

Brexit: the status of EU citizens in the UK

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On 23 June 2016, the UK voted to leave the European Union (the so-called “Brexit”). Since the Brexit vote over three million EU citizens living in the UK and over a million UK nationals living in other EU states have been living in a state of uncertainty concerning their future. The UK Government has set out its proposal for the rights and status of these individuals in its policy paper designed to “*put those citizens first*”.

Summary

On 26 June 2017 the UK Government produced its policy paper *Safeguarding the position of EU citizens in the UK and UK nationals in the EU* to provide EU citizens with greater certainty over their future in the UK (the “**Proposal**”). The Proposal hinges on the status of individuals immediately prior to a specified date which is yet to be determined (the “**Cut Off Date**”). EU citizens who have been a resident in the UK continuously for a period of five years prior to the Cut Off Date will be entitled to apply for “**Settled Status**”.

EU citizens who arrived in the UK before the Cut Off Date, but who have not been a resident in the UK continuously for a period of five years, will be given “*temporary status*” and permitted to remain until they reach the five year mark. Once they have reached five years, these individuals will also be entitled to apply for Settled Status. EU citizens who arrive after the Cut Off Date will be allowed to stay for a “*temporary period*” but should have “*no expectation of guaranteed settled status*”.

In an attempt to ensure Brexit takes place without any sudden shocks, and to avoid what the Proposal calls a “*cliff-edge*”, EU citizens will be allowed a two year grace period from “*exit day*” during which to apply for their new status. Those awarded Settled Status will be allowed to stay in the UK indefinitely, entitled to use public services and receive benefits, including pensions and healthcare, on the same basis as British citizens. They also become eligible to apply for British citizenship. The Proposal is not unilateral but contingent on UK citizens living abroad receiving reciprocal treatment from other EU states.

The Proposal intends to introduce legislation to establish the rights of EU citizens in the UK, which would be enforced by British courts. This has proved particularly controversial, with the European Parliament Brexit negotiator Guy Verhofstadt insisting the ECJ “*must play its full role*”.

Uncertainties

The Proposal, which constitutes a crucial part of the negotiations with the EU, has been pitched by Theresa May as offering EU citizens residing in the UK with rights which are “*almost equivalent to British citizens*”. However, the Proposal contains a number of uncertainties.

- **Cut Off Date:** The Proposal has set out that the specified Cut Off Date will be no earlier than 29 March 2017 (the date at which the UK triggered Article 50) and no later than the date of the UK’s withdrawal from the EU (likely March 2019). This provides the UK with both leverage in the negotiating process

and flexibility to safeguard against the possibility of a late surge of migrants into the UK as Brexit nears. It is conceivable, therefore, that certain EU citizens could lose the rights which they held at the time that the UK was still a member of the EU. Whilst it seems unlikely that the EU would agree to anything earlier than the date of the UK's formal withdrawal from the EU, until a specified Cut Off Date is agreed, millions of EU citizens will continue to feel vulnerable. The UK Government has subsequently stated that free movement will end in March 2019, despite speculation that EU migration could continue with a registration scheme during any post-Brexit transitional arrangements.

- **Right to Leave:** Under the Proposal, those with Settled Status will risk losing such status if they are absent from the UK for more than two years, unless they have "*strong ties*" to the UK. Not only are EU citizens not afforded the same protection as British citizens, who are at liberty to go abroad for long periods without losing their citizenship, but there is also significant uncertainty as to how "*strong ties*" will be interpreted and whether the clock can be reset if an individual returns to the UK during the two year period.
- **Family Dependants:** Currently, EU citizens living in the UK have the right to bring over family members to join them. Under the Proposal, family members who arrive before the Cut Off Date will need to apply for Settled Status in the same way but those family members who arrive after the Cut Off Date will be subject to "*the same rules as those joining British citizens*" which is likely to include a strict income means test. This has yet to be clarified but it is worth considering the current income thresholds for non-EU citizens: £18,600 for those bringing over a partner, an additional £3,800 for a child and a further £2,400 for each additional child.
- **Documentation:** The Proposal states that EU citizens will be required to obtain "*documentation showing their settled status*" which will include those individuals who have already gone through the process of attaining permanent residency status. The Proposal is silent on the form that this residence document will take.
- **Fees:** The fee for submitting an application for Settled Status has not yet been fixed with the Proposal stating only that it will be set "*at a reasonable level*". Currently, there is a substantial difference between the fee for a document certifying permanent residence (£65) and the fee for becoming a naturalised British citizen (£1,282) or for indefinite leave to remain (£2,297). It is likely that the fee will be closer to the permanent residence end of the spectrum but what will be deemed a "*reasonable level*" remains to be seen.

Practical guidance for Employers

The rights of EU citizens to continue working in the UK has been an early point of contention in the Brexit negotiations. According to the Recruitment and Employment Confederation and the Migration Policy Institute, an estimated 17 per cent of the London labour force is made up of EU citizens. Across the rest of the UK, EU citizens account for around 7 per cent of the labour force.

At the forefront of UK employers' thoughts is for businesses to be allowed to continue largely unaffected during Brexit negotiations – securing the future of millions of EU workers in the UK is central to this.

Companies who hire workers from across Europe are keenly aware of the risk of losing those workers who are concerned about the impact of Brexit on their lives. Yet, it is not only EU citizens who will be affected, British workers at international organisations, which use the UK as a base for Europe, are becoming increasingly concerned that their jobs may be relocated.

In this respect, educating staff and effectively communicating the key Brexit issues to them will be imperative over the coming months and years. Employers could play an active role in assisting those affected with their applications for Settled Status. This may involve offering to pay application fees on their behalf. Depending on the number of those affected, companies may be required to bolster their human resources department in order to deal with the increased administrative burden. Employers should, however, be cautious about providing assistance to EU citizens which they are not otherwise providing to the equivalent non EU employee or worker– this has the potential to amount to inadvertent discrimination if mishandled.

Conclusion

The EU has set its stall out, seeking to guarantee the existing rights and freedoms of both EU citizens in the UK and UK nationals in other EU countries. The Proposal has been criticized by the EU for a lack of sufficient detail to reassure these citizens. Yet, it is important to remember that the Proposal is just a starting point to be tabled as part of a long negotiation process. In the words of EU's chief Brexit negotiator Michel Barnier, the UK will need to offer "*more ambition, clarity and guarantees*". What is certain is that the status of these individuals will form a key part in Brexit negotiations and it will be for employers to actively engage with staff along the way about the likely implications. If they don't then rumours of relocations or restructurings may fill the vacuum, leading to a worried and less productive workforce.

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