

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

Information correct as at 19 October 2018

Introduction

- Seraphus
- A firm specialising in UK law and policy concerning asylum, human rights, immigration and European free movement
- A *www.freemovement.org.uk* partner
- Seraphus is contracted to provide legal and policy advice to the EU Rep in the UK, and information services to the communities of the EU Embassies
- This presentation concerns the situation at the moment and how citizens' rights will be protected in the future

2016 referendum

- EU law will cease to apply when the UK leaves
- This has necessitated a negotiated transition period by way of an agreement between the EU and the UK covering the divorce areas
- This is known as the Draft Withdrawal Agreement (DWA), which was published on 19 March 2018
- Part Two of the DWA 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 DWA 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 stage for the settled status scheme
- 01 November 2018 – Start of the second trial stage
- 29 March 2019 – Latest start date for the settled status scheme
- 29 March 2019 – The proposed date the UK leaves the EU
- 31 December 2020 – The transition period and EU law ends
- 01 January 2021 – A new UK immigration system will be deployed for those who want to come and live in the UK after this date
- 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 DWA 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 for a period of 5 years (with PR)
- Select family members will be allowed to enter the UK after 31 December 2020

Family members

- The family members, of any nationality, of an EU citizen who can enter the UK anytime:
 - Spouse
 - Civil partner
 - Durable partner
 - Dependent children or grandchildren (including that of the spouse or civil partner)
 - Dependent parents or grandparents (including that of the spouse or civil partner)
- 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 of the EU citizen must be residing in the UK by 31 December 2020

Irish citizens

- Irish citizens enjoy a right of residence in the UK which exists outside the UK's membership of the EU
- Common Travel Area (CTA)
- They are not required to apply for settled status but may wish to do so as this will be evidence that they are covered by the DWA
- Non-EU family members of Irish citizens will need to apply and can without the Irish citizen doing so

Social assistance

- 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

The settled status process

- The DWA 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

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

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 forgone 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.

Key requirements

- **ALL 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)

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 online or paper 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

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

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 documents 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

- The online form will automatically check HMRC and DWP for evidence of residence against an NI number
- The HO will not check any data beyond an '*ongoing relationship*'
- Gaps in records can be supplemented with additional proof of residence
- A non-prescriptive list of acceptable residence evidence at Annex A of the Statement of Intent
- 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 those who pose a security threat
- Disclosure will be required by all adults
- Checks will be made against UK criminality and security databases
- 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

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
- Access using the identity document number (used in the application) and the date of birth
- This digital form can be shared by the holder with third parties via a single use access code sent to the mobile number or email address used in the application
- 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)
- 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

- Citizens' rights are to be monitored in the UK by a new Independent Monitoring Authority (IMA)
- During the Transitional Period / Implementation Period the European Commission will retain its monitoring role
- UK courts can still seek preliminary rulings from the CJEU on questions of interpretation 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 DWA)

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 EU Rep https://ec.europa.eu/unitedkingdom/services/your-rights_en website
 - 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')
 - The <https://www.the3million.org.uk> website
 - The www.freemovement.org.uk website
 - The GLA <https://www.london.gov.uk/what-we-do/business-and-economy/representing-london-brex-it-talks/advice-european-londoners> website
 - For those who advise and assist EU citizens the eurights.uk website
 - And your Embassy websites