

BRIEFING PAPER
Commons Select Committee on Exiting the EU
Evidence session on the rights of EU citizens in the UK

6 June 2018

Background:

the3million last presented to the Select Committee on 18 January 2017. Since then, the negotiations relating to the chapter of EU citizens' rights have led to many high-level discussions both in Brussels and in the UK.

However, neither the Joint Report of December 2017 nor the European Council's "common understanding" and outline of the Withdrawal Agreement reached in March 2018 sufficiently protect European citizens, due to omissions and ambiguities which have not been addressed.

Amongst other issues, the3million calls for clarity on the many issues raised by the UK's proposed 'settled status' as illustrated by our "150 questions to the Home Office"¹. We also recommend some measures to guarantee our rights, as well as clarify the process and criteria for claiming those rights.

Guaranteeing EU citizens' rights through an international protocol and UK primary legislation

We welcome the fact that the UK Government has made promises to EU citizens that go beyond the EU-UK Joint Report of December 2017 and the draft Withdrawal Agreement of March 2018, such as dropping the requirement for Comprehensive Sickness Insurance and testing for "lawful residence" in line with the EU Directive. However, intentions are not enough and legally binding commitments are crucially required.

Specifically, we ask for a citizens' rights Protocol:

- a) although a separate document, this Protocol would be attached to the final Withdrawal Agreement. The Protocol does not amend the WA. It explains the way the UK will implement it and set out in detail how the UK intends to implement the application process for 'settled status' which would be based on a simple proof of identity and residence. Criminality checks would have to be within the current limits of EU law;
- b) the Withdrawal Agreement and Protocol would then need to be implemented in UK law via primary legislation. The current draft of the Withdrawal Agreement is not clear enough on this issue and unfortunately makes it easier for the UK to opt for

¹ 150 questions to the Home Office (14/05/2018) www.the3million.org.uk/questions

implementation through the less robust secondary legislation. However, lessons from the Windrush story show that continuously changing secondary legislation only leads to disastrous consequences for those citizens involved.

This requires action at two levels:

1) Withdrawal Agreement:

Article 4 of the draft Agreement must be revised to set out explicitly that the citizens' provisions will be incorporated into primary legislation. This promise was in fact included in the Joint Report, even though it has not been translated well into the Withdrawal Agreement.

See our detailed explanation in our document 'Comments on the WA implementation' ²

2) UK Parliament:

Even in the absence of a revision of Article 4 of the draft Withdrawal Agreement, the UK Parliament should ensure that it sets out the details of the EU citizens' status and application process in the Withdrawal Agreement and Implementation Bill, without delegating this to secondary legislation.

The government's plan to introduce the new application scheme for settled status early on a voluntary basis before the Withdrawal Agreement and Implementation Bill creates other issues. Specifically, it would mean less scrutiny of the scheme in this 'test' version. It is also very likely that the government will then ask Parliament to give it the powers to proceed with the compulsory version from 29 March 2019 without any parliamentary debate.

This would seriously undermine the intentions of both chambers of the Parliament not to have a stronger say about the Implementation Bill. Without our status and application system set out in detail into primary legislation, 3.6 million EU citizens will be the next Windrush disaster.

Guaranteeing citizens' rights in case of 'no deal'

Following the concept that "nothing is agreed until everything is agreed", the risk remains that a Withdrawal Agreement between the EU and UK may not successfully be concluded. Such a situation would automatically force EU citizens in the UK into an immigration status that was never designed for them in the first place: Indefinite Leave to Remain (ILR).

EU citizens would then face dire consequences which would impact on their daily lives and that of their families. In the first instance, there would be immediate consequences for travel, access to the workplace and services, and potential discrimination. Worst still, many would be at high risk of not being able to stay under the highly restrictive and complex ILR regulations ³.

² Analysis papers by the3million on the Withdrawal Agreement http://bit.ly/WithdrawalAgreement_comments_2

³ Brexit Acquired Rights: House of Lords' Justice Committee report of December 2016: <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/82.pdf>

Ring-fencing the WA chapter on citizens' rights is therefore crucial to offer a critical safety net in the case of no deal outcome to the negotiations.

The need for oversight of the final Withdrawal Agreement

In relation to citizens' rights, the WA provides part of the enforcement tools traditionally offered by EU law, namely direct effect (Article 4), and the opportunity for preliminary references (Article 151), although the latter is limited in time (i.e. the 8-year sunset clause for the jurisdiction of the Court of Justice of the European Union).

Article 152 appears to intend to address this particular implementation void in the UK by requiring the latter to set up an Independent Authority. However, there is no guarantee at all that the 'independent authority' will at any stage operate independently. There are enough examples of UK 'independent authorities' which have not been able to operate independently, either by way of appointments or restrictions in resources.

Therefore, we are advocating for a UK-EU joint authority (rather than UK only), and its function should not be time-limited as cases are likely to arise during the lifespan of all EU citizens who are protected by the WA, which includes current EU citizens in the UK and their children. It must also be truly independent and able to meet the potential size and complexity of the task over the years.

We also encourage Parliamentarians to adequately scrutinise the implementation of the WA in the future, in relations to citizens' rights, through the work of committees.

Declaratory system for EU citizens to claim their rights

What was agreed between the EU and the UK in the Joint Report of December 2017⁴ only sets the overall framework within which Member States can operate a registration process for EU citizens. It proposes two mechanisms: one which is declaratory, the other constitutive.

The current system ('permanent residence') is declaratory - EU citizens need not apply for a status, only demonstrate that they possess the right to stay. The UK government, however, favours a constitutive process ('settled status') whereby EU citizens must apply for a conditional grant of leave to remain. Those who do not apply for or are not successful in acquiring the new status will be deemed illegal in the UK.

We accept that EU citizens in the UK will be required to show that they are part of the group protected by the EU/UK Withdrawal Agreement and that a registration scheme proving membership of that group will be necessary. However, the UK has never had a registration system for EU citizens who live in the UK and, to date, it is unclear what criteria will be used to grant or refuse "settlement" under 'settled status'. Since the Withdrawal Agreement offers the option for Member States to apply more liberal criteria for citizens to qualify for

⁴ https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

rights, we strongly recommend that the UK adopts a declarative approach. This would include accepting ID and proof of residence as sufficient.

A declaratory approach would be in line with the majority of Member States (17 out of 27) have indicated they will use about British citizens post Brexit.⁵ A declaratory approach has also received the support of the European Parliament Task Force⁶.

Finally, the sheer volume of applications that will need to be processed is creating an unprecedented administrative challenge so that everyone is registered in time; therefore, a simple declaratory process makes sense.

Voting rights

the3million is campaigning to retain the rights of EU citizens to vote and stand for office in local elections. The issue of voting rights has been left outside the scope of the negotiations because the European Commission has argued that this is a matter for national competence.

We welcome the fact that the UK Government has previously indicated that it intends to continue granting this right for EU citizens after Brexit, it should be encouraged to formalise this promise with counterparts in EU member states. The devolved administrations of Wales and Scotland have already clearly stated that they will maintain current voting rights for EU27 citizens.

It should also be noted that UK citizens will continue to hold voting rights in the rest of the EU for those Member States that allow third-country nationals to vote, and the UK has been encouraged to hold bilateral talks with the remaining eleven EU Member States.

Freedom of movement and lifelong right of return

We ask that EU citizens in the UK enjoy a lifelong right of return (currently limited to five years) as well as associated individual economic rights and recognition of qualifications.

Leaving the right of return after five years to the discretion of the Home Office is problematic, considering their track record in dealing with individual cases. This is particularly relevant for young EU citizens living in the UK who might have lived all their lives in the UK and might study or start a professional career abroad, with no certainty they could come back to their country if they do not repatriate within five years.

Recognition of international qualifications is adjacent to this issue, as young EU citizens in the UK are more likely to study in the EU than their British counterparts, and will require a recognition of the qualifications they have gained while studying in the EU.

In reverse, EU citizens in the UK with British qualifications must be able to continue

⁵ <https://www.theguardian.com/politics/2018/may/25/majority-of-eu27-favour-simple-approach-on-britons-residency>

⁶ <http://www.europarl.europa.eu/unitedkingdom/en/media/news/2018/march18/brexit-steering-scrutiny-withdrawal.html>

supplying cross-border services, as well as setting up businesses and having a right of establishment across the EU27, which is dependent on the recognition of their British qualifications by the EU.

Comprehensive Sickness Insurance requirement

Considering that the UK Government has indicated many times in recent months⁷ that the Home Office will not require evidence of Comprehensive Sickness Insurance for the settled status application.

We ask for the requirement to be removed from the current 'permanent residence' registration process now. Removing this requirement would greatly ease the registration for 'permanent residence', especially for those who wish to apply now for British citizenship but are being prevented from doing so because of this unnecessary hurdle. Recent evidence shows the CSI requirement is still a reason for refusal on its own or a barrier for application from those who believe they will be refused.

The UK can remove the CSI requirement via simple regulation and amendment of current guidelines for caseworkers.

Eligibility to the protection the WA: dual citizens, Zambrano carers etc.

The current draft of the Withdrawal Agreement does not cover everyone, which has the potential of creating tough situations for some.

In the case of dual citizens, uncertainty remains when the WA and the domestic law clashes. Take the real-life example of a dual British - Dutch citizen. Will she be able to bring her mother over from the Netherlands to live in the UK if at that point in the future she becomes dependent on her?

- If the answer to this is yes, i.e. as a dual national she is covered by the Withdrawal Agreement,
- If the answer is no, i.e. as a dual national she is not covered by the Withdrawal Agreement.

We also asked the eligibility questions in our 150 questions for groups of people not covered by the scope of the WA, such as Surinder Singh cases (non-EU family members of British citizens who have exercised EU freedom of movement before returning to the UK), Zambrano cases (non-EEA citizen primary carer of a British citizen who is residing in the UK) and Irish citizens.

⁷ Immigration Minister Caroline Nokes 20/022018 <https://www.theyworkforyou.com/wms/?id=2018-02-20.HCWS471.h>

Full questions in Section 2 of our 150 questions to the Home Office ⁸.

⁸ 150 questions to the Home Office (14/05/2018) www.the3million.org.uk/questions