

Brexit negotiations – Agreement on phase 1

On 8 December 2017 the negotiators from the European Union and the United Kingdom government produced a joint report setting out the agreement reached in phase 1 of the negotiations for the United Kingdom's departure from the European Union. This report is published with the caveat that nothing is agreed until everything is agreed. There is still a significant negotiation to be undertaken and agreement reached. The joint report confirms the progress that has been made and importantly, for our purposes, gives key indicators about the rights of European nationals living in the UK following the UK's departure from the European Union.

What has been agreed?

The report covers three areas:

1. Protecting the rights of Union citizens in the UK and UK citizens in the Union;
2. The framework for addressing the unique circumstances in Northern Ireland; and
3. The financial settlement

We will focus only on the first of these areas; citizen's rights.

The report will inform the final Withdrawal Agreement. Once it is agreed the Withdrawal Agreement will be binding on the UK and EU Member States. The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, to implement the Agreement.

Citizen's Rights

The report describes that the Withdrawal Agreement will protect certain rights held by nationals of the EU and their family members living in the UK, and UK Citizens living in other European countries, where those rights were exercised prior to a specified date, that date being the date of the UK's withdrawal from the European Union ("Withdrawal Date"). Those rights include the right to continue living in the UK, to work, to study, to leave the UK and re-enter and to have certain family members join them.

Where a person is protected under the Withdrawal Agreement, their direct family members, irrespective of their nationality, will be entitled to join the person in the UK after the Withdrawal Date provided they were the person's family member prior to the Withdrawal Date, even if they have not previously lived in the UK. This will be on the same conditions as under current EU law.

Children born after the Withdrawal Date whose parent is protected by the Withdrawal Agreement will be able to join that parent in the UK, but only if both parents are protected, one parent is protected and the other is a British Citizen or the protected parent has sole responsibility for the child.

All other family members including family members with whom the relationship has been established after the Withdrawal Date will be subject to national legislation. In the UK, they will need to meet the requirements of the Immigration Rules. These impose strict evidential requirements, including an onerous financial requirement.

The UK and EU27 are permitted to require a person with protection under the Withdrawal Agreement to apply for status conferring that status. If a successful application is not made, no status will be held. In the UK, this status will be called settled status. This will be introduced on a transitional basis in 2018 and a mandatory basis following the Withdrawal Date. This is a significant change to the rights held by European nationals and their family members. Under Union law, EU nationals have automatic rights which can be recognised by Member States but which operate with or without recognition. Under the Withdrawal Agreement people with protection will be entitled to apply for status but will not have that status until it is granted to them by the national government of the Member State. In the UK the UK Visas and Immigration section of the Home Office holds this decision-making power.

The report indicates that the process for applying for settled status will be transparent and smooth and will avoid unnecessary administrative burdens. Application forms will be short, simple and user friendly and the Home Office will cooperate with applicants to help them to prove their eligibility. Evidential flexibility will be applied and applications should not be refused for simple errors. The application may be free or, if charged, will likely cost £65. Protected persons will have a two-year period in which to make their application for settled status. The intention to make the process user friendly and to apply common sense to the consideration of applications is welcomed but it does go against practitioners' experience of the working practices of the Home Office and may not be achievable given the scale of the task ahead, namely for the UK Government to grant status to over 3 million European nationals and their family members in the United Kingdom.

Those who already hold permanent residence in the UK will be able to have this converted to settled status without charge. This is likely to apply only to those who hold a permanent residence card. The conversion to settled status will be subject to an identity check and may be subject to a criminality check and confirmation of on-going residence.

The right to live permanently in the UK achieved under the Withdrawal Agreement will not be lost by an absence of up to five consecutive years.

Social security coordination will still apply, for example enabling the aggregation of a payment of national insurance contributions in different Member States prior to the Withdrawal Date.

The European Health Insurance Card scheme which enables the reciprocal payment for health care in different Member States will continue for EU

nationals living in the UK prior to the Withdrawal Date, for as long as their residence continues.

The stated intention is that rights in place at the Withdrawal Date will continue. However there is a significant shift in the nature of these rights. There will no longer be automatic rights instead, they will need to be applied for to be granted. Following withdrawal, Europeans in the UK and UK nationals in European must request permission from the national government to remain in that territory. This is not a continuation of the rights in place at the Withdrawal Date but is instead a replacement for diluted conditional rights.

Are there still areas of uncertainty?

Direct family members, including spouses, children and dependent parents, whose relationship pre-dates withdrawal have protection under the Withdrawal Agreement but there is no certainty for extended family members. Extended family members include all dependent family members save for parents. Extended family members currently have rights under European Law but it appears that these may be lost.

We consider that there will be a particular difficulty for children born after the Withdrawal Agreement to a parent living in the UK with protection under the Agreement and a parent without protection who is not a British Citizen. It appears that a child in these circumstances will not have protection under the Withdrawal Agreement.

If a European national was not exercising their Treaty rights at the date of the UK's withdrawal from the EU due to a technicality, will they lose their rights entirely? This requires clarification and a declaration that flexibility will be exercised needs to be given.

The intention is that the application for settled status will be straight forward and will not require comprehensive sickness insurance for a period as a student or self sufficient person. However, this is not expressly provided for in the report. From government policy announcements it is not clear whether a historical period without CSI when this was required will be classed as lawful residence for the purpose of a settled status application. This requires clarification.

Will ongoing residence be a requirement to convert from permanent residence to settled status? The report suggests that evidence of residence is required to convert settled status, however under current provisions for permanent residence this is not lost by an absence of up to two years and under the Withdrawal Agreement permanent residence is not lost by absence of up to five years. Could persons with permanent residence living overseas apply for settled status?

There is a two-year grace period provided for to enable EU nationals to secure settled status. If a person does not secure settled status at what stage could they

be classed as an overstayer and liable to removal? Will discretion be exercised if a person was unable to make the application within the two-year period?

If settled status is refused, it appears that there will be a right of appeal. Will additional resource be provided to the Ministry of Justice to support the judiciary who are already struggling to cope with a significant backlog of appeal cases?

We do not have any clear policy steer on the rights of European nationals who wish to enter and live in the United Kingdom after the Withdrawal Date. This is likely the biggest issue on Citizen's Rights which has been left outstanding. In this context how will UK based business protect their workforce and what will be the process for recruiting from the EU in the future?