

The potential impact on EU citizens of the UK government's 'settled status' proposal

A key concern for EU citizens in the UK is how their lives will be impacted by the UK government's 'settled status' proposal. The proposal, if implemented, will see EU citizens lose their current rights and be forced to apply for a grant of leave to remain in the UK under new rules relying on principles set out in the currently negotiated Withdrawal Agreement. How different will EU citizens' lives be under the proposal? Can the UK government be trusted to implement a fair policy? Why are groups like the3million so concerned about the role the Home Office will play in this proposal?

Insight into the issues surrounding the UK Home Office's rules for those already subject to these requirements (third country nationals), their interpretation of EU law, the application of and compliance with these laws, their resources and delegation of responsibilities is essential to answer these questions. We thought it would be helpful to direct readers to some specifically helpful resources relating to key points.

From the outset, we draw your attention to the lack of empirical data available to assist with presenting the issues. We also want to draw your attention to the guarded manner in which the UK government approach their data. This is particularly demonstrated in a report referred to within the footnote¹. As such, much of the information we are able to give is based on experiences of practitioners in the legal sector and evidence in the public domain.

The Home Office's Rules

For nationals from outside the EU, the UK applies Immigration Rules that control and restrict their access to the UK. These rules can be broadly divided into 'worker' and 'family' categories. There is a particular complexity associated with their structure. The Byzantine reference in the Court of Appeal has gained much traction publicly.² It is not an understatement.

Individuals seeking leave to remain (leave to remain is granted to persons subject to immigration control in the UK with conditions attached - such as where to work, what benefits can be accessed etc.) in the UK have to navigate the requirements through complex forms, difficult rules, very specific evidential requirements, arcane policy and expensive fees. Leave to remain is easily revocable and the consequences are harsh.

Surrounding this complex system of rules and procedure is the UK government's 'hostile environment'. The architecture of this has been implemented broadly through two recent acts (the Immigration Act 2014 and 2016). These pieces of legislation (in addition to others) have introduced measures that prevent persons from accessing work, property, bank accounts, driver's licenses etc. and being guilty of a criminal offence if you are unable to demonstrate that you have a specific right to remain in the UK. If you are unfortunate enough not to satisfy the requirements of the Immigration Rules, you are plunged into the 'hostile environment'.

There are a number of articles and reports in the public domain relating to the 'hostile environment' and its implementation over the past few years and these are referred to in the footnote below.³ Specifically,

¹ <https://www.instituteforgovernment.org.uk/blog/can-home-office-cope-three-million-eu-residents>

² <https://www.freemovement.org.uk/court-appeal-finally-points-based-system/>

³ Hostile environment:

<https://1mcb.com/immigration-law-update-article-8-r-application-agyarko-others-v-sshd-2015-ewca-civ-440/>;

<http://www.independent.co.uk/news/uk/crime/detention-the-black-hole-at-the-heart-of-british-justice-9961576.html> ;

<https://www.freemovement.org.uk/hostile-environment-affect/>;

<https://www.jcwi.org.uk/blog/2016/05/23/what-s-next-hostile-environment-immigration-act-2016-and-queen-s-speech>;

<https://www.kingsleynapley.co.uk/insights/blogs/immigration-law-blog/immigration-bill-2015-the-real-impact-of-creating->

perhaps more so for dramatic purposes, reference is drawn to a dramatisation of a much loved mascot of the UK (Paddington Bear) and the consequences experienced under the 'hostile environment'.⁴

Finally, the UK Home Office take enforcement action applying aggressive rules which see persons being arbitrarily detained for prolonged periods. Private law claims against the Home Office for unlawful detention are plentiful and do not result in policy change. Brandon Lewis, the current Immigration Minister, gave evidence before the Commons home affairs select committee on 21 November 2017. The contents were widely reported in the liberal press.⁵ His evidence highlights the arbitrary and aggressive strategy adopted by the Home Office. The session for example highlighted the prospect that EU nationals may be deprived of a bank account for a year due to errors. The select Committee's Chair Yvette Cooper also drew attention to the fact that only 40% of appeals before a tribunal are successful.⁶ Expanded on below are further details of the UK carrying out specific enforcement action against EU nationals.

It is very challenging for persons from outside the EU to regularise and remain in the UK. The challenges are not only felt by those who are seeking to work in the UK but those who have human rights arguments keeping them here. The rules related to family applications (spouses and children wishing to be in the UK with their settled/British family members) are equally complex and difficult to satisfy.

the3million have real concerns that the UK's continued approach to cherry pick EU law through incorrect interpretation will continue after the UK leaves the EU. Without legislation outside of UK Immigration Law for EU citizens in the UK, CJEU oversight and incentive, the UK will likely continue on this path. This will affect EU citizens in the UK particularly harshly without additional safeguards that take into account the heightened risk of living in a country that has left the EU.

The UK Government's interpretation of EU law

The UK as a current member state of the European Union is under various obligations to apply, interpret and implement various EU laws. Within the context of free movement of people, various directives and instruments have set out member states' obligations. The Citizens Directive 2004/38/EC is the central instrument.

The UK has adopted a tough interpretation of EU law. This is particularly evident in the complex nature in which it has been interpreted⁷, and the restrictions imposed on, appeal rights.⁸ What this has led to though are problems with implementing and complying with EU law in the UK.

[a-hostile-environment;](#)

[http://www.politics.co.uk/comment-analysis/2017/09/07/hostile-environment-2-0-post-brex-it-migration-plans-are-all;](http://www.politics.co.uk/comment-analysis/2017/09/07/hostile-environment-2-0-post-brex-it-migration-plans-are-all)

<https://politicsmeanspolitics.com/when-the-government-introduces-immigration-checks-to-freeze-bank-accounts-you-better-buy-a-good-38e97335c3ae>

⁴ Paddington bear by Colin Yeo:

[https://www.freemovement.org.uk/an-immigration-lawyer-reviews-paddington/;](https://www.freemovement.org.uk/an-immigration-lawyer-reviews-paddington/)

<https://www.freemovement.org.uk/an-immigration-lawyer-reviews-paddington-2-hostile-environment/>

⁵ Brandon Lewis-Select Committee:

[https://www.theguardian.com/politics/2017/nov/21/immigration-minister-pledges-swift-processing-of-eu-citizens-status;](https://www.theguardian.com/politics/2017/nov/21/immigration-minister-pledges-swift-processing-of-eu-citizens-status)

<http://www.independent.co.uk/news/uk/politics/brexit-latest-news-eu-citizens-uk-right-to-stay-minister-brandon-lewis-yvette-cooper-theresa-may-a8067941.html>

⁶ <https://www.theguardian.com/politics/2017/nov/21/immigration-minister-pledges-swift-processing-of-eu-citizens-status>

⁷ *Sala* and *Khan* cases in the court of appeal

<https://www.freemovement.org.uk/breaking-sala-overtured-court-appeal/>

<https://asadakhan.wordpress.com/2017/11/15/appeal-rights-and-efms-the-end-of-sala/>

[https://www.newLawjournal.co.uk/content/jurisdiction-block-demolished-khan](https://www.newlawjournal.co.uk/content/jurisdiction-block-demolished-khan)

The UK has thus repeatedly struggled to implement EU law correctly. The most recent regulations (designed to interpret EU law for caseworkers to apply in decision making) fail on many levels to implement EU law correctly. The UK's Immigration Law Practitioners Association (ILPA) have repeatedly informed the EU of these failings.⁹ Indeed, there have been numerous cases domestically and within the ECJ (now CJEU) that have declared UK interpretation to be unlawful.¹⁰

The UK Government's application of this interpretation of EU law

There have been escalating accounts of arbitrary application of the UK's laws against EU nationals. This is particularly felt within some Eastern European diasporas in the UK for example from Poland and Romania. EU citizens are being arrested, referred to the Home Office and found to be economically inactive under European law. The consequence being that the Home Office can remove the EU citizen on the grounds that they are not exercising a right under EU law (worker, self-employed, etc.). They are then detained and removed relatively swiftly. There are numerous accounts of this and these are again set out in the footnotes.¹¹ You will note that such action is subject to litigation in the UK High Court. The litigious culture of the Home Office is well known and expanded on below.

This methodology is extended to non-EEA nationals living in the UK. **the3million** believe that this arbitrary approach will see thousands of EU citizens subjected to poor treatment by the Home Office. We have particular concerns about the impact this approach will have on vulnerable EU citizens. There is real risk to those who are elderly, with a disability and in precarious/dangerous circumstances such as victims of trafficking, domestic violence etc.

The Home Office's resources

The Home Office's own resources call into question their ability to process applications made by EU citizens and their family members. The resources they have to date have resulted in large numbers of applications being rejected (29% of applications are currently rejected) and refused by the Home Office, in a number of instances unlawfully. Letters have been sent in error by the Home Office to EU citizens threatening removal.¹² These issues are not a recent phenomenon resulting from a surprise surge in applications for recognition of permanent residence by EU citizens. It is a perpetual issue of the Home Office. Incompetence has been a long-term feature of the Home Office's legacy and is well documented in the public domain.¹³

⁸ At present, appealing an EU law decision of the Home Office can be done from within the UK. However, there are a number of exceptions that allow for a person to be removed from the UK whilst their appeal is pending.

⁹ <http://www.ilpa.org.uk/pages/brexit-advocacy-series.html>

¹⁰ <http://www.ilpa.org.uk/resources.php/33661/ilpa-evidence-for-the-home-affairs-committee-home-office-delivery-of-brexit-immigration-inquiry-6-no>

¹¹ <http://www.righttoremain.org.uk/blog/eu-rough-sleepers-to-get-their-day-in-court/> - further articles and points of reference can be found within this email.

¹² <https://www.theguardian.com/politics/2017/aug/23/home-office-apologises-for-letters-threatening-to-deport-eu-nationals>

¹³ HO incompetence:

<https://www.theguardian.com/politics/2017/nov/20/civil-servants-bordering-on-clueless-over-brexit>

<http://www.politics.co.uk/blogs/2017/08/25/the-home-office-not-fit-for-purpose>

<http://www.independent.co.uk/voices/home-office-deportation-british-citizens-told-to-leave-theresa-may-a7923696.html>

The issue of the Home Office's resources extends in particular to the time it takes to make decisions on applications, the quality of the decision-making and caged manner of decision making.¹⁴

the3million cannot see how the Home Office will be in a position to manage and decide over 3 million applications for documents, especially within the 2 year grace period envisioned. There is a suggestion that a 15% increase in resources will be able to manage a sizeable increase in their work load. Brandon Lewis seemed to think it was possible but this does not stand up to scrutiny, particularly in light of the historical incompetence of the Home Office. Furthermore, the recent UK budget will see a cut to Home Office resources.¹⁵ Whether or not the Home Office will share the budget assigned to Brexit remains to be made clear. We have seen reports also of the Home Office unable to fill positions for their proposed scheme.¹⁶

When the lack of resources, the risks of refusal/rejection and the grave consequences of refusal are considered together they present a very bleak picture for the protection of EU citizens living in the UK or the preservation of their rights. Again, **the3million** are particularly concerned about what impact this will have on vulnerable groups. We particularly draw your attention to the risk faced by family members of EU citizens who are from outside the EU.

The Home Office's culture and habits

A further measure against the issues of resources and the law, is the culture within the Home Office. This is best reflected in its practices during litigation. The now former president of the Upper Tribunal (IAC) (a senior judicial position who oversees the specialist chamber that deals with immigration and asylum cases) has commented repeatedly on the combative and unhelpful approach taken by the Home Office in litigation.¹⁷

Accountability of the Home Office

Despite legal intervention, the Home Office are known for not complying with orders of the courts¹⁸. In a recent decision in the Upper Tribunal, the former president made stark remarks about the Home Office's noncompliance. This is a common feature for practicing lawyers where Home Office decisions have been quashed by the court and have had to be remade. These remade decisions do not always factor in the criticism of the court and result in repeat litigation.

Complaints about the conduct of the Home Office to the Parliamentary Ombudsman are also often doomed to fail, due to the requirement for submitting such a complaint to a local MP who may well refuse to carry it forward, or who does so in a manner that does not reflect the complex nature of the complaint.

¹⁴ See in particular the result of resource issues reported in this article <http://www.politics.co.uk/comment-analysis/2017/09/07/hostile-environment-2-0-post-brexite-migration-plans-are-all>

¹⁵ <https://www.freemovement.org.uk/immigration-and-the-budget/>

¹⁶ <https://www.theguardian.com/uk-news/2017/nov/19/home-office-admits-its-struggling-to-recruit-staff-to-register-eu-nationals>

¹⁷ Most recently R (on the application of AM and others) v Secretary of State for the Home Department (liberty to apply – scope – discharging mandatory orders) [2017] UKUT 372 (IAC). See also the case, for example, of VV (grounds of appeal) [2016] UKUT 53 (IAC) (13 November 2015) the Upper Tribunal criticises the Home Office's conduct of appeals to the Upper Tribunal against decisions of the First-tier. This is in addition to Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC) (FM post: Contrasting cases on grounds of appeal) and MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC). See also <https://legalthackette.com/2017/11/08/immigration-judge-slams-worse-than-useless-home-office-officials/>

¹⁸ <https://www.freemovement.org.uk/explainer-can-home-secretary-really-guilty-contempt-court-breach-court-order/>

A further bleak prospect is the UK government's proposed restriction on data protection.¹⁹ This will ultimately reduce accountability and transparency when persons wish to access data held by the Home Office.

Collective consideration of the above

In isolation, these issues are increasingly problematic. Collectively, they will expose large numbers of EU citizens to considerable problems. The problems experienced now by EU citizens, however, will only be amplified if the settled status proposal is implemented. EU citizens need to be safeguarded against this. **the3million** have prepared an alternative to the UK proposal which will help avoid problems and protect against these realities, ensuring that families will not be torn apart.

The failings of the settled status proposal and our Alternative Proposal

the3million have produced a number of papers setting out the issues surrounding the UK's proposal of settled status. In particular how it is not a preservation of the status quo. We ask that you consider these and other resources we have produced by visiting the 'publications' section on our website. For example, our Alternative Proposal, which sets out a workable solution to the UK's flawed proposal, and our response to the UK's Technical Note on settled status can be found there.²⁰ Crucial issues relating to the nature, design and proposed implementation of the UK's settled status proposal need to be addressed in sufficient detail in the Brexit negotiations.

Sufficient resources

The UK government's proposal lacks clarity as to whether it is going to rely on applicants demonstrating that they have 'sufficient resources' to be able to acquire settled status. This further muddies the waters in respect of the proposed hybrid of settled status with EU law elements, and is unworkable. If a 'sufficient resources' test were to be applied to EU nationals under the UK proposal, failing this test could well see an applicant refused and facing removal from the UK. There is no clear forthcoming definition of how this would be assessed. We grow increasingly concerned that vital points such as this will be missed in the negotiations or worse not be fully established by the time it is implemented. We believe that the only workable solution that will not disrupt people's lives or tear families apart lies in our Alternative Proposal. This will avoid multiple errors with dramatic consequences due to simplicity of registration, and be inclusive in respect of disabled and vulnerable groups.

¹⁹ <http://www.politics.co.uk/comment-analysis/2017/11/03/buried-in-a-government-bill-an-immigration-rule-strips-milli>

²⁰ <https://www.the3million.org.uk/publications>; https://bit.ly/t3m_AlternativeProposal; https://bit.ly/t3m_TechnicalNote