

Brexit and Immigration: An update on citizens' rights

Withdrawal Agreement; Settlement Scheme; Future Immigration System

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WITHDRAWAL AGREEMENT

Withdrawal Agreement

- 19 March 2018 – citizens' rights provisions agreed
- 14 November 2018 – complete text agreed subject to approval
- Citizens' Rights addressed in Part Two
- Vote in parliament on 11 December 2018 (**OUTCOME VERY UNCERTAIN**)
- Then to be subject to a vote before European parliament

Transition period

- Art. 126
 - Transition period begins when WA enters into force (**11pm on 29 March 2019**)
 - Ends 31 December 2020
 - Free movement to continue during this period
 - Union citizens and family members arriving during this period and residing under EU law are on route to permanent residence (see later slides)

APPLICABLE LAW

- Union law concepts in WA to be interpreted in line with CJEU caselaw handed down before the end of the transition period (Art. 4(4))
- Post-transition, UK courts and administrative authorities to have “*due regard*” to relevant CJEU caselaw (Art. 4(5))
- CJEU to have an ongoing role in interpretation of Part Two in UK proceedings commenced within **8 years** of the transition period ending (earlier in residence status cases if process for granting status begins before end of transition). Provision made for binding preliminary rulings. (Article 158)

PART TWO: CITIZENS' RIGHTS

- Structure:
 - Title I: General Provisions
 - Title II: Rights and Obligations
 - Chapter 1: Rights related to residence, residence documents
 - Chapter 2: Rights of workers and self-employed persons
 - Chapter 3: Professional qualifications
 - Title III: Coordination of social security systems
 - Title IV: Other Provisions

DEFINITIONS – FAMILY MEMBERS

- Art. 9 contains Part Two definitions
- Art. 9(a) – family members
 - Art. 9(a)(i) adopts definition in Art. 2(2) of Citizens’ Directive (2004/38/EC):
 - Spouse
 - Registered partner
 - Dependent direct descendants under 21 and those of spouse / partner
 - Dependent direct relatives in ascending line and those of spouse / partner
 - Art. 8(a)(ii) extends definition of family members to “*persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive them of a right of residence granted by this Part*”. [i.e. **Chen carers**]

PERSONAL SCOPE: WHO BENEFITS FROM PART TWO (I)

- Union citizens living in UK and UK nationals living in a Member State:
 - under Union law;
 - “*before the end of the transition period*”;
 - and who “*continue to reside there thereafter*” (Art. 10(1)(a), (b));
- Frontier workers (Art. 10(1)(c), (d));
- Plus family members of the above, subject to further conditions...

PERSONAL SCOPE: WHO BENEFITS FROM PART TWO (II)

- Family members within Personal Scope of WA:
 - Residing in host state under Union law at end of transition period (Art. 10(1)(e)(i))
 - Direct relatives outside host state at end of transition if within Art. 2(2) of Citizens' Directive (Spouse, etc, see previous slide) (Art. 10(1)(e)(ii))
 - Children born or adopted post-transition (subject to further conditions (Art. 10(1)(e)(iii))
 - Family members residing in host state at the end of the transition period with:
 - retained rights of residence under Art. 12 and 13 of the Citizens' Directive
 - Permanent residence under Art. 16(2), 17 or 18 of the Citizens' Directive (Art. 10(1)(f))
 - Contd...

PERSONAL SCOPE: WHO BENEFITS FROM PART TWO (III)

- Part Two further applies to persons falling under Art. 3(2)(a) and (b) of the Citizens' Directive whose residence was facilitated by the host state if residing in the host state at the end of the transition period (Article 10(3))
- *(Art. 3(2)(a) and (b) address, respectively,*
 - *(a) any other family members, irrespective of nationality, who are dependants / members of household or where serious health grounds strictly require the care of the Union citizen; and*
 - *(b) partner with whom the Union citizen has a durable relationship)*

PERSONAL SCOPE: WHO BENEFITS FROM PART TWO (IV)

- Art. 10(4) requires that the host state facilitate the entry and residence of the Union national's partner in a durable relationship post-transition *“provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.”*

Chen / Surinder Singh / Zambrano (I)

- *Chen* carers are covered by the WA
 - Definition of family member in Art. 8(a)(ii) – see previous slide.
 - In scope – Art 9(1)(a) / 9(1)(e)(1)
 - Post-transition residence under Art. 12(3) by reference to Art. 21 TFEU

- Primary carers and children with a derivative right of residence under the principles confirmed by the Court of Justice in *Harrow London Borough Council v Ibrahim* (LBC) and *Teixeira v Lambeth LBC* will also be brought within the personal scope of the draft WA by respectively Articles 9(1)(e)(i)—in the case of the carer, for the same reason as *Chen* carers, and 9(1)(a) or 9(1)(b) in the case of the child, if the child is an EU citizen or UK national.

Chen / Surinder Singh / Zambrano (II)

- *Surinder Singh* cases
 - **Not within scope**
 - Personal scope provisions in Art. 9(1)(a) and (b) require that the Union citizen / UK national as the case may be “*continue to reside*” in the host state post-transition.
 - Does not allow for those returning to country of origin after exercising treaty rights in another EU state.
 - **(UK government intends to provide for *Surinder Singh* cases in settled status scheme – see later slides)**

Chen / Surinder Singh / Zambrano (III)

- *Zambrano* carers:
 - **Not within scope**
 - Meet definition of family member in Art. 8(a)(ii), but
 - Not brought within personal scope by Art. 9
 - No basis for post-transition residence in Art. 12(3) by reference to Art. 20 TFEU

Permanent residence

- WA maintains use of term “*permanent residence*”
- UK scheme refers to “*settled status*”
- Art. 15 of the WA provides for the acquisition of PR in line with Art. 16-18 of the Citizens’ Directive
- **Can only be lost following a five year absence – Art 15(3) (cf Citizens’ Directive Art. 16(4) – two year absence)**
- Art. 16 – those who have not acquired PR by end of transition period shall have the right to acquire it.

Residence status & documentation

- Article 18 permits (but does not require) the parties to the agreement to require that those entitled to reside under the WA “*apply for a new residence status*”
- (i.e. residence documents conferring status, not declaratory of underlying right)
- UK has adopted this route

Residence status & documentation

- Art. 18(1) sets out a long list of requirements for the status application process. Key provisions:
 - Deadline not less than 6 months post-transition if residing in host state pre-transition, or three months post-arrival if not residing (18(1)(b))
 - Extensions must be permitted where reasonable grounds for failing to respect deadline (18(1)(d))
 - Process to be smooth, transparent and simple, with short, simple, user friendly forms (18(1)(e) and (f))

Residence status & documentation

- Charges must not exceed that for nationals for similar documents (18(1)(g))
- If already have PR documentation can exchange free of charge (18(1)(h))
- Duty on host state to assist (18(1)(o))
- Criminality and security checks permissible (18(1)(p))
- Residence document shall state that it is “issued in accordance with” the WA (18(1)(q))
- Applicants shall have access to redress procedures (18(1)(r))

Residence status & documentation

- Art. 19 permits the application process for residence status to begin during the transition period
- UK intends to begin process before transition period begins.

RESTRICTIONS ON RIGHT OF RESIDENCE (ART. 20)

- Before the end of the transition period, the protections against expulsion in the Citizens' Directive will apply. Expulsion only possibly on grounds of public policy, public security or public health, etc.
- Host states will be able to apply stricter domestic law provisions should they so choose in relation to post-transition conduct. UK will so so.

Rights of Redress

- Right of redress in relation to the Art. 18 status application process
 - Art. 18(1)(r), 18(3)
 - Procedure shall permit review of legality and “*facts and circumstances*”
 - Rights arising under Part Two deemed to apply to an applicant until conclusion of the redress procedure (so, suspensive effect) unless...
 - ...redress is sought in a case where an (allegedly) fraudulent or abusive application has been submitted, in which case removal may take place before the conclusion of the redress procedure, albeit the individual must be able to return to present their defence in person (Art. 18(3) and 20(4), read with Art. 31 and 35 of the Citizens’ Directive).

Rights of Redress

- Post-transition cases involving restrictions on right of residence
 - Art. 21 provides that Art. 15 and Chapter VI of the Citizens’ Directive shall apply *“in respect of any decision of the host State that restricts residence rights”* of a person within the personal scope of Part Two
 - Right of redress (Citizens’ Directive, Art. 31(1))
 - Not suspensive of removal
 - Where application made to suspend enforcement, cannot remove until determined (subject to exceptions) (Citizens’ Directive, Art. 31(2))
 - Procedure must provide for review of legality and facts and circumstances (Citizens’ Directive, Art. 31(3))
 - Readmission ordinarily permitted to present defence in person (subject to exceptions) (Citizens’ Directive, Art. 31(4))

TITLE IV: OTHER PROVISIONS

- Article 38: Permits more favourable treatment
- Article 39: Life long protection for those covered by Part Two so long as they continue to meet the conditions in the relevant titles

Nothing is agreed until everything is agreed

- Agreed provisions only come into force if WA concluded. What happens if no deal?
- Commitment that EU nationals in UK when UK leaves will be treated in line with WA / settlement scheme – e.g. Sajid Javid @ CPCC, Home Office Employer’s Toolkit, etc
- Much less clear what happens re EEA nationals arriving post-29 March 2019
- If no deal, 2016 Regs would remain in force by virtue of s.2 of the European Union (Withdrawal) Act 2018 until revoked.

Nothing is agreed until everything is agreed

- Caroline Noakes to Home Affairs Select Committee on 30.10.18: in event of no deal, by (e.g.) October 2019, *“we will have brought forward the future immigration system, and EU citizens will not have an automatic right to work in the UK unless they have been through the same processes that we are going to apply to the rest of the world.”*
- Home Secretary 27.11.18 gave similar evidence, stating there would be no additional burden on employers, but declining to give details.

SETTLEMENT SCHEME

Settlement Scheme for EU nationals in the UK

- KEY DOCUMENTS
 - EU Settlement Scheme, Statement of Intent (21.6.18)
 - Appendix EU
 - ILPA Comment on EU Settlement Scheme (5.11.18)
 - Caseworker Guidance: EU Settlement Scheme: EU citizens and their family members, v.1.0 (1.11.18) (for use during private beta phase 2)
 - EU Settlement Scheme: suitability requirements , v.1.0 (1.11.18) (for use during private beta phase 2)

Settlement Scheme – Appendix EU

- Intended to implement Citizens' Rights provisions of WA
- Currently in testing phase (private beta 2)
- Intended to be fully in force from 30 March 2019
- Rules brief, but augmented by lengthy definitions annex

Settlement Scheme – Appendix EU

- EU2 – Applicant will be granted ILR where
 - Valid application under EU9
 - Meets eligibility requirements in EU11 / EU12
 - Does not fall for refusal on suitability grounds under EU15/16

Settlement Scheme – Appendix EU

- EU3 – Applicant will be granted 5 years' limited LTR where
 - Valid application under EU9
 - Does not meet eligibility requirements in EU11 / EU12, but meets requirements for limited leave in EU14
 - Does not fall for refusal on suitability grounds under EU15/16

Settlement Scheme – Appendix EU

- Valid application (EU9)
 - Made using required process
 - Fee paid
 - Required proof of identity & nationality provided
 - Required biometrics provided (photograph)

Settlement Scheme – Appendix EU

- Eligibility for ILR as EU national / family member (EU11):
 - Documented right of PR or holds ILR, and no supervening event
 - Completed a continuous qualifying period of five years as a relevant EU citizen, family member, or family member with retained right of residence , and no supervening event
 - EU citizen who has ceased activity , and no supervening event, or family member thereof
 - Person with retained rights of residence, and no supervening event
 - Child under age of 21, etc
 - **Supervening event = 5y + absence since granted PR or acquired 5 years residence, or falling within suitability provisions (exclusion, deportation, etc)**

Settlement Scheme – Appendix EU

- Eligibility for ILR as family member of qualifying UK national (EU12):
 - Provision for *Surinder Singh* cases
 - Grant of ILR if resident over 5 years (or child under age of 21, etc, in certain circumstances)

Settlement Scheme – Appendix EU

- Eligibility for limited leave to remain (EU14)
 - Eligible if would be eligible for ILR under EU11 or EU12 but for not having completed five years' qualifying residence
 - Child of spouse / partner of qualifying UK national who is being granted limited leave to remain.

Settlement Scheme – Appendix EU

- Suitability (EU15 / EU16)
 - Mandatory refusal (EU15) where
 - Subject of extant Deportation Order, Exclusion Order or Exclusion Decision
 - Subject to removal under EEA Regulations “*on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC.*” **[See ILPA commentary at 5.5; Home Sec & Perm. Sec seemed unaware of this provision as at 27.11.18! See also *Suitability Requirements* guidance]**
 - Discretionary refusal (EU16)
 - False information, documents, etc, material to decision to refuse, and decision to refuse is proportionate

Settlement Scheme – Appendix EU

- Suitability
 - Caseworker guidance says cases will fall to be assessed under the provisions of the EEA Regs 2016
 - Criminality checks will take place
 - If potential for exclusion / deportation action refer to Immigration Enforcement
 - If they take action, refusal under EU15 will follow

Settlement Scheme – Other issues

- Agreement does not extend to non-EU European Economic Area states (Iceland, Liechtenstein and Norway) and Switzerland. Pending agreement, intention is that the settlement scheme will apply (SOI, para 1.10)
- Application process will be primarily electronic, with very limited scope (as yet unspecified) for paper applications.

Settlement Scheme – Other issues

- Intention is that in most cases continuity of residence will be confirmed through HMRC and/or DWP data, but where this not possible, evidence will have to be submitted.
- SOI and Caseworker Guidance annexes set out different classes of evidence. There is clearly scope for dispute and controversy here.
- Pre-30.3.19 refusals will attract right of administrative review; intention is to enact primary legislation to provide for a right of appeal from 30.3.19

Settlement Scheme – Other issues

- *Chen* carers and *Ibrahim & Teixeira* carers rights' are protected by the WA. Provision for them has yet to be made clear.
- *Surinder Singh* cases not covered by WA, but provided for in Appendix EU
- *Zambrano* carers do not attract rights under the WA. Provision will be made in the Immigration Rules.

Settlement Scheme – Other issues

- Testing:
 - Private Beta 1: 28 August to 17 October 2018 completed successfully, according to Home Office report
 - Private Beta 2: 1 November 2018 to 21 December 2018, limited eligibility
 - Public beta to follow
 - Fully open by 30 March 2019
 - Deadline for applications from those resident in UK at end of transition period will be 30 June 2021

FUTURE SYSTEM

Future immigration system

- Migration White Paper initially planned for summer 2017
- Still not published
- Telegraph (24.11.18) reporting due to be published “*in the week beginning December 3*”
- Sajid Javid to HASC yesterday (27.11.18) – “*The government hasn’t set a final publication date for the white paper, but very shortly... I’d certainly say in December.*” Would not commit to publication before Brexit deal vote on 11.12.18

Future immigration system

- Indications of shape it will take:
 - July 2018 White Paper – The Future Relationship between the United Kingdom and the European Union
 - Migration Advisory Committee Report 18.9.18 (commissioned to provide evidence base for post-Brexit immigration policy)
 - Home Secretary (2.10.18) and PM (4.10.18) speeches at CPC

Future system (July 2018 White Paper)

- July 2018 White Paper

“Framework for mobility”. Envisages *“reciprocal arrangements, consistent with the ending of free movement”* that:

Future system (July 2018 White Paper)

“support businesses to provide services and to move their talented people”

- reciprocal arrangements that would allow UK nationals to visit the EU without a visa for short-term business reasons and equivalent arrangements for EU citizens coming to the UK
- reciprocal provisions on intra-corporate transfers

Future system (July 2018 White Paper)

“allow citizens to travel freely, without a visa, for tourism ...”

- *proposes “reciprocal visa-free travel arrangements to enable UK and EU citizens to continue to travel freely for tourism in the future”*
- *“The Government wants UK and EU nationals to continue to be able to use the European Health Insurance Card (EHIC) to receive healthcare should they need it while on holiday.”*

Future system (July 2018 White Paper)

“facilitate mobility for students and young people...”

- *“The UK and the EU should continue to give young people and students the chance to benefit from each other’s world leading universities”*
- *“The UK proposes a UK-EU youth mobility scheme ...”*

Future system (July 2018 White Paper)

“...ensur[ing] smooth passage for legitimate travel while strengthening the security of the UK’s borders”

- *UK wants “reciprocal arrangements with the EU that ensure smooth passage for UK nationals when they travel to the EU, for example on business or on holiday”*
- *“short, simple and user-friendly application processes”*

Future system (MAC report)

- ***EEA migration in the UK: Final report***
- Published 18.9.18
- Purpose was “*to provide an evidence base for the design of a a new migration system after the end of the implementation period in 2021.*”

Future system (MAC report)

Key conclusions

- Many of the impacts of EEA migration seem to be small in magnitude when set against other changes (Chair's Foreword)
 - *“The fall in the value of the Pound after the referendum vote to leave the EU probably raised prices by 1.7 per cent - this is almost certainly a larger impact than the effect on wages and employment opportunities of residents from all the EEA migration since 2004, although over a different time period.”*

Future system (MAC report)

Key conclusions

- *“migrants have no or little impact on the overall employment and unemployment outcomes of the UK-born workforce” (possible variability depending on skill level but unclear);*
- *“migration is not a major determinate of the wages of UK-born workers”*
- *“the existing literature and the studies we commissioned point towards immigration having a positive impact on productivity but the results are subject to significant uncertainty”*

Future system (MAC report)

Key conclusions

- Migration has reduced prices of some personal services, and has increased house prices, particularly in low stock areas
- *“EEA migrants pay more in taxes than they receive in benefits. The positive net contribution to the public finances is larger for EU13+ migrants than for NMS migrants.”*
 - Considerable variability, depending on household income.
 - ***“A more selective approach to EEA migration, which is not available under free movement, could provide an even more positive impact of migration on the public finances.”***
 - A system that selected on age and earnings ***“could produce even higher gains.”***

Future system (MAC report)

Key conclusions

- No evidence that migration has reduced the quality of healthcare. EEA migrants contribute more through financial resources and work than they consume.
- No evidence that migration has reduced parental choice in schools or attainment of UK born children.
- Limited but growing impact on social housing.
- Migration does not impact on crime

Future system (MAC report)

Recommendations

- Free movement means of loss of control over “*level and type of immigration into the UK*”
- **No view expressed on whether future migration rules should be addressed as part of negotiations on future relationship with EU. Report assumes not, and proceeds on that basis.**

Future system (MAC report)

Recommendations

- Evidence points to high skilled migrants “*having a clear benefit to existing residents*”, while the same is not true for lower skilled migrants.
- “... a policy on work migration that provided greater access for higher-skilled migration while restricting access for lower-skilled workers to enter the UK would be consistent with the available evidence.”

Future system (MAC report)

Recommendations

- Propose abolition of Tier 2 (General) cap
- Bring medium skilled jobs within Tier 2 (General), but...
- Maintain £30,000 salary threshold
- Extend immigration skills charge to EEA citizens
- Abolish RMLT
- Make it easier to change employment once here
- No route for low skilled workers except perhaps seasonal agricultural workers

Future system (CPC 2018)

- Sajid Javid 2.10.18
 - “*unique opportunity to reshape our immigration system for the future*”
 - “*A skills-based, single system that is opened up to talent from across the world. A system that doesn't discriminate between any one region or country. A system based on merit. That judges people not by where they are from, but on what they can do. What people want – and they will get – is control of our own system. With a lower, and sustainable level of net migration. And above all, that has to mean one thing: an end to freedom of movement.*”

Future system (CPC 2018)

- Theresa May 4.10.18
 - *“restore full and complete control of who comes into this country to the democratically elected representatives of the British people”*
 - *New system “will be based on what skills you have to offer, not which country you come from”*
 - *“...we will be able to reduce the numbers, as we promised.”*
 - *“...by ending free movement we will give British business an incentive to train our own young people and to invest in technology that will improve their productivity.”*