

UK Implementation of Citizens' Rights under the Withdrawal Agreement

Less than five months from the UK's projected withdrawal from the EU, [the3million](#) remain deeply concerned about the state of the negotiations. In separate briefing papers we raise our concerns about various shortcomings of the Withdrawal Agreement, and about the 'no deal' scenario. However, even in the event of a strengthened Citizens' Rights agreement being signed and ratified under Article 50, we have a number of key issues with the UK implementation of such an agreement, which we set out below.

We highlight and explain:

- our concerns with the **EU settlement scheme and future implementation** of the Withdrawal Agreement
- the need for clearer legal guarantees by way of a **Citizens' Rights Protocol** to be attached to the Withdrawal Agreement and guarantees in primary legislation
- our concerns surrounding **governance and oversight** of the implementation

1. Concerns with the proposed EU Settlement Scheme and future implementation of the Withdrawal Agreement

We ask the government to provide EU citizens with a **physical proof** of settled status to avoid discrimination within the hostile environment. We seek **clarification of the rules** which appear to allow checking for health insurance and income by the back door, and we seek reversal of the **data protection immigration exemption**. The procedures requiring citizens to register for a new status in the UK should be **simple, clear and free of charge**. Finally, we continue to object to **criminality checks** being imposed.

[the3million](#) published a comprehensive response¹ to the 'EU Settlement Scheme Statement of Intent' and we highlight below some of our most pressing concerns.

The UK and the EU have committed to the provision of a document evidencing status under the draft Withdrawal Agreement which may be in a digital form. Unfortunately, the government has decided to not provide all successful applicants with a document, digital or otherwise. Whereas non-EU family members of EU citizens will be given a biometric document under the settled status scheme, EU citizens themselves will instead be issued with a code that can be used to access an online portal which will confirm a person's status. This cannot be in accordance with the Withdrawal Agreement for the clear reason that a code is not a document.²

In addition, such a code is not sufficient for those successful EU applicants to navigate the policies of the Hostile Environment. Taking renting as an example, landlords face substantial penalties for letting to illegal immigrants, and research by JCWI³ and RLA⁴ clearly shows the discrimination of citizens without recognisable documentation. It is highly unlikely that (smaller) landlords will have the means or intention to check electronically on a code provided to them by EU citizens.

We therefore ask the government to provide **physical documents** to both EU citizens and their family members so that they can evidence their rights under the Withdrawal Agreement effectively.

¹ <http://bit.ly/t3m-SOI-Response>

² See the wording of Article 17(1) of the Draft Withdrawal Agreement

³ https://www.jcwi.org.uk/sites/jcwi/files/2017-02/2017_02_13_JCWI%20Report_Passport%20Please.pdf

⁴ <https://research.rla.org.uk/press-release/nearly-half-landlords-less-likely-rent-without-british-passports/>

the3million requests urgent **clarification of the immigration rules (Appendix EU)**⁵ implementing the EU settlement scheme via the Immigration Act 1971. We have raised many issues and compiled them into a single document currently containing 162 questions⁶. The Immigration Minister committed to answering them fully by the end of June 2018 but **we have not received any answers**. We have attempted to extrapolate our own answers from publications such as the 'EU Settlement Scheme Statement of Intent'⁷, and the caseworker guidance to be used during the private beta phase⁸.

One such concern (raised in our question 1.30) is around the 'suitability check' in EU15(c) of Appendix EU, which appears to undermine the entire premise of the EU Settlement Scheme. Rather than a registration based on simple proof of identity, residence and criminality check, the 'suitability check' provided by EU15(c) appears to re-introduce criteria such as Comprehensive Sickness Insurance or 'genuine and effective work', which could lead to hundreds of thousands of rejections. The Joint Council for the Welfare of Immigrants (JCWI) have launched a legal challenge⁹ on this point.

We have also repeatedly raised the issue of discrimination that would inevitably result if there were to be any period where EU citizens entitled to, but who had not yet applied for, settled status are to be treated differently to EU citizens not entitled to settled status. It is not the fault of EU citizens in the UK that the UK chose never to implement mandatory registration of EU citizens, and it would be unacceptable for them to be discriminated against during the time it takes to grant over 3 million citizens a new status. The evidence given by the Immigration Minister to the Home Affairs Select Committee on the 30th October 2018¹⁰ demonstrates that we are right to have raised this time and again, although our warnings have not been heeded.

The UK has recently introduced an **exemption on data protection** in immigration related matters. This undermines our rights provided by the General Data Protection Regulation (GDPR) and puts EU citizens at risk of not being able to fight measures taken against them by the Home Office. the3million and Open Rights Group have launched a judicial review¹¹ against the UK Government challenging the exemption.

The Withdrawal Agreement specifies that the administrative procedures for obtaining status should be '**smooth, transparent and simple**', and be issued '**free of charge** or for a charge not exceeding that imposed on citizens or nationals for the issuing of similar documents'. We argue that for many citizens, the procedure will be burdensome due to the documentary evidence they have to supply if they do not have 5 years' records in the HMRC database. The Home Office presents the £65 fee for settled status as equivalent to the current fee for Permanent Residence, however applying for Permanent Residence is optional whereas the settled status application will be mandatory for citizens to be able to continue to live in their own homes.

⁵ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>

⁶ <https://www.the3million.org.uk/questions>

⁷ <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736281/EU_Settlement_Scheme_Caseworker_guidance.pdf

⁹ <https://www.jcwi.org.uk/news-and-policy/broken-promises-eu-nationals-government-intends-to-remove-after-brex>

¹⁰ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/government-preparations-for-brex-border-and-security-operations/oral/92133.pdf>

¹¹ <https://www.openrightsgroup.org/press/releases/2018/open-rights-group-and-the3million-launch-judicial-review-challenging-the-data-protection-acts-immigration-exemption>

We argue that the Settled Status scheme should not include a **criminality check**, since the government is only entitled to refuse settled status to those who pose a threat to UK security. Such people should be known to the government already, therefore criminality checks should not be necessary. A self-declaration of criminality is highly problematic.

2. The need for legal security by way of a Citizens' Rights Protocol to be attached to the Withdrawal Agreement and via primary legislation

We call for a **Citizens' Rights Protocol** to be annexed to the Withdrawal Agreement, or to a separate Citizens' Rights Agreement in the case of no deal; and for our rights and the settled status scheme to be set out into primary legislation. The UK Government has promised a registration system based on proof of identity, residence and criminality check. However, the Government can go back on this promise at any time and start to impose requirements such as being in work or holding comprehensive sickness insurance, even if the Withdrawal Agreement is signed. Only a protocol would make the commitments for a simple registration procedure legally binding by being set out in primary legislation domestically as well as being codified in a legal text at the international level.

The Government has promised a registration procedure simply based on proof of identity, residence and criminality check. It would not apply free movement criteria such as the requirement to be in 'genuine and effective work' or have sufficient resources and comprehensive sickness insurance (CSI) in its implementation of the settled status scheme. (It must be stressed that access to the NHS should suffice as complying with the CSI requirement¹², but the UK government has not accepted this). These free movement criteria in fact make sense in a declaratory registration system in a country that is an EU Member State, but are far more problematic when:

- applied to a constitutive registration system (and in a context of 'hostile environment')
- the UK will no longer be a Member State
- the UK never had a registration system
- 3 million citizens need to be registered at once
- there is no longer full protection of the EU judicial system

Applying the free movement criteria rigidly post-Brexit would lead to similar rejection rates as the UK's current PR registration system, currently 29%. (In fact the rejection rates would likely be higher since many EU citizens are currently not applying since they know they would be rejected.) This would therefore probably lead to over a million EU citizens failing to gain settled status thus becoming illegal and facing possible deportation.

It therefore makes completely sense that the UK has promised not to rigidly apply the free movement criteria and has set on track a settled status application that will be based on identity, residence and criminal checks.

However, there is nothing at all to prevent the UK from going back on these promises in the future. In fact, even the current rules presented in the Appendix EU to the Immigration Rules, is ambiguous on whether the free movement requirements related to being or having been in work will be applied.

Unfortunately, the Withdrawal Agreement does not provide protection on this issue, since it gives the same discretion regarding implementation of these criteria to Member States of the EU, while the impact will be massively different when such discretion is allowed to a non-EU country using it in a constitutive registration system.

¹² http://www.europarl.europa.eu/doceo/document/P-8-2017-003659_EN.html

Moreover, as the European Union Withdrawal Act leaves sweeping powers to the Government on this issue, the requirements for registration could be tightened considerably by the Government without substantial intervention by Parliament.

The only way to legally guarantee the UK, and all future UK governments, keeps to its promises is by way of a Citizens' Rights Protocol to be annexed to the Withdrawal Agreement, or to a separate Citizens' Rights Agreement in the case of no deal. Such a Protocol would be a legally binding text at the international level, an international declaration by the UK on how it will implement the Withdrawal Agreement. The UK Government should propose such a protocol as a gesture of goodwill, since it would contain nothing other than the political promises it has already made.

Even in the case of the signature of a Protocol, but particularly in its absence, the UK Parliament should set out details of the simple registration procedure and its requirements in primary legislation, rather than leaving it open to easy amendment by ministerial intervention. Such details can be set out in the Withdrawal Agreement and Implementation Bill (WAIB).

3. Governance and Oversight of the EU Settlement Scheme Implementation

We urgently call for an **Independent Monitoring Authority** to be established as a **UK-EU supranational** body and to include representatives from **civil society organisations**. Furthermore, monitoring, oversight and the ability to refer to the CJEU should not be limited to a period of **8 years**.

To date we have not been given any details on governance and oversight provision, including an effective dispute settlement mechanism, for the implementation of the Withdrawal Agreement.

The Withdrawal Agreement calls for the establishment of an Independent Monitoring Authority, to take over from EU enforcement mechanisms from the end of the transition period. We argue that such an authority should be a **joint UK-EU body**, so that it is equivalent to the supranational protection that British in Europe in EU Member States will receive from the European Commission. Given recent scandals like Windrush, which took enormous pressure from the media to finally gain attention, trust in the Home Office is at an all-time low. EU citizens are not reassured by a monitoring authority which is solely UK based, thereby effectively 'marking its own homework'.

The **Independent Authority should be operational from the start of the transition period** as many issues will arise then when the bulk of the people will have to be registered. It is true that EU enforcement mechanisms still apply during this period, but there are limits to such enforcement due to the discretion of the Commission (which might be even more the case after Brexit).

We also ask that the **8 year sunset clause** on the CJEU and Independent Authority be reconsidered.

We are concerned about the interim arrangements proposed by the UK Government whereby implementation of the citizens' rights part of the WA will be monitored by the Chief Inspector for Borders and Immigration (ICIBI). This is because the ICIBI role is limited to monitoring and reporting. The inspector will not be able to effectively fulfil the role envisioned by the draft WA.

Any design of the new authority, whether a UK-EU institution or a merely national institution, should provide convincing guarantees to ensure its independence from Government and include representatives from civil society organisations representing EU citizens.