Achieving safe switchover
from Free Movement to Settled Status for all

The Immigration and Social Security Coordination (EU Withdrawal) Bill has one primary purpose, namely to **end EU free movement** legislation in the UK. The EU's free movement gives all EU citizens[1] the right to live and work in other EU member states than their own, without having to be granted permission under another country's domestic immigration legislation.

The result of this is that all EU citizens who currently live in the UK on the basis of their free movement rights **need a new legal UK** status under the EU Settlement Scheme (EUSS), launched by the Home Office in 2019. EU citizens who are eligible and who successfully apply to the scheme are granted settled status or pre-settled status, depending on how long they can demonstrate having lived in the UK.

It is in everyone's interest that the transition from free movement to settled status[2] for an unknown number of individuals (but estimated over four million) is as safe and fair as possible. Neither the public nor the Government want to see anyone left behind without legal status, falling through the cracks into the consequences of the UK's 'hostile environment' policies.

(1) In this paper, we use the simplified 'EU citizens' to refer to all EU, EEA and Swiss citizens, and those non-EU citizens who derive their rights to live, work and study in the UK from their EU/EEA/Swiss family member.

(2) For brevity, we use 'settled status' to mean either settled status or pre-settled status under the Home Office's 'EU Settlement Scheme'.

(3) *the3million.org.uk/automatic-rights*

The optimal solution – a declaratory status

the3million has long advocated what we believe is the best way to ensure that no-one gets left behind. A summary can be found on our website[3], along with many papers we have written over the years.

In a nutshell, our proposal is to ensure that any EU citizen who fulfills the eligibility criteria of the EUSS **has a legal immigration status** (either pre-settled or settled status) automatically, by an act of law. However, those citizens would still need to **register** this 'declaratory' status with the EUSS in order to obtain **proof** of that status.

The Government's response to this proposal has been to say that it will lead to Windrush, but this is not the case. Windrush was ultimately caused by a low take up of the 1987 registration scheme, at a time where proof of registration was not needed in daily life. As Wendy Williams highlights in the Windrush Lessons Learned Review, *"Publicity leaflets from the time also explained that there would be no consequences if people chose not to register at that time. It is unsurprising that some did not register."*

The UK is a very different place in 2020. Proof of status is now needed on a near daily basis, for example to work, study, rent, access healthcare and benefits, or travel into the UK. After the EUSS deadline of 30 June 2021, EU citizens will no longer be able to rely on their EU passport, needing proof of their **new** status instead.

It is worth noting, and a sobering thought, that if the current legal basis for the EUSS had been used for the Windrush generation, then not only would thousands of people have been unlawfully denied access to work, homes, help and healthcare in recent years, but they would also have had no rights under UK law whatsoever.

In the absence of a declaratory status

The Government has repeatedly indicated that it does not wish to change the legal framework of the EU Settlement Scheme (EUSS) such that pre-settled and settled status is a declaratory status.

This means that if the Immigration and Social Security Coordination Bill becomes law **without any further legislative changes,** then any EU citizen who has not applied to the EUSS by the effective date of that Bill will lose their legal status in the UK, with all accompanying consequences.

We summarise here the various issues which require urgent protective legislative measures.

Status during the 'grace period'

The Withdrawal Agreement makes clear that EU citizens must have until at least 30 June 2021 to apply for their new status.

Since the Government intends the ending of free movement to take effect from 1st January 2021, there is a six-month gap during which EU citizens without pre-settled or settled status (but otherwise **eligible** for that status) have no basis in law to be in the UK.

The Home Office have stated they will deal with this in due course, but no details are known.

Extension of the 30 June 2021 deadline

There are many reasons for the EUSS deadline to be extended.

The COVID crisis has made it impossible for citizens of some EU countries to obtain the necessary identity documents. Others have struggled to get the required family permits, or obtain birth certificates for their newborn babies.

The Government has not put enough resources into contacting hard-to-reach or vulnerable EU citizens, those who are not on social media or do not see adverts on public transport. The Home Office funded charities have lost months of opportunities for face-to-face outreach events.

The scheme should not be closed without debate and approval from Parliament.

Applying after the EUSS deadline

The Government has not defined what constitutes 'reasonable grounds' for being allowed to apply for EUSS status after the deadline. It has given some examples (children whose parent or guardian failed to apply on their behalf, people in abusive or controlling relationships who were prevented from applying, and those who lack the physical or mental capacity to apply), but these are based on the restrictive list from existing immigration law.

What about somebody who simply did not realise they had to apply? Because they had not heard about the scheme, or for example because they had a Permanent Residence status and had not realised this would become void?

No scheme anywhere in the world has ever reached 100% of its intended audience by the deadline. Even a massively successful campaign like the Digital TV switchover reached 97% – leaving 3% to apply after the deadline. **Just 3% of EU citizens would translate to over 100,000 individuals.**

Interim status for late applicants

Even if someone is considered to have reasonable grounds to apply after the deadline, they will be burdened with a period of unlawfulness.

An EU citizen granted status in e.g. March 2022 will have been without lawful status between July 2021 and March 2022 – with potentially devastating impacts through, for example, the cost of NHS healthcare incurred in the interim period.

Further reading

"Settled Status: What level of take-up can we expect?" – report by NPC (New Philanthropy Capital)[4]

NPC says: *"The government is aiming for everyone who is eligible for it to secure settled status and we welcome this ambition. But the stakes are high. If just 5% of the estimated 3.5m EU citizens living in the UK do not register by the deadline, 175,000 people would be left without status.*

A registration scheme like this has never been run in Britain. But in other countries around the world similar things have been attempted. While there are no directly comparable examples, we should seek to learn what we can from past experiences."

Regularisation schemes in other countries show between 43% and 85% coverage, except for India which achieved 99% coverage over 7 years – though it had far lower bureaucratic barriers than the EU Settlement Scheme. The Indian scheme also suffered from data protection issues.

The most successful non-regularisation scheme in the UK was the Digital TV Switchover, which acquired 97% coverage over a five year period. However, 3% applying after the EUSS deadline equates to over 100,000 EU citizens.

"Windrush Lessons Learned Review" – by Wendy Williams[5]

In the 1970s, the "Windrush generation" (Commonwealth citizens who had arrived in the UK before 1973) did not need to prove their immigration status in their daily lives; to work, rent or receive healthcare. However, section 2.2.4 of the Review explains how successive changes to immigration legislation during the 1980s started impinging on the rights of this generation and their children without many of them realising it. The British Nationality Act 1981 allowed people to register, and many did not - which is what ultimately led to the heartbreaking consequences in recent times.

Page 12 of the review explains why it was that many of the Windrush generation had not registered their status in 1987 : *"According to Home Office papers from the time, those administering the 1987 registration scheme said they intended the advertising to be informative but not "stimulate a flood of inquiries". Publicity leaflets from the time also explained that there would be no consequences if people chose not to register at that time. It is unsurprising that some did not register."*

The Home Office's stated position on a declaratory status

The Home Office rejects our proposal of a declaratory status by claiming it will lead to another Windrush. This was most recently restated by the Immigration Minister in June 2020[6] during the Committee stage of the Immigration and Social Security Coordination (EU Withdrawal) Bill, where he said: *"whereas a declaratory system, under which individuals acquire an immigration status under an Act of Parliament, would significantly reduce the incentive to obtain and record evidence of status. Indeed, the amendment does not include any requirement to do that, so in decades to come it could result in some of the issues we saw in the Windrush scandal: people with a status that has been granted, but for which there is no clear or recorded evidence."*

However, we have always been clear that our proposals for a declaratory status are to be coupled with a **mandatory registration** to obtain proof of that status. In stark contrast to the 1987 registration scheme highlighted above in the Windrush Lessons Learned Review, where we find ourselves now in 2020 there are wide-ranging and immediate consequences to not having a proof of status.

We reiterate that **had the status of the Windrush generation not been declaratory, they would have lost all rights in the UK.**

(4) *thinknpc.org/resource-hub/settled-status-what-level-of-take-up-can-we-expect/*
(5) *gov.uk/government/publications/windrush-lessons-learned-review*
(6) *bit.ly/3lGPuwO*

"EU settlement scheme: are warnings of 'Windrush on steroids' overblown?" – UK in a Changing Europe blog[7]

This blog by one of our members explains the difference between constitutive and declaratory, and addresses the misinterpretation of our proposal by the Home Office. It concludes:

"Anyone who has missed that deadline will face an incentive to register almost instantly, rather than 40 years down the line.

Yes, they will face practical problems, but crucially they will not be at risk of detention or removal. They can simply belatedly register their pre-existing rights.

Changing the legal underpinning of the EU Settlement Scheme can therefore make all the difference to avoiding a future 'Windrush on steroids' scandal."

Definition of "reasonable grounds" for applying after the EUSS deadline

This was most recently asked in a Parliamentary Question[8], where the reply given explained that such guidance will only be published at a later stage, but examples of those who would be allowed to apply after the deadline *"will include children whose parent or guardian failed to apply on their behalf, people in abusive or controlling relationships who were prevented from applying, and those who lack the physical or mental capacity to apply."*

We remain concerned about people whose sole reason for not applying is that they did not know they needed to.

"This is how to stop Brexit causing a new Windrush scandal for EU citizens" – by EU Law Academic[9]

Professor of European Law Stijn Smismans[10] explains how a declaratory system coupled with a registration to obtain proof of status works, and includes a reference to his full legislative proposal[11] – drafted as amendments to the then Immigration and Social Security Coordination (EU Withdrawal) Bill 2017-19. The article was also written up on the FreeMovement[12] immigration website.

(7) *ukandeu.ac.uk/eu-settlement-scheme-are-warnings-of-windrush-on-steroids-overblown/*
(8) *parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-06-25/HL6159/*
(9) *bit.ly/Smismans_stopEUWindrush*
(10) *cardiff.ac.uk/people/view/478913-smismans-stijn*
(11) *papers.ssrn.com/sol3/papers.cfm?abstract_id=3433055*
(12) *freemovement.org.uk/this-is-how-to-stop-brexit-causing-a-new-windrush-scandal-for-eu-citizens/*

the3million is a non-partisan grassroots organisation of EU citizens in the UK, formed after the 2016 EU referendum to protect the rights of people who have made the UK their home.

For more detailed facts, references and briefings, contact us at *advocacy@the3million.org.uk* or see our website **www.the3million.org.uk**