

UK GOVERNMENT'S "OFFER" TO EEA NATIONALS WISHING TO REMAIN IN THE UK POST-BREXIT

On 26 June 2017, the UK Government published "The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU". This is essentially the UK Government's "offer" to European Economic Area (EEA) nationals who are currently living in the UK who wish to remain in the UK post-Brexit. As noted by the media, it represents its position on this issue for the purposes of the withdrawal negotiations.

OVERVIEW – EVOLUTION OF THE CURRENT "FREE MOVEMENT" RIGHTS

A summary of the offer as it relates to the ability of EEA nationals to live, work and study in the UK after the UK's withdrawal from the EU is set out below. A graphic illustration of the chronology of the proposals is also included at the end of this document.

Before exit

- ♦ EEA nationals will continue to be able to exercise free movement rights until the UK formally leaves the EU: this is hardly surprising, since it represents the current legal position in EU law.

From exit

- ♦ When the UK leaves the EU, EEA nationals who wish to remain in the UK will have to apply for a temporary residence permit granting them immigration permission to stay in the UK.

Since the UK is aware that it is impractical to issue a high volume of residence permits immediately when the UK leaves the EU, the UK Government will provide a period of blanket residence permission (deemed leave), which is likely to last for around two years, to all EEA nationals during which they will have to apply for the appropriate residence permit (the grace period). During this time, EEA nationals will be able to continue to live and work in the UK.

- ♦ Those EEA nationals who have already resided in the UK for five years, or, reach this milestone at a certain point in the future, may be eligible to apply for "settled status".

This will be a new status equivalent to the UK's existing indefinite leave to remain (ILR) status (also known as permanent residence or settlement), which non-EEA nationals can obtain if they remain in the UK for a set period (normally five years) under certain UK immigration categories.

Those who already possess a document certifying their EU permanent residence status, which can be obtained by EEA nationals who have exercised an EU Treaty right (which includes employment, self-employment, study, self-sufficiency and being a job seeker) in the UK for five years, will also have to apply for this new "settled status". However, this will involve a streamlined process subject to limited criteria.

- ♦ Those who obtain this "settled status" will be free to reside in the UK in any capacity and undertake any lawful activity in the UK, to access public funds and services and to apply for British citizenship after holding this status for 12 months.
- ♦ This "settled status" will be a separate legal scheme governed by UK law and will not be subject to the jurisdiction of the Court of Justice of the European Union (CJEU).

It will be tailored to meet the needs of those EEA nationals who are currently in the UK. For example, in order to obtain this status, there will be no requirement to hold comprehensive sickness insurance throughout the five-year period, which is one of the current (sometimes challenging) requirements for EU permanent residence for those who are studying or who are deemed to be self-sufficient in the UK.

- ♦ How to qualify for "settled status"? EEA nationals must have arrived and become resident before a certain cut-off date to be determined (which will be between 29 March 2017 - when the UK triggered Article 50 - and the date that the UK formally withdraws from the EU (likely to be March 2019)).

If they have not satisfied the five-year residence requirements by the time the UK leaves the EU they will either:

- be able to apply for "settled status" during the grace period, if they reach the five-year mark during that time; or
 - apply for a temporary residence permit during the grace period which will extend their immigration permission to stay beyond the end of the "grace period" until such time as they have completed the five-year period for "settled status".
- ♦ EEA nationals who arrive in the UK after the cut-off date but before the UK withdraws from the EU will be allowed to remain in the UK during the "grace period" but will then have to apply for a temporary resident permit before the end of the "grace period".

When that temporary residence permit expires, they will have to apply for UK immigration permission under the new rules which will apply to EEA nationals. They may eventually become eligible to settle permanently - but this group should have no expectation of guaranteed "settled status".

- ◆ Those EEA nationals who arrive in the UK during, or after, the "grace period" will have to apply for UK immigration permission under the new rules which will apply to EEA nationals.

What about dependants?

- ◆ Dependent family members of an EEA national who is already in the UK who join the EEA national before the UK's exit will be able to apply for "settled status" after five years, provided the EEA national also qualifies for "settled status", even if the five years falls after the UK's exit, irrespective of the cut-off date.

They will also be able:

- to benefit from the "grace period" and, if they do not meet the requirements for "settled status" during the "grace period";
- to apply for a temporary residence permit to enable them to complete the required five-year period for "settled status".

Those joining after the UK's exit will either be subject to the same rules as those joining British citizens, which would mean that they would be subject to the £18,600 annual minimum income requirement, or to the alternative post-exit immigration arrangements which will apply to EEA nationals.

Special status of Irish nationals

Although these proposals will apply to all EEA nationals equally, they will not affect Irish nationals who will continue to be deemed to be settled in the UK as soon as they arrive in the UK by virtue of the Ireland Act 1949.

ANALYSIS

Reciprocity issue / role of CJEU

At this stage, these are only proposals: they are only likely to be implemented in their current form if the UK can negotiate reciprocal arrangements for British citizens living in the EEA. EU spokesmen stated immediately on publication that they do not

think that the proposals go far enough in protecting the rights of EEA nationals and that any status, whether temporary or settled, given to EEA nationals post-Brexit should be governed by the CJEU. However, the UK has also stated that one of its key negotiation positions is that, once the UK leaves the EU, it will no longer be subject to the jurisdiction of the CJEU.

Setting the cut-off date

One of the most important negotiation points is going to be when the cut-off date will be: this will apply both to EEA nationals in the UK and to British citizens in other EU countries. The EU is going to push for this to be the date that the UK leaves the EU but the UK will try to negotiate an earlier date. This is because the government is concerned about a last minute rush of EEA nationals coming to the UK shortly before the UK leaves the EU so that they will be able to apply for the temporary status which will then lead to "settled status".

Good news / less good news

The good news is that the UK Government plans not to make it a requirement that EEA nationals must have held comprehensive sickness insurance throughout the five-year period in order to obtain "settled status". A large number of EEA nationals currently do not qualify for a document certifying EU permanent residence, even those who have been in the UK for a considerable amount of time, since they have not met this requirement.

The less good news is that EEA nationals who already possess a document certifying EU permanent residence will have to apply for this new "settled status", albeit via a streamlined process.

Issues so far not addressed

There are a number of issues which the proposal does not address, such as:

- ◆ Will all EEA nationals who are in the UK before the cut-off date and remain in the UK for five years be eligible for "settled status", irrespective of the activities they have undertaken during that period or will they have to meet certain minimum criteria?
- ◆ Will there be a residence requirement for "settled status"? If yes, will this be the same as for EU permanent residence and ILR, that is, the EEA national must not have been outside the UK for more than 180 days in any of the 12-month periods which make up the five-year qualifying period?

- ◆ If an EEA national enters the UK before the cut-off date and obtains a temporary residence permit during the “grace period” but does not satisfy the “settled status” requirements before the temporary residence permit expires, will they be able to apply to extend the temporary residence permit until such time as they do meet the “settled status” requirements?
- ◆ The amendments which will need to be made to the law on the prevention of illegal working to ensure that EEA nationals will be able to continue to undertake employment in the UK during the “grace period” and beyond.

Industry bodies have also criticised the proposals for not providing any details about the immigration arrangements which will apply to EEA nationals who wish to work in the UK post-Brexit.

DOCUMENTS CERTIFYING PERMANENT RESIDENCE VS NEW “SETTLED STATUS”

The proposals have caused consternation among EEA nationals who have already obtained documents certifying EU permanent residence, as they will be required to apply for “settled status” once it is introduced, which will involve paying a further fee to obtain this status. This is the case even though it appears that the requirements for “settled status” will be less stringent than those which apply to EU permanent residence.

In view of this question, the UK Government has stated that those who already possess a document certifying EU permanent residence will be subject to a more streamlined process to obtain “settled status”. Consequently, although the Home Office is currently advising EEA nationals who have already been resident in the UK for five years not to apply for documents certifying EU permanent residence, many may still wish to do so to benefit from this future process.

They may particularly want to do this as there are currently reportedly three million EEA nationals in the UK: it would take the UK a considerable amount of time to process applications for “settled status” for all these individuals. It is therefore going to be a huge logistical challenge for the Home Office to process that amount of applications within the two-year “grace period”. Consequently, obtaining a document which will enable an EEA national to obtain “settled status” more quickly is clearly an attractive proposition, especially as processing times for these applications are currently quite short (around two to three months).

It is also worth noting that any EEA national who has been in the UK for six years and wishes to obtain British citizenship, must first obtain a document certifying EU permanent residence before they are eligible to submit a citizenship application.

Obviously, EEA nationals who obtain British citizenship prior to the UK’s withdrawal from the EU will not be affected by these proposals.

THE FUTURE

As stated at the outset, these proposals only represent the UK Government’s initial negotiating position. Although there is a willingness on both sides to resolve these issues as soon as possible, the final deal may be quite different from those set out in the UK Government’s document. As the withdrawal negotiations progress, we hope gradually to get a clearer idea of the immigration system that will apply to EEA nationals post-Brexit and we will keep you updated as more information becomes available. Full details of the UK Government’s proposals can be found [here](#).

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ILLUSTRATION OF UK GOVERNMENT'S PROPOSALS FOR CONTINUITY OF IMMIGRATION RIGHTS FOR EEA NATIONALS

