JCWI briefing: A future settlement for EU treaty rights holders in the UK

About JCWI
The Joint Council for the Welfare of Immigrants (JCWI) is an independent national charity established in 1967. We work to ensure justice and fairness in immigration and asylum law and policy and we provide direct legal advice and assistance to those affected by UK immigration control.

Background
Over 3.5 million people currently reside in the United Kingdom under rights provided by European Union treaties ('EU treaty rights holders'). Freedom of movement is one of the founding principles of the European Union, and has been embedded within EU law since the 1960s. The majority of the rights currently held by EU citizens are set out in the 2004 EU Citizens Directive[1], which was implemented into UK law by the Immigration (European Economic Area) Regulations 2006.

Many EU treaty rights holders living in the UK are long-term residents, with jobs, homes and families here. Since the result of the June 2016 referendum on UK membership of the European Union, the future status of these individuals has remained uncertain. The position of UK nationals currently residing elsewhere in the European Union is similarly precarious.

This briefing outlines the view of the Joint Council of the Welfare of Immigrants (JCWI), based on our legal and advocacy work in this area, on what we believe to be the fairest and most workable settlement for EU treaty rights holders currently residing in the UK. We offer this in the expectation that, if introduced for EU treaty rights holders here, UK nationals living elsewhere in the EU would be more likely to benefit from a similarly generous policy. We also highlight categories of individuals who could experience particular difficulties in securing their rights of residence here, and who should therefore be particularly accommodated within any new rules.

Statistics
- At least 3.5 million EEA+ nationals (nationals of EU member states, Iceland, Lichtenstein, Norway and Switzerland) currently reside in the UK[2].
- In addition, a further number of non-EEA nationals currently reside in the UK under the protection of EU treaties, including non-EEA family members of EEA nationals, individuals with retained rights and others with derived rights of residence. More details on these groups are given below, but estimates of their numbers are not available.
- Labour Force Survey data from 2016 indicated that 2.3 million EEA+ nationals (64%) first arrived in the UK at least 5 years ago and therefore may qualify for permanent residence. A further 280,000 (8%) could be eligible for permanent residence on the basis of having been born in the UK, meaning that up to 72% of EEA nationals currently residing in the UK could already be eligible for permanent residence[3].

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158 (30 April 2004)
[2] *Here Today, Gone Tomorrow: The Status of EU citizens already living in the UK*, Migration Observatory, 3 August 2016, available at: http://www.migrationobservatory.ox.ac.uk/resources/commentaries/today-gone-tomorrow-status-eu-citizens-already-living-uk/
[3] Ibid, Migration Observatory 2016

- At least 1.2 million UK nationals currently reside in other European Union member states, including France, Ireland, Spain and Germany[4].

Summary of policy proposal

We advocate a policy that would grant permanent residence (and/or the opportunity to acquire permanent residence), to all those currently residing in the UK under European Union treaties. We propose that a minimal application process be introduced for all those with the right to reside in the UK, either from the point when Article 50 is triggered or from the point that the UK ceases to be a member of the European Union.

This approach would be simpler, less costly and easier to administer than a policy that introduced extensive evidential and application requirements. It would avoid the likelihood of large application backlogs, protracted appeals, and legal challenges on human rights grounds. Finally, we believe that an early announcement on this policy, prior to the triggering of Article 50, would be more likely to result in a generous reciprocal settlement for UK citizens living elsewhere in the European Union.

1. Who should be included?

A new settlement for EU treaty rights holders should grant permanent residence, (and/or the opportunity to acquire permanent residence), to all those residing in the UK under European Union treaties at the point at which Article 50 is triggered, or from the point that the UK ceases to be a member of the EU. This includes a number of different categories of people.

Currently, EEA+ nationals and others here under EU treaties automatically acquire permanent residence if they have lived in the UK for a continuous five year period engaging in specified 'qualifying activities' (i.e. working, studying, self-employed, self-sufficient, or looking for work here). Those here as students and as self-sufficient persons are also required to be in possession of comprehensive sickness insurance. EEA+ nationals may attain proof of permanent residence from the Home Office if they wish, but are not required to do so.

In addition to EEA+ nationals, non-EEA family members of an EEA+ national exercising treaty rights may qualify for permanent residence after five years residence in the UK. Some further groups of individuals may also have rights of residence through:

- Derived rights of residence. Some EEA+ and non-EEA nationals derive their right to reside in the UK from their relationship with an EEA+ national who is exercising treaty rights here. This includes some rights-holders under UK caselaw which has brought into effect EU law, including via the Surinder Singh route (which gives the right to reside in the UK to some non-EEA family members of British citizens who have exercised their EU treaty rights in another EEA member state), and the Zambrano route (which gives rights to reside to some non-EEA nationals who are primary carers of British citizens residing in the UK).

- Retained rights of residence. Some EEA+ and non-EEA nationals have retained residence rights in the UK, arising from a previous period in which they had the right to reside here. This includes EEA+ and non-EEA nationals whose prior relationship with a qualifying EEA+ national in the UK had subsequently ended (e.g. due to divorce or bereavement). Some former workers and self-employed people who have ceased to work in the UK may have retained rights of residence here.

[4] *International migrant stock by destination and origin*, 2015, United Nations Global Migration Database, available at: http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml

2. **What rights should be given to EU treaty rights holders?**

We propose that EU treaty rights holders currently residing in the UK be granted permanent residence (and/or the opportunity to acquire permanent residence), under *the current rules*.

We would not support a system that introduced retrospective limitations on rights that would currently be guaranteed to EEA+ and non-EEA nationals under current rules. Our view on this is in line with the House of Lords EU Justice sub-committee, which recommended in December 2016 that:

> "*EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement."*[5]

Any imposition of new rules (e.g. a 'good character' requirement as is part of applications for Indefinite Leave to Remain made by non-EEA nationals) would constitute the introduction of retrospective legislation and would be both undesirable and potentially unlawful. In 2015, in a report on the Immigration Bill, the House of Lords Constitution Committee noted that:

> '[T]he rule of law requires government to act according to law, and from that perspective the retrospective provision of a legal basis for executive action is constitutionally suspect and calls for a clear justification… As we have previously stated, there needs "*to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable*."'[6]

In our view there would be no compelling reason in the public interest that would justify making it more difficult for EU treaty rights holders already residing in the UK to settle here permanently, than is currently permitted under existing rules.

Any new settlement for EU treaty rights holders should grant residence rights for up to five years, with the option to secure permanent residence, to those already residing in the UK when the new rules enter into force (e.g. the date on which Article 50 is triggered/date on which the UK ceases to be an EU member state). This would enable all those who have arrived in the UK prior to this date to move towards permanent residence and fulfil their legitimate expectations of settling here if they so wish.

We consider it unlikely, given the limited time period expected before new rules would enter into force (particularly if the date of Article 50 trigger were the cut-off point), that there would be a significant influx of EEA+ or non-EEA nationals seeking to take advantage of a new settlement. Of more concern, in our view, is that the government must ensure that those EEA+ and non-EEA nationals *already* residing in the UK have adequate time and information to organise their affairs, to avoid their being unfairly disadvantaged by a rule change.

3. **How should EU treaty rights holders qualify for permanent residence rights in the UK?**

We would argue for the current permanent residence application process, and evidential requirements, to be significantly simplified.

There are practical reasons for this. A large number of applications – potentially more than 3.5 million – could be expected if EU treaty rights holders are required to apply for

[5] In *Brexit: acquired rights*, House of Lords European Union Justice Sub-Committee, Para 121, published14 December 2016, available at: http://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf

[6] *Seventh Report: Immigration Bill*, House of Lords Constitution Committee, 21 December 2015, http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7506.htm

permanent residence in the UK. The current application form in order to certify permanent residence in the UK is 85 pages long. Applicants are required to provide evidence of having participated in a 'qualifying activity' for a continuous five-year period. Further evidence may be required to prove an applicant's identity, nationality and living arrangements in the UK. Non-EEA nationals applying for permanent residence are also required to submit biometric information. This suggests that the Home Office can expect to receive a significant volume of lengthy applications if the system is not simplified.

Existing data on EEA permanent residence applications offers an indication of how the system would cope with a large number of applications from EU treaty rights holders. We would highlight the following based on current evidence:

- **The UK's immigration system would be unable to deal with the number of applications and their complexity,** unless permanent residence requirements were reduced and the application process radically simplified. The Migration Observatory has estimated that it will take 140 years worth of Home Office work at the current rate to process applications from 3.5 million EEA+ applicants[7]. In addition, the Home Office could expect to receive a higher number of complex applications from EEA+ and non-EEA nationals applying on the basis of family rules, and derived and retained treaty rights.
- In fact, Government data suggests that the **Home Office has been already unable to deal with the recent rise in EEA+ permanent residence applications**. There has been a growing backlog of permanent residence applications in the period up to and following the EU referendum in June last year - Home Office figures show that applications considered 'in progress' more than doubled between June 2015 and July 2016, rising from 37,618 to almost 100,000 applications[8]. Although the government is reportedly trialling modifications which could speed up the process, our experience is that delays and unreliable decision-making would be very likely unless substantial additional resources were diverted to the Home Office.
- Analysis by the Migration Observatory shows that **just 66% of permanent residence applications made by EEA+ nationals in 2015 were approved by the Home Office**, with 34% either refused or considered invalid[9]. This is much higher than the refusal rate for non-EEA nationals applying for settlement in the UK, where only around 5% are rejected. This suggests that there are systemic problems with the current permanent residence requirements in the UK, and that some applicants struggle to understand the rules and application process. These problems would be likely to be replicated in a wider application process of this nature.

It is also our view that costs for applications should be capped, in order to encourage as many EU treaty rights holders as possible to apply and resolve their immigration status. If the application process is too demanding, costly or complex, it will result in large numbers of applicants being refused the right to reside in the UK, and becoming liable for removal.

We propose instead that the government establishes a new, shorter application process for permanent residence rights, which requires only limited evidence from applicants. We suggest that the following evidence could be accepted as supporting evidence for permanent residence applications:

- **EEA+ nationals**: Proof of nationality (ID document) + proof of residence in the UK on or prior to the date that Article 50 is triggered.

[7] Ibid, Migration Observatory 2016.
[8] Home Office Figures reported in The Guardian, *Huge backlog as EU citizens rush to secure British residency , Wednesday 30th November 2016*, available at: https://www.theguardian.com/uk-news/2016/nov/30/eu-citizens-in-uk-home-office-residency-applications-right-to-remain-before-brexit-talks
[9] Ibid, Migration Observatory 2016

- **Non-EEA national family members** – Proof of nationality + proof of residence in the UK on or prior to date that Article 50 is triggered + proof of relationship to EEA+ national as above.
- **EEA+ and non-EEA nationals with retained and derived rights** – Proof of nationality + proof of residence in the UK on or prior to date that Article 50 is triggered + proof of relationship to EEA+ national as above + proof of circumstances that would give rise to lawful residence e.g. proof of the end of a relationship with a qualifying EEA+ national.

4. **Which groups of EEA+ and non-EEA nationals would be particularly vulnerable under a new settlement?**

We urge policy-makers to ensure that any policy towards EU treaty rights holders allows for the difficulties that would be faced by particular groups in demonstrating their residence rights in the UK. In December 2016, the House of Lords EU Justice Sub-Committee heard that some EEA+ nationals in the UK would not be able to prove their right to reside here under the current rules, despite having lived here for extended periods in the belief that they are in full compliance with all requirements[10].

We expect that some EEA+ and non-EEA nationals would already qualify for permanent residence but find themselves unable to prove it due to lack of evidence. We also anticipate difficulties for some EEA+ national students and self-sufficient persons, if the Home Office does not accept access to the National Health Service as adequate to meet the Comprehensive Sickness Insurance requirement for these categories.

We would particularly highlight the positions of:

- **EEA+ nationals who are low-paid/part-time/casual workers**. Some workers will struggle to prove their employment experience in the UK if required to do so in a permanent residence application. Some workers will not be aware that their work must be considered to be 'genuine and effective' in order to qualify for status. Some may be working cash in hand but not registered as self-employed as they believe that their employers are making relevant tax/National Insurance deductions on their behalf.
- **EEA+ nationals who are registered as self-employed**. Some self-employed workers are likely to struggle to provide documentary proof of income at the required levels, and particularly in cases where income varies from year to year.
- **EEA+ and non-EEA family members[11] residing here with an EEA+ national who is exercising treaty rights**. We would expect government to make provision for this group but this has not been confirmed.
- **Non-EEA nationals living in the UK with derived rights under routes established by UK case law**, including the Surinder Singh and Zambrano routes.
- **Some children including**:
    - Children whose EEA+ national parents do not qualify for permanent residence. This will include some children who were born in the UK and who have resided here since birth;
    - EEA care leavers and children in care. Looked-after children or care leavers may no longer be a family member of a qualified EEA+ national. They may struggle to find and to present evidence of their status in the UK, and will normally be unable to access legal aid;
    - the position of children not yet born to EEA+ nationals who have been granted permanent residence in the UK.

[10] Ibid, House of Lords 2016
[11] Ibid, Migration Observatory 2016

- **EEA+ and non-EEA family members with retained rights of residence.** This could include people who have acquired rights of residence from living in the UK with an EEA+ partner, and where that relationship has subsequently ended e.g. due to death or divorce.
- **EEA+/non-EEA victims of domestic violence**, where they have separated from an EEA+ partner who was exercising treaty rights in the UK and are unable to access evidence of their status via their former partner.
- **Some minority groups,** and in particular those with lower education and English language skills including Roma, who may struggle to meet permanent residence application / evidential requirements.
- **EEA+ nationals who are victims of trafficking,** who may struggle to prove status if their documents have been taken from them by a trafficker.
- **People with 'gaps' in exercising their treaty rights** i.e. those who have taken period of maternity/paternity leave from their work, have spent extended periods of time outside the UK etc. may struggle to prove their status.

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