

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

Short Version - Information correct as at 28 November 2018

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 is not law yet so: *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 (PB₁) stage for the settled status scheme
- 01 November 2018 – Start of the second trial (PB₂) stage
- 14 November 2018 – WA jointly agreed by the UK and the EU
- 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

Transitional period

- EU law will be maintained
- Free movement continues between 29 March 2019 to 31 December 2020 (this period can be extended by joint agreement)
- On 01 January 2021 free movement will end
- A new UK immigration system will be developed for those who want to come and live in the UK after this date

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

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 know 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 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

Key requirements

- ALL EU CITIZENS WHO WANT TO LIVE IN THE UK AFTER 31 DECEMBER 2020 HAVE TO APPLY UNDER THE SCHEME!
- Except those who hold ILR. But they can and probably should apply as well
- Even those who have a PR card still need to apply
- 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)

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

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.

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

- 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

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
- Face-to-face services may be implemented 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
 - The applicant is the subject of an exclusion order or an exclusion decision, or
 - 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
- An application *may* also be refused where, whether or not to the applicant's knowledge:
 - False or misleading information was submitted
 - False representations or documents have been submitted
 - 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 a username and password
- This digital form can be shared by the holder with third parties via a single use access code
- 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

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!

Deal or no deal?

- Legal position is on 30 March 2019 the current EEA Regulations will stay in force [section 2 of The European Union (Withdrawal) Act] – in effect a continuation of free movement (for now)
- Once this happens the UK Govt. will have to decide how to proceed with EU citizens' rights
- The HO have hinted that they are working towards the settled status scheme whatever the outcome of the negotiations, this would be the sensible approach
- Note however, during the negotiations the UK has conceded on a few points like future family members and there is a theoretical risk of that might be rolled back
- Ultimately, we cannot say with legal certainty what will happen in the event of a no deal

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-brex-it-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')