

EEA Nationals (Indefinite Leave to Remain) Bill [HL]

HL Bill 38 of 2017–19

Summary

The [EEA Nationals \(Indefinite Leave to Remain\) Bill \[HL\]](#) is a private member's bill introduced by Lord Oates (Liberal Democrat). The bill had its first reading in the House of Lords on 6 July 2017 and is due to receive its second reading on 19 July 2019.

Once the UK leaves the EU, free movement rights will end. EU, EEA and Swiss nationals will become subject to UK immigration controls. Lord Oates has stated that the purpose of the bill is as follows:

The EEA Nationals (Indefinite Leave to Remain) Bill would provide a guarantee in British law that, regardless of the outcome of the EU withdrawal process, EU citizens, other EEA nationals and their family members living in the UK at the time of exit from the EU, would be granted indefinite leave to remain in the United Kingdom.¹

The bill would grant the right of abode to EEA nationals who were resident in the UK on the date of exit from the EU and their family members.

The Government has already established a scheme to allow EU, EEA and Swiss citizens living in the UK and their family members to secure their long-term status in the UK post-Brexit. This scheme is in line with the citizens' rights provisions of the draft withdrawal agreement negotiated between the EU and the UK. The Government has said it will continue with the EU Settlement Scheme if the UK leaves the EU with no deal. However, there would be some changes to the scheme if that happened, for example to the cut-off dates for applying.

Unlike the arrangement proposed by the bill, the Government's EU Settlement Scheme does not automatically grant the right to remain lawfully in the UK after Brexit. Instead, individuals must make an application. The status they are granted depends on the length of the applicant's residency in the UK. The design of the scheme has been criticised for requiring individuals to make an application. Groups such as The 3 Million (a campaign group representing EU citizens in the UK) and the House of Commons Home Affairs Committee support a declaratory approach. This would mean EEA citizens residing in the UK before a certain date would automatically acquire a new status allowing them to stay, and they could apply for a document to prove their status.

Background: Brexit and Free Movement

Free movement of persons is a key feature of EU membership. Article 21 of the Treaty on the Functioning of the European Union gives EU nationals the right to move and reside freely within the territory of the EU's member states. Citizens of Iceland, Liechtenstein and Norway (the non-EU member countries of the European Economic Area (EEA)) and Switzerland also have free movement

rights.² Free movement rules give EU nationals the ongoing right to reside in another EU member state if they are a:³

- worker or self-employed person;
- jobseeker;
- self-sufficient person;
- student; or
- family member accompanying or joining an EU citizen who fits into one of the above categories.

After five years' continuous and legal residency in another member state, an EU national automatically acquires the right of permanent residence.⁴

Free movement rights will no longer apply to the UK once it leaves the EU. The Government is legislating in the Immigration and Social Security Coordination (EU Withdrawal) Bill to end free movement of persons into the UK. That bill will make EU, EEA and Swiss nationals and their family members subject to UK immigration controls.⁵ They will require permission to enter and remain in the UK under the UK Immigration Act 1971. As the House of Commons Home Affairs Committee has pointed out, this will affect not just people wishing to come to the UK in future, but those who are already resident:

This change will affect all people who are here through exercise of the Treaty right to freedom of movement and who have not taken British citizenship or been granted indefinite leave to remain (as distinct from permanent residence under EU law), and will include citizens who have been resident in the UK for many years, and those who were born here and have never lived anywhere else.⁶

Bill Overview

Clause 1 of the bill is the operative clause. It would give the right of abode in the UK to EEA nationals and certain family members resident in the UK on the date of exit from the EU. Clauses 2 and 3 set out definitions for the purposes of the bill. Clause 4 provides that the bill's provisions would come into force on the day it received royal assent and would extend to the whole of the UK.

Right of Abode

Clause 1 of the bill would amend section 2 of the Immigration Act 1971 to give the right of abode to:

- EEA nationals who were resident in the UK on the date of exit from the EU; and
- 'Family members', 'extended family members' and 'family members who have retained the right of residence' of an EEA national or British citizen resident in the UK on the date of exit from the European Union.

If someone has the 'right of abode', it means they can live or work in the UK without any immigration restrictions.⁷ They do not need a visa to come to the UK. There is no limit on the length of time they can spend in the country. Section 2 of the Immigration Act 1971 currently provides that all British citizens and some Commonwealth citizens automatically have right of abode in the UK.⁸ Home Office

guidance explains that the right of abode is “a statutory right which a person either has or does not have depending on whether the conditions in section 2 of the 1971 Act are satisfied”.⁹ The right of abode can be removed in certain circumstances. Section 2A of the 1971 Act allows the Secretary of State to remove a Commonwealth citizen’s right of abode if s/he “thinks that it would be conducive to the public good for the person to be excluded or removed from the United Kingdom”. However, section 2A does not allow the Secretary of State to remove the right of abode from a British citizen.

Having the right of abode differs from having indefinite leave to enter or indefinite leave to remain. These are types of immigration status.¹⁰ Individuals must usually apply to receive indefinite leave to enter or to remain. A person who holds indefinite leave to remain but has been absent from the UK for more than two consecutive years automatically loses their indefinite leave as a matter of law.¹¹

Definitions

Subsection 1(2) of the bill provides that an EEA national is someone who is defined as an EEA national under regulation 2 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). These regulations transpose into UK law the EU Directive that sets out the rights of EU citizens and their family members to move and reside within the territory of the EU’s member states.¹² This directive is sometimes known as the free movement directive.

The bill also defines other categories of people by referring to the definitions set out in the regulations. Clause 3 specifies that a person is to be regarded as:

- a “family member” if they meet the definition in regulation 7.¹³
- an “extended family member” if they meet the definition in regulation 8.¹⁴

Clause 1 of the bill would confer the right of abode based on residency in the UK on the date of exit from the EU. Clause 2 sets out what would qualify as being resident in the UK for this purpose. A person would be regarded as being resident if they could demonstrate that on the date of exit they were:

- employed or self-employed and paying national insurance in the UK.
- in full-time study in the UK.
- on an electoral register in the UK.
- a family member who had retained the right of residency under regulation 10 of the Immigration (European Economic Area) Regulations 2016. This regulation allows certain family members of EEA nationals to keep their right of residence in the UK when the EEA national dies, leaves the UK, divorces their spouse or dissolves their civil partnership.¹⁵ It also allows the family member to keep the right of residence if they are the parent of a child who retains the right of residence.
- otherwise a “qualified person” under regulation 6 of the Immigration (European Economic Area) Regulations 2016. This regulation defines a “qualified person” as an EEA national living in the UK as a jobseeker, a worker, a self-employed person, a self-sufficient person or a student.¹⁶
- compliant with other criteria set out by the Secretary of State in regulations. Subsection 2(2) of the bill specifies that any regulations of this type would have to be approved by both Houses of Parliament.

EU Settlement Scheme

The Government has already established a scheme to allow EU, EEA and Swiss citizens living in the UK and their family members to secure their long-term status in the UK post-Brexit.¹⁷ However, unlike the scheme proposed by the bill, the Government's EU Settlement Scheme does not automatically grant the right to remain lawfully after Brexit. Instead, individuals must make an application. The rights they are granted depend on the length of the applicant's residency in the UK.

Launching the EU Settlement Scheme, the Government said that it was in line with the citizens' rights provisions of the draft withdrawal agreement negotiated between the UK and the EU.¹⁸ The Government has reached separate agreements with Norway, Iceland and Liechtenstein (the EEA EFTA states) and with Switzerland to address citizens' rights issues post-Brexit.¹⁹ Nationals of these countries can apply to the EU Settlement Scheme in the same way as EU nationals.

In the event of a no-deal Brexit, the UK would not be bound by the withdrawal agreement. However, the Government has said that if there is a no-deal Brexit, it would continue to run the EU Settlement Scheme.²⁰ If there was no deal, different deadlines would apply to the scheme.²¹ If there is a deal, applicants are eligible to apply to the scheme if they are living in the UK by 31 December 2020. If there is no deal, the cut-off date is the date of the UK's exit from the EU. If there is a deal, applications can be made until 30 June 2021. The deadline is 31 December 2020 if the UK leaves the EU without a deal.

Successful applicants to the EU Settlement Scheme will be granted either 'settled status' or 'pre-settled status', depending on how long they have already been resident in the UK:

- **Settled Status** would be granted to eligible applicants who have five years' continuous residence in the UK.²² People granted settled status can stay in the UK as long as they like and may be eligible to apply for British citizenship. 'Settled status' is a name used for indefinite leave to remain (if the application is made in the UK) or indefinite leave to enter (if the application is made outside the UK) under the EU Settlement Scheme.²³
- **Pre-settled Status** would be granted to eligible applicants who do not have five years' continuous residence in the UK.²⁴ They can stay in the UK for a further five years from the date they are granted pre-settled status. Once they reach five years' continuous residence in the UK, they can apply to change from pre-settled status to settled status. 'Pre-settled status' is a name used for limited leave to remain (if the application is made in the UK) or limited leave to enter (if the application is made outside the UK) under the EU Settlement Scheme.²⁵

The Government has stated that EU citizens and their families who have not applied for UK immigration status by the deadline "will technically have no lawful basis to remain in the UK".²⁶ However, the Government also stated that "where there are reasonable compassionate or practical grounds for missing the deadline", a "proportionate approach will be taken and cases will be considered on their individual merits".

It is possible for individuals to lose their settled or pre-settled status once it has been granted. An individual with settled status who spent more than five years in a row outside the UK (four years in the case of Swiss nationals) would lose their settled status.²⁷ Likewise, an individual with pre-settled status who spent more than two years in a row outside the UK would lose their pre-settled status. People with settled or pre-settled status could also lose it by way of deportation.²⁸ After the transition period, or if the UK leaves the EU without a deal, people with settled or pre-settled status could be subject to

deportation for committing a crime. Under EU law, EU nationals living in the UK can currently be deported only for reasons of public policy or public security.²⁹

Criticism

The EU Settlement Scheme has been criticised for requiring EU, EEA and Swiss nationals resident in the UK to apply for a new status. There have also been concerns that some people may not realise they need to apply, for example those who already hold permanent residence documents, and children.³⁰ It is also feared that some applicants may face difficulties with the digital nature of the application process or with providing evidence of the status to which they are entitled.³¹

There have been calls for a system which would instead automatically allow EEA citizens to continue living in the UK. The 3 Million, a campaign organisation which represents citizens of the EU27 member states living in the UK, has said:

The current 'EU settlement scheme' imposes a requirement on EU citizens to apply for a new immigration status under UK law or become undocumented. This risks a repeat of the Windrush scandal: many thousands of people may become illegal immigrants if they fail to apply by the deadline, facing the full force of the hostile environment policy.

Instead, we have consistently proposed a declaratory system for both EU citizens in the UK and UK citizens in the EU, which will see citizens automatically acquire a new status. Citizens would be able to register via a simple system and obtain a physical document in order to prove their rights and access services, but they would not lose rights or become illegal citizens if they do not register.³²

Like The 3 Million, the House of Commons Home Affairs Committee also suggested that failing to get the settlement scheme right would "run the risk of another Windrush scandal".³³ The committee suggested that a "declaratory approach" would be preferable.³⁴ This would mean there was a presumption that EU citizens residing in the UK before a certain date had "a legitimate and recognised residency status and just needed to be provided with a document to prove it".³⁵ The committee called for the Government to "confirm in primary legislation the rights of EEA nationals who are resident in the UK at the time of its exit from the EU".³⁶ In its view, "no-one should be left without rights because they have not completed the scheme". However, the committee said individuals should be required to apply to the settlement scheme for documents to prove their rights.

The committee also expressed concerns about the Home Office's ability to manage the number of applications the EU Settlement Scheme is expected to attract.³⁷ It said the Home Office must ensure it has sufficient technological capacity and enough trained staff to handle the workload and inquiries, particularly from vulnerable applicants.³⁸

Proponents of an automatic scheme have argued that this was what was promised during the referendum campaign.³⁹ In a statement on behalf of the official Vote Leave campaign in June 2016, Boris Johnson, Michael Gove, Priti Patel and Gisela Stuart set out their proposals for a new immigration system if the UK voted to leave the EU. They wrote:

[...] there will be no change for EU citizens already lawfully resident in the UK. These EU citizens will automatically be granted indefinite leave to remain in the UK and will be treated no less

favourably than they are at present.⁴⁰

On the question of whether leave to remain should be granted automatically, Caroline Nokes, the Immigration Minister, said in March 2019:

We have considered carefully the introduction of the EU Settlement Scheme and its implications for EEA and Swiss citizens and their family members, including whether we should automatically grant leave to remain. However, this would create ongoing confusion amongst EEA and Swiss citizens, their family members, employers and service providers as to their rights to remain in the UK and access benefits and services.

Requiring EEA and Swiss nationals to apply for and receive a status via the EU Settlement Scheme is key to ensuring life continues smoothly for them in the future. This will become particularly important when we move into the future immigration system as the resident population will need to be able to distinguish themselves from those who may have different rights.⁴¹

The House of Commons Library estimated that as of the end of May 2019, around 23% of EU, EEA and Swiss nationals living in the UK had applied under the EU Settlement Scheme.⁴² This means that around 2.6 million more EU, EEA and Swiss nationals may need to apply, although this is only an estimate. It is not possible to estimate the number of non-EU citizens who still must or could apply (family members of an EU citizen who are not themselves British or EU citizens).

Further Information

- House of Commons Library, [EU Settlement Scheme](#), 6 June 2019
- House of Commons Home Affairs Committee, [EU Settlement Scheme](#), 30 May 2019, HC 1945 of session 2017–19

¹ Text supplied by Lord Oates on request from the Library.

² UK Government website, [‘Countries in the EU and EEA’](#), accessed 10 July 2019.

³ House of Commons Library, [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill 2017–19](#), 25 January 2019, p 12.

⁴ European Union, [‘Permanent Residence \(>5 Years\) for EU Nationals’](#), accessed 10 July 2019.

⁵ [Explanatory Notes to the Immigration and Social Security Coordination \(EU Withdrawal\) Bill](#), 20 December 2018, p 2. The bill is currently awaiting report stage in the House of Commons.

⁶ House of Commons Home Affairs Committee, [EU Settlement Scheme](#), 30 May 2019, HC 1945 of session 2017–19, p 6.

⁷ UK Government website, [‘Prove You Have Right of Abode in the UK: Overview’](#), accessed 8 July 2019.

⁸ For further details about Commonwealth citizens who have right of abode see: UK Government website, [‘Prove You Have Right of Abode in the UK: Commonwealth Citizens’](#).

⁹ Home Office, [Nationality: Right of Abode](#), 23 May 2018, p 4.

¹⁰ UK Government website, [‘Apply to the EU Settlement Scheme \(Settled and Pre-Settled Status\): If You Have Permanent Residence or Indefinite Leave to Remain’](#), accessed 8 July 2019.

¹¹ Home Office, [Returning Residents](#), 13 July 2018, p 5.

¹² Home Office, [Explanatory Memorandum to the Immigration \(European Economic Area\) Regulations 2016](#), November 2016.

¹³ For more detailed information about who qualifies as a “family member”, see: Home Office, [Free Movement Rights: Direct Family Members of European Economic Area \(EEA\) Nationals](#), 18 February 2019.

¹⁴ For more detailed information about who qualifies as an “extended family member”, see: Home Office, [Free Movement Rights: Extended Family Members of EEA Nationals](#), 27 March 2019.

¹⁵ Home Office, [Free Movement Rights: Retained Rights of Residence](#), 14 February 2019, p 5.

- ¹⁶ Home Office, [Free Movement Rights: Qualified Persons](#), 20 November 2018, p 8.
- ¹⁷ Home Office and UK Visas and Immigration, '[EU Settlement Scheme: Statement of Intent](#)', 21 June 2018.
- ¹⁸ *ibid.*
- ¹⁹ Department for Exiting the European Union, '[UK Agreements with the EEA EFTA States and Switzerland](#)', 20 December 2018.
- ²⁰ Department for Exiting the European Union, [Citizens' Rights—EU Citizens in the UK and UK Nationals in the EU: Policy Paper](#), last updated 29 March 2019, pp 3–4.
- ²¹ *ibid.*; and UK Government website, '[Apply to the EU Settled Status Scheme \(Settled and Pre-Settled Status\): Overview](#)', accessed 9 July 2019.
- ²² UK Government website, '[Apply to the EU Settlement Scheme \(Settled and Pre-Settled Status\): What You'll Get](#)', accessed 9 July 2019.
- ²³ Home Office, [EU Settlement Scheme: EU, Other EEA and Swiss Citizens and Their Family Members](#), 29 March 2019, p 5.
- ²⁴ UK Government website, '[Apply to the EU Settlement Scheme \(Settled and Pre-Settled Status\): What You'll Get](#)', accessed 9 July 2019.
- ²⁵ Home Office, [EU Settlement Scheme: EU, Other EEA and Swiss Citizens and Their Family Members](#), 29 March 2019, p 5.
- ²⁶ House of Commons, '[Written Question: Immigration: EU Nationals](#)', 24 May 2018, 146072.
- ²⁷ UK Government website, '[Apply to the EU Settlement Scheme \(Settled and Pre-Settled Status\): What You'll Get](#)', accessed 9 July 2019.
- ²⁸ House of Commons Library, [EU Settlement Scheme](#), 6 June 2019, p 17.
- ²⁹ House of Commons Library, [Deportation of Foreign National Offenders](#), 1 August 2017; and Adrienne Yong, '[When Britain Can Deport EU Citizens—According to the Law](#)', *The Conversation*, 23 November 2017
- ³⁰ House of Commons Library, [EU Settlement Scheme](#), 6 June 2019, pp 40–1.
- ³¹ *ibid.*, pp 38–40; and House of Commons Home Affairs Committee, [EU Settlement Scheme](#), 30 May 2019, HC 1945 of session 2017–19, pp 30–42.
- ³² British in Europe and The 3 Million, [What a Future Prime Minister Can Do to Protect Citizens' Rights](#), 7 June 2019.
- ³³ House of Commons Home Affairs Committee, [EU Settlement Scheme](#), 30 May 2019, HC 1945 of session 2017–19, p 4.
- ³⁴ *ibid.*, p 23.
- ³⁵ *ibid.*, p 20.
- ³⁶ *ibid.*, p 23.
- ³⁷ *ibid.*, pp 44–50.
- ³⁸ *ibid.*, p 50.
- ³⁹ For example, British in Europe and The 3 Million, [What a Future Prime Minister Can Do to Protect Citizens' Rights](#), 7 June 2019; and Lord Oates, [HL Hansard, 4 April 2017, col 1016](#).
- ⁴⁰ Vote Leave, '[Restoring Public Trust in Immigration Policy—A Points-Based Non-Discriminatory Immigration System](#)', 1 June 2016.
- ⁴¹ House of Commons, '[Written Question: Immigration](#)', 7 March 2019, 227101.
- ⁴² House of Commons Library, '[The Progress of the EU Settlement Scheme So Far](#)', 25 June 2019. This excludes Irish nationals, who can apply but do not usually have to do so. For further information about the status of Irish nationals, see: House of Commons Library, [EU Settlement Scheme](#), 6 June 2019, p 6.

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