

THE JUSTICE PAPERS

The Bar Council

Protecting our Freedom
The Future of EU Citizens' Rights



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The UK's departure from the EU is one of the most fundamental constitutional and political events in generations. Ensuring that the rights of EU citizens and their family members are protected is a major priority. The scale of the task is unprecedented as millions of people are required to apply for immigration status in anticipation of their EU law right to live, work and study in the UK ending. Failure to apply for immigration status before the deadline may have serious consequences for people who have lived in the UK for decades, such as not having the right to work or rent a property, or even being removed to a country that they haven't lived in for decades.

EU citizens' rights: what is happening right now?

The UK left the EU on 31 January 2020. We are currently in a "transition period" in which EU law, including the right to freedom of movement, continues to apply. The transition period is scheduled to end at 31 December 2020 ahead of the Government introducing a new immigration system in 2021.

As part of the Withdrawal Agreement between the UK and the EU, EU citizens and their family members living in the UK before the end of the transition period must have a way of securing their right to stay here.

The application system that the government has devised is called the

EU Settlement Scheme ('the Scheme'). Through the Scheme, EU citizens and their family members have to prove: that they are an EU citizen or a family member, that they are not a "serious or persistent" criminal and that they have a "continuous qualifying period" of residence. If they have under five years' continuous residence, they qualify for "Pre-Settled Status" (Limited Leave to Remain of five years) and if they have been continuously resident for five or more years, they qualify for "Settled Status" (Indefinite Leave to Remain). Applicants granted Pre-Settled Status will have the opportunity to upgrade their status once they have completed five years' continuous residence.

The Public Law's Project concerns

The Government considers the Scheme to be a pilot for its new immigration system. The Scheme is innovative in a number of ways, in particular, its use of technology. The application process is online for most applicants, with the option of proving an applicant's identity via a mobile phone app. There is an automated data-check that is a "shortcut" for establishing continuous residence. The app conducts an automated check of the applicant's tax and benefits records. If the check establishes five years' continuous residence, the applicant does not need to upload further proof. One of the problems with this is that the automated data check

does not consider all benefits data. In particular, it excludes data in relation to Child Benefits and Child Tax Credits. Not taking these benefits into account likely means that it will be harder for women – who are more likely to be getting these benefits - to establish continuous residence through the automated data check.

There is a real concern that unfairness in the automated data checks is leading to people being offered – and accepting - Pre-Settled Status when they are entitled to Settled Status. This distinction could have a big impact on their rights to access services in the UK such as healthcare, housing and benefits. Currently, for example, pre-settled status does not entitle them to access certain means-tested benefits.

Another innovation of the Scheme is that successful applicants will generally not be given physical proof of their immigration status. Instead, they will receive a “digital document” that can only be accessed online. This is basically a system which allows you to request a code that you can then use to prove your status to an employer, landlord, etc. There is considerable concern that this will lead to EU citizens being discriminated against. Will prospective landlords, employers and others required to undertake identity checks favour people with easier to access physical proof? The Government has not provided any proof that they have considered the risk of discrimination created by providing only digital proof.

What the Public Law Project is doing

Public Law Project (PLP) is a national legal charity that aims, amongst other things, to support disadvantaged groups in accessing their rights. We have established an EU Settlement Scheme Support Hub (‘the Hub’) to ensure that the Scheme operates in a manner which is fair and lawful, promotes access to justice and protects the interests of marginalised groups.

The Hub is working closely with charities across England and Wales to identify where the Scheme may be working in an unfair way. We also help them to support people whose applications are more complex than usual, such as applicants who are concerned that their criminal records may lead to them being deported, or third country family members having difficulty evidencing their eligibility to the Scheme.

We are working collaboratively with specialist organisations that work with prisoners and people with mental capacity issues to combine our public law expertise with their subject-matter knowhow in order to advocate for lawful and fair policies in these areas. To inform our policy work we are gathering evidence through our Hub partners, making Freedom of Information Act (FOIA) requests and assisting Parliamentarians from across the political spectrum to make enquiries to Ministers.

One of the ways we can seek to ensure the Scheme is fair is through judicial review casework challenging particular features of the scheme. In 2018, PLP acted for the Joint Council for the Welfare of Immigrants (JCWI) in a challenge to Home Office rules intended to prevent 'unsuitable' people from being granted settled status. The practical effect of those rules would have been to reject – and ultimately remove from the UK – applicants who had received removal notices for not exercising treaty rights, which could be evidenced by something as minor as not having health insurance.

Following JCWI's challenge, the Home Secretary addressed our client's key concerns, introduced a new proportionality requirement, and confirmed that it would not refuse the Scheme's applications on the basis of non-exercise of treaty rights alone.

Challenges ahead

The Scheme closes in June 2021 and while more than three million applications have been received by the Home Office, it is far from "job done". There is no reliable way of estimating how many people still need to apply but it is very likely that a large number of vulnerable EU citizens and family members have not secured their status yet. As such, we must strive to ensure that the Scheme operates fairly and that everyone entitled to continue living their life in the UK is able to do so.