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Citizens' rights provisions in the European Union (Withdrawal Agreement) Bill 2019-20

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This briefing covers the citizens' rights provisions in the *European Union (Withdrawal Agreement) Bill 2019-20* (the Withdrawal Agreement Bill, or WAB). The Bill was introduced on 19 December 2019 and had its Commons Second Reading on 20 December.

This briefing has been produced for the Bill's Committee Stage and remaining stages in the Commons. The Bill has been referred to a Committee of the Whole House starting on Tuesday 7 January 2020. Proceedings will continue on the Bill on Wednesday 8 January and will conclude with the remaining stages on Thursday 9 January.

Citizens' rights are covered in Part 3 of the Bill (clauses 7-17 and Schedules 1-2). Clauses 7-17 and Schedule 1 are unchanged from the Withdrawal Agreement Bill introduced in the 2019 session.[1] A couple of changes have been made in Schedule 2 (highlighted below).

Information on Clause 37 of the current Withdrawal Agreement Bill can be found in the Library's separate Insight 'Family reunion rights and the EU (Withdrawal Agreement) Bill', published on 23 December 2019.

1. Overview of Part 3 of the Bill

Part 3 of the Withdrawal Agreement Bill (WAB) gives powers in UK law to implement provisions for protecting citizens' rights in the Withdrawal Agreement (WA), and the similar separation agreements with Switzerland and with the EEA EFTA states – Iceland, Liechtenstein and Norway.[2]

The citizens' rights provisions in the WA set out a framework for the continued legal residence (and associated rights, including social security and healthcare rights) of EU citizens living in the UK, and UK nationals living in the EU, at the end of the transition or implementation period (31 December 2020). Individuals will be able to rely on the WA

1 See commentary on the provisions in the previous Bill see the Commons Library Insight 'Withdrawal Agreement Bill: Citizens' rights', 22 October 2019

2 For simplicity, hereafter where this Section refers to the WA it should be taken to include the agreements collectively, and references to the EU not only as references to the EU27 but also Switzerland and the EEA EFTA states.

and separation agreements directly to assert their rights (as reflected by **clauses 5 and 6** of the Bill). The provisions apply **only** to those in a cross-border situation at the end of the transition period (the Explanatory Notes for the WAB refers to them as the 'protected cohort').

The rights of those moving between the UK and the EU **after** the end of the transition period will be the subject of future negotiations – the Political Declaration sets out the broad framework agreed by the UK and EU for future mobility arrangements.[3]

The section on citizens' rights in the WA negotiated by the Johnson Government was unchanged from the WA previously negotiated by the May Government.[4] Although some provisions may be controversial, citizens' rights were agreed at a relatively early stage of EU-UK negotiations.

2. Background to Part 3 and controversial provisions[5]

2.1 The EU Settlement Scheme

The WA allows the UK to require people living here under EU law to apply for a new residence status conferring their rights under the separation agreements. The UK established the EU Settlement Scheme ('EUSS') for this purpose.

The EUSS began processing applications in March 2019. Statistics on the number of applications to the EUSS and their outcomes are being published regularly by the Home Office. There are some limitations with the data available so far, such as an inability to identify repeat applications. The total number of people who will need to apply to the scheme isn't known, because there are only estimates of the number of people living in the UK with rights under EU law.

2.2 A 'constitutive' rather than 'declaratory' system

The WA permits either a 'declaratory' or 'constitutive' system for verifying an individual's rights. The EUSS is 'constitutive'. This means individuals must successfully apply to the EUSS in order to have the protections set out in the WA.

The 3 million (a campaign organisation representing EU citizens in the UK) believes that a 'declaratory' system, which automatically recognised EU citizens' rights in law, would be a better way of ensuring their continuity of status post-Brexit. But in the government's view, schemes which confer status by automatic operation of the law, but don't issue confirmation of status documents, don't work.[6] It has been argued, however, that such problems could be avoided by making the EUSS a declaratory scheme with a requirement to register.

The Home Office is undertaking a range of outreach and communications activities targeted towards EUSS applicants. But it has been estimated that about 30% of EU

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3 Briefly, this states that free movement of persons will no longer apply. It refers to an intention to provide for visa-free travel for short visits, and to consider arrangements providing for entry and residence for certain specific purposes, such as research, study, training, youth exchanges, and business purposes in defined areas.

4 For more detailed commentary on the citizens' rights aspects of the WA, see Commons Library Briefing Paper CBP-8453, The UK's EU Withdrawal Agreement, 8 July 2019

5 This section draws on commentary on the version of the Bill published in the previous Parliament.

6 HC Deb 9 April 2019 c1048

citizens may struggle with the EUSS application process, whether due to a lack of awareness of the scheme or difficulties making an application or proving their eligibility.[7] They are therefore particularly vulnerable to losing their status and entitlements in the UK. Groups identified include the elderly, people with limited English, children and young people in the care system, homeless people, people who arrive soon before the deadline and people in casual employment.[8]

Another major concern the 3 million have is that the government has rejected calls to issue physical proof of status documents to people who successfully apply to the EUSS. Instead, they receive a digital status.

2.3 Deadline for applying to the EUSS

Clause 7 allows Ministers to make regulations specifying a deadline for applications to the EUSS. The WA states that the deadline cannot be less than six months after the end of the transition period (therefore, 30 June 2021, unless extended). The government has been criticised for not setting out in any detail its intended approach towards people who miss that deadline.[9]

2.4 Protections for people not covered by the WA

The UK chose to include within the scope of the EUSS certain categories of people with rights under EU law who were not included in the citizens' rights part of the WA (e.g. family members of British citizens who are covered by the 'Surinder Singh' principle). **Clause 7(2)** and **(3)** provide that "if the Minister considers it appropriate", regulations made under **clause 7(1)** may be made to apply to those groups. Professor Steve Peers, a leading commentator on EU law, has suggested that the Bill should contain stronger protections for these people.[10]

2.5 Rights of appeal against EUSS decisions

The WA provides for a right of appeal against decisions to refuse to grant residence rights.

This is reflected in **clause 11** of the Bill, which provides a power to make regulations giving a right of appeal against certain specified "citizens' rights immigration decisions". The Bill's Explanatory Notes confirm that the appeals will be to the First-tier Tribunal (Immigration and Asylum Chamber). Onward appeals on a point of law would be for the Upper Tribunal.

The Public Law Project (a charity which conducts legal casework, strategic legislation, and research and policy work) suggests that the right of appeal should be directly provided for in the Bill, rather than left to secondary legislation.[11] It has also queried the purpose of the reference to judicial reviews in **clause 11(3)**. It highlights that it isn't necessary to provide

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7 British Future, Getting it right from the start: Securing the future for EU citizens in the UK, January 2019

8 See, for example, PoliticsHome, Older people facing 'Windrush 2' unless Home Office tweaks Brexit citizen scheme, Ministers told, 27 September 2019; Migration Observatory, Unsettled status? Which EU citizens are at risk of failing to secure their rights after Brexit?, 12 April 2018

9 Home Affairs Committee, Oral evidence, Home Office preparations for Brexit, HC 67, 23 October 2019, q292-3

10 Stephen Peers, The Withdrawal Agreement Implementation Bill, *EU Law Analysis Blog*, 22 October 2019

11 Public Law Project, Preliminary briefing on the European Union (Withdrawal Agreement) Bill, 22 October 2019

a statutory basis for access to judicial review, and that the government couldn't use these powers to limit access to judicial review, due to its special constitutional status.

The quality of Home Office decision-making on EUSS applications has been questioned. There have been reports, for example, that some longstanding EU citizen residents have wrongly been given 'pre-settled' rather than 'settled' status (which people who can demonstrate five years' residence in the UK should receive).[12]

Currently, people applying under the EUSS have the right to an administrative review (an internal review of the decision by Home Office staff). Administrative reviews of EUSS decisions appear to have a substantially higher success rate than other immigration decision categories, although there is limited published data on the number and outcome of EUSS administrative reviews.

Analysis of FoI requests by the Public Law Project showed that, as at 12 September 2019, 291 out of 325 administrative review decisions (89.5%) overturned a decision to grant pre-settled instead of settled status.[13] Possible explanations for the high success rate include the effectiveness of the review process and problems with the quality of automated checks and initial decision-making. It has also been suggested that reviews may be affected by the fact that applicants can submit new evidence at that stage. However, the Public Law Project estimates that around 48% of EUSS administrative review decisions it had data for were not based on new evidence.[14]

2.6 Ensuring the IMA's independence

Some stakeholders have expressed concerns about whether the provisions for establishing an 'Independent Monitoring Authority for the Citizens' Rights Agreements' (IMA) are sufficient to ensure its independence from the Government.[15] The Lords Constitution Committee has described the IMA as "a new body with a complex mandate and structure which merits further careful scrutiny."[16]

The IMA's role, as required by the WA and EEA EFTA Separation Agreement, is to monitor the UK's implementation of the citizens' rights parts of the Agreements. The European Commission will perform the same role on behalf of EU Member States in respect of British citizens living in the EU. Like the Commission, the IMA will have authority (but not an obligation) to carry out inquiries in response to requests from the Secretary of State, Ministers of devolved areas, or complaints from individuals who fall within the scope of the Agreements. It can also initiate its own inquiries. The IMA also has the power to intervene in legal proceedings and to apply for judicial review (in Scotland, supervisory jurisdiction of the Court of Session).

The European Commission and IMA must report annually on the implementation and application of the citizens' rights provisions in the WA, including the number and nature of complaints received.

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12 Kuba Jablonowski, The good, the bad, and the hard truth buried in the EU settlement scheme stats: analysis, *Free Movement Blog*, 13 September 2019

13 Public Law Project, Admin review & EU settlement: what does the 89.5% success rate show?, 3 December 2019

14 This is based on analysis of successful requests for refunds of administrative review fees (refunds are not available for decisions overturned due to additional evidence).

15 Home Affairs Committee, Oral evidence, Home Office preparations for Brexit, HC 67, 23 October 2019, q306-7

16 Lords Constitution Committee, European Union (Withdrawal Agreement) Bill: interim report, HL Paper 21, 5 November 2019, para 43

Stakeholders' concerns largely relate the IMA's appointments process, as detailed in **Schedule 2** of the Bill.

The IMA's Chair and other non-executive members are to be appointed by a Secretary of State. The Minister must ensure, "so far as possible", that the non-executive members include a member(s) who knows about conditions in Scotland, Wales, Northern Ireland and Gibraltar relevant to the citizens' rights part of the WA. The appointment approval process includes a role for Ministers in the devolved governments, but they cannot automatically block an appointment by disagreeing.

Non-executive members appoint the executive members, including the chief executive. They must consult the Secretary of State before appointing the chief executive. The Secretary of State can appoint an interim chief executive until that appointment takes place.

Neither the Bill nor Explanatory Notes specify which Minister will have these responsibilities. Critics are concerned that the IMA's independence will be compromised if appointments fall within the remit of the Minister responsible for the EUSS (currently, the Home Secretary). Alternative appointment models have been suggested – for example, by giving a parliamentary committee a role in approving appointments.[17]

2.7 IMA's functions

Schedule 2 differs to the previous version of the Bill by: allowing for more of the IMA's functions to be delegated within the organisation (paragraph 10); giving Ministers powers to prevent public authorities disclosing information to the IMA on national security grounds (paragraph 38); giving the Secretary of State powers to transfer functions of the IMA to another relevant public authority (paragraph 39); and related amended powers to remove functions of the IMA and for its abolition (paragraph 40).

3. Social security co-ordination, and equal treatment

The long-established EU Social Security Co-ordination Regulations provide a reciprocal framework to protect social security rights for people moving between EEA states (and Switzerland). The regulations clarify which state a person is insured in for contributions and benefits purposes, require equal treatment in access to benefits, allow periods of insurance in different countries to be aggregated, and enable certain benefits (including state pensions) to be 'exported'. A well-established system of administrative co-operation underpins the rules.

Further information on EU social security co-ordination – including examples of how the system works in practice – is given in Section 4.1 of Commons Library briefing prepared for the Second Reading of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19.[18]

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17 Exiting the EU Committee, The progress of the UK's negotiations on EU withdrawal: December 2017 to March 2018, HC 884, 18 March 2018, para 40

18 Commons Library Briefing Paper CBP-8473, Immigration and Social Security Co-ordination (EU Withdrawal) Bill, 25 January 2019

The WA allows social security co-ordination to continue to apply to people after the end of the transition period, if they come within the scope of the WA. The UK Government's Explainer for the previous WA said that this would ensure that people moving between the UK and the EU before the end of the transition period "are not disadvantaged in their access to pensions, benefits, and other forms of social security, including healthcare cover."[19] The WA also provides protections in other circumstances so that, for example, where a UK national has previously worked and paid social security contributions in a Member State, rights flowing from those contributions, such as benefits, pensions and reciprocal healthcare rights, are protected.

Further information on the social security co-ordination provisions in the WA can be found in Section 3.5 of the Commons Library's July 2019 briefing on the UK's Withdrawal Agreement.[20]

Clause 13 of the Bill provides UK Ministers (and/or in areas of devolved competence a devolved authority) with regulation-making powers (including 'Henry VIII' powers) to implement the WA provisions on social security co-ordination, to supplement their effect, and deal with any other related matters. The powers could also be used to implement future changes to the EU co-ordination rules (see the commentary on Article 36(2) of the WA in the Library's July 2019 briefing, for the UK's obligations in this regard).

In its report on the previous Withdrawal Agreement Bill, the Lords Constitution Committee noted that there is no sunset clause limiting the powers in clause 13, adding that it was not clear why the powers would be required beyond the implementation (or 'transition') period.[21] The Government may argue that the powers will be required to implement future changes to the co-ordination rules agreed after the transition period has ended.

Clause 14 provides regulation-making powers (including, again, 'Henry VIII' powers) to ensure that domestic legislation is consistent with the provisions on non-discrimination and equal treatment for persons residing and working in the UK on the basis of the WA. The Explanatory Notes for the previous WAB stated that these powers could be used, for example, to ensure that EU nationals currently accessing benefits and services can continue to do so on the same basis after the end of the transition period.[22]

3.1 Social security co-ordination and the Political Declaration

For those moving between the EU and the UK **after** the end of the transition period, the revised Political Declaration states that the EU and the UK would "agree to consider addressing social security coordination in the light of future movement of persons", as part of future mobility arrangements base on non-discrimination between the EU27 states and "full reciprocity."[23]

A recent commentary suggests that while EU27 negotiators would prefer future arrangements to mirror as closely as possible the existing social security co-ordination

19 14 November 2018, para 37
20 CBP-8453, 8 July 2019
21 Constitution Committee, European Union (Withdrawal Agreement) Bill: interim report, HL 21 2019, 5 November 2019, para 53
22 Bill 7-EN, October 2019, para 213
23 Paras 52, 49

regulations, the UK's preference would be for a much less comprehensive model covering only some contributory benefits.[24]

[24] Simon Roberts, 'Social security coordination after Brexit: trying to take an egg out of an omelette?', ERA Forum (2019); doi:10.1007/s12027-019-00591-9

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