

Briefing notes - press conference Thursday 3 December 2020

'You are our friends, neighbours and colleagues and we want you to stay'.

Warm words from the Government, which of course we welcome - yet as ever the devil is in the detail.

We've talked a lot about this moment. The UK leaves the transition period on 31 December 2020 and the Withdrawal Agreement activates. EU citizens in the UK no longer have the protection of EU law and must rely on an international treaty which the UK has shown it is not afraid to threaten.

Whilst many EU citizens have successfully acquired their new status to stay in the UK, they must still enforce their rights to live, work and be treated equally to their fellow Brits. COVID presents new challenges, compounding some existing ones. 2021 will be a challenging year. But what could those challenges be?

1. If they haven't already done so, EU/EEA citizens and their families need to apply to the EU Settlement Scheme. Those who will not apply by the deadline face considerable risks. The law is against people and we can see the traps they will fall into.
2. Despite having status, not everyone understands what it means. We are seeing increased reports of confusion around what rights people have in the UK. Both in terms of EU citizens and employers.
3. The UK needs to stick to the deal. Pre-settled status shouldn't have a cliff edge.

In this briefing note, we set out a non-exhaustive selection of some of the outstanding issues facing EU citizens and their families in the UK, hoping to continue their lives as they did before:

- We do not know what we do not know - who and how many will fall between the cracks?
- Thousands may face healthcare charges despite applying to the EU Settlement Scheme
- Millions of individual cliff-edges related to pre-settled status expiring
- Pre-Settled Status is not a 'right to reside' for benefits purposes
- No National Insurance Numbers (NINOs) being issued to EU citizens
- EU students remote studying at UK universities face refusal of pre-settled status
- COVID-19 related absence - still no certainty, still awaiting guidance changes
- Comprehensive Sickness Insurance - the relaunched EU infringement procedure
- EU citizens receive only digital proof of their status under the EU Settlement Scheme

We do not know what we do not know - who and how many will fall between the cracks?

Background: Unlike many other EU countries, the UK never had a registration process in place for either its own citizens or for immigrants. That means it is not possible to know how many EU citizens live in the UK. This posed a challenge once Brexit became a reality and the Government took the decision to end free movement. All EU citizens and their families who already live in the UK had to be given a new status, and the Government decided to do this by making people apply for that status (instead of by giving it to them by legislation and simply requiring people to register to obtain proof of their status).

Problem: Original estimates of the number of EU citizens in the UK were just over three million. By the end of October 2020, almost four million grants of status¹ under the EU Settlement Scheme had been made. No registration or application system anywhere in the world has ever reached 100% of its intended audience. If the Government fails to reach even a small percentage of people, hundreds of thousands of people face loss of access to jobs, housing, healthcare and potential deportation after the EU Settlement Scheme deadline of 30 June 2020. The challenge therefore is to ensure as many people as possible hear the message about the need to apply. Many will have missed the Government's information campaigns so far, through online, adverts on bus-stops and other media. COVID-19 has made a difficult situation even worse, with many charities and other organisations unable to hold face-to-face events to inform people.

Solution: The Government should write a letter to every single household in the UK (since there is no way of reaching the targeted audience of only EU citizens).

This letter should be addressed not only to EU citizens, but also to family, friends, neighbours and colleagues - to ask them to look out for their EU citizen contacts and make sure that they know they need to apply to be able to stay and keep their rights in the UK. It should also explain to people who are landlords or employers that during the first six months of 2021 they do not need to check for people to have settled or pre-settled status, and that having an EU passport or national identity card is enough to be allowed to rent or work.

As an example that this can be done, and is a very cost-effective exercise, Brighton and Hove sent a card² to every single household in their area.

But this should not be the end of the outreach work required, the Government needs to actively research and target groups it has concerns about and provide funding and support where appropriate. It has currently researched the numbers of children in care that need to apply³. The survey found **less than 50% have applied**. As such, this has encouraged the Government to drive support and focus on these groups.

This project and approach needs to be expanded to other areas of concern quickly. By working in partnership with local authorities and regional groups, a better picture can be formed to understand who is still to apply and engage with them.

¹ <https://www.gov.uk/government/collections/eu-settlement-scheme-statistics>

² <https://twitter.com/brightonhovecc/status/1323958281044430848?s=21>

³ <https://www.gov.uk/government/publications/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020>

Thousands may face healthcare charges despite applying to the EU Settlement Scheme

Background: During the so-called ‘Grace Period’ between 1 January 2021 and 30 June 2021, EU citizens who do not have pre-settled or settled status live in a complex legal landscape. On the one hand, the “Immigration Bill”⁴ which recently received Royal Assent will end free movement from 1 January 2021. On the other hand, the Withdrawal Agreement insists that the UK (and all EU Member States) must allow a grace period of at least six months for EU (and British) citizens to apply for their new status. Therefore parts of UK law, the ‘EEA Regulations’, have been ‘saved’ to apply beyond 1 January 2021 to protect those who are eligible to apply to the EU Settlement Scheme but have not yet done so or are still waiting to receive their status.

Problem: The saved regulations do not quite protect *everyone* who is eligible for (but has not yet been granted) status under the EU Settlement Scheme. This is because it only protects those who have strictly exercised treaty rights, which leaves out a large cohort of people who are not economically active (they were either studying or self-sufficient) and did not know that they needed Comprehensive Sickness Insurance [CSI] (see our later separate section on more information on CSI).

The Government considers this cohort as not living in the UK lawfully, and has stated so explicitly in correspondence to the3million. However, since CSI is not a requirement for the EU Settlement Scheme, this cohort *is* able to submit an application to the Scheme.

The problem arises because this cohort is *not protected* by legislation from the moment they put in an application, they are only protected *once* they are granted their status - which can be months later. This lack of protection can have various serious consequences, most notably when it comes to accessing healthcare. It has been confirmed to us that although GP and Accident & Emergency visits are available to this cohort without cost, non-emergency hospital treatment is not.

The Government claims that this is merely continuing the current situation, but that is not accurate. In the past, the NHS did not check if EU citizens were exercising treaty rights, however recent policies have now changed this. One of our own colleagues was a self-sufficient EU citizen without CSI for many years and had extensive breast-cancer treatment from the NHS without being required to pay. She might face a very different situation if she found herself requiring treatment after 1 January 2021 and she was not yet in possession of pre-settled or settled status.

Solution: The Government should change their legislation such that *everyone* who applies to the EU Settlement Scheme is granted rights under the Withdrawal Agreement [WA] from the moment of application. This is even specified under Article 18(3) of the WA, so we consider the Government to be breaching its terms in the way it has drafted this legislation. In addition, we feel the Government should require the NHS to signpost anyone to the EU Settlement Scheme if they are eligible for, but have not yet applied for, status under the Scheme.

⁴ It's proper name is the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020

Millions of individual cliff-edges related to pre-settled status expiring

Background: Under the EU Settlement Scheme rules, if an eligible applicant has been in the UK for less than five years, they are granted 'pre-settled status'. This expires five years after the date it is granted. In order to be able to stay in the UK beyond the expiry of their pre-settled status, they **can** apply for the full 'settled status' as soon as they become eligible for it (i.e. they have clocked up five years of 'continuous residence'), however they **must** do so before their status expires.

Problems:

Forgetting to apply for a new status

For someone who continues to live in the UK, doesn't break their continuity of residence or any other eligibility criterion, but simply forgets to apply for settled status before their pre-settled status expires, the consequences are hard to overstate.

They lose their lawful basis to be in the UK, they face the full policies of the hostile environment namely potential loss of job, rental accommodation, driving licence, access to healthcare. All for forgetting an administrative procedure.

the3million consider that this loss of status is not compliant with the Withdrawal Agreement. Whereas e.g. levying financial penalties for not applying in time would be allowed, Article 20 of the Withdrawal Agreement does not cover loss of status for lack of an administrative action.

Becoming ineligible for a new status

A related, and equally serious issue occurs after 1 January 2021 when people do break their continuity of residence, for example by leaving the UK for 14 months.

Even though their pre-settled status may still be valid and within its expiry date, it then becomes impossible to apply for a new status under the EU Settlement Scheme.

This is because a key eligibility requirement is to have continuous residence which began before 31 December 2020. This is a requirement that they can no longer fulfil, since they broke their continuous residence, and therefore they will have no choice but to attempt to apply for a status under the new Immigration Rules instead, or leave the UK.

Solution: The UK should amend the EU Settlement Scheme rules such that pre-settled status does not expire after five years.

Pre-Settled Status is not a 'right to reside' for benefits purposes

Background: When people apply for Universal Credit, they have to demonstrate a 'right to reside' to access it. British citizens satisfy this automatically, as do EU citizens with full settled status. However, EU citizens with pre-settled status cannot use their pre-settled status to demonstrate their 'right to reside'. Instead, they have to show that they are, in short, workers or have retained worker rights.

Problem: This means EU citizens with pre-settled status are not benefiting from 'equal treatment' rights as promised in the Withdrawal Agreement. This has caused a lot of hardship especially during the COVID-19 pandemic, as many people have lost their jobs and face destitution without access to Universal Credit and other help from the Government.

Solution: Status under the EU Settlement Scheme is supposed to be a proof of rights under the Withdrawal Agreement, and as such should be sufficient to receive equal treatment to British citizens including when it comes to receiving social assistance. The Withdrawal Agreement allows countries to restrict access to benefits for those who have only just arrived in their host country before they start working, but it does not allow the UK to differentiate between different 'classes' of people who all have identical grants of pre-settled status. The Government should therefore simply make pre-settled status a 'right to reside'. (Interestingly, it **was** a right to reside until July 2019, at which point the Government changed its mind.⁵)

No National Insurance Numbers (NINOs) being issued to EU citizens

Background: Since March 2020, EU citizens have been unable to receive a National Insurance Number due to the pandemic. The official explanation⁶ is that EU citizens have not been through an identity check interview, therefore they would need a face-to-face interview to obtain a NINO, which is not possible during the pandemic. A solution was originally promised by September 2020 - to use virtual appointments -, but recently the Government stated⁷ this would now not be available until after March 2021.

Problem: Although strictly speaking it is possible to work without a NINO (employers should get round it by using an emergency 'tax code') we are seeing the following problems:

- The emergency tax code results in tax and national insurance contributions being paid at maximum levels. These are refunded eventually but this is causing serious cash flow issues for many.
- Many employers are not aware of the emergency tax code solution, so are refusing to employ EU citizens without a NINO. It is pushing many EU citizens, desperate for work, into the black market, causing a race to the bottom on employment rights.
- Even for those who are working, there are instances where a NINO is required which is causing considerable problems for people. We have seen evidence of the following:
 - Refused funded childcare to which they are entitled through lack of NINO
 - Refused Government maternity allowance to which they are entitled through lack of NINO
 - Unable to set up a private pension through lack of NINO

⁵ http://www.t3m.org.uk/PreSettledStatus_UniversalCredit

⁶ <https://questions-statements.parliament.uk/written-questions/detail/2020-07-20/76859>

⁷ <https://questions-statements.parliament.uk/written-questions/detail/2020-10-30/109436>

- Unable to apply for Universal Credit through lack of NINo
- Employers unable to claim furlough for those without NINo
- Unable to register as self-employed for the purposes of licences

Solution: The solution is so simple - an online service to verify identity has been in place since April 2020⁸. It was created for universal credit applications, and should be used for National Insurance Number applications. Alternatively - a regular zoom call between the DWP and NINo the application should be sufficient. Indeed this solution was anticipated in the Government's response to a question in parliament. The situation is unacceptable and is causing considerable harm to people's everyday lives.

EU students remote studying at UK universities face refusal of pre-settled status

Background: Many EU citizens enrolled in British universities, starting last autumn. They would have made all their arrangements for coming to the UK, in many cases even including applying for accommodation. However, due to the pandemic many have faced travel restrictions or just advice not to travel (both from the UK and from their EU country of origin). Since universities have responded to the pandemic by moving as much as possible to online teaching, many of these students will have sensibly decided to stay in their home countries and study remotely while waiting for restrictions to ease by spring.

Problem: EU citizens who are not physically in the UK by the end of the transition period, i.e. by 11am on 31st December 2020, are not covered by the citizens' rights part of the Withdrawal Agreement, and thereby not eligible to apply for pre-settled status under the EU Settlement Scheme. This means that when they come next year, they will have to apply for a student visa under the new immigration rules instead. These visas cost £348, plus £470 a year in healthcare charges to be able to use the NHS, and place restrictions on the type of work they can do whilst studying. Their future employment prospects are drastically reduced if they wish to continue living in the UK owing to the new immigration regime.

This seems extraordinarily unfair when considering that these students are participating every bit as much as their co-students who **are** in the UK - they are attending the same lectures, handing in the same assignments, participating in the same groups - in short they would physically be in the UK **but** for COVID-19. Some have paid fees expecting to study in the UK relying on their freedom of movement rights. Surely they have a legitimate expectation to study in the UK?

The Government's insistence that no exceptions can be made equates to a message that says 'Make unnecessary travel arrangements, against Foreign Office pandemic advice, to ensure you get the rights you are entitled to'.

The same applies in reverse to UK students who have started a university course in the EU this autumn, and haven't yet physically travelled to the EU, studying remotely from the UK instead.

Solution: Again - it's simple. The EU and the UK together could agree to make a legal exception for those who can prove they enrolled in a university in the UK/EU respectively, and would have physically travelled if it had not been for the pandemic.

In the absence of that, the UK could, with the stroke of a pen, nevertheless create an exception in the EU Settlement Scheme rules, and accept evidence of intent to come to the UK before the end of the year. People would clearly need to provide that evidence, for example in the form of a university place and attendance.

⁸ <https://dwpdigital.blog.gov.uk/2020/10/15/confirm-your-identity-a-new-way-to-verify-online>

COVID-19 related absence - still no certainty, still awaiting guidance changes

Background: EU citizens with pre-settled status break their so-called 'continuity of residence' if they are away from the UK for more than six months in any twelve-month period. As a result, it will become impossible for them to clock-up five years of 'continuous residence' before their pre-settled status expires - and therefore they will be stuck. They won't be able to apply for settled status, nor will they be able to renew their pre-settled status. Their only option will be to leave the UK and try to obtain a visa under the new immigration rules, which may prove impossible for many.

Problem: The Government has indicated many times that the guidance for case workers will be updated 'shortly' and that they may look flexibly on covid-related absences. However, the specific detail is urgently needed because if a covid-related absence is to be dealt with by the use of the existing '**one-off**' long absence allowed for certain situations, this will cause problems for those who have already had to use that exemption through for example childbirth.

Solution: The Government should publish its guidance as soon as possible. It has already done so a few months ago for **other** immigration rules, so there is no reason that this cannot be done for the EU Settlement Scheme rules. People need to plan their lives around this guidance before they miss out on maintaining their continuity of residence.

Comprehensive Sickness Insurance - the relaunched EU infringement procedure

Background: Under EU Free Movement rules, EU citizens are required to show 'comprehensive sickness insurance' [CSI] if they move to another EU member state yet are not economically active there, i.e. if they are students or self-sufficient.

In the UK, this requirement was little known or advertised to EU citizens, and the insurance was never needed or even requested in order to access NHS healthcare.

In 2011, the EU Commission launched an Infringement Procedure against the UK, stating that access to the NHS should fulfill the CSI requirement.

In October 2020, the EU Commission relaunched an Infringement Procedure on the same issue. We assume this relaunch is owing to the passing of time and new case law that may affect the legal opinion on the issue.

Problem: Many people think that CSI is no longer a problem because the EU Settlement Scheme does not ask for evidence of CSI. However, the issue re-appears in many forms buried deep within the complex immigration rules and secondary legislation:

- People with settled status who want to go on to naturalise as British citizens find that their last 10 years are examined to see if they had CSI when not economically active. There is 'discretion' to ignore such periods but who would gamble £1,500 citizenship fees on an opaque discretion?
- Anyone who does nevertheless go on to naturalise, and become a dual EU-British citizen will then find that they have now lost their rights to future family reunion. If it was previously a requirement for them to have CSI to be lawfully resident in the UK they would need to demonstrate this at the time they naturalised and thereafter.

- Anyone who is not economically active at the end of this year, and who does not have CSI, is not protected by the 'grace period regulations' - secondary legislation which is intended to cover EU citizens between 1st January 2021 (when free movement rules in the UK end) and 30th June 2021 (the EU Settlement Scheme deadline).

Solution: The UK should accept that access to the NHS - bearing in mind this is funded by general taxation, including e.g. VAT and not just income tax - satisfies the CSI requirement.

EU citizens receive only digital proof of their status under the EU Settlement Scheme

Background: EU citizens who receive status under the EU Settlement Scheme do not receive any physical proof of that status. Their status is held by the Home Office, and people need to go online to access it, involving access codes sent to their email or mobile telephones. Employers, landlords, the NHS, border control and countless other private and public organisations will need to use digital systems to check whether an EU citizen has rights to their services.

Problem: This digital system can work well for many, and in many different circumstances. However it will not work for all, and it will not always work. The government's own impact assessment has acknowledged this. We are concerned for vulnerable and elderly citizens, and those who lack digital skills. We foresee a lot of discrimination especially when it comes to applying for jobs and renting accommodation - where employers and landlords face very tough sanctions for employing or letting to anyone without permission to be in the UK. Many will struggle with the digital system and will likely find it easier to choose the candidate with physical proof.

Whilst we can see the direction is digital by default, we argue that this cannot be done overnight using one group of citizens as guinea pigs. Australia is the only country in the world to have achieved a (near) fully digital immigration system, and it allowed people to have a physical backup for over a decade while the entire society became accustomed to digital status.

We have campaigned on this issue extensively, and most recently an amendment to the Immigration Bill, to require the Government to give physical proof of status to any EU citizen who requested it, was passed by the House of Lords by a large majority⁹. However it was defeated in the House of Commons.

Solution: As with many of our other proposals, the solution would be simple. There is already an existing infrastructure and process to give physical proof of status for non-EU citizens with pre-settled and settled status. All that is required is to open this up to EU citizens who wish to request such physical proof.

In the meantime, the3million has started collecting evidence of people who struggle to evidence their digital status, by asking them to report their problem at <https://t3m-digitalstatus.paperform.co>.

⁹ <https://www.theyworkforyou.com/lords/?id=2020-10-05d.446.1>