

Brexit and Immigration: Citizens' Rights in the Draft Withdrawal Agreement

Implementation

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Legislative implementation



The Government will lay before Parliament, prior to exit day on 29 March 2019, a **Withdrawal Agreement and Implementation Bill**: see David Davis' Written Statement HCWS342 13 Dec 2017.

This will contain domestic provisions to give legal effect to the Withdrawal Agreement (“WA”).

White Paper on immigration implementation expected to be published before end of 2018: BBC Today Programme, 6 February.

Implementation of provisions on citizens' residence rights



Title II Chapter 1 of the WA: Rights related to residence, residence documents.

Article 17 of the WA specifies a host of conditions and protections that any national registration system must adhere to, but with discretion as to detail. E.g. a document evidencing settled status “may be in a digital form”: Article 17(1).

UK's implementation of Article 17 will be a “Settled Status” scheme.

See:

- gov.uk guidance: **“Status of EU citizens in the UK: what you need to know”**
- HM Government's **“Technical Note: Citizens' Rights – Administrative Procedures in the UK”**

Government's plans

- Intention to make the application process “as streamlined, quick and user-friendly as possible”. Recognition that current Citizens’ Directive system not fit for purpose.
- Use of existing government data to reduce the amount of evidence an applicant will need to provide, e.g. HMRC employment records to show UK work history.
- Applicant will need to provide an identity document and recent photograph, and declare any criminal convictions.
- Applicant won’t need to “give fingerprints”.
- Online application form expected to go live in late 2018 so that applications can commence even before exit day.

Government's plans



- *“The Home Office will provide support to ensure your application isn’t turned down because of simple errors or omissions. We will contact you where it appears a simple omission has taken place and help you fix it. We will also let you know if you need to provide more evidence, before a decision is made”* (all derived from Article 17(1)(o)).
- *“A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to avoid unnecessary administrative burdens”*: Technical Note at [15].

Government's plans



- Scheme will remain open until 30 June 2021 (and possibly for a further year if there are technical problems – Article 17(1)(c)).
- Simple and free scheme for exchange of permanent residence and ILR documents for “settled status” document.
- Family members of UK nationals who have exercised their free movement rights in another EU Member State before returning to the UK before exit day, as per the *Surinder Singh* case law, will be eligible for the UK’s settled status scheme: see FOI response by Home Office T 1663/18.

More generous provision than WA and EU law

- The UK is to adopt a “pragmatic approach” to the implementation of the WA, by ensuring more generous provision than set by the WA, which requires 5 years of continuous residence and exercise of Treaty rights as per Citizens’ Directive.
- Initially (in the Technical Note in November 2017): no requirement for comprehensive sickness insurance, no “genuine and effective work” test, no requirement to account for undocumented periods and all trips abroad.
- Recently, even more generous: no requirement to have been exercising Treaty rights at all (e.g. as a worker, student etc) for the 5-year period. Caroline Nokes (Immigration Minister) in February 2018 to the EU Scrutiny Committee: *“We are not going to apply any tests about whether they have been working and exercising their treaty rights; it is literally just if they can demonstrate residency”*.

The app



... this is reflected in the app currently under development (see [politics.co.uk](https://www.politics.co.uk/article/this-is-what-the-eu-immigration-app-will-look-like) article *“This is what the EU immigration app will look like”* by Ian Dunt on 22 March 2018), which will only ask:

1. Are you an EU national or family member?
2. Do you live in the UK?
3. Do you have a criminal record?

“The app will verify whether you are an EU national by using European data, or a national insurance number tied to nationality, or information provided on entry into the UK. It will check your presence in Britain by scanning HMRC and DWP databases.”

If no work record, use a driving licence, utility bills, bank statements, tenancy agreements, council tax bills, bank statements etc.

Cost and timing



The application fee will be no more than the cost for a UK passport (£75.50), unless the applicant has a valid permanent residence document, in which case it is free.

Decision “within a couple of weeks” of application: Brandon Lewis (oral evidence in December 2017 before House of Lords committee).

Rights of review / appeal



- Administrative review mechanism in the first instance to “quickly resolve any case-working errors”
- Statutory right of appeal as to “legality ... as well as the facts and circumstances on which the decision is based”. This means a full merits review, as required by Article 17(1)(r).
- Appeal will have suspensive effect “unless a deportation decision is made, or the individual is in the UK in breach of a deportation or exclusion order”, in which case the Government may certify for “deport first, appeal later”, with scope for returning to attend the appeal hearing (as per current EEA deportation cases).

Non-compliance



- “Understanding that there may be good reasons why some people may not have applied” before the specified deadline (a minimum of 6 months after the end of the transitional period, i.e. at least 30 June 2021), “the UK will take a proportionate approach to those who miss the deadline for application” (see scope for applying after the deadline if “reasonable grounds” for failure: Article 17(1)(d)).
- “Where there were good reasons for an individual not to have made an application [within the deadline], the UK authorities will consider exercising discretion to allow an ‘out of time’ application for status under the Withdrawal Agreement”: Technical Note at [17].



Implementation concerns

See the report by Oxford University's Migration Observatory: *"Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?"* (12 April 2018)

Looks at four main categories of people at risk of failing to secure settled status:

- People who do not realise that they can and need to apply;
- People who are vulnerable for some reason, such as victims of abuse or exploitation;
- People with other barriers to accessing or understanding the system itself; and
- People who cannot provide the required evidence.

The scale of the enterprise



Potentially **3 - 4 million EU citizens** and their families will be eligible for residence status.

House of Commons Home Affairs Committee report “*Home Office delivery of Brexit: immigration*” (14 February 2018) expresses concerns about the capacity and resources to cope with the Brexit workload – see e.g. [128]-[130].

People who do not realise that they can and need to apply



Particular concerns about:

- Children of EU Citizens in the UK (~3/4m EU citizens under 18)
- Very long term residents (284,000 for at least 20 years)
- People with permanent residence status
- People who are expecting to return home
- People who think they are not eligible or fear being rejected (e.g. based on previous ineligibility due to lack of comprehensive sickness insurance)

Vulnerable People



These are people who may or may not realise they need to apply, but face difficulties.

For example:

- women in abusive or controlling relationships
- children in care or transitioning from care to adult life
- Victims of exploitation / trafficking
- People with mental health issues

Other barriers to accessing or understanding the system

- People with limited English proficiency
- People with low levels of literacy
- Elderly people:
 - Memory loss
 - Degenerative aging conditions
 - Limited or no digital literacy
 - Isolated from family members

People who cannot provide required evidence

- People with no or limited official paper trail
- Depends on evidential flexibility
- People without bank accounts
- People without proof of address
- People in precarious or non-standard housing
- People who arrive shortly before the cut-off date
- People without evidence of formal work in the UK

Next steps



- Mitigation of implementation concerns will depend on what constitutes a “good reason” for failure to comply with the deadline for applications for residence status.
- More information on the criteria that the government will apply is required.
- The White Paper on Immigration later this year will hopefully address this.