

The Alternative to Current Proposals for EU Citizens Living in the UK before Brexit: UKPR and UKTR

EXECUTIVE SUMMARY

We have a very unique and unprecedented set of circumstances in the UK. The UK has never had an effective registration system for EU citizens who exercise their free movement rights to live in the UK. EU citizens have lived, worked, studied, voted, paid taxes, opened bank accounts, carried out jury duties and voluntary work, have used (as well as worked in) the NHS, etc., without impediment.

EU citizens living in the UK before Brexit should be entitled to continue their lives as EU citizens with their current and future family members. Any system to register EU citizens should therefore avoid retrospective conditions that would result in refusals, appeals, delays, detentions or deportations.

The UK should abandon its attempt to fit EU citizens under existing immigration rules, and accept that the rights of EU citizens living in the UK can only be protected by a UK-EU Treaty, subsequently implemented via a Withdrawal Citizens Rights Act which sets out a status, independent of UK immigration law, to protect this finite group of people. This Act must allow for direct effect and referral to the CJEU. We have previously demonstrated¹ that the UK proposal of settled status under UK immigration rules falls short of protecting rights of EU citizens and their family members. The EU from its side should take EU citizenship seriously and ensure British citizens currently residing in the EU can retain all their rights, including free movement throughout the entire EU.

Both sides should acknowledge that, given that the UK will no longer be part of the EU, reciprocity *in real life* between EU citizens in the UK and British citizens in the EU may require partially different legal solutions. This will therefore require a certain degree of flexibility from both parties achieved through a constructive political agreement.

A simple, quick and accessible registration process should be available as soon as possible, once an international Treaty under Article 50 is implemented in UK law, after which any EU citizen currently living in the UK can register with a local government facility, which offers an accessible decision making process. There should be a grace period after Brexit during which registration will be optional. The grace period should be sufficiently long to allow for all EU citizens in the UK to have been made aware of the registration scheme, and for the scheme to be able to cope with the volume of all EU citizens in the UK to register and receive their documentation. During this grace period, EU citizens in the UK should be entitled to work, study and use social assistance freely on production of their EU ID card or passport alone, maintaining the status quo. Any alternative would create discrimination between those EU citizens who have obtained their documentation, and those who are entitled to documentation but have not obtained it yet.

The key elements of the proposed scheme will involve:

- When registering, EU citizens should show evidence of their residence in the UK with their passport or ID card together with an NHS card, National Insurance number, council tax bill or other simple

¹ p5-8, https://bit.ly/t3m_BiE_UKProposal

documentation, utilising the current European Passport Return Service. If they have five years' residence, they will be issued with a UKPR (Permanent Residence) document evidencing their right of life-long residence and right to return to the UK. If they have less than five years' residence, they will instead be issued with a UKTR (Temporary Residence) document.

- Whole families can be registered together, which will help to address the common issue of residence proof being in the name of one householder only.
- The document will be issued for free or for a nominal fee. EU citizens who live in the UK and have existing PR documents will be able to exchange those documents for UKPR documents for free. Similarly, those who have an existing RC (Registration Certificate) document will be able to exchange it for a UKTR document for free. They only need to provide simple evidence of living in the UK at the time of applying for their replacement document. No retrospective checks will be carried out e.g. to verify whether there has been a break in their residence previously.
- The UKTR document will indicate the date at which the EU citizen will have completed five years and can exchange their UKTR document for a UKPR document. EU citizens who receive a UKTR document will be informed that they will have to comply with conditions set out in the Withdrawal Agreement until they acquire UKPR. Crucially, however, any requirement for Comprehensive Sickness insurance (CSI) will be covered by the NHS (as recommended by the Commission since 2012).
- An in-country right of appeal will automatically apply to those who are denied a document confirming their rights, with strict time limits, right to apply for Legal Aid if eligible, protection from enforcement and the right to continue working, studying, renting etc. for those who are refused a UKTR or UKPR document until their appeal has been concluded. It is essential that EU citizens are protected from the hostile environment² in the UK until final decisions are made on their applications.

Throughout this document, the following acronyms have been used, in order to aid the flow and clarity of the narrative:

WCRT	A potential separate Withdrawal Citizens Rights Treaty, which could be agreed as an earlier ring-fenced international agreement between the UK and the EU covering the rights of EU citizens in the UK and the UK citizens in the EU. In the absence of a WCRT these rights will be set out in the Withdrawal Agreement
WA	Either the Withdrawal Agreement or the WCRT
WCRA	Withdrawal Citizens Rights Act The transposition of the WA into UK national law via primary legislation (passed by Parliament)
UKPR	UK Permanent Residence
UKTR	UK Temporary Residence

² The 'Hostile Environment' refers to the UK Immigration Law changes of 2012, of which Theresa May, then Home Secretary said in an interview with the Telegraph "The aim is to create here in Britain a really hostile environment for illegal migration". This has resulted in landlords, employers, banks, etc. being forced to become agents of the Home Office, in combination with a package of ever-changing complex Byzantine rules and increasing fees.

INTRODUCTION

We have previously outlined an alternative to the EU and UK's proposal to preserving EU citizens' rights for both groups: EU citizens in the UK and British citizens in the EU.

As part of our response to the 4th round of negotiations³, we set out principles we wish to see adopted within an alternative. These were as follows:

What EU citizens in the UK need is for ALL their rights to be guaranteed in a UK-EU agreement, but equally translated into UK law in a way that will be easily recognised by administrations and courts.

The solution is the following:

1. To ensure that EU citizens in the UK retain their current rights, their status has to be set out in detail in an international agreement between the UK and the EU. This can be the Withdrawal Agreement, but ideally a separate Withdrawal Citizens' Rights Treaty (WCRT) under Article 50 that is adopted prior to that, in order to ring-fence our rights in case the Brexit negotiations fail. We have shown elsewhere⁴ that this is legally possible under Article 50. Moreover, it is very important to have a Withdrawal Citizens Rights Act (WCRA) in place before registration for the new status starts.
2. The status set out in the WA will describe our status comprehensively covering all our existing rights, for both EU citizens in UK and British in EU. For the British in the EU this means continuity of EU citizenship rules. For EU citizens in the UK, the WA will have to provide more detail on how this status has to be translated into UK law.
3. For EU citizens in the UK, the WCRT or the citizens part of the Withdrawal Agreement should be translated into UK law via primary legislation, namely in a separate bill, and not in an Immigration Bill. The WCRA is about fully recognising the rights of a closed category. **It is not about regulating future immigration flows.** The status of EU citizens already residing in the country should therefore be labeled in terms different than 'settled status' or 'ILR' (Indefinite Leave to Remain). The WA has to indicate which criteria and which application procedure will be put into practice for registration, within the respect of EU law.
4. The WA should be given direct effect and the preliminary reference procedure should remain available for the interpretation of the WA. This procedure will be available for British in the EU. Reciprocity means this should also be available for EU citizens in the UK. Direct effect and preliminary reference to the CJEU are needed as guarantee in the case that the national legislation or national implementation is not in conformity with the WA.

The following will expand on this to illustrate an alternative to settled status that is workable, fair and in keeping with preserving the *status quo* for EU citizens in the UK.

³ https://bit.ly/t3m_BiE_Round4

⁴ <https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/>

WHY do we need an alternative to the current proposals?

An alternative is needed to protect citizens who have built their lives in the UK relying on the principle of free movement. We have previously demonstrated⁵ that the UK proposal of settled status under UK immigration rules falls short of protecting rights of EU citizens and their family members. This would lead to their lives being severely disrupted.

These concerns have been affirmed by the current UK government's proposal to add an immigration exemption to the new Data Protection Bill.^{6 7} This addition could see EU citizens being denied access to information held by the Home Office about them.

We continue to read daily reports of homeless EU citizens being removed on spurious grounds and often denied a right to appeal, or the marriages of EU citizens to third country nationals being considered 'sham' by the Home Office, deportation letters being sent in error, and multiple instances of the UK Home Office ignoring court orders.^{8 9 10 11 12}

The EU negotiation position, on the other hand, is overly formulaic and legalistic. It does not take sufficient account of the situation on the ground and this will leave many citizens unable to continue living their lives in the UK as normal.

No other state in the EU has ever undertaken the mass registration of 3 million or more citizens within a very short timeframe. This is a huge challenge that may plausibly lead to a proliferation of administrative errors and legal complications with potentially serious consequences for countless EU citizens and their families. EU citizens in the UK will therefore need enhanced protection to avoid having their lives disrupted or even facing detention or deportation when the UK is no longer a member state of the EU.

Finally, the negotiations between the EU and UK are reportedly deadlocked. The negotiations have not worked towards a workable alternative to current EU law that embraces the principles of EU Citizenship. We wish to introduce an alternative that will break the deadlock and move negotiations towards a reciprocal and fair solution that works for the EU, the UK Government and EU citizens.

⁵ p5-8, https://bit.ly/t3m_BiE_UKProposal

⁶ <http://amberhawk.typepad.com/amberhawk/2017/10/dp-bills-new-immigration-exemption-can-put-eu-citizens-seeking-a-right-to-remain-at-considerable-dis.html>

⁷ <http://www.politics.co.uk/comment-analysis/2017/11/03/buried-in-a-government-bill-an-immigration-rule-strips-milli>

⁸ <https://www.theguardian.com/uk-news/2017/oct/11/home-office-couple-living-legally-in-uk-criminals>

⁹ <https://www.theguardian.com/uk-news/2017/oct/13/uk-ministers-told-to-get-a-grip-after-accidental-deportation-letters>

¹⁰ <https://www.theguardian.com/uk-news/2017/oct/13/british-american-family-split-across-atlantic-after-home-office-error>

¹¹ <https://www.theguardian.com/uk-news/2017/aug/23/judge-amber-rudd-orders-torture-victim-asylum-seeker-detention>

¹² <https://www.theguardian.com/uk-news/2017/sep/14/home-secretary-ignores-court-order-sends-asylum-seeker-kabul-samim-bigzad>

WHAT is the alternative to settled status?

UKPR and UKTR

EU citizens should not be deprived of their current rights. This means they should be able to benefit from the right of Permanent Residence after a period of five year residence, and of the rights of temporary residence as recognized by EU law prior to such five year residence.

In a post-Brexit UK, such status will be set out in the WA and implemented in national law via statute (WCRA). We will therefore refer to these two types of status as UKPR (UK Permanent Residence) and UKTR (UK Temporary Residence).

Which rights are included in UKPR?

The rights of UKPR will be set out in detail in the WA and mirror the current rights European PR provides, namely right of residence, principle of equal treatment to British citizens (with exception of some rights such as national voting rights as currently provided by EU law), as well as transnational rights currently related to PR, such as coordination of health and social security entitlements between UK and EU and recognition of economic rights and professional qualifications. It is important that these transnational rights are enshrined in the WA and the WCRA so that administrations and courts can easily find a comprehensive description of the specific status of EU citizens who resided in UK prior to Brexit. We stress that these rights need to be comprehensively set out in the WA and a single UK act transposing it. This will avoid any mixing of these rights with UK immigration rules and laws. They must remain distinct.

There is however one key difference between current EU PR and UKPR. The latter should provide an indefinite right to return, to be set out in the WA and WCRA. Current EU PR provides for the loss of PR after two years of absence from the country. However, that makes sense when a country is part of the EU and free movement rules are systematically being implemented so after having lost PR an EU citizen could still return and build up rights again under normal free movement rules. This will obviously no longer be the case when the UK leaves the EU.

What rights are included in UKTR?

As with EU law, EU citizens have, prior to obtaining PR, the right to reside, and have similar access to services as British citizens, as well as the transnational rights as people who hold PR, but with some limitations in relation to benefits for those not in work. Exclusion or expulsion is only possible within the limits set by CJEU case law, and relate particularly to those who have not been in work (and are not a family member of somebody in work) constituting a burden on the welfare state, or reasons of public security as defined in the Directive 2004/38.

Registration for UKPR and UKTR

The UK has never introduced a compulsory registration system for EU citizens, although EU law allows Member States to do so and many other Member States have done so. This, combined with the unique circumstance of a member state leaving the European Union, makes it highly problematic to introduce a registration system retrospectively, if that implies asking people for evidence related to situations that may go back (decades, often) in the past. Moreover, given the large number of citizens who will need to be

registered, any system that relies on multiple criteria and extensive evidence will be practically impossible to put in place, inevitably leading to a large backlog and a potential increase in the margin of error, currently standing at 10%. This would potentially leave thousands or more undocumented and illegal until their situation is sorted out.

Hence, the only realistic way to register EU citizens for UKPR or UKTR is via a registration system based on a light-touch proof of residence. Equally, when a person with UKTR applies for confirmation of UKPR after the requisite period, they need only demonstrate their continued residence during that period. The WA should set out clearly that residence is the only criterion for registration as well as clarify the details of the procedure as we will now set out below.

The registration system should be based on the presumption that EU citizens were exercising their rights in accordance with the Citizens' Directive prior to Brexit cut-off date. This is necessary in view of the previously faulty implementation of registration and the administrative/logistical problems experienced by large numbers of EU citizens in the UK. Also bearing in mind that the UK is leaving the EU, the consequences of not doing so are far more draconian for individual citizens than if the UK continued to be a member of the EU.

Once a new registration system is available, EU citizens in the UK will be eligible to obtain either a UKTR or a UKPR document confirming their respected right of residence in the UK.

EU citizens who have lived in the UK for five years or more at the point of registration will be recognised as having UKPR. Those EU citizens living in the UK with existing PR documents will be recognised as having equivalent UKPR status in the UK and can exchange them for a UKPR document for free. UKPR status will be valid for life.

Those with fewer than five years of living in the UK prior to Brexit will have a temporary right to continue living in the UK known as UKTR. They will be able to build up rights in the UK for five years to qualify for UKPR. Those EU citizens living in the UK with existing RC (Registration Certificate) documents will be able to exchange them for a UKTR document for free, with the same issue date as the RC document.

EU citizens with UKTR status can obtain a UKTR document confirming their status. The UKTR document will indicate the date when UKTR began, namely the date when the EU citizen started living in the UK. It will also indicate the date (five years after the start date) when the EU citizen will qualify for UKPR.

The declaratory nature and consequences of registration

The UKTR and UKPR registration will be declaratory meaning that the status is not granted by the document itself. The document is merely evidence of the status and loss of the document will not have potentially severe consequences. The mere absence of a registration document as such can never be a reason for expulsion from the UK. This is in keeping with the current rights of EU citizens. It is in the spirit of how they came to be in the UK and live their lives. Replacements for lost documents should be locally available, cheap and quickly accessible.

UKTR and UKPR documents will facilitate access to services and declaration of rights. It is important, though, to note the difference between holding UKPR and UKTR status. Once obtained, UKPR status confirms all the rights currently protected by EU PR status, and is valid for life. The UKPR document is a simple instrument to clarify that status in relation to services, employment and administration.

Someone with UKTR status will have a UKTR document to show their status, which will allow easy access to services such as the NHS. However, unlike holders of UKPR, a holder of UKTR does not have entirely the same access to services as British citizens. Just like temporary status under EU law today, those in work (or who have been sufficiently in work; and their family members) have the same access to services as British citizens. There are however some limitations for those not in these categories, in relation to accessing benefits during the period of UKTR. Hence, when applying for these services, one may be asked to provide proof of respecting the criteria under the Directive 2004/38.

Moreover, as provided by Article 14 of the Directive 2004/38, somebody holding UKTR can lose residence rights if they become an unreasonable burden on the social assistance system of the host Member State. Like under current EU law, the UK will be allowed to verify whether an EU citizen with UKTR still fulfills the conditions of Directive 2004/38, but such verification cannot be carried out systematically (art 14(2) Directive 2004/38). Expulsion on this ground can only happen within the strict boundaries currently provided by EU legislation and case law. The same applies for reasons of public security provided under EU law.

As the UK will no longer be member of the EU, it is important to set out these criteria in the WA as well as a clear stipulation of respect of CJEU case law. For example, the WA should clearly stipulate that access to the NHS must be interpreted as meeting the definition of Comprehensive Sickness Insurance (CSI) and the Primary Earnings Threshold (PET) criteria must not be applied when interpreting whether or not someone is a worker or self-employed.

Time-line: Cut-off and Grace Period

Cut-off date:

As the UK will be part of the EU until Brexit day, that day should be used as the cut-off date. Namely, all EU citizens residing in the UK prior to that date should receive UKPR or UKTR with the chance to build up UKPR. This implies a five year period post-Brexit for EU citizens to build up UKPR if they arrived just prior to Brexit.

Grace period:

A grace period for implementation will be required to enable all EU citizens in the UK who live in the UK at Brexit to register for a document confirming their UKTR or UKPR status. This grace period for registration will avoid a 'cliff edge' scenario. It will need to be sufficiently long to allow for all EU citizens in the UK to have reasonably been made aware of the registration scheme, and for the scheme to be able to cope with the volume of all EU citizens to register and receive their documentation (for example, if the grace period were to be 2 years, the system would need to be able to register around 6,000 citizens per working day). During the registration period, EU citizens will be able to apply for either UKPR or UKTR documents confirming their rights.

During the grace period landlords, employers, the NHS, the Department for Works and Pensions (DWP), local Councils, etc. will not be allowed to require citizens to hold UKTR or UKPR documents. As now, they only need to provide current proof of nationality and, where applicable, evidence of the other requirements (habitual residence tests, ordinary residence tests etc.). Renting a house, accessing the NHS, accessing welfare benefits etc., should not lead to discriminations during the grace period. The grace period ensures that EU citizens are considered as legally living in the UK with simple proof of their EU ID card or passport.

At the end of the grace period, EU citizens who have been in the UK prior to Brexit day should all be registered either for UKTR or UKPR as appropriate.

The grace period will have consequences for any new immigration policy the UK intends to introduce in relation to EU citizens arriving post-Brexit. Since during the grace period it will be difficult to distinguish between those who have arrived prior and those who have arrived post-Brexit, the de facto implementation of a new immigration policy can only come into place following the grace period. Obviously, people arriving post Brexit will not be able to prove residence prior to Brexit, so will never be able to obtain UKTR or UKPR.

The grace period could only start prior to Brexit day if a WCRT were adopted prior to Brexit day that can guarantee the procedure for registration and rights granted under UKTR and UKPR.

If citizens' rights are protected in the Withdrawal Agreement, instead of in a separate WCRT adopted earlier, the registration procedure and grace period cannot start any earlier than Brexit day.

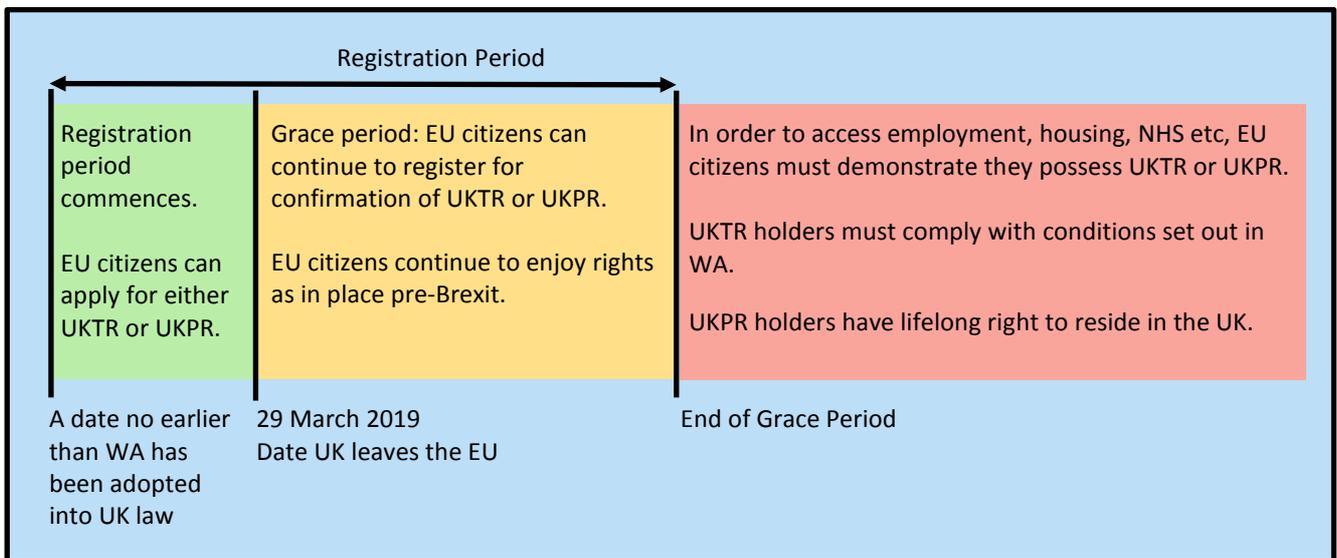


Diagram representing the application of the 'grace Period'

Applied Example of an EU Citizen Obtaining UKPR During the Grace Period

Juliet is a French citizen. She has been living in the UK since 2010. The grace period commences and she applies for her UKPR document at her Local Authority. Because Juliet has been resident in the UK for at least five years prior to the commencement of the grace period she has acquired UKPR status. She is eligible to apply for a document confirming this.

During the grace period Juliet does not need to have her UKPR document to work, rent, access the NHS etc. Following the grace period, Juliet will need her UKPR document to work, rent, etc. This does not

Following the grace period

Once the grace period has concluded, EU citizens will need to demonstrate their right of residence in the UK. This will usually be done via their UKTR or UKPR document. If they do not demonstrate that they have UKTR or UKPR status, they will need to show they have leave to stay under UK Immigration Rules.

Applied Example of an EU Citizen Acquiring UKPR Following the Grace Period

Victor is a German citizen. He entered the UK on 15 March 2018. He starts to work full time.

Victor applies for and acquires a UKTR document on 7 January 2020 confirming his right to reside in the UK. The document confirms that he will acquire UKPR on 15 March 2023 if, between 7 January 2020 and 15 March 2023, he complies with the conditions set out in the WA. Victor still has his job and continues working full time.

The grace period ends on 29 March 2021. Victor changes employment on 1 September 2022. Because the grace period has ended he needs to demonstrate that he has a right to work by using his UKTR document. Victor is able to commence his new employment. He continues working full time.

Victor continues his full time employment and on 16 March 2023 applies for his UKPR document by submitting his UKTR document and showing that he continued to be resident in the UK since receiving his UKTR document. He receives his document on 18 May 2023 confirming he has UKPR.

Applied Example of an EU Citizen Acquiring UKPR Following the Grace Period

Silvia is a Spanish citizen, in a registered partnership with Susan who is a British citizen. Silvia has been living in the UK since 20 April 2016. Silvia has not worked in the UK, and Susan supports both of them with her job.

Silvia acquires a UKTR document on 18 July 2019 confirming her right to reside in the UK. The document confirms that she will acquire UKPR on 20 April 2022 if, between 18 July 2019 and 20 April 2022, she complies with the conditions set out in the WA. In Silvia's case, if she does not work, this means that she needs to continue to be self-sufficient. Silvia does not need to obtain Comprehensive Sickness Insurance (CSI), since she has access to the NHS which fulfills the CSI requirement.

On 1 May 2022, Silvia applies for her UKPR document by submitting her UKTR document and showing that she continued to be resident in the UK since receiving her UKTR document. She receives her document on 1 July 2022 confirming she has UKPR.

Exclusion and Expulsion

It is currently agreed between the EU and UK Government that restrictions due to public security, policy or health as per the Citizens' Directive 2004/38 apply to EU citizens pre-Brexit. The position is not agreed post-Brexit. This proposal will require that the WA include the standards set out in the Citizens' Directive continue to apply to EU citizens with UKTR and UKPR post-Brexit.

Judicial Protection

An in-country appeals process should be available against negative decisions on registration applications for UKTR and UKPR. A similar appeal process should be available for EU citizens facing restrictions, particularly during UKTR. It will be an easy, quick and affordable process. The EU citizen who follows the appeals process should not experience any restrictions until the appeals process is concluded.

Individuals should be protected by direct effect of the WA, which means they should be able to rely directly on the WA provisions in front of the domestic courts in case of omissions or inconsistencies with national law. UK courts should continue to be able to refer to the CJEU for clarification as the final arbiter where needed.

WHO is covered by this Alternative?

All EU citizens in the UK regardless of age will be able to apply for UKTR or UKPR before the end of the grace period. However, specific arrangements need to be put in place for children of EU citizens with UKTR.

Arrangements for Children with UKTR

If an EU citizen parent has entered the UK before Brexit and obtains UKTR during the grace period, their children will be given the same status. If the EU citizen parent with UKTR complies with conditions set out in the WA they will be able to exchange it for a UKPR document. Their children will be able to obtain their UKPR documents at the same time.

Applied Example for Families with Children Born Pre-Grace Period

Jonas and Freda are Austrian and married. They have lived in the UK for 2 years before the grace period commences. They had a son, Frederik, 2 months before the grace period commenced. Jonas, Freda and Frederik have UKTR status and obtain their UKTR documents. As long as they comply with the conditions set out in the WA, they will be entitled to receive a UKPR document in 3 years' time.

Three years pass. Jonas and Freda have complied with the terms of the WA during the 3 years. They are therefore eligible to apply for confirmation of their UKPR. Because Frederik was born to parents resident in the UK before Brexit who now have UKPR, he too will be issued his UKPR document.

Children born to an EU parent before Brexit will take their parent's status and be able to pass that status on to their children. Children born to an EU parent after Brexit will also take their parent's status but will not be able to pass it on to the next generation.

Applied Example for Families with Children born Pre-Brexit

Lucia is an Italian citizen. She acquired UKPR status before the beginning of the grace period. She and her British husband Mark have a baby boy before Brexit, Lucas. Because Lucas is born to a EU parent with UKPR he too has acquired UKPR status. When Lucas has children of his own they too will have acquired UKPR status. However, Lucas' grandchildren will not receive UKPR status.

Had Lucas been born **on or after** Brexit he would still receive the status of his parents but would not be able to pass it on to his children.

Children, at the point of turning 21, or no longer dependent on their parents, whichever is later, will need to obtain their own UKTR document and build up rights towards UKPR like their parents.

Applied Example for Families with Children who Become Independent Adults During the Grace Period

Paul and Maria are Dutch and moved to the UK with their 18 year old son Zac 1 year before the grace period. They are all eligible to apply for confirmation of their UKTR status when the grace period commences. The UKTR paperwork states that Paul, Maria and Zac will acquire UKPR in 4 years' time if they comply with the terms of the WA.

Because Zac is under 21 he will be able to rely on his parents' compliance with the WA. He will not need to comply with the conditions until he turns 21. Once Zac turns 21, or becomes independent, whichever is the later, he will need to comply with the conditions of the WA until he qualifies for UKPR status.

Current and Future Family Members

Under EU Law family members can accompany or join their EU citizen in a member state. This is commonly referred to as 'family reunion rights'. Family members can also apply for UKTR or UKPR. Family members include direct family members (spouse/civil partner, direct descendants in the descending line (under 21 or dependent), direct dependants in the ascending line), including those with retained rights, and extended family members. This will be particularly relevant for non-EU national family members.

Applied Example of Non-EU Family Members Acquiring UKPR

Gretchen is a Polish citizen. She and her Indian husband, Hitendra, have been living in the UK for 3 years before the commencement of the grace period. Because they were both living in the UK when the grace period commences they can both obtain their UKTR documents. Once they receive their UKTR documents Gretchen will need to comply with the conditions of the WA until she acquires UKPR.

If Gretchen complies with the conditions of the WA, Hitendra will acquire UKPR at the same time as Gretchen. If neither of them are able to acquire UKPR status they must either find a route under the UK Immigration Rules to remain or leave the UK.

It is the UK's position that following Brexit rights to family reunion for family members will be limited to provisions under the UK Government's Immigration Rules. We have previously set out in our papers¹³ the significant issues with this proposal that would prevent an EU citizen from being joined by a dependent relative and also make it difficult and expensive to be joined by a spouse.

We propose that the WA preserve current family reunion rights of EU citizens who are in possession of UKTR or UKPR for **both** existing and future family members.

Those family members of EU citizens with UKPR who show that they are the family member of the EU citizen will have a right to reside in the UK under the WA. Family members of EU citizens with UKPR will be recognized as having UKTR until they have acquired five years residence in the UK.

¹³ p5, https://bit.ly/t3m_BiE_UKProposal

Applied Example of Non-EU Family Members Joining EU Citizen with UKPR post-Brexit

Phoebe is a Dutch citizen. She has acquired UKPR during the grace period. Brexit day passes and she marries her partner of 1 year Brad. Brad is a US citizen. Because Brad is the spouse of an EU citizen with UKPR he can join his wife in the UK. Brad is eligible for a UKTR document that will confirm his right to remain in the UK.

Once Brad has lived in the UK with Phoebe for five years, he will have acquired UKPR status and will be eligible to apply for a document confirming the same.

Family members of EU citizens with UKTR will also have a right to reside. However, EU citizens with UKTR will need to demonstrate that they are complying with the terms of the WA to have their family members join them in the UK.

It is important to stress that family members will, like their EU citizen family member, be able to benefit from retained rights under current EU law. These will be codified into the WA.

Cases in which a shortened period of stay is required to obtain UKPR

In certain situations EU law allows people to acquire permanent residence when they have resided in the country for less than five years (Article 17 Directive 2004/38). These grounds for qualifying early for PR are respected within our proposal. They cover mainly people who are disabled or retired and have worked in the UK at some point:

- people who have to stop working due to permanent incapacity
 - if they have resided in the UK for more than two years, they acquire UKPR
 - if the permanent incapacity is the result of an accident at work or occupational disease there is no minimum requirement of stay
 - if the person who has worked and becomes incapacitated is married to a British citizen, there is no minimum requirement of stay
- people who have retired and have been working in the UK for at least one year in the UK prior to their retirement, obtain UKPR after residence of three years. If they are married to a British citizen there is no minimum residence requirement

People who are in this situation prior to Brexit will be able to acquire UKPR on the basis of such shorter period of residence if they provide proof of their condition (disabled, retired; and having worked in the UK).

If people retire or become disabled while holding UKTR, they can turn their UKTR into UKPR by fulfilling the conditions set out above.

Applied Examples of obtaining UKPR earlier

Andres is an Estonian National who enters the UK 2 years before Brexit and starts working. After a year he has an accident at work that results in him being permanently unable to work again. Following Brexit, Andres is able to acquire a UKPR document, because he is permanently incapacitated.

Emilia is a Swedish National who enters the UK 2 years before Brexit and starts working. Following Brexit, Emilia acquires a UKTR document. Unfortunately, Emilia has an accident at work that results in her being permanently unable to work again. Because Emilia is permanently incapacitated she can turn her UKTR status into UKPR early and can obtain a document reflecting this.

Giselle is a French National, nearing retirement age, who enters the UK 2 years before Brexit, working for one year, and then retiring. Following Brexit, Giselle acquires a UKTR document. Because Giselle has worked for a year, and has retired, she is able to acquire UKPR after 3 years of residence instead of 5 - therefore she can obtain a document reflecting UKPR one year after obtaining her UKTR document.

Derivative rights

This WA will also cover those who established Derivative Rights in the UK. Derivative Rights are known as such because they 'derive' from EU law other than the Citizens' Directive. Derivative Rights include the following:

Zambrano cases

Primary carers of British citizen children or dependent adults. Primary carers acquire a right to remain where requiring them to leave the UK would force the British citizen they care for to leave the EU.

Chen cases

Primary carers of EU children who are exercising free movement rights in the UK as a self-sufficient person. Primary carers acquire a right to remain where requiring them to leave the UK would prevent the EU child exercising their right of free movement.

Ibrahim and Teixeira cases

Children of an EU citizen worker or former worker where children are in education in the UK have a derivative right. Also, primary carers of children with this right will have a derivative right where requiring the primary carer to leave the UK would prevent the child from continuing their education in the UK.

Dependent children aged under 18 of primary carers in one of the categories set out above

Dependent children of primary carers have a derivative right where requiring them to leave the UK would force the primary carers to leave the UK with them.

Those with Derivative Rights prior to 29 March 2019 will also be able to apply for a document confirming UKTR status. However, as is in keeping with current EU law, they will not be able to apply for UKPR. They will continue to hold UKTR until they lose their derivative right.¹⁴

¹⁴ This right will be subject to future interpretation by Domestic Courts and the Court of Justice of Zambrano, Chen etc. principles

Applied Example of a Chen Carer

Victoria is a South African citizen in the UK with her Irish children who are in full time education. Before the grace period commences. Victoria has successfully applied for a residence document confirming her derivative right to remain in the UK.

Victoria applies for a UKTR document confirming her continued right to reside in the UK. She receives instructions with the UKTR document informing her that she cannot apply for UKPR and will need to find an alternative route to remain in the UK once her children have turned 18.

There will also be special provision for family members of British citizens who are resident in the EU prior to Brexit. These provisions will allow for British citizens to have their family members accompany them if and when they return to the UK. British citizens will need to demonstrate that they were resident in the EU prior to Brexit. Family members both pre and post Brexit are eligible to accompany the returning British citizen.¹⁵

Applied Example of Family Members of British Citizens Returning to the UK from the EU

Julia is a British citizen who has a Permanent Right to Reside in Austria. She lives there with her Austrian husband Franz. Julia works from home, and provides most of the day to day care for her Austrian mother-in-law, Gretel, who lives with her and Franz. Gretel is dependent on Julia.

A few years pass after Brexit. Julia has been offered a work opportunity in the UK. She wants Franz and Gretel to accompany her in the UK. Because the UK is no longer a member of the EU, Franz and Gretel cannot exercise Freedom of Movement law as before. Because Julia, a British citizen, has been exercising her rights in Austria her family members can accompany her if she returns to the UK.

Franz and Gretel apply for UKTR documents confirming their right to enter the UK as family members of Julia. They are all informed that to qualify for UKPR Julia must comply with the conditions set out in the WA.

Julia, Franz and Gretel enter the UK. Julia finds a job and begins working full time. Five years pass and because Julia has been working the whole time, her, Franz and Gretel all qualify for UKPR.

Please note: The above example relies on the conclusion that the UK Government's interpretation of 'extended family members' not to include 'in-laws' is not compatible with EU Law. We draw particular reference to the Court of Justice judgement Rahman (C83/11).¹⁶

¹⁵ Please note, the conditions established under the current and future interpretation of Surinder Singh C-370/90 will need to be demonstrated by the Family Member when they apply.

¹⁶ <http://curia.europa.eu/juris/liste.jsf?num=C-83/11>

HOW will EU Citizens register?

Once the registration period commences, EU citizens and their family members will be able to apply for UKPR or UKTR documents. The application process will be simple, digital and implemented at a local level.

A simple, clear document will be given to all those who register. There will be no biometrics taken of EU citizens except photographs, and no pooling of information by the Home Office.

EU citizens who have completed five years' residence in the UK prior to the grace period will simply need to provide evidence of their nationality and five years residence to obtain a document confirming their UKPR status. Those who do not yet qualify for UKPR will again show proof of their nationality and evidence of how long they have lived in the UK to obtain a UKTR document.

In terms of evidencing these rights, a 'light touch' system must be adopted. Applicants can apply online or for appointments with their local authority or attend a drop in appointment, utilising the European Passport Return Service. During the appointment, the applicant will provide proof of their ID (via a passport or ID card) together with a light-touch evidence of their residence commencing prior to Brexit (for example by council tax bills, an NHS card, National Insurance number or any other evidence of residence). The applicant will then be provided with a notice confirming that the application has been made (a receipt) or will receive a document confirming their temporary or permanent right of residence (UKTR or UKPR document).

There should be no additional checks performed on citizens relating to criminal records and conduct as set out in the UK government's Settled Status proposal. The same principles of exclusion and misuse of rights as set out in EU law¹⁷ should be encapsulated within the future agreement. There should be no systematic checks of a person's background when they pursue a document confirming their right.

We believe that local authorities are well equipped to work with the UK Home Office to make decisions relating to UKTR and UKPR documentation. The UK Home Office already delegate a number of responsibilities to local authorities relating to Passport Return Services and Nationality Checking Services. Local authorities make numerous decisions on a daily basis relating to EU citizens accessing benefits and housing. These require complex assessments of applicants' compliance with EU law. We submit that, in light of these unprecedented circumstances, decision making powers can be easily delegated to local authorities to assist with applications, decision making and issuing of documents to EU citizen applicants.

It should be possible to process entire families in one application. If proof of residence is only in the name of one householder, then marriage or civil partnership certificates, birth or adoption certificates are sufficient to prove residence for the other members of the family.

¹⁷ Article 27 of the 2004/38 Directive: http://www.earegulations.co.uk/CitizensRightsDirective/ByPage/Article_27

Applied Example of a single Family Application

Martin is a British citizen, who has married Anita, a Swedish citizen. They have two children who are also Swedish citizens. They moved to the UK 6 years ago, and Anita has not worked in the UK as she has been a full-time parent. All the household bills, council tax bills etc are in Martin's name.

Martin and his family are able to make an appointment at the local council, and by providing residence proof in Martin's name, together with their marriage certificate and the children's birth certificates, Anita and her children are all issued with UKPR documents.

Non-EU family members will apply in a similar manner to now, evidencing their right to either UKPR or UKTR as part of an application to the Home Office. This will then be processed and a decision produced no later than six months from the date of application. Non-EU family members, like now, will be provided with a certificate confirming that their application has been submitted. This will confirm that they have a presumed right to remain in the UK until a final decision is made.

If an application is refused, the applicant will be afforded a right of appeal. Their right to remain in the UK is presumed until the court's final determination of the appeal. As set out in our previous documents and previously in this document, oversight by the CJEU is essential. The reference procedure will need to remain on both sides of the channel.

FINAL REMARKS

Citizens' Rights should be protected and not sidelined. The UK's position paper of June 2017 said that it intended to seek to protect the current EU healthcare arrangements "for UK citizens and EU citizens who benefit from these arrangements before the specified date". It is worth protecting the rights of the three million or so EU citizens living in the UK so that they can continue their lives without interruption or distress. Preserving the status quo on both sides of the Channel for this finite group of citizens, not just in terms of healthcare, must take into account the difficulties involved in retrospective registration of EU citizens in the UK and the fact that nobody should have to leave or have their lives disrupted as a result of Brexit. The continuation of existing rights for this finite group of EU citizens needs to be enshrined in the WA, with direct effect so that individuals remain entitled to take action in local courts if the WA is not complied with, and a continuing opportunity for courts on both sides of the channel to use the CJEU reference procedure to resolve issues.

We therefore ask the UK and the EU to ensure that all current rights are protected and set out, together with a residence based registration procedure in the UK, in an international Treaty between the UK and EU. We believe that this Treaty best takes the form of a separate Withdrawal Citizens' Rights Treaty (WCRT) adopted under Article 50, prior to the Withdrawal Agreement and Brexit day (and implemented in UK law by a Withdrawal Citizens' Rights Act (WCRA)). Such a ring-fenced WCRT is the only way to avoid citizens to continue to be treated as bargaining chips in other parts of the Brexit negotiation. Most importantly, such a separate WCRT will stand even if the rest of the negotiation fails. It would finally bring certainty to the fate of more than four million citizens. The earlier such a WCRT and WCRA are adopted the earlier the UK can implement its registration procedure. In the absence of a ring-fenced WCRT, we ask the UK and EU to set out all rights, procedure and judicial protection in the WA, and ask the UK to implement it via a WCRA and start the registration procedure soon afterwards.

To get to this solution we call upon the UK and EU to do justice to their promises to protect us, and to depart from their negotiation positions that impede such protection. The UK should abandon its attempt to fit EU citizens under existing immigration rules, and accept that the rights of EU citizens living in the UK can only be protected by a UK-EU Treaty, subsequently implemented via a Citizens' Rights Act which sets out a status specific for this finite group of people. The EU from its side should take EU citizenship seriously and ensure British citizens currently residing in the EU can retain all their existing EU citizenship rights, including free movement throughout the entire EU.

Both sides should acknowledge that, given that the UK will no longer be part of the EU, reciprocity *in real life* between EU citizens in the UK and British citizens in the EU may require partially different legal solutions. UKinEU will be automatically be protected by the WA as an act of EU law, while this will require a WCRA at UK level. Leaving translation into UK law to an inclusion into UK immigration law will not provide reciprocity. Equally, given the way the UK has implemented EU law previously, the challenge of registering an unprecedented number of people, and the UK no longer being a member of the EU, the rigid application of EU law criteria in the context of a registration system when a country is leaving will have far more negative consequences than in the context when a country is member of the EU. Hence, again, reciprocity would not be guaranteed in *real life*. The UK and EU should therefore agree that the WA should include specific details on how the status and registration procedure will be organized within the UK, while such detail may not always be required for UKinEU since the substance of rights, the registration and application procedures and case law of free movement of persons are well established.

This paper is a working document, produced by the **the3million**'s legal team with input from the EU27 working group.

the3million is a not for profit group and support network which campaigns to preserve the rights of EU citizens in the UK and British citizens in Europe after Brexit.

It takes its name from the estimated number of EU citizens who moved from another member state and live and work, and have generally established their life in the UK, many for a very long time.

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Version:

1.0	23 rd October 2017	Initial working version
1.1	5 th November 2017	<ul style="list-style-type: none"> Added a new reference regarding the proposed removal of data protection from individuals for the purposes of immigration control: http://www.politics.co.uk/comment-analysis/2017/11/03/buried-in-a-government-bill-an-immigration-rule-strips-milli Added applied example of Silvia to clarify self-sufficiency for an EU citizen in partnership with a British citizen. Clarified proof of residence requirements in "How will EU citizens register" section. Clarifications of declaratory nature of UKTR/UKPR Other minor amendments
1.2	13 th November 2017	<ul style="list-style-type: none"> tidied internal reference urls
1.3	6 th December 2017	<ul style="list-style-type: none"> Added section on cases in which a shortened period of stay is required to obtain UKPR