

## European Union (Withdrawal Agreement) Bill

### Briefing on changing the EU Settlement Scheme to be declaratory

#### What does it mean to make the EU Settlement Scheme declaratory?

It would mean that any EU citizen (or their non-EU family member) who satisfies the eligibility criteria for pre-settled or settled-status, **has that status** by virtue of legislation, even if they have not yet been through an application or registration process.

They would still need to register their status through the EU Settlement Scheme to get **proof of their status**, which may be necessary after the deadline to show entitlement to e.g. work, rent, and healthcare.

A common illustration of a declaratory scheme is British citizenship. **Legislation** (rather than possession of a passport) determines whether someone is or is not a British citizen. However, if a British citizen wants to travel abroad, they will need **proof** of their citizenship, and will therefore need to apply for a passport.

#### Why is it so important to make the EU Settlement Scheme declaratory?

Very simply, because **there will be people who miss the deadline**:

- No scheme anywhere in the world has **ever** managed to reach [100% of its target audience](#)
- Even for the most successful scheme, the UK Digital TV switchover, only 97% had signed up on the eve of the switchover – the remaining 3% of people signed up over the following days
- Many groups of people [may not be aware](#) they need to apply, including for example:
  - **Children** whose parents don't apply, or do not realise their children need to apply, or who mistakenly assume their UK-born children are British citizens
  - **Very long term residents** who have been here for several decades
  - People who have already applied for permanent residence
- People with pre-settled status may forget to re-apply for settled status in time, especially:
  - Those with **low digital literacy**, who were possibly helped to get pre-settled status
  - Those who **mistakenly accepted pre-settled status** when they were entitled to settled status

Shortly after the deadline, these people without status will start experiencing practical difficulties - for example obtaining or keeping their jobs, renting accommodation, or accessing healthcare.

The current system, however, **will go further and deprive these citizens of their legal status** (unless their reason for not applying on time falls within a very [narrow list of exemptions](#)) – putting them at risk of detention and removal from the UK. Even if the settlement scheme were as successful as the Digital TV Switchover, this would affect over 100,000 citizens – far more than the Windrush scandal.

**The current system, if applied to the Digital TV Switchover example, is equivalent to criminalising those who missed the deadline, and stopping them from ever watching TV again.**

A much fairer system – a declaratory one – would simply allow these citizens to still register after the deadline, once they realise they need proof of their status.

## Why is it wrong to say a declaratory scheme would create a second Windrush?

The Immigration Act 1971 (coming into force in 1973) granted a right to people from the Commonwealth who had already settled in the UK before 1973 to remain in the UK indefinitely. They were not forced to obtain documentation. These citizens therefore had a declaratory status. Four decades on, the victims of the Windrush scandal struggled to prove their legal right to be in the UK.

The **Windrush scandal was caused by a combination of factors:**

- the legal environment changing around people who had lived here for decades
- the 2012 introduction of the 'Hostile Environment', claimed to be intended for 'illegal immigrants' but actually ruining the lives of *undocumented* (yet lawfully resident) immigrants and British citizens
- lack of record keeping by the Home Office (including historical leave to remain records)
- Home Office staff being incentivised by targets and bonuses to reach deportation targets

However, **there was at least a legal safety net** – these citizens *had* a legal status thanks to the Immigration Act 1971.

When the Government says that making the EU Settlement Scheme declaratory would create a second Windrush, they are perversely **blaming the scandal on the safety net**. However, this is based on a fundamental, two-fold misunderstanding:

- For the Windrush generation there was **no immediate incentive to register their status:**
  - in 1973 there was no real need to have documentation, especially for people who did not travel out of the UK
  - 40 years later, rules were changed which meant that people needed documentation to prove their right to work, to rent, to access healthcare and benefits. It was very difficult for many to retrospectively prove they had been in the UK since before 1973
  - In contrast, for EU citizens *now* there will be a very immediate incentive to register - once they have to demonstrate their status to differentiate themselves from EU citizens arriving after Brexit with fewer rights, even if the registration system is declaratory
- **Removing the legal safety net would have made matters far worse** for Commonwealth citizens:
  - there *still* would have been people who would not have applied – simply because **no scheme anywhere has ever reached 100%** of its intended target audience
  - those who had not applied then would **now be in an even worse position**, as they would not even have a legal basis in the UK. Rather than the Home Office being able to make reparations and set up a compensation fund, their ruined lives and deportations would have been 'legal' though certainly no less morally scandalous.

**A declaratory EU Settlement Scheme provides a legal safety net** for eligible citizens who miss the deadline for whatever reason. Yes, they will struggle in the short term by not having any **proof** of their status, but they will not have **lost** their status and will quickly be able to register once they find they need that proof - just like those 3% of people who missed the deadline to register for Digital TV.

### More information:

- EU settlement scheme: are warnings of 'Windrush on steroids' overblown?  
<https://ukandeu.ac.uk/eu-settlement-scheme-are-warnings-of-windrush-on-steroids-overblown>
- This is how to stop Brexit causing a new Windrush scandal for EU citizens  
<https://www.freemovement.org.uk/this-is-how-to-stop-brexit-causing-a-new-windrush-scandal-for-eu-citizens/>