruntled state would have automatic standing to challenge the deal in Court. The European Parliament would also have standing and the agreement could also be the subject of advisory reference to the CJEU as occurred in relation to the proposal for accession of the Union to the ECHR (Opinion 2/13, ECLI:EU:C:2014:2454).

17. Fundamental Rights concerns will therefore have to be at the centre of Brexit negotiations. Any agreement that fails to respect EU fundamental rights risks being struck down by the CJEU leaving the UK facing the expiration of the two-year timeframe with no agreement in place.

C. Human Rights in International Trade

vi. Human Rights in Trade Agreements

18. The policy and process of incorporating human rights clauses in EU trade agreements have been gradual and uneven. Nevertheless, the overall direction of EU policy is clear in the sense of putting great emphasis on respect for human rights throughout the EU’s ‘external action’. The Lisbon Treaty reinforced this. The unevenness, particularly in terms of enforcement of human rights clauses, is a consequence of the tension between principled policy and the power-driven realities of international relations. But that does not mean that the policy has been ineffective. There is significant review of the human-rights implications of trade agreements; the EU’s tariff preferences for developing countries (Generalised Scheme of Preferences) are predicated on respect for human rights; EU development aid is conditioned on such respect; the CJEU enforces human-rights protection in EU’s external policies (e.g. counterterrorism); and the European Parliament has intervened in international negotiations which raise human rights questions (PNR, with the US).

19. It is a policy question whether the UK should include human rights clauses in its trade agreements, post-Brexit. However, not doing so would expose it to critiques of inconsistency, between its internal policies and legal regime, protective of human rights, and its external policies. In a globalised world there is growing opinion that economic
relations ought not, and in fact cannot be separated from respect for human rights. It would be regressive to take a different approach.