



Broken Promises: The EU nationals the Government intends to remove after Brexit

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Summary

Hundreds of thousands of EU citizens living in the UK have no guarantee that they will be able to stay, because the Government has broken its promise to give status to everyone who is not a serious criminal. New immigration rules that came into effect in August bar Home Office officials from granting settled status to anyone subject to removal decision for not exercising EU treaty rights. This affects students, stay-at-home partners of British citizens, retired people, and others who do not have private health insurance, as they are deemed not lawfully resident.¹ The Government's view is that they are not exercising treaty rights and are liable to have a removal decision made against them by immigration enforcement.

If that happens, they will not get settled status, will become undocumented and subject to the Hostile Environment, immigration detention and removal. It is likely many will be able to stay, but it seems the system will be a lottery based on the whim of immigration enforcement. This is a far cry from the user-friendly, efficient and transparent scheme the Government claims it is creating.

The Broken Promise

On 21st June 2018 the Immigration Minister, Caroline Nokes, confirmed to Parliament the plans for the settled status scheme under which the roughly 3.8 million EU citizens currently resident in the UK would have to apply to legally remain in the UK. She set out the three checks that would be made:

1. They are the person they claim to be and an EU citizen;
2. They are resident in the UK;
3. They are not serious criminals.

"Thirdly, we will check that the applicant is not a serious or persistent criminal and does not pose a security threat. It is right that we do what is needed to protect everyone who lives in the UK, but we are not concerned with minor offences, and these provisions will not affect the overwhelming majority of EU citizens and their family members."² Theresa May

This was entirely in line with previous statements made by Ministers - that the EU settlement scheme would be generous, simple, and that the only EU nationals who would not be able to remain in the UK are those with **serious criminal records**. These assurances were given on the record to Parliamentary Committees and to Parliament by **Brandon Lewis when he was Immigration Minister, by Caroline Nokes, the current Immigration Minister, and by Sajid Javid as Home Secretary**. Details of these statements are provided in the Annexe to this briefing.

JCWI and other migrant organisations who attended meetings with the Home Office over the past year to discuss aspects of the settled status scheme, were given the same information by officials.

¹ The UK's insistence that such people have private health insurance is itself of questionable legality and subject to current infringement action by the European Commission.

² <https://hansard.parliament.uk/commons/2018-06-21/debates/F9399B0C-6967-4F2C-BF14-FCD3F4DEBC4A/EUSettlementScheme>



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Repeated assurances were made that the settled status scheme would be 'different' because it would not require individuals to prove that they had been exercising EU treaty rights. Caroline Nokes told Parliament "Applicants will not need to show that they meet other detailed requirements of current free movement rules. This means, for example, that stay-at-home parents, retired people and students can all be eligible."³

But when the Home Secretary altered the Immigration Rules, changes taking effect 28th August 2018, to implement this promised scheme he inserted provision EU15(c).⁴ This requires Home Office staff to reject applications from anyone "subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC".

This is far broader than what was promised and puts hundreds of thousands of EU nationals at risk who are regarded by the Home Office as not exercising Treaty Rights. This has nothing to do with criminality let alone serious criminality.

Who is affected?

Anyone who currently has a removal order made against them by the Home Office, and anyone who in future has a removal order made against them before they have been granted settled status. It is very hard to estimate the numbers of EU nationals who are not exercising Treaty Rights, but an indication can be found in the report of the Migration Observatory at Oxford University entitled 'Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit'.⁵

This report highlights the scale of the problem. To take one example, the number of non-Irish EU citizens above the age of 18 who have been economically inactive for 5 years or more is estimated to be 213,000. Some of these individuals may have Permanent Residence status and some, though likely a small number, will have the private health insurance required to be lawfully resident. However, many will not and would be liable to be removed were they to come to the attention of the Home Office. Most of them may have no idea that this is the case as these requirements have not been publicised by the Government. This is a fraction of the overall numbers as it does not include those in work that is not sufficient to meet the threshold, nor those economically inactive for shorter periods of time, students, or young people.

Overall, it is JCWI's view that there are likely to be a sizeable group of EEA nationals who are **not serious criminals**, but may mandatorily be found to be ineligible for the scheme under EU15(c) because they:

- a. Have been issued with a removal notice, or notice of liability to be removed, from the UK for non-exercise, or ceasing to exercise, Treaty rights (e.g. someone who had been told they were

³ <https://hansard.parliament.uk/commons/2018-06-21/debates/F9399B0C-6967-4F2C-BF14-FCD3F4DEBC4A/EUSettlementScheme>

⁴ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>

⁵ <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/>



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- going to be removed because they weren't working or didn't have a genuine prospect of work if they were job-seeking, or didn't have comprehensive sickness insurance),
- b. Have been issued with a removal notice, or notice of liability to be removed, from the UK for misuse of Treaty rights (for example, on the grounds of a supposed 'sham' marriage or perhaps under the Home Office's previous unlawful policy of treating rough sleeping as an abuse of rights),
 - c. Are victims of trafficking with criminal convictions.

Worse, as we note above, there are likely hundreds of thousands who could be issued with a removal notice under the Home Office's current rules at any time before they are granted settled status.

We note with great concern that in contrast to the overall picture of immigration enforcement, where action taken against individuals has been in decline, action against EU nationals has increased in recent years, and notably since the European referendum result. More and more EU nationals are being targeted by Home Office for removal.⁶ The Home Office has been found to be acting unlawfully in many cases.⁷

What will happen to those affected?

They will not be granted a legal right to stay in the UK and will be made undocumented migrants. This will leave them liable to exploitation by the worst in society: rogue landlords, traffickers, modern slavers and loan sharks operating in the black economy. Up till now, European Union nationals, even if not exercising treaty rights, have been shielded from the effect of the Hostile Environment measures. The Government has made it clear that will no longer be the case for those who fail to apply or who are refused settled status within the specified period of grace. Subject to any special arrangement that is reached on future migration with the EU as part of the negotiations, it is likely that any EU national who is not granted settled status will be treated as any other overstayer and subjected to the full force of the Hostile Environment. There is certainly no guarantee in place that they will not be.

Annex – Further Examples of Assurances Given

On 21st June 2018 , the Home Secretary, Sajid Javid, gave evidence to the House of Lords EU Justice sub-committee. In that evidence he described the settled status scheme thus:

'The key three steps will be: first, the need to prove your identity; secondly, the need to prove that you actually live in the UK—you have to prove that; and, thirdly, the need to prove that you have no serious criminal convictions. Those are the three key steps that it will cover.

Our default position will be to grant status. We will be looking to grant status as quickly as we can. We will not be looking at all for reasons or excuses not to grant status—of course not. It will be driven by the default view

⁶ <https://www.euronews.com/2017/10/31/alarm-over-rise-in-uk-deportations-of-eu-citizens>

⁷ <https://www.independent.co.uk/news/uk/home-news/homeless-eu-citizens-deporting-illegal-policy-home-office-high-court-ruling-brexite-stop-a8110001.html>



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that, if you provide this information, if you are not going to be granted status there has to be a very good reason why you would not get it. It could be, let us say, that you have a serious criminal conviction or have given some kind of false information on your identity—something of that type.'

On 4th June 2018 Caroline Nokes responded to a question in Parliament as Immigration Minister saying 'The majority of applicants will need to meet only three criteria: they will have to prove their identity, prove that they are resident in the UK, and prove that they do not pose a serious criminal or security threat.'

On 12 December 2017 the then Immigration Minister, Brandon Lewis, gave evidence to the EU Justice sub-committee of the House of Lords on Brexit and citizen's rights where he was pressed a number of times on this point:

- a. When asked to confirm that the settled status process would not involve an 80 page form, he responded with some details explaining the simplicity of the process finally saying 'All we will need to confirm is that there is no and that the person applying really has been, and is, living in the UK.'
- b. When pressed on this point he said: 'the only circumstances in which I can foresee someone not being granted settled status is either if the criminal records check clearly shows that they are a criminal, or if someone claims to be an EU citizen in the UK but is not, which would be a fraudulent application.'
- c. When asked about the appeals process he made the point that such appeals would very rare because 'the only reason someone would appeal in the first place would be if there was a query about whether they had or did not have a criminal record of if the claim was fraudulent—that is, if it involved someone who was not a European citizen living in the UK.'
- d. When asked what level of criminality would attract a withdrawal of settled status, the Chairman asking for reassurance that a minor conviction of theft for example should not preclude a grant, he replied 'We already have that in place effectively, even for non-EU citizens. There is a level of criminality at which you cannot stay in the country, and that is what we are looking at applying.'
- e. Later when asked by Baroness Ludford to confirm whether or not tests would be applied relating to non-exercise of Treaty rights Mr Lewis was unequivocal in his reassurance saying 'I argue that I can give you confidence—as I am confident—that the system will be different because it will be different. The decisions that are being taken, and have been taken, on permanent residency involve judging whether an EU citizen in the current situation, pre Friday's agreement, can be granted permanent residency. There are a number of tests and requirements that they have to pass to get permanent residency, as Lord Cashman outlined. That is different from their ability to stay here under the free movement directive. In terms of granting settled status, what was agreed on Friday is different. In order to get settled status, somebody will need to evidence that they are an EU citizen living in the UK.'
- f. He was asked to confirm by the Chair that it really was as simple as that, saying that it was, he again reiterated ' We are granting settled status to EU citizens who are living here and who do not fail a criminal record check.

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