

# EU Citizens' Rights and Settled Status

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Contracted by the European Commission to provide legal and policy advice to the EC Representation in the UK, the EU Embassies and the European Direct Information Centres

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# Introduction

- Seraphus
- A firm with 30+ years of combined experience
- UK domestic law, asylum, human rights, and EU law
- A *www.freemovement.org.uk* partner
- Proponents of freedom of movement for all
- As a result of the 2016 referendum these two areas of immigration law are about to intertwine in a way we as practitioners have not experienced before

# EU law

- Currently most EU citizens and their family members live in the UK under EU law which is commonly known as free movement
- This allows EU citizens to come to the UK to live, work, set up businesses, study etc. (known as 'exercising treaty rights')
- Most people do not have much interaction with EU law because their passport or ID card is enough to evidence their rights
- Some may have a document issued from the HO - such as a blue PR document - which shows that they live in the UK under EU law
- Non-EU family members of EU citizens are the most likely people to have such documents in order to travel, be employed, access NHS etc., more easily (they are not obliged to apply)

# 2016 referendum

- EU law will cease to apply when the UK leaves
- This has necessitated a negotiated agreement between the EU and the UK covering the divorce areas including citizens' rights, financial reconciliations, and the Irish border
- This is known as the Withdrawal Agreement (WA), jointly agreed on 14 November 2018
- Part Two of the WA sets out the conditions that EU citizens and their family members will be able to continue living in the UK for the rest of their lives (if they wish), after Brexit
- The WA will be voted on in the UK parliament on 11 December 2018. If this is approved the WA should become law
- But for now... *"nothing is agreed until everything is agreed"*

It's an issue for  
everyone

*"For me as a French resident, I'm thinking, what's going to happen? Are they going to kick me out? Do I need to get a British passport? Should I marry an Englishman? No I won't go that far."*

Eva Green, French born actress

# Key dates

- 28 August 2018 – Start of first trial (PB<sub>1</sub>) stage for the settled status scheme
- 01 November 2018 – Start of the second trial (PB<sub>2</sub>) stage
- 14 November 2018 – WA jointly agreed by the UK and the EU
- 15 January 2019 – The “meaningful vote”
- 21 January 2019 – Start of the third trial (PUB<sub>1</sub>)
- 29 March 2019 – Latest start date for the settled status scheme
- 29 March 2019 – The date the UK leaves the EU(?)
- 31 December 2020 – The end of the transition period
- 30 June 2021 – Deadline for EU citizens and family members to secure residence rights under the settled status scheme

# Nationalities protected

- The EU27 nationals
- Non-EU family members
- The WA does not cover citizens of Iceland, Liechtenstein, Norway (EEA) and Switzerland but the UK Govt. says it intends the citizens of these countries to be included in the settled status process

# Individuals protected

- EU citizens and family members who, by 31 December 2020, have been residing in the UK can continue to do so
- Those who are outside the UK on 31 December 2020 but have maintained continuity of residence (without PR)
- Those who are outside the UK on 31 December 2020 and can establish a historical continuous residence for a period of 5 years
- Select family members will be allowed to enter the UK after 31 December 2020



# Family members

- Family members of an EU citizen who can enter the UK anytime:
  - Spouse
  - Civil partner
  - Durable partner
  - Dependent children or grandchildren (including adopted, born through surrogacy recognised in UK law, and children in respect of guardianship orders)
  - Dependent (dependency is assumed) parents or grandparents
- The relationship must have existed on 31 December 2020 and at the time that they enter the UK (except future children)
- All other (extended) family members must be residing in the UK by 31 December 2020

# Family members

- Family members can be of any nationality if related to the:
  - EU national
  - Spouse of the EU national
  - Civil Partner of the EU national
- Family members of the durable partner are not included
- Other (extended) family members have to be related to an EU citizen

# Family members

- Relationships need not exist on 31 December 2020 for:
  - Future children born to the EU citizen or their spouse and civil partner
  - Future children adopted by the EU citizen or their spouse or civil partner
- Any family members who arrive after 31 December 2020 will need to apply for pre-settled status within 3 months of their arrival

# Social assistance

- Under the WA there will be no change to healthcare, pension or other social assistance rights
- Department for Work and Pensions (DWP) will continue to apply the habitual residence test to access some social assistance
- These protections are different to the issue of lawful residence and so are not covered as such by the EU Settlement Scheme/Settled Status Scheme (though settled status is evidence of being protected by the WA)

# The settled status process

- The WA allows the UK to introduce a constitutive registration system to distinguish between current and future EU citizens
- This is what is known as the EU Settlement Scheme/Settled Status Scheme
- Two statuses:
  - Settled status is for those EU citizens and their family members who have lived in the UK for 5 years when they apply (with some limited exceptions to the 5 year rule)
  - Pre-settled status is for those who have not lived in the UK for 5 years by 30 June 2021 and to allow them to accrue the 5 years needed to apply for settled status (they must apply for settled status before their pre-settled status expires)
- The details are contained in the Home Office (HO) Statement of Intent, Appendix EU of the Immigration Rules and the EU Settlement Scheme Caseworker Guidance
- Senior Caseworker Guidance will not be published

# Applying

- Most EU citizens cannot apply at the moment (only test groups)
- Application process to be '*fully open*' by 29 March 2019
- Applying by 30 June 2021 gives discretion as to the date of submission
- Choose the most optimum period, some people may want to establish their status as soon as they can
- Online form and an Identity App
- Paper form will be available to a limited (as yet undefined) group, the online form will be the norm
- A certificate of application will be generated on applying

# Fees

- Those who have participated in the scheme to date had to comply with the following fee scheme:
  - Adults - £65
  - Under 16s - £32.50
  - Free for those with ILR / PR documents
  - Free for 'Looked After Children' (i.e.: those under local authority care)
  - Free for holders of pre-settled status who apply for settled status
- On 21 January the PM confirmed that the scheme will be fee free when implemented fully in March 2019 and those who were required to pay before then will be refunded

# Key requirements

- ALMOST ALL EU CITIZENS WHO WANT TO BENEFIT FROM THE WA HAVE TO APPLY UNDER THE SCHEME!
- Even those who have a PR card still need to apply
- There is an exemption for those who hold ILR. But... they can and probably should apply as well
- To apply there are 4 things that an applicant must do:
  - Make a valid application
  - Prove identity and nationality
  - Prove length of residence in the UK
  - Undergo a criminality check (for over 18s)



# Move favourable provisions

- To make the pre/settled status easier to administer the UK Government has used the '*more favourable provisions*' at Art 34 WA to forgo the following requirements of free movement:
  - Evidence of exercising '*treaty rights*' in most situations (see also EU16 Suitability requirements)
  - Evidence Comprehensive Sickness Health Insurance (Students and Self-Sufficient persons)
- In essence this means that the HO will look at how long an applicant has been resident in the UK for and not at whether they have been working, unemployed, claiming benefits etc.

# Valid application

- An application must be valid before the HO will consider it
- There are four requirements for validity:
  - It must be made in the UK using the required application process
  - Payment of the fee
  - Provide the required proof of identity and nationality
  - Enrol facial image (Non-EU citizen family members will need to enrol biometric data)
- An application will not be rejected as invalid, a reasonable opportunity to fix the invalidity will be allowed
- If an applicant is given a reasonable opportunity to remedy the invalidity but fails to do so the HO will retain the entire fee

# Identity

- Verified by a passport (for any applicant), or
  - National ID card (for EU citizens)
  - Biometric Residence Permit (for Non-EU citizens)
  - Biometric Residence Card issued under the EEA Regulations
- An App will check biometric passports and transmit identity data to the HO (only available on Android phones not iPhones)
- EU Exit: ID Document Check App steps:
  - Provide name, phone and email
  - Scan ID
  - Verification code sent to phone
  - Scan ID chip
  - Take 'likeness' test
  - Take selfie
  - Complete

# Identity

- Face-to-face services available in certain locations to allow applicants to access the App
- Alternatively, documents can be posted to the HO
- The HO may accept alternative evidence of identity and nationality *'where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons'*

## Residence: establishing

- The online form will automatically check HMRC for evidence of residence against an applicant's NI number
- The HO will not check any data beyond an *'ongoing relationship with HMRC'*
- The HO has said they will also carry out checks with the DWP
- Gaps in records can be supplemented with additional proof of residence
- A non-prescriptive list of acceptable residence evidence in the EU Settlement Scheme: evidence of UK residence guidance
- Can submit a photocopy, photograph or scanned digital image of any required evidence
- Note exclusions

## Residence: continuous

- They must not have been absent from the UK for more than 6 months in any 12 month period otherwise continuous residence is broken
- One period of absence of more than 6 months but which do not exceed 12 months are permitted for an important reason
  - childbirth
  - serious illness
  - study
  - vocational training
  - overseas posting
- Any period of compulsory military service is permitted

# Criminality

- The HO intends to identify serious or persistent offenders, or
- Anyone who poses a security threat
- Disclosure will be required by the EU citizen or family member aged 18 or over
- Checks will be made against UK criminality and security databases (PNC and WI)
- Checks may be made against overseas criminal records
- Conduct, including convictions that relate to it, before 31 December 2020 will be assessed according to the current EU public policy tests for deportation
- Conduct, including convictions that relate to it, from 01 January 2021 will be considered against UK deportation thresholds

# Criminality: suitability

- An application *will* be refused on grounds of suitability where:
  - The applicant is subject of a deportation order or a decision to make a deportation order, or
  - The applicant is the subject of an exclusion order or an exclusion decision
- An application *may* also be refused where:
  - Whether or not to the applicant's knowledge false or misleading information was submitted
  - Whether or not to the applicant's knowledge false representations or documents have been submitted
  - The applicant is subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC
    - *Note not to be used against students or self-sufficient persons for lacking Comprehensive Sickness Health Insurance*
  - The decision must be proportionate



## Criminality: suitability

- Suitability Guidance confirms EU15(c) gives the HO the option, if it so chooses to exercise it, to internally refer settled status applicants who have not exercised treaty rights to Immigration Enforcement (IE) on that basis
- Because the EU15 applies in respect of the date of decision of the settled status application, this allows the HO to in essence, pause the settled status application while IE is considering a removal decision
- If IE decides to issue a remove decision then, as it will be in existence prior to the determination of the settled status application, the application can be refused under EU15(c) on that basis. The applicant will receive the removal decision and the settled status refusal simultaneously
- What we don't know here is, whether there will be a particular cohort of EU citizens targeted (e.g. out of work single mother or a street-homeless persons) and what factors will the Senior Caseworker and European Migration Policy Team consider
- Poor quality decision-making which has characterised HO policy towards EU nationals may continue, thereby putting many outside the settled status scheme
- Monitoring the processes will be vital to ensure that it is consistently and fairly applied

# Granted: the status

- For EU citizens, evidence of pre-settled or settled status will be in digital form – this means online they can:
  - View the status
  - Understand the rights associated with the status
  - Update personal details
- Accessible via ID number, date of birth and name (two-stage verification code)
- Displays:
  - Name, photo, personal details
  - Type of status and what this status means
  - Providing rights (ID document or status pre-Dec 2020) information and sharing this with third parties

## Granted: the status

- Shared via email address or via an access code, and the link will remain live for 30 days
- An employer, for example, will see a photo, name, and whether a person can work or with limitations
- The employer can enter their details and the HO will be able to view (and keep) a record of the company accessing the status, the person who made the check, the date of the check and a reference number
- After 31 December 2020 the following may ask for evidence of status: employers, landlords, NHS, banks, DWP, immigration services

## Granted: the status

- Non-EU citizen family members will be issued with a biometric residence document
- Holders of pre-settled status will need to maintain continuous residence and, where relevant, their family relationship, in order to qualify for settled status later
- Holders of pre-settled status must apply for settled status before the expiry of the pre-settled status to continue living in the UK
- Holders of both statuses will be able to travel to and from the UK using a valid passport or (at least until 31 December 2025) a valid national ID card

# A simple process?

- The HO has said that the process will be:
  - Streamlined
  - User-friendly
  - Draw on existing government data
  - Work with applicants to avoid errors or omissions
  - Approach is to look to grant, not for reasons to refuse
  - HO Caseworkers will be able to exercise discretion in favour of applicants, with a principle of evidential flexibility
  - HO will work with applicants and give them a '*reasonable opportunity*' to avoid errors or omissions that may impact on the decision process.
  - But, only where '*a simple omission*' has taken place

# A simple process?

- The HO caseworking centre currently consists of 1500 staff, of which 300 are working within the EU Settlement Resolution Centre (with readjustments if required)
- Currently, there are no performance or time targets set
- The internal HO IT system is called PEGA

# Professional Qualifications

- Professionals trained and obtained qualifications in one MS and who decide to move to work in another MS which regulates access to and pursuit of this profession would have to obtain in that MS recognition of their qualifications
- In a few professions (doctors, nurses, dental practitioners, midwives, pharmacists) there is an automatic recognition system based on common minimum training conditions
- The MS where recognition is sought must issue a relevant decision within strict deadlines. Such decisions are subject to appeal under national law
- The WA provides EU citizens residing in the UK at the end of the transition period and having previously obtained recognition of their qualifications should not be affected by Brexit as regards the validity of the recognition
- The WA also covers pending applications for recognition made before the end of the transition period

# Refusals

- Where a valid application is refused before 31 December 2020 the applicant can:
  - Reapply to remedy the refusal ground
  - Request an administrative review of the decision
  - If the refusal is received after 30 March 2019, apply to appeal the decision (subject to primary legislation)
- An appeal is made to the immigration tribunal at a cost of £80 / £140 (depending on an paper or oral appeal)
- Continued right of residence under free movement is unaffected by refusal decisions received before 31 December 2020



# Missed deadlines

- If an applicant misses the 30 June 2021 deadline they can apply late
- They must have a '*good reason*' for the delay in their application date
- They will then have a reasonable further period in which to apply
- But, a period of unlawful residence may occur
- SO MAKE SURE YOU APPLY BEFORE THE DEADLINE!

# Monitoring

- Rights under the WA are life-long (though they may lapse in certain circumstances) and will be binding under international law
- The UK legislation enacting the WA will prevail over other UK legislation, so the UK laws cannot 'accidentally or otherwise' take away rights protected
- UK courts can ask the CJEU for its interpretation of the WA for 8 years after the end of the transitional period / from when the settled status scheme begins (no earlier than coming into force of the WA), which should be long enough to ensure that it can rule on the most significant cases
- Other aspects of the WA are not time limited (i.e. rely directly on the WA that prevails over incompatible national legislation, align to the relevant case-law of the CJEU before the end of the transition and have due regard to future cases)

# Monitoring

- During the Transitional Period / Implementation Period the European Commission will retain its monitoring role
- Citizens' rights are to be monitored in the UK by a new Independent Monitoring Authority (IMA)
- This authority will also have the right to bring legal action before UK courts in connection with citizens' complaints with a view to seek adequate remedies
- Prior to establishing the IMA, the Independent Chief Inspector for Borders and Immigration (ICIBI) will be the UK monitoring authority
- The authority, as well as the Commission, will each report annually to a specialised committee on citizens' rights set up by the WA on their activities related to the implementation of citizens' rights, including the number and nature of complaints received

# Deal or no deal?

- The government [published](#) a plan on 06 December 2018 if there is no Brexit deal. It would continue with this scheme but make it less generous in the following ways:
  - only apply to people who arrive before 29 March 2019
  - have a shorter deadline for applications, of 31 December 2020
  - have no right of appeal, only an internal administrative review or full-blown judicial review as remedies
  - make it easier to deport people convicted of minor crimes from March 2019. “The EU deportation threshold would continue to apply to crimes committed before exit. However, we would apply the UK deportation threshold to crimes committed after 29 March 2019.”
  - make it harder for non-EU family members. A cut-off point for family members of EU citizens with settled status (i.e., the status needs to be obtained before a family applies) to join them in the UK is set as 29 March 2022 (or 31 December 2020 for spouse and partners whose relationships were established after exit and other dependent relatives)
  - Professional qualifications relevant date changed to 29 March 2019

## Reference material

- EU Settlement Scheme: evidence of UK residence  
[https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence?utm\\_source=053514df-6adf-4fce-ab24-6720e685357f&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence?utm_source=053514df-6adf-4fce-ab24-6720e685357f&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)
- EU Settlement Scheme Caseworker Guidance and Suitability Requirements Guidance for PB2  
<https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance>
- EU Settlement Scheme: employer toolkit  
[https://www.gov.uk/government/publications/eu-settlement-scheme-employer-toolkit?utm\\_source=7057ffdc-5bae-4f45-8db1-a4b98b87fc26&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/publications/eu-settlement-scheme-employer-toolkit?utm_source=7057ffdc-5bae-4f45-8db1-a4b98b87fc26&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)

## Reference material

- EU Settlement Scheme pilot: current expected processing times for applications (to be updated)  
<https://www.gov.uk/government/publications/eu-settlement-scheme-application-processing-times/eu-settlement-scheme-pilot-current-expected-processing-times-for-applications>
- EU Settlement Scheme pilot: applicant information  
<https://www.gov.uk/government/collections/eu-settlement-scheme-pilot-applicant-information>
- EU Settlement Scheme private beta 1  
<https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-1>

## Further info

- EU citizens and their family members can follow updates on:
  - The <https://www.the3million.org.uk> website
  - The [www.freemovement.org.uk](http://www.freemovement.org.uk) website
  - The EU Rep [https://ec.europa.eu/unitedkingdom/services/your-rights\\_en](https://ec.europa.eu/unitedkingdom/services/your-rights_en) website
  - GLA Hub <https://www.london.gov.uk/what-we-do/business-and-economy/representing-london-brexit-talks/eu-londoners-hub>
  - And register for email updates on the gov.uk page: <https://www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-whatyou-need-to-know> (Google: 'EU settled status')