



THE JOINT COUNCIL
for THE WELFARE
OF IMMIGRANTS

GUARANTEEING SETTLED STATUS FOR EEA NATIONALS

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Produced in Partnership with:



Executive Summary

The Government has an extremely limited timeframe to complete the largest programme of immigration documentation the United Kingdom has ever undertaken. Roughly 4 million people resident in the UK before the end of the Brexit transition period will need to apply for Settled Status under a brand-new application process. JCWI is concerned that a non-declaratory scheme will fail to fulfil the government's aim: that all EEA citizens and family members in the UK are able to regularise their status and stay in the UK. In the absence of a declaratory system for registration, the Settled Status Scheme is in urgent need of reform.

Arbitrary cliff-edges

- The scheme creates two cut-off dates – 30 June 2021, and five years later for those granted Pre-Settled Status. These will act as a cliff edge for those who have failed to obtain status making them undocumented overnight.
- In a scenario in-which the UK leaves the EU without a negotiated deal, the cliff-edge deadline becomes even less flexible, which will result in more people losing their legal status in the UK.

Measuring Success

- The Government has not set out what constitutes success or failure for the settled status scheme.
- Of course, assessing the success of the scheme and its reach will be difficult, if not impossible, given the imprecise nature of available statistics. This could result in “Hostile Environment” policies being applied to an unknown and potentially very large new population.

No-deal Scenario

- In the event of the Government's failure to secure a deal with the EU, it must minimise the disruption to the lives of EEA citizens.
- In a No-Deal scenario, there will be no way for the Government to discern between those arriving in the transitional period those who arrived before. Imposing additional requirements of registration will only harm long-standing UK resident EU citizens who may be wrongly mistaken for more recent arrivals.

Access to Justice

- The Withdrawal Agreement specifies that there will be a right of appeal, but the Government has yet to set out the legislation providing for this.

Home Office Resources

- There is no evidence that the Home Office has the resources to take on the significant increase to its caseload implied by the roll-out of the scheme. While targets for processing applications are ambitious, it is unclear whether current provisions of staffing and training are sufficient to meet them.

Wrongful Refusals

- EU nationals may find themselves ineligible to apply for the scheme due to poor decision-making or to having been subject to a wrongful removal or deportation order.

Summary of Recommendations:

1. All EEA and Swiss citizens and their family members, and other individuals protected by EU law, currently living in the UK **should be granted permanent Settled Status** and required to register for documentation within a period of five years or more.
2. Short of this, there should be **a legal presumption in favour of those applying to convert Pre-Settled Status to Settled Status**, without them having to provide further evidence of their continuous residence.
3. The Government must set out **what it views as success** for the settled status scheme.
4. The Government should use all tools available, including the Labour Force Survey & the Census to **ensure it can monitor** how many EU nationals resident in the UK have not been granted settled status.
5. If the Government cannot demonstrate that all eligible EEA citizens have been granted a new immigration status, EU nationals **should not be subject the hostile environment**, detention or deportation.
6. The Government should **introduce a declaratory approach** to ensure the protection of all EU nationals resident in the UK on or before March 29 2019.
7. The terms of the settled status process (e.g. time limits, eligibility, appeal rights) should **remain the same** whether the UK leaves the European Union with or without a deal.
8. The **right to appeal refusals** of Settled or Pre-Settled Status must be clearly and urgently set out in law.
9. **Legal Aid must be made available** for Settled Status applications and appeals.
10. The Government should make urgent plans to **increase Home Office staff capacity**, through training & recruitment, in order to meet the task of registering 3-4 million EEA citizens.
11. The Government should **publish detailed guidance** as to how EEA citizens will be able to demonstrate their right to be in the country after March 29th in the event of a no-deal exit
12. All removal or deportation orders of applicants for Settled Status **should be suspended** and their existence not prejudice the determination of their claim.
13. **Transparency and meaningful oversight** must be built into the system of automated checks.
14. The Government must **publish clear information detailing the logic of the system**, which welfare and tax information is to be used, how data will be stored and how they can challenge decisions or obtain evidence of what data has been used and how.

Contents

Introduction	4
Cliff-edges	6
Measuring Success	8
No-Deal Scenario	9
Access to Justice	10
Home Office Resources	11
Wrongful Refusals.....	12
Vulnerable EU Nationals	13

Introduction

The EU Settled Status Scheme is designed to implement the Government's promise that all EEA citizens, their family members and dependants¹ living in the UK on or before March 29, 2019 will be entitled to remain in the country without any diminishment of their rights. This goal echoes repeated assurances given by both the leave and remain campaigns during the EU referendum that EU nationals already living in the UK would not lose their right to remain in the UK.

Two approaches to achieving this goal were open to the Government in line with the provisions of the EU Withdrawal Agreement: A declaratory, or non-declaratory system. In a declaratory system, the Government would automatically grant a legal status to all EEA citizens resident in the UK on or before March 29, 2019. The primary advantage of this is that it avoids the possibility of people falling through the gaps of the system or failing to make an application and finding themselves, without the legal right to remain in the UK.

A declaratory system is the least bureaucratic solution to implement, removing the need for the Home Office to process the applications of 3.5 million people on top of its existing caseload. It is also the best way to provide peace of mind to EEA nationals, their families, friends and colleagues, removing the anxiety they are experiencing linked to uncertainty about their future in the UK.

For these reasons, JCWI advocates a simple declaratory system whereby all EEA citizens in the UK will be considered to be legally resident which is managed through mandatory registration. The scheme should be managed within a realistic timeframe – at least five years. JCWI advocates the simplicity and cost-effectiveness of a declaratory system at a time when the Government is balancing the many challenges thrown up by the UK's exit from the EU. Most, if not all, EU countries will be adopting this declaratory approach.

This approach would ensure that tens, if not hundreds of thousands of EU nationals, lawfully resident in the UK, do not arbitrarily lose their right to remain. The settled status scheme could easily be adapted to register people, but EEA nationals would be safe in the knowledge that an error or failure on their part would not result in losing legal immigration status, but instead an administrative penalty at most.

The scheme created by the Home Office is non-declaratory, requiring EEA nationals to apply to the Home Office in order to obtain permission to remain, which may be granted or denied. The functioning of the scheme has been designed to be as easy and straightforward as possible, with the majority of applicants able to obtain status quickly through a digital system. Under this system, most eligible persons will be able to regularise their new status without complication or delay - providing the digital system works as planned and there is sufficient

¹ In this briefing where we refer to EU nationals or citizens, this should be taken to include all family members and dependants, carers, and others with a right to reside in the UK under the EU treaties. In addition the Government has promised settled status will be available to nationals of non-EU EEA countries and Switzerland and their family members, and the same considerations will apply in that case.

resource in the Home Office to deal with paper evidence. However, given the nature of the non-declaratory system, there is a risk that some people will be unable to obtain the status they are eligible for and therefore find themselves undocumented.

The Government has made no attempt to remedy the “hostile environment” provisions which proved detrimental to Windrush nationals, and which are applied to all those who are undocumented. EU nationals who find themselves undocumented will be subject to these same provisions and will be denied access to housing, healthcare, employment benefits and bank accounts. A failure to register even 5% of eligible EU nationals could result in around 175,000 people losing, overnight, their legal right to reside in the country. The high number of EU nationals at risk has the potential to make the Windrush scandal look like a storm in a teacup.

In this briefing, JCWI therefore recommends a number of changes that could be made to the operation of the existing non-declaratory system to ensure that the minimum possible number of people find themselves in this situation.

It is also important to note that, in a situation where the government fails to agree a deal with the EU, many of the areas of risk highlighted in this briefing will be exacerbated by plans to tighten and restrict the scheme.

Cliff-edges

This is the largest programme of immigration documentation in British history and it is being attempted within a short, self-imposed, deadline. This deadline creates two cliff-edges, where tens, or potentially hundreds, of thousands of people will lose their legal right to be in the country. These people will be subject to the policies of the hostile environment, losing the right overnight to healthcare², to work, rent property³ or open bank accounts. They will be at risk of detention and deportation.

The first deadline comes up in June 2021 – six months after the end of the planned “implementation period” during-which free movement rights will continue to apply in the UK. This gives the Home Office two and a half years to process the applications of around 3.5 million people⁴, using a brand-new system. The potential for minor errors to create large-scale problems is significant.

The Statement of Intent published by the Home Secretary indicates that a “proportionate” approach will be taken to those with “sensible” reasons for having failed to obtain status in time.⁵ However, there is little clarity as to what this will mean in practice, and greater assurances are needed in order to understand what a “proportionate” approach will mean in practice. Current Home Office practice is to take punitive measures with those who have missed deadlines, denying them status and seeking their removal from the UK. Only firm legal guarantees to the contrary will guard against this risk.

The second cliff edge is connected to temporary “Pre-Settled Status”. The Home Office is granting a temporary (five year) status - known as pre-settled status - to individuals who can prove short periods of residence in the UK but can't show that they've been here for five years continuously. Those granted pre-settled status will then have another five years to build up further evidence of residence. If they have not done so within that time period, they will not be eligible for settled status and pre-settled status cannot be renewed.

Many of those granted pre-settled status will have been granted temporary status because they are particularly vulnerable and unable to provide evidence or documentation for long-term residency in the UK. There is no reason to assume that a few years down the line their circumstances will have changed. EU nationals in this situation are likely to find themselves, five years later, still unable to demonstrate their residency to the satisfaction of the Home Office. As Pre-Settled Status cannot be renewed, EU Nationals in this situation will be unable to regularise their status and will be forced to leave the country or remain without leave. By not providing the option for renewal of Pre-Settled Status, the Home Secretary has created an arbitrary barrier to individuals becoming documented, regularised residents.

² <https://www.jcwi.org.uk/access-to-healthcare>

³ <https://www.jcwi.org.uk/right-to-rent>

⁴ <https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>

⁵ <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

Ultimately, this second, temporary status does not serve any clear purpose, but does create a number of administrative hurdles for the most vulnerable individuals, at extra cost to the Home Office. At a minimum, Pre-Settled Status should be granted based on the intention to remain in the UK, allowing for the automatic transfer into full Settled Status after five years. However, JCWI does not see a clear reason not to offer those Pre-Settled Status with permanent status from the outset

Recommendations

- All EEA and Swiss citizens and their family members, and other individuals protected by EU law, currently living in the UK **should be granted permanent Settled Status** and required to register for documentation within a period of five years or more.
- Short of this, there should be **a legal presumption in favour of those applying to convert Pre-Settled Status to Settled Status**, without them having to provide further evidence of their continuous residence.

Measuring Success

Currently the Home Office has refused to set out what success for the Settled Status Scheme means. There is no target for the number or percentage of EEA nationals that must be registered. Without goals, Parliament will not be able to hold Government to account.

We recognise that there is a lack of precise data relating to the exact number of EEA citizens and dependents currently resident in the UK. This produces a situation whereby it is difficult, if not impossible, for the Government to know exactly what proportion of the population it has successfully reached, how many people are unaccounted for and how many are at risk of losing status. The Government should use all tools at its disposal to improve its knowledge, including the Labour Force Survey and the upcoming Census⁶.

The consequences for people who fail to apply and regularise their status are severe, and there are multiple groups of people who, for reasons of vulnerability or exclusion, may fall into this category (see Appendix). It is therefore essential that the Government is able to demonstrate that it has not allowed large numbers of people to slip through the gaps before it subjects those people to its immigration enforcement policies.

It is estimated that around 3.5 million EEA citizens currently reside in the UK. If the Government cannot demonstrate that all of these people have been able to obtain the right to remain, as promised, it should review its approach before the cliff-edge point at which potentially huge numbers of people will lose their status.

Recommendations

- The Government must set out **what it views as success** for the settled status scheme.
- The Government should use all tools available, including the Labour Force Survey & the Census to **ensure it can monitor** how many EU nationals resident in the UK have not been granted settled status.
- If the Government cannot demonstrate that all eligible EEA citizens have been granted a new immigration status, EU nationals **should not be subject the hostile environment**, detention or deportation.
- The Government should **introduce a declaratory approach** to ensure the protection of all EU nationals resident in the UK on or before March 29 2019.

⁶ <https://migrationobservatory.ox.ac.uk/resources/commentaries/measuring-success-will-we-ever-know-how-many-eligible-eu-citizens-did-not-apply-for-settled-status/>

No-Deal Scenario

We welcome the assurance that EEA residents in the UK will continue to have the right to apply for Settled Status until the end of 2020 in the event of the UK leaving the EU without a deal⁷. However, there has been a lack of clarity as to whether the Pre-Settled Status for those who are unable to demonstrate five years' continuous residence will operate in the same way under a no-deal exit scenario. This needs urgent clarification. Furthermore, it is unclear why, under a no-deal scenario, the deadline for applications will be shortened by six months.

Overall, the anxiety and confusion that is likely to be experienced by EEA citizens in the event of no-deal will represent a further challenge to an already overly bureaucratic process. More people are likely to be confused about their eligibility for any kind of status, or whether or not the scheme remains underway, and are, therefore, less likely to register. This will lead to a larger proportion of people forced into undocumented status.

In a no-deal scenario, people arriving from EEA countries after the 29th of March 2019 will be entitled to remain for only three months. They will be able to apply for a three-year residence permit, which will be non-renewable, but not for Settled Status. This represents a further administrative burden on the Home Office which it is in no position to adequately respond to.

It will be difficult for the authorities to distinguish between EEA citizens eligible to work and those who are not, as they will possess no identifying documentation. Overall the system is likely to exacerbate a situation of chaos and anxiety, and lead to many miscarriages of justice.

EU citizens, who may have long-standing plans to come to the UK for work or to join loved ones should not be punished in the case of No-Deal. The existence of that the UK and arbitrarily shorter period of leave to remain and bringing forward deadlines just when their lives will feel most precarious is unjustified.

Recommendations

- The terms of the settled status process (e.g. time limits, eligibility, appeal rights) should **remain the same** whether the UK leaves the European Union with or without a deal.

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762222/Policy_paper_on_citizens__rights_in_the_event_of_a_no_deal_Brexit.pdf

Access to Justice

It is essential that the Government immediately sets out the legal provisions for the right to appeal a refusal to grant Settled Status, under all circumstances. This should include leaving the EU without a deal. This right is clearly stated in Article 21 of the Withdrawal Agreement⁸, but has yet to be written into law, despite the fact that applications for Settled Status are already underway.

In the event of No Deal, the Government has stated that decisions to refuse an application will be subject only to an internal administrative review or judicial review. This is an unsatisfactory alternative to the right to a full appeal before a judge. It is more expensive for both the State and claimant to undertake a judicial review rather than an appeal their decision. This may result in situations where applicants entitled to status are unable to challenge an unlawful decision due to the prohibitive cost.

There is no justification for the diminishing of EEA citizens' rights in a situation where the government has failed to negotiate a deal. It is at this time that they will be the most in need of solid, clear and reliable legal safeguards to minimise the uncertainty of their situation.

Legal Aid must also be made available at every stage of the process of application to ensure that nobody is priced out of access to information and a fair decision confirming their rights. As stated previously, the vast majority of EEA citizens are likely to obtain Settled Status quickly and easily, without the need for any legal assistance, so we do not envision this representing a significant cost. However, it will make all the difference to those people who, due to intersecting vulnerabilities or obstacles have more complex cases, and to those people who wrongfully refused.

Recommendations

- The **right to appeal refusals** of Settled or Pre-Settled Status must be clearly and urgently set out in law.
- **Legal Aid must be made available** for Settled Status applications and appeals.

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf

Home Office Resources

There is no evidence that the Home Office is administratively prepared to take on the increase in workload that is required to register around 3.5 million people. The Government has expressed confidence⁹ that the Home Office is sufficiently resourced to take on this burden, but downplaying the challenge runs the risk of significant consequences further down the road.

A failure to register even as little as 5% of eligible citizens could result in a situation where up to 175,000 people are left without legal status in the country.

While most people will be able to submit documentation electronically, there is a risk of long delays and backlogs in the processing of claims of applicants who have to send in their documents in physical form. This will necessarily occur for a minority of people whose passports cannot be read electronically. It will also apply to people with more complicated cases, for those are unused to or do not have access to technology. In these cases, people could be left without identity documents or the ability to travel for significant periods of time. The Government's assurance that it aims to complete the turnaround of documents within a few weeks will be of little assurance, particularly as the Home Office has a long history of delays in processing applications.¹⁰

There are likely to be significant peaks and troughs in the rate of applications being submitted, with much higher numbers at the start and shortly before the end of the application period. At these times the potential for backlogs or processing failures become much higher.

It is of the utmost urgency that the Government clarifies, how the Home Office will manage this process, particularly in the case of No-Deal.

Recommendations

- The Government should make urgent plans to **increase staff capacity**, through training & recruitment, in order to meet the task of registering 3-4 million EEA citizens.
- The Government should **publish detailed guidance** as to how EEA citizens will be able to demonstrate their right to be in the country after March 29th in the event of a no-deal exit

⁹ <https://www.gov.uk/government/publications/eu-settlement-scheme-application-processing-times>

¹⁰ <https://www.independent.co.uk/news/uk/home-news/home-office-uk-immigration-delays-visa-applications-a8543241.html>

Wrongful Refusals

The published guidance for the Settled Status Scheme states that individuals will be ineligible to remain in the UK if they have a standing deportation or removal order against them.¹¹ There is a significant risk that people who have been wrongfully subjected to deportation or removal orders may find themselves unable to register for Settled Status.

The scheme also relies on an automated process of decision making based on a digital system of data sharing between the Home Office, the DWP and HMRC. There has been little concrete detail published to date about how these automated checks will work in practice. It is important that complex and life-changing decisions such as these will not be made entirely on an automated basis, as the potential for error could result in drastic consequences for applicants.

Transparency in both the logic of the systems and the ability for applicants to access data that has been used must be assured¹².

Recommendations

- All removal or deportation orders of applicants for Settled Status **should be suspended** and their existence not prejudice the determination of their claim.
- **Transparency and meaningful oversight** must be built into the system of automated checks.
- The Government must **publish clear information detailing the logic of the system**, which welfare and tax information is to be used, how data will be stored and how they can challenge decisions or obtain evidence of what data has been used and how.

¹¹ Immigration Rules Appendix EU 15 and 16

¹² <http://www.ilpa.org.uk/data/resources/35100/EU-Settled-Status-Automated-Data-Checks-ILPA-Research-Piece.pdf>

Vulnerable EU Nationals

Most EU nationals living in the UK are likely realise that it is necessary for them to apply for Settled Status and will not have significant difficulty in doing so. However, there will be a minority of people – usually the most vulnerable– who will not realise that they need to apply, will be unable to apply, or may be frightened of applying.

There is no way to know for certain exactly who and how many people fall into this category. These people will simply lose their legal status on one of the arbitrary cliff-edge deadlines and be considered to be in the UK illegally, in many cases without being aware of it.

There are various categories of people who are at risk of falling into this situation, including but not limited to:

- Children of parents who do not apply themselves or do not realise that children also need to be registered. This includes cases of parents who assume that their child or children will have automatically obtained British citizenship or other form of leave to remain based on being born in the UK. Not all children born in the UK are automatically eligible for British citizenship, but parents may well assume that they are.
- Elderly people, those who are isolated or digitally excluded, those who do not have access to information about political developments or what they are required to do.
- People who have been living in the UK for a long time may assume that, after several decades of living in the UK, they have accumulated residency rights. They may assume that settled status is only necessary for people who have arrived more recently.
- Conversely, people who arrive in the UK shortly before one of the deadlines may assume that they are not eligible to apply. Anybody who has been living in the UK for less than five years may assume that they cannot apply and may not realise that pre-settled status is available to them. Recent arrivals are also less likely to have established a paper-trail with the relevant Government departments and may worry that they are unable to prove their residency.
- People who have a criminal record but have only committed minor offences that would not preclude them from gaining Settled Status may assume that they are ineligible and fail to apply.

Regardless of their knowledge of the need to apply for Settled Status, some people who are entitled will nonetheless fail to apply because of difficulties in evidencing five years of residence. Such people may assume it is safer not to apply or be prevented from doing so because of other barriers. For example:

- Even for people who have been in the country for a longer time, the lack of a paper trail proving their accommodation and employment history may represent a barrier to accessing the status they are entitled to. This is likely to affect people who work cash-in-hand and live in unstable, unregistered accommodation. There is likely to be

crossover with people who are in situations of exploitation, trafficking, working in forced labour, or slavery. Such people may be unable to access their documents, or not have proof of address or employment available to them. Being unable to apply for settled status will mean that eventually they will be further marginalised by losing their legal status in the country making escape from their situation more challenging.

- Another exploited group who may find it hard to demonstrate their address or access other forms of documentary evidence about their lives are victims of domestic violence or exploitative relationships. People in these situations may rely on abusive partners to provide documents.
- Even in situations free from outright exploitation or abuse, it will still be difficult for some people to demonstrate their status. This may happen to people who live in informal rental situations, such as living rent-free with friends or doing unpaid caring work in return for lodging.
- Some people may find that the language barrier proves an obstacle to applying. This is unlikely to be a sufficient reason in and of itself, but for people who are already isolated or in an unstable or abusive situation, the lack of a good command of English may represent an additional barrier.

Taken all together, this represents a significant number who are unlikely to be able to register for status. In many cases, those who fail to register will do so because they experience more than one of these vulnerabilities.

What this will mean in practice is that children and people living in already vulnerable situations will find themselves, often without their knowledge or understanding of the consequences, without leave to remain in the country. If they do not or are unable to leave, they will encounter the full force of the hostile environment, be unable to safely and legally rent property or work. This will further marginalise people who are already in situations where they are vulnerable to abuse.

*"I feel insulted, anxious.
This is where my home is and now
I have to apply to stay here. And nobody
can give me a guarantee that it will all be ok."*

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