

Brexit and EU Settlement

Briefing for homelessness services
March 2019

Let's end homelessness together

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FEEDBACK, CORRECTIONS AND SUGGESTIONS

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Introduction

On 23 June 2016, UK voters voted in a referendum to leave the European Union. Following that, the Prime Minister invoked Article 50, meaning that the formal process of the UK leaving the EU began. The proposed date for leaving the EU was 29 March 2019. However, it may be that an extension of membership is agreed by the EU which would change the date of leaving to a later date.

Amongst other things, Brexit will have an impact on EU citizens residing in the UK or wishing to reside here in future. This briefing seeks to explain in simple terms what the impact will be and the possible scenarios depending on whether the UK has a negotiated exit from the UK or leaves without a deal ('no-deal Brexit').

All information in this briefing is correct at time of writing (late March 2019) but may be subject to change.

Definitions

For the purposes of this paper:

- The term **EU citizen** will be used to refer to citizens of the 27 EU member states¹, excluding the UK.
- **EEA citizen** will be used to refer to citizens of Norway, Iceland and Liechtenstein.
- **Third country national** will be used to denote a non-UK citizen of a country other than the EU or EEA.
- The **EU Settlement Scheme** or **EUSS** refers to the special scheme set up by the UK government for the registration of EU citizens post-Brexit.
- **UKVI** stands for UK Visas & Immigration and is the department of the Home Office responsible for immigration control.

What happens to EU citizens in the UK post-Brexit?

At present, EU citizens in the UK who are here for one of the purposes outlined in EU law (broadly: working, work-seeking or studying) are classed as people who are 'not subject to immigration control'.² This means that they do not need the permission of the Home Secretary to enter or reside in the UK. When the UK leaves the EU, EU law will cease to apply and therefore EU citizens will become people 'subject to immigration control', that is, needing the permission of the Home Secretary to enter or reside in the UK.

Under the planned Brexit process, the change will be gradual. Following the exit from the EU, there will be a transitional period during which the UK will continue to recognise EU citizens' rights to enter and reside in the UK. During the transitional period, UKVI will operate a special EU Settlement Scheme which will enable EU citizens to register for a continued right of residence in the UK once the transitional period has ended.

Negotiated Exit Scenario

If the UK has a negotiated exit from the EU, it is proposed that the transition period, during which EU citizens' rights continue to be recognised in the UK (including entitlement to welfare benefits, housing and other services as it currently stands), will continue until 31 December 2020. When the transition period ends, EU citizens in the UK who have not yet registered on the EUSS would have a grace period up to 30 June 2021 to register on the scheme.

¹ A complete list of EU member states can be found here: https://europa.eu/european-union/about-eu/countries_en

² S.7(1) Immigration Act 1988

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Up to 31 December 2020, new EU citizens would still be able to enter the UK freely and register on the EUSS at some stage before 30 June 2021.

EU citizens in the UK would continue to have the right to bring third country national close family members (spouses, civil partners, durable partners, children, parents, grandparents) into the UK to join them during the transition period and, after 31 December 2020, would still be able to bring in those family members if the relationship with them existed on 31 December 2020.

No deal scenario

In the event that the UK leaves the EU without a negotiated deal, there are some differences to the above proposal. What information we have comes from the government policy paper published in December 2018³. There will still be a transitional period during which EU citizens' rights to reside in the UK will continue to be recognised. However, the situation with regard to maintaining rights to welfare benefits, housing or other services during that period is less clear. The government's position paper on a no deal Brexit states that they envisage that "EU citizens and their family members **lawfully residing in the UK by 29 March 2019**" (emphasis added) would continue to have 'broadly' the same rights during the transition period as those which currently exist. There is no commitment to any similar rights for those EU nationals who come to the UK after that date or, presumably, those who are deemed to have been living 'unlawfully' in the UK.

In a no-deal scenario, the deadline for EU citizens and family members to register on the EUSS will be 31 December 2020. Any new EU citizens seeking to enter the UK during the transition period would be required to apply for 'European Temporary Leave to Remain' (ETLR) within 3 months of arrival, which would be granted for a period of 36 months. There is at present no clarity what rights and entitlements might be attached to this leave and whether periods spent in the UK with ETLR could lead to a permanent right of settlement in the UK.

The EU Settlement Scheme

UKVI has been piloting the EUSS since 2018 (during the pilot scheme only accessible as an app on Android devices) and a small number of EU citizens have already applied and been processed under the pilot scheme.

The EUSS is due to open in full on 30 March 2019. At this stage any EU citizen will be able to apply under the scheme. The scheme will not open to EEA citizens until a later date, although in other respects their situation will be the same as that of EU citizens. All EU citizens in the UK must apply for registration under the EUSS before the deadline date (as above). Third country national family members of EU citizens must also register on the scheme. Any EU citizen who does not register within the timeframe will be an undocumented person after that date.

An applicant can apply to the EUSS through an app available for download on Android phones or tablets⁴, or by completing an online application form available on the gov.uk website. Paper application forms will only be issued in exceptional circumstances. The EUSS process has been designed to be 'light-touch' and straightforward. In most cases documents will be scanned and uploaded to a website rather than being sent by post.

³ Policy Paper on Citizens' Rights in the event of a No Deal Brexit:

www.gov.uk/government/publications/policy-paper-on-citizens-rights-in-the-event-of-a-no-deal-brex

⁴ EU Exit: ID Document Check <https://play.google.com/store/apps/details?id=uk.gov.HomeOffice.ho1>

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In order to apply, each applicant will need:

- An email account
- Identification documents
- Proof of nationality

Third country nationals applying under the scheme will also need to provide evidence of their relationship with the EU citizen family member.

Following an announcement by the Prime Minister on 21 January 2019, applications to the EUSS from 30 March 2019 will be free.

There are three possible outcomes from an application to the EUSS:

- 'Settled status', that is Indefinite Leave to Remain in the UK. Awarded to those who can evidence 5 years' residence in the UK
- 'Pre-settled status', that is a grant of Limited Leave to Remain in the UK for 5 years. Awarded to those who cannot yet evidence 5 years' residence in the UK. An applicant granted pre-settled status should re-apply for settled status when they are able to evidence 5 years' residence in the UK.
- Refusal of status. The only reason currently given for refusal of status by UKVI would be "serious or persistent offending behaviour". The bar for refusal is set higher than for most other immigration applications and is essentially equivalent to the current deportation threshold for EU citizens. Any applicant who is concerned about this should seek further legal advice.

Establishing Settled status

It should be noted that settled status is granted to those who can show 5 years' residence in the UK, not 5 years' 'exercising treaty rights' which is the current requirement for a grant of Permanent Residence in the UK. This means that many EU citizens who have previously struggled to obtain a permanent right of residence in the UK may be able to gain settled status. Those who have an existing Permanent Residence document will still need to apply to the EUSS to be granted settled status.

Upon application, UKVI will automatically review the HMRC and DWP records of applicants for the last 6 years to see if 5 years' residence can be established. If 5 years' residence cannot be evidenced through this route, the applicant will have opportunity to submit other documents to evidence 5 years' residence. If 5 years' residence cannot be evidenced, then pre-settled status would usually be granted.

EU citizens granted status under the scheme will not be given a physical document but will instead be given access to a 'digital document', which they can share to evidence their status.

Irish Citizens

Irish citizens do not need to apply for settlement under the EUSS as they have a pre-existing right to reside in the UK. However, they may apply if they wish to do so, and third country national family members of Irish citizens will need to apply.

Entitlements to Welfare Benefits & Housing

At present there is a lack of clarity as to the entitlements of those who have been granted settled or pre-settled status under the EUSS. The government has stated its intention that entitlements (restricted to those here lawfully by 29 March 2019 in a no deal scenario) should “...remain the same as now”.⁵ However, great swathes of existing legislation and guidance on rights and entitlements will need to be amended to take account of the EUSS if this is to be the case.

The government policy paper, ‘EU Settlement Scheme: statement of intent’⁶, states that those granted status under the EUSS will be able to “...continue their lives in the UK much as before, with the same entitlements as now to work..., study and access public services and benefits, according to the same rules as now”⁷. This a statement of policy and is not legally binding. Many existing welfare and housing entitlements are subject to the Right to Reside test. The test as it applies to EU citizens contains exemptions which mean that those EU residents who are not exercising specific treaty rights are often deemed not to have a ‘right to reside’ and are therefore unable to access many benefits and social housing assistance. However, those with Indefinite Leave to Remain or Limited Leave to remain are deemed to have a right to reside. There are as yet no exemptions introduced in existing law to differentiate those granted Indefinite Leave or Limited Leave under the EUSS. It would therefore seem that, under the law as it stands, those with either settled or pre-settled status under the EUSS must have a right to reside and therefore would only need to evidence habitual residence in order to meet the criteria for access to benefits or housing to which the right to reside applies. This would create a very different scenario from the current situation for EU nationals.

It is likely that changes will be made to existing law in time and that some test cases will need to be heard to establish the exact position under the new scheme.

Particular considerations for homelessness organisations

Homelessness organisations working with EU citizens, EEA citizens and third country nationals here by virtue of EU law may need to support people with the following issues:

- Digital exclusion – people experiencing homelessness may struggle to access online applications or resources to scan documents. They may also not yet have an email address, which is essential for the application process.
- Proof of ID/nationality – applicants will need a passport or national identity card in order to access the scheme and this may not be easy for some applicants. In exceptional cases UKVI may consider other evidence of nationality.
- Documentation – while the Home Office have pledged to take a flexible and positive approach to applications with the presumption being in favour of granting status, the burden of proof still lies, ultimately, with the applicant. Those whose residence cannot be evidenced by HMRC or DWP records will need to gather evidence of residence covering 6 out of 12 months for each year in which they are claiming residence. UKVI has published guidance on what evidence will be accepted but states that this list is not exclusive but simply provides examples of what is acceptable.⁸ Documents such as

⁵ EEA Nationals in the UK: Access to social housing and homelessness assistance in a no deal scenario:

www.gov.uk/guidance/eea-nationals-in-the-uk-access-to-social-housing-and-homelessness-assistance-in-a-no-deal-scenario

⁶ www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent/eu-settlement-scheme-statement-of-intent#what-will-status-under-the-eu-settlement-scheme-provide

⁷ Paragraph 7.1.

⁸ EU Settlement Scheme: Evidence of UK residence: www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence

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CHAIN records or letters from homelessness organisations or similar on headed paper documenting contact with an applicant should also be accepted as evidence.

- Language barriers – while the Home Office has pledged that the guidance on the scheme will be available in all EU languages, the application process is only available in English. Also, some EU nationals who were born outside of the EU may not speak an EU language fluently.
- Third country national family members whose relationship with the EU family member has broken down are likely to struggle to evidence the relationship.
- There is no legal aid for making an application under the EUSS.
- Those with chaotic lifestyles, substance misuse issues or mental health problems may struggle to remember passwords to access the digital document which evidences status.

Sources of help

The government has pledged funding to organisations to assist those potential applicants deemed ‘vulnerable’ to apply to the EUSS. This includes help for homeless applicants. At time of writing the recipients of the funding have not been announced.

Some organisations will also offer Digital Assistance, that is access and support to complete the application process which does not include any element of advice.

Further reading and resources

EU Settlement Scheme: Community Leaders Toolkit – resources produced by the government to equip community organisations to provide basic information about the EUSS

www.gov.uk/government/publications/eu-settlement-scheme-community-leaders-toolkit

Homeless Link ‘Supporting EEA nationals’ factsheet – practical information for homelessness organisations on working with EU & EEA nationals and their rights and entitlements

www.homeless.org.uk/our-work/resources/working-with-eea-migrants

Free Movement website – guides to applications and up to date information www.freemovement.org.uk

CPAG judicial review pre-action protocol template letters – including letters challenging decision to refuse benefits to those with pre-settled or settled status under the EUSS

www.cpag.org.uk/content/judicial-review-pre-action-letters

The 3 Million – campaigning and information www.the3million.org.uk/

CIH Housing Rights Info – website from the Chartered Institute of Housing providing advice on migrant rights to housing for individuals and advisers www.housing-rights.info



What we do

Homeless Link is the national membership charity for organisations working directly with people who become homeless or live with multiple and complex support needs. We work to improve services and campaign for policy change that will help end homelessness.

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