

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 EU free movement law will end and all EEA citizens will fall under UK domestic immigration law

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 free movement law will cease to apply when the UK leaves
- This has necessitated a scheme to protect the residence status of EU nationals under UK Immigration Rules
- This is what is known as the EU Settlement Scheme/Settled Status Scheme (EUSS)
- The framework conditions of this was set out in Part Two of the Withdrawal Agreement (WA)
- In the event of a negotiated Brexit:
 - The EU Settlement Scheme will be implemented in full and in accordance with the WA
- In the event of a 'no-deal' Brexit:
 - The EU Settlement Scheme will still be implemented but with some changes

Presentation structure

- This presentation will cover:
 - a. The requirements of the EU Settlement Scheme in the event of a negotiated Brexit
 - b. The changes to the EU Settlement Scheme in the event of a 'no-deal' Brexit
 - c. The proposed temporary immigration system for EU citizens coming to the UK after 29 March 2019 in the event of a 'no-deal' Brexit

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 private EUSS trial (PB1)
- 01 November 2018 – Start of the second private EUSS trial (PB2)
- 14 November 2018 – WA jointly agreed by the UK and the EU
- 15 January 2019 – The “meaningful vote” (government defeated)
- 21 January 2019 – Start of the public EUSS trial (PUB1)
- 29 March 2019 – The date the UK leaves the EU (?)
- 30 March 2019 – Current stated full launch of the EUSS
- 31 December 2020 – The end of the transition period (under WA)
- 31 December 2020 or 30 June 2021 – Deadline for EU citizens and family members apply to the EUSS (unless there are good reasons)

EU Settlement Scheme:
A negotiated Brexit



The scheme

- Applications are for one of 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 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)
- Online form and an Identity App (on Android phones only)
- Paper form will be available to a limited (as yet undefined) group, the online form will be the norm
- The 30 June 2021 deadline gives discretion as to the date of application

The scheme

- It's a residence based application, the Home Office will not ask for:
 - 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 what they have been doing while resident in the UK (e.g. working, unemployed, claiming benefits)

The scheme

- ALMOST ALL EU CITIZENS, AND FAMILY MEMBERS, WHO WANT TO REMAIN LIVING IN THE UK WILL HAVE TO APPLY UNDER THE SCHEME!
- Even those who have a PR card still need to apply
- Failure to apply in time may result in no lawful status in the UK
- There is an exemption for those who hold ILR. But... they can and probably should apply as well

Nationalities protected

- The EU27 nationals
- Irish nationals can apply but do not need to (rights from CTA)
- Non-EU family members
- Non-EU family members of Irish citizens will need to apply and can without the Irish citizen doing so
- The WA does not cover citizens of Iceland, Liechtenstein, Norway (EEA) and Switzerland. There are separate agreements covering these countries and the UK Govt. intends these citizens to be covered by the EUSS
- Dual British/EU nationals cannot apply but their rights are protected (including sponsoring family members)

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

Fees

- Those who have participated in the scheme to date have 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 during the trial stage will be refunded

Key steps

- To apply there are 4 things that an applicant must do:
 1. Make a valid application
 2. Prove identity and nationality
 3. Prove length of residence in the UK
 4. Undergo a criminality check (for over 18s)

Validity

- An application must be valid before the HO will consider it
- There are four requirements for validity:
 - It must be made in the UK (under the trial stage) 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)
- The '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 (“nationwide coverage by full launch”)
- 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’*
- HO policy on alternative evidence of identity is to be published in due course
- Those with identity documents coming up renewal for should consider renewing in good time to ensure they can meet the EUSS deadline

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

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*' and will be limited to going back 7 years
- The HO will also carry out checks with the DWP for evidence of residence (note: these are limited checks)
- 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

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

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
- Non-EU citizen family members holding pre-settled or settled status will be issued with a biometric residence document

Granted: the status

- Holders of both statuses will be able to travel to and from the UK using a valid passport or a valid EU national ID card (for a period of time though the UK Govt. intends to phase out the use of ID cards)
- After 31 December 2020 the following may ask for evidence of status: employers, landlords, NHS, banks, DWP, immigration services
- 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

Granted: Pre-settled status

- 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
- The same rules on continuous residence apply to holders of pre-settled status and can be through 6+ months in one stretch or accumulatively (with the 12 month exception)
- 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 pre-settled status may lose this status if they commit a criminal offence

Granted: the rights

- Settled status provides for a 5-year absence allowance but would be lost if the holder spends longer than this outside of the UK
- Holders of settled status can apply for British ('naturalisation') citizenship but are not required to do so
- Under the WA there will be no change to healthcare, pension or other social assistance rights
- Holders of either status may lose it if they commit a criminal offence

Becoming British

- You can apply for naturalisation immediately if:
 - You are the spouse or civil partner of a British citizen
 - If you were issued a permanent residence document or ILR in another capacity more than 12 months prior to the date of your naturalisation application
- Otherwise, you can apply for naturalisation:
 - 12 months after the date on which you were issued a permanent residence document or you were granted ILR
 - 12 months after the date you were granted settled status
- There are other additional requirements to be naturalised as British (these requirements are outside the scope of this presentation)

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

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!

The deadline to apply:
30 June 2021



Monitoring

- Rights under 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)

What we have seen so far: Private Beta 1 & 2

- PB1 received 1053 applications all of whom were granted status
- 64% were granted settled status with 36% granted pre-settled status
- No refusals
- PB2 received 29987 applications, 27211 decisions (14 January 2019)
- 70% were granted settled status with 30% granted pre-settled status
- No refusals but , 11 challenges against not receiving settled status
- Short processing times, most cases decided within a week
- HMRC and DWP checks not as extensive as had been hoped
- Mobile App used in PB2 prone to technical difficulties
- Not many vulnerable applicants have been through the yet

EU Settlement Scheme:
A 'no-deal' Brexit



No deal: The scheme

- The UK Govt. [published](#) a plan on 06 December 2018 if there is no Brexit deal
- European Free Movement will probably end on 29 March 2019 meaning that new EU arrivals will be subject to a new immigration system
- The EU Settlement Scheme will still be run in the way described under the WA but it will be 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

No deal: The scheme

- More restrictive for family members. There will be 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:
 - 29 March 2022 for close family members where the relationship existed before 29 March 2019
 - 29 March 2022 for children born by this date
 - 31 December 2020 for spouse and partners and other dependent relatives whose relationships were established after 29 March 2019
- It will be easier to deport people convicted of minor crimes from 30 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."*
- The UK 'may uprate' exported pensions on condition of reciprocity

Future No deal Arrangements: Visiting the UK

- As free movement will be ending, there will be a temporary transitional immigration system from 30 March 2019 until 31 December 2020
- This is to give the UK Govt. time to implement the new post-Brexit immigration system, which is expected to commence on 01 January 2021 (UK Govt. white paper 19 December 2018)
- This means that EU citizens arriving in the UK after 29 March 2019 will need permission to be here under domestic immigration law
- EU citizens (and non-EU family members) coming for short visits will be able to enter the UK, as they can now, and stay for up to three months from each entry

Future No deal Arrangements: Visiting the UK

- This permission will be automatically granted to EU nationals on arrival to the UK
- It will include permission to work and to study, which means individuals can start those activities on arrival
- EU citizens *might* be subject to security checks at this stage (we do not yet know the extent of these checks, if they apply at this stage)
- Family members
 - Close EU family members (spouse, partner, dependent child under 18) can accompany the EU national, i.e. arrive as a visitor together and stay together
 - Third country nationals who wish to accompany an EU citizen will need to apply in advance for a family permit
- Free for EU nationals, third country nationals will be charged

Future No deal Arrangements: Staying in the UK

- Those who want to stay longer will need to apply to the Home Office for leave to remain ('European Temporary Leave to Remain') within three months of arrival
- Those who apply to stay longer will receive a 36-month (three years) non-extendable visa (i.e. does not lead to settled status)
- This will bridge the time in the UK to when the new immigration system starts
- It is unclear at the present time what the position will be for those who stay longer than three months but who do not apply for European Temporary Leave to Remain
- However, the Home Office states that those who are here without permission may face enforcement action

Future No deal Arrangements: Staying in the UK

- To acquire the 36-month visa the applicant must:
 - Satisfy the Home Office security checks (again, we do not yet know the extent of these checks)
 - Pay the Home Office application fee (we do not know how much this will cost)
- Employers, universities, landlords will not be required to ask for evidence of the 36 month visa until after 31 December 2020

Future No deal Arrangements: ILR?

- For those who want to stay in the UK beyond the 36-month period, they will need to apply for a new visa under the new system after 1 January 2021
- Applicants will need to meet the rules relating to that visa, including suitability requirements, and pay the relevant fees (including the ISH)
- Those who cannot satisfy the requirements for any other type of visa will be expected to leave the UK before the end of their 36-month visa
- Some categories of visas do not lead to settlement ('ILR')

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
- EU Settlement Scheme public beta phase: suitability requirements
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772102/EUSS-public-beta-suitability.pdf
- EU Settlement Scheme: community leaders toolkit
<https://www.gov.uk/government/publications/eu-settlement-scheme-community-leaders-toolkit>

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: applicant information
<https://www.gov.uk/government/collections/eu-settlement-scheme-applicant-information>
- EU Settlement Scheme private beta 1- report
<https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-1>
- EU Settlement Scheme private beta 2- report
<https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-2/eu-settlement-scheme-private-beta-testing-phase-2-report>

Further info

- EU citizens and their family members can follow updates on:
 - The <https://www.the3million.org.uk> website
 - The www.freemovement.org.uk website
 - The EU Rep 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 email updates')

Remember to apply,
apply before the deadline,
and spread the message!

Thank you!