

EEA Nationals (Indefinite Leave to Remain) Bill - briefing for Lords second reading

EU Settlement Scheme: from a constitutive to declaratory system

Risks of a constitutive settlement system

The Home Office has designed the EU Settlement Scheme as a constitutive system, so called because the act of registration constitutes acquiring the right of residence. In making the right of residence dependent on the application process itself, a constitutive system renders lawful EU residents unlawful if they miss the application deadline. After the deadline, a previously lawful resident who failed to register has no right to work, rent or access healthcare and benefits. As Yvette Cooper MP stated to the Home Affairs Select Committee in February, this could generate a “Windrush [scandal] on steroids¹” as millions of EU citizens have to apply or lose their rights entirely by the cut-off date - possibly as soon as 31 December 2020².

Example of the risks associated with a constitutive system

It is 2023, Casandra is a Spanish citizen who has been living in the UK since 2015. She has never left the UK. Casandra has failed to apply for status via the EU settlement scheme. Casandra has no legal basis to remain in the UK. Casandra receives medical treatment via a NHS trust hospital. Because Casandra has no legal basis to remain in the UK she is liable to pay for her treatment. Casandra cannot afford to pay for her treatment and owes thousands of pounds worth of debt to the NHS. The NHS trust refuse to provide any follow up treatment because she has no legal basis to remain in the UK. Casandra applies for status via the EU settlement scheme. She is eventually successful. However, as Casandra had no lawful basis to be in the UK at the time she received her previous treatment, she is still liable to pay for her treatment.

Advantages of a declaratory system

While the3million have consistently argued that any transition away from the right of free movement carries significant risks for those currently exercising it, a declaratory system would minimise the probability and severity of those risks. This is because under such a system the right of residence derives only from fulfilling eligibility requirements, and registration under the scheme merely confirms or declares that right. While a mandatory registration process can – and in our view, should – be part of this system, missing the registration deadline renders lawful EU residents undocumented, but not unlawful under a declaratory scheme. This can be compared with holding British citizenship: while this status is not dependent on holding a passport, in practice citizens have to obtain a passport for convenience or to exercise certain rights, such as overseas travel.

¹ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/eu-settlement-scheme/oral/96447.html>

² https://docs.wixstatic.com/ugd/0d3854_819ef67ce5ab4f0284d0cdbb47815ae8.pdf

Example of how a declaratory system would benefit Casandra

Despite Casandra not registering for status via the EU settlement scheme, because she was resident in the UK prior to relevant date she has a lawful basis to live in the UK. After speaking with Casandra and seeing proof she was living in the UK before the relevant date, the NHS trust establish that she has status to be eligible for NHS treatment. Casandra therefore receives the free NHS treatment she is entitled to. The NHS trust explain that Casandra should register her status with the Home Office. Casandra registers for status via the EU settlement scheme and receives proof of her lawful basis to stay in the UK. She uses this proof to receive further treatment from the NHS.

Incentives to apply under a declaratory system

Although the risk of repeating a Windrush scenario is still present under a declaratory system, compared with a constitutive scheme it is much lower. This is because while there is no difference in terms of eligibility for the scheme, a declaratory system makes the consequences of missing the deadline far less severe, while retaining pressure and incentives on EU residents to register with it. Furthermore, while the EUSS system in its current form does not grant status holders a physical document of their status, under our proposed declaratory system they would obtain such a document. This would incentivise registrations and, following registration, make it easier to navigate the hostile environment for document holders.

Example of the value associated with a physical document (constitutive system)

In this example, the current constitutive scheme is applied.

Casandra is feeling better and wants to work to pay off her debt to the NHS trust. She approaches a prospective employer. The employer asks for proof of her right to work. Casandra has no physical proof of her status after applying via the EU settlement scheme. She asks the potential employer to check her status online. The potential employer refuses to do so and asks for physical proof which he has previously received from other employees. Casandra explains that this is not available and the potential employer refuses to employ her. Had Casandra been in possession of a physical document, the employer would have offered her a job.

Soft deadline to register in a declaratory system

A declaratory EU settlement scheme takes as the starting point that EU citizens and their families acquire settled or pre-settled status automatically by fulfilling eligibility requirements. This does not mean there are no deadlines or cut-offs in a declaratory system. The date of the UK withdrawal from the EU, or the end of any transition period, would act as a **soft deadline to register** under our proposed declaratory scheme, and many qualifying EU citizens will

likely choose to apply by then. EU citizens arriving in the UK after Brexit will not have the same rights, and for those already residing in the UK the registration document will be the easiest way to evidence their status. Thereafter, a date could be set for certain types of private or public actors to start requiring proof of registration to access services – but they should retain the authority to establish proof of entitlement in other ways. If an unregistered person is already receiving e.g. benefits, these entitlements should not be interrupted for a reasonable period during which that person can register.

Eligible EU citizens would still be able to register at any time in the future, and would never be rendered illegal and thus at risk of removal or deportation merely on the basis of not having registered with the scheme. In this way, the risk of “Windrush on steroids” would be entirely avoided.

<u>Constitutive system</u>	<u>Declaratory system</u>
Act of registration <i>constitutes</i> acquiring the right of residence	Right of residence derives from fulfilling eligibility requirements and registration only confirms or <i>declares</i> that right
EU citizens are applying for a new status under UK immigration law and can be refused.	EU citizens are simply registering to obtain proof of a status they automatically hold.
Missing the deadline means being undocumented and unlawfully resident in the UK.	Missing the deadline means being undocumented but not unlawful, and EU citizens retain the right to register in the future should they miss the deadline.