

‘Settled status’ and its alternative under UK law

Introduction

In an announcement at the end of June 2017, the UK Government indicated that all EU nationals in the UK, who had lived in the UK for five years or more, including those who already held permanent residence, would need to apply for settled status. Settled status falls within the Secretary of State’s definition of Indefinite Leave to Remain under the immigration rules. If applied to the 3 million EU citizens living in the UK pre-Brexit, settled status would see them being stripped of all existing rights. They would have to apply to have their rights to live in the UK granted as ‘indefinite leave to remain’ in the UK. Unlike EU Citizens’ current rights which are declaratory, meaning that a Registration or Permanent Residence card is merely evidence of their existing rights, settled status is constitutive, meaning that EU Citizens will have to apply for a grant of status. Settled status is designed to make EU Citizens subject only to the UK Government’s immigration rules and laws, as opposed to EU rules and laws. The necessity to apply for and be subject to the conditions of settled status falls far short of the preservation of rights promised to the 3 million.

This document will first set out why ‘settled status’ is unacceptable; showing very concretely what it would mean in practice and illustrating how it undermines existing rights, compared to the EU status of Permanent Residence.

The second part of the document explains the very problematic underlying philosophy in the Government’s approach to ‘settled status’ and proposes instead a solution that guarantees all the rights of EU citizens in the UK, acknowledging that this requires a solution that is ultimately translated into UK law.

Why ‘settled status’ is unacceptable.

What will happen when an EU Citizen applies for settled status?

EU Citizens would be obliged to apply for settled status or leave to remain via a proposed digital service. This will require EU Citizens to prove their identity and provide evidence to satisfy some unspecified requirements such as ‘criminality’ and ‘conduct’ checks, residence requirements and identity procedure. Failure to meet the UK Government’s requirements could have a disastrous impact on an EU Citizen living in the UK such as losing the right to work, residence, access to banking and housing or even removal from the UK.

A mandatory procedure of application – Currently, for non-EU nationals, the Home Office requires correct forms, specified identity documents, significant fees and compliance with all requirements for an application to be valid. Failing to meet any of these requirements leads to applications being rejected. The UK Government will apply similar requirements to EU Citizens. This will result in fees being lost when applications are rejected and, following Brexit day, EU Citizens being without any lawful basis to remain in the UK.

Failure to satisfy requirements - We know that the UK Government will require EU Citizens to demonstrate that they were resident in the UK for a 5 year period in order to qualify for a grant of settled status. Criminality and conduct checks will be performed. It is unclear what threshold of criminal history the UK Government will accept or what ‘conduct’ will result in applications being refused. Indeed, we do not know how far back into a person’s history they will go to satisfy themselves of this requirement. Some of these individuals could have lived in the UK all or most of their lives. It is possible that they could be deported or granted periods of temporary leave. It is possible that the term ‘conduct’ could incorporate less serious previous breaches of UK law, such as bad driving or not paying their TV licence on time, or not having complied

with the terms of an Accession work regime, or having attended a demonstration in the past. It is impossible to know how much data mining would occur into a person's background such as obtaining NHS records and bank accounts.

General grounds for refusal - In addition to specified requirements relating to settled status, the general grounds for refusal that apply to all applications under the Immigration Rules will likely extend to EU Citizens. General grounds include issues where false information is provided, either with or without an applicant's knowledge, with an application (this could be just a misspelt name) or previous refusals. A simple matter such as this will result in the refusal of an application under the immigration rules.

Any refusal or rejection of an application could see EU Citizens being deemed to be in the UK unlawfully post Brexit, which could result in them facing removal from the UK under the UK proposal.

The above illustrates that EU Citizens will not experience treatment equivalent to the *status quo*.

Lengthy processing times - The process for settled status applications will take a considerable amount of time. The Migration Observatory has estimated that it will take 140 years' worth of Home Office time at the current rate to process applications from 3 million+ EEA applicants. The Home Office will be under considerable pressure to make these decisions within a much shorter time frame. An overworked department is likely to lead to inconsistent and erroneous decision making.

What would happen if an EU citizen's application for settled status were to be refused?

No rights of appeal - The current appeal regime allows EU Citizens to challenge Home Office decisions in an independent Tribunal and beyond. The Tribunal can assess whether or not the decision is in accordance with EU Law. The UK proposal, on the other hand, refers to UK courts governing decision-making post Brexit. It gives no indication whether there will be ongoing appeal rights to challenge EU refusal decisions. The only appeal rights that currently remain in the Tribunal are if a Human Rights or Protection (refugee/humanitarian protection claims) claim has been made to the Home Office. Without appeal rights, the only remedy will be risky, complex and costly judicial review claims. Increasingly the government is attempting to ensure that some categories of appeals can be exercised only from abroad.

Certification of decisions - where there are no human rights arguments keeping someone in the UK, or if the UK does not accept that there is a serious risk of a human rights breach, the Home Office can certify a case as unfounded. This would deny the EU Citizen their right of appeal in the UK.

If an EU Citizen gets settled status, can it be taken away?

EU Citizens could face losing settled status if they are found guilty of criminal conduct. EU Citizens could see their status revoked automatically and face deportation following a criminal conviction carrying a 12 month or longer sentence. The threshold for revocation of status and deportation under current UK immigration rules is lower than under EU law. Under EU law a potential deportee has to be individually assessed as to whether they would be a danger to the country or be unable to be rehabilitated before such a radical step as deportation can be undertaken. Even strong human rights arguments rarely succeed in resisting deportation orders of non-EEA nationals and preventing revocation of settled status.

EU citizens would face losing their right to remain in the UK if they are absent from the UK for more than 2 years. If they wish to return they would have to apply to enter the UK from abroad and demonstrate they have 'strong ties' in the UK. Processing times vary from country to country. This is a restrictive, loosely defined concept giving border staff significant discretion to refuse entry to a returning resident. This would see families separated and lives disrupted.

Can Family Members get settled status?

To secure settled status, people who were the family members of an EU citizen post Brexit will have to demonstrate that they are in a 'genuine relationship' with their EU Citizen family member. The Home Office have zealously applied the test of genuineness with regard to spouses and are quick to categorize marriages as "sham." Those who fail to persuade the Home Office that they are in a genuine relationship with their EU family member will have their applications refused.

Partners will need to meet the highly controversial minimum income threshold requirements which has drastically reduced the number of foreign spouses who qualify to enter or remain in the UK. Other family members such as dependent parents or grandparents who currently qualify under the Citizens' Directive will face an almost impossible hurdle to secure entry clearance or leave to remain as "adult dependent relatives". The change in UK immigration rules for family members in 2012 has led to a huge increase in separated spouses and children or in families being unable to bring their elderly family members to the UK to care for them.

What about UK citizens returning to the UK with their EU Citizen family members?

The position will be the same as above. For example, the German mother-in-law of a British citizen returning to the UK from a life in the EU to live in the UK post Brexit will no longer be allowed to join as a family member.

What will it be like living in the UK with settled status?

At a minimum, applying for settled status will require a time consuming and expensive application process, with many potential pitfalls to success. Because this status requires the issuing of a specific document if this documents is lost or misplaced it will require a second time-consuming and expensive process to replace it. At its extreme, a lost or misplaced document can lead to access to work, housing, NHS care, banking etc. being withdrawn.

The alternative to settled status

The offer of 'settled status' is inspired by the following underlying philosophy:

1. EU citizens in the UK will be brought fully within UK Immigration law. This has many consequences, which go beyond the fact that settled status takes away current rights. It also means that concepts and case-law of UK immigration law will gradually further undermine acquired rights as EU citizens.
2. It is likely that the Repeal Bill allows for (many) aspects of the current status of EU citizens to be undermined simply by Government, even without Parliamentary debate.
3. The UK recognizes that some citizens' issues, such as health and social security coordination, need to be dealt with in the WA. However, it is far more ambivalent about the extent to which rights of residence can be covered in the WA.

This leaves EU citizens in the UK in an extremely vulnerable position; left between on the one hand the creeping undermining of their rights by immigration law concepts, case law and governmental intervention; and on the other hand, a set of international law commitments which administrations might fail to recognise.

What EU citizens in the UK need is for ALL their rights to be guaranteed in a UK-EU agreement, but equally translated into UK law in a way that they will be easily recognised by administrations and courts.

The solution is the following:

1. To ensure that EU citizens in the UK retain their current rights, their status has to be set out in detail in an international agreement between the UK and the EU. This can be the Withdrawal Agreement (WA), but preferably a separate citizens' rights agreement (CRA) that is adopted prior to that, in order to ring-fence our rights in case the Brexit negotiations fail. We have shown elsewhere that this is legally possible under Article 50. ([see here](#))
2. The status set out in the WA/CRA describes our status comprehensively covering all our existing rights, for both EU citizens in UK and British in EU. For the British EU this means substantially continuity of falling under EU citizenship rules. For EU citizens in the UK, the WA/CRA will have to provide more detail on how this status has to be translated into UK law.
3. For EU citizens in the UK, the citizens part of the WA or the CRA should be translated into UK law via primary legislation, namely in a separate bill, and not in the Immigration Bill. The Bill is about fully recognizing acquired rights of a closed category. It is not about regulating future immigration flows. The status of EU citizens already residing in the country should be labeled in different terms than 'settled status' or 'ILR'. The WA/CRA has to indicate which criteria and which application procedure will be put into practice for registration, within the respect of EU law.
4. The WA/CRA should be given direct effect and the preliminary reference procedure should remain available for the interpretation of the WA/CRA. This procedures will be available for British in the EU. Reciprocity means they should also be available for EU citizens in the UK. Direct effect and preliminary reference are needed as guarantee in the case that the national legislation or national implementation is not in conformity with the WA/CRA.