



# Immigration arrangements in the event of a no deal Brexit - What we know so far

European Union: MW 459

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## Summary

1. The major long-term consequence would be the end of free movement, as would also be the case for a Brexit with a deal. However, in the shorter-term, both sides agree that travel for visits should remain visa-free and EU citizens who are already here prior to 29 March would be able to apply to remain here permanently. The Home Secretary has also indicated that there should be a transition period of 21 months (until January 2021) during which EU citizens would still be able to come to the UK and stay for three years using a temporary, non-extendable immigration status.<sup>1</sup>
2. Access for work for EU nationals arriving in the UK after Brexit would change but enforcement of the arrangements must necessarily wait until the process of registering existing and previous EU residents has been completed – the deadline for registration will be December 2020. Meanwhile, British citizens who wished to move to and work in the EU after Brexit would need to apply for work permits under existing national work permit arrangements.
3. EU citizens who are already in the UK on Brexit day would have the right to apply and be considered for settled or pre-settled status. EU citizens who arrive after Brexit would also be able to apply for settled status if they have *previously lived* in the UK prior to Brexit. In a no deal situation, the right of EU citizens who are here to be joined by close, current family members would be subject to a **cut-off date of March 2022**, after which they would be required to observe UK immigration rules. In Europe, suitable arrangements for British residents are the responsibility of member states. It has been reported that several governments, including France, Spain, Poland and Germany, are preparing legal safety nets for British nationals in the event of no deal.
4. The Government's White Paper published in December 2018 outlines the immigration system that is envisaged after Brexit. We oppose key elements, including the loosening of the Tier 2 (General) route for non-EU workers. We have also highlighted the absence of detail on loopholes such as EEA family permits.<sup>2</sup>

# EU nationals who are already here on Brexit day

5. The Government released a policy paper in December 2018 which said that, in the event of a no deal scenario, 3.7 million EU nationals who are already here at the time of Brexit (29 March 2019) would be able to apply for settled or pre-settled status (granting them a status similar to indefinite leave to remain).<sup>3</sup> Those here by 29 March 2019 would have until 31 December 2020 to apply under the EU settlement scheme which it has now been confirmed will fully come into operation on 30 March. A £65 registration fee will no longer be charged, following a January 2019 announcement by the Government.<sup>4</sup>

## Status of EU nationals in the UK on Brexit Day if there is no deal

6. The EU Settlement Scheme will open on 30 March. A total of 135,000 people received a grant of settled or pre-settled status between the opening of initial private beta-testing of the scheme in late August 2018 and the end of February 2019.<sup>5</sup> In the event of no deal, the government has said that EU nationals who are already here would continue to have access to in-country benefits and services on broadly the same terms as now. They would also continue to have their professional qualifications recognised.<sup>6</sup>

7. However, the December 2018 release by the Department for Exiting the EU noted that there would be the following differences compared to a situation in which there was a deal<sup>7</sup>:

- There would be no six-month 'grace period' beyond 31 December 2020 during which EU nationals in the UK could apply for settled status.
- EU citizens may need a passport rather than an EU identity card to enter the UK from early 2021 onwards.
- If the EU national applying to stay wished to challenge the Government's decision on settled status, he or she would have the same recourse to appeal or judicial review as a non-EEA national in the UK. There would be no preliminary reference procedure to the Court of Justice of the European Union *'as it would not have any jurisdiction in the UK'*.
- The EU deportation threshold<sup>8</sup> would continue to apply to crimes committed before exit. However, the threshold that currently applies to non-EU criminals<sup>9</sup> would apply with respect to crimes committed after 29 March 2019.
- There would be a significant change with respect to EU citizens' ability to bring in family members.

The current draft withdrawal deal grants EU citizens who arrive prior to the end of the transition period the right to bring in spouses and registered partners, parents, grandparents, children and future children, grandchildren or persons with whom they are in an existing durable relationship who could then stay permanently without being subject to the UK immigration rules. Such rights would persist during the lifetime of respective family members provided that the relationship existed prior to the end of the transition period.

However, in a situation with no deal, the Government has specified a cut-off point of **29 March 2022** for such family members to join EU citizens with settled status in the UK (where the relationship existed at the time of Brexit day or where a child was born overseas after this

date). This would likely have a significant impact on the number of family members joining EU citizens living in the UK. In a no deal scenario, EU citizens with settled status would also only be able to be joined by future spouses and partners (where the relationship was established after exit) and other dependent relatives until 31 December 2020. After that point the UK Immigration Rules would apply

8. There is a degree of legal uncertainty about the grounds on which pre-exit entrants who are EU citizens would be able to remain in the UK should clause 1 of the Immigration Bill be implemented without further transitional measures being provided for in advance of the registration of EU residents being completed, probably by 2021. It has been suggested that one remedy would be for the Settlement Scheme rights to be enshrined in UK law through the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, and not through the planned Withdrawal Agreement Bill and that such rights should also apply to any EU national arriving before the UK implements its future immigration system. ***Our position is that the government should provide urgent clarification, in advance of 29 March, regarding the grounds on which pre-exit entrants who are EU citizens would be able to remain in the UK in the event of a no deal Brexit.***<sup>10</sup>

## EU nationals arriving in the UK after Brexit day

9. The EU's 'Free Movement Directive' (2004/38/EC) has been transposed into UK domestic law via the Immigration (EEA) Regulations 2016 and other legislation. The Government has published the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 which would '*end the EU's rules on free movement in the UK and other retained EU law on immigration which will have been saved in UK law by the European Union (Withdrawal) Act 2018 ("EU (Withdrawal) Act")*'. The Bill also repeals section 7 of the Immigration Act 1988.<sup>11</sup> As a result of the Bill, EEA nationals and their family members would require permission to enter and remain in the UK under the Immigration Act 1971.<sup>12</sup>

10. It should be noted that a number of elements of the proposed new immigration system (outlined in the Immigration White Paper, published on 19 December) are to be open to consultation for a period of a year. Clause 4 of the Bill allows the Home Secretary to make more detailed changes to the immigration rules via secondary legislation. Indeed, it has been suggested that clause 4(2)(a) arguably gives the Secretary of State the power to modify by regulations any piece of immigration legislation passed prior to 2019, as long as the Secretary of State can argue it is in connection with ending free movement.<sup>13</sup> The new post-Brexit immigration system is not expected to come fully into operation until 1 January 2021.

11. The Bill passed its Second Reading (297 to 234 votes) on 28 January and has now completed the Committee stage in the House of Commons. A failure to pass the legislation prior to Brexit day would mean that free movement into the UK by EU citizens would continue as before.

12. This is not incompatible with Government's statements. On 28 January 2019, the Home Secretary announced that, from the date of No Deal exit, EU nationals will still be free to come to the UK but if they want to stay for work or any other reason beyond three months they must apply for (and pay for) Temporary Leave to Remain. This would allow a three-year stay. This status will not of itself give any right to remain permanently or to settle. If people wanted to stay for longer they would have to apply under new post-Brexit immigration arrangements (not set to be finalised / implemented until 2020 / early 2021).<sup>14</sup>

13. However, concerns have been raised about the enforceability of the European Temporary Leave to Remain proposal. As the Migration Observatory put it in evidence to Parliament on 20 February: *“The responsibility [under this scheme] would be on individuals to apply if they wanted to stay for more than three months. They would need to apply. If they did not, in principle they would be working illegally, but the employer will have no obligation to check that, because they will still be able to employ someone based solely on their EU passport. That would be the only right to work check required of them.”*

14. When it announced the provisions for European Temporary Leave to Remain in late January 2019, the brief statement was lacking in detail. Prior to Brexit day, the government should provide more information on this scheme and how it might be enforced. Indeed, it should seek to allay concerns raised by the words of one senior Home Office source quoted as saying: *“Immigration enforcement will effectively come to an end [in a no deal scenario].”*<sup>15</sup>

## EU family members

15. The Government has said that, in the event of a no deal Brexit, non-EU family members of EU citizens who come to the UK after the withdrawal date will be able to join them provided that they apply for an EEA family permit prior to travelling here. This is concerning since it may set a precedent for the post-Brexit continuation of EEA family permits, which currently allow EU nationals to avoid the UK immigration rules. The Home Office has identified this as the **‘route of choice’** for those seeking to frustrate UK immigration control.<sup>16</sup> The Government should confirm that EEA family permits will cease to be issued following the no deal transition period and also that they will close the *Metock* route, which allows non-EU nationals who are in the UK illegally to remain if they form a genuine relationship with an EU citizen.

## Checks at the UK border and immigration enforcement

16. It was reported in August 2018 that, for reasons of staff capacity the Border Force would probably have to carry on treating EU citizens preferentially (vis-à-vis non-EU nationals).

17. Home Office sources have also said that that Border Force is preparing to divert staff currently charged with tracking down illegal immigrants to help out at ports and airports in the event of a ‘no deal’ Brexit.

18. A further matter is the EU plan to introduce a new system of advance notice of travel known as ETIAS in 2021 (requiring a fee of seven Euros for a three-year authorisation). The UK is also considering a similar system (possibly modeled on the United States’ ESTA system). It seems likely that such systems would apply to each other’s citizens.

## Checks by employers

19. Employers are already legally required to check, by reference to an ID card or a passport, whether an applicant for a job has the right to work in the UK. However, this will not be possible until millions of EU citizens residing in the UK have applied for and been granted settled or pre-settled status.<sup>17</sup> This process is likely to take until 2021 at the earliest.

20. Accordingly, on 31 October, the Home Secretary told ITV: *“If there was a no-deal - if - we won’t be able to immediately distinguish between those Europeans that were already here before March 29, and those who came after — and therefore as a result I wouldn’t expect employers to do anything different than they do today.”*<sup>18</sup> Thus it appears that employers will not be required to conduct extra checks on prospective EU national employees in the immediate aftermath of a no deal Brexit.

## Health care and social security

21. The export of social security benefits will need separate discussion and negotiation. A no deal scenario would mean the current reciprocal healthcare, shared by the UK and the EU27, would no longer apply. Britons could find their European Health Insurance Card (EHIC) - a passport to emergency medical treatment - is no longer valid in some EU countries.

## Students and academic exchanges

22. The UK’s Immigration White Paper published in December 2019 indicated that EU students may be required to apply for study visas from 2021 onwards.<sup>19</sup> It also mooted expanding to EU nationals the current Youth Mobility arrangements, which allow 18-30 year olds largely from Anglophone countries to come here for two years for work travel or study. It is unclear whether such arrangements would apply in the event of a no deal Brexit, although it is sufficient to note that, as the current youth mobility scheme (incorporating citizens of eight non-EU countries) is the result of a series of bilateral agreements, such expansion would depend on further negotiation with the EU.

## Future access to the UK for EU citizens

23. In the event of no deal, it would, of course, be in the UK’s own interests to facilitate travel and study with EU countries while ensuring our own access to key skills. Migration Watch UK has outlined how this might be achieved.<sup>20</sup> The key difference is that the final outcome would no longer involve negotiations with the EU, although consultation would be prudent.

24. The proposals set out in the Immigration White Paper (published on 19 December 2019) are not due to come into force until early 2021, although the Home Office envisages applications for new visas under the system being considered from Autumn 2020. However, the detail of the new system is still to be determined and will depend partially upon any possible amendments to the Immigration Bill currently making its way through Parliament and on the year-long consultation period which the government will conduct following the Bill’s passage.

## British nationals already resident in the EU on Brexit Day

25. The reciprocal UK/EU commitment to protect citizens’ rights would fall away in the absence of a Brexit deal. This is despite the fact that on 27 February MPs unanimously backed a cross-party amendment requiring the government to ‘seek at the earliest opportunity’ a UK-EU commitment to adopt and implement those agreements on citizens’ rights that are within the Brexit deal prior to the UK’s departure from the EU. However, the European Commission has reportedly rejected the request for a joint commitment to safeguard citizens’ rights ahead of a possible no-deal Brexit.

26. In the event of no deal, the priority for most of the million or so Britons in EU countries will be to register as residents, but the rules - including deadlines for paperwork - vary from country to country. For example, from the end of March - in the event of no deal - Britons residing in Germany will have three months in which to register for a new temporary residence permit. Meanwhile, 'third country' nationals in Spain are required to meet an income threshold in order to remain legally resident. Several governments, including France, Spain, Poland and Germany, are reportedly preparing legal safety nets for British migrants in the event of a 'no deal' Brexit.

27. The European Commission, in its contingency plan for no-deal Brexit, urges the EU27 to *'take a generous approach to the rights of UK citizens in the EU, provided that this approach is reciprocated by the UK'*. It says the EU27 *'should adopt a pragmatic approach to granting temporary residence status'*.

## Travel by British nationals to the EU

28. The arrangements for those British travellers going to the EU after a no deal Brexit are more complicated since immigration arrangements for non-EU nationals remain the purview of individual EU member states. British travellers would be required to have a passport that is valid for at least three more months on the date they intend to leave the EU. Such a passport must also be issued within the last ten years, As the website Free Movement puts it: *"This is why the UK government has taken measures to inform its citizens that they should check their passports before travelling to any of the states in the Schengen area (the travel area that covers most European countries) after 29 March 2019."*<sup>21</sup>

29. With regard to short-term travel (ie stays of up to 90 days within a six-month period), the Commission has followed the UK in indicating that it would allow visa-free travel for visitors in the event of no deal.<sup>22</sup> Visa-free non-EU business visitors are permitted to participate in meetings, seminars, trade fairs, workshops and business conferences.

30. British nationals who wish to travel to the EU after a no deal Brexit for a longer period for the purpose of work would need to apply for a work permit, either under the EU's Blue Card scheme for highly-skilled non-EU workers (e.g. in Germany) or under national work permit arrangements.<sup>23</sup> EU plans (submitted in 2016) to abolish national non-EU work migration schemes and replaced them with an expanded EU Blue Card have stalled. Only a few countries (e.g. Germany, France, and to a lesser extent Italy) use the current EU Blue Card to any significant degree. Countries such as the Netherlands, Denmark, Spain, Sweden and Belgium have their own skilled work permit schemes via which British nationals would be required to apply.

31. If the period of stay exceeds the period of three months, then a long-stay visa would be required. As Free Movement notes, usually EU countries offer long-stay visas with one-year validity, which often are renewable or extendable. They often lead to settlement on the basis of five or ten years' long residency. Employment is not permitted under the visa-free regime so those wishing to get a job for only one or two months would need to get a long-stay work visa as well. The application process often includes the obligation to find a job before applying. Application processes vary by country.

32. The long-stay visa requirement will also apply to those wishing to study in the EU or join a family member in any of the member states.

# The Irish Border

33. The government has consistently said it will do everything in its power to avoid a hardening of the border whatever the circumstances. Accordingly, the UK government does not intend have any controls at the Irish border in the event of a no-deal Brexit. Instead it will rely on self-reporting by businesses. The government said there would be no customs requirements for most goods, adding: "We would only apply a small number of measures strictly necessary to comply with international legal obligations, protect the biosecurity of the island of Ireland, or to avoid the highest risks to Northern Ireland businesses - but these measures would not require checks at the border." Some have raised concerns that such arrangements would effectively create a border of sorts in the Irish Sea since exports from the Republic to the UK mainland would attract tariffs and checks, while there would be no checks or tariffs on goods going from the Republic to Northern Ireland. It is still not clear what arrangements the Irish government will put in place on its side of the border if Britain leaves the EU without a deal.

## Conclusion

34. A degree of uncertainty is inevitable, especially when so many individuals will be affected by the changes in the legal environment. As suggested in paragraphs 8 and 14 above, the government should provide more clarity on the legal position and the enforceability of the European Temporary Leave to Remain status going forward. The EU, and EU member states, should also provide as much reassurance as possible to British nationals residing in the EU in advance of Brexit Day.

13 March 2019

## Notes

1. Home Office guidance, 28 January 2019, URL: <https://www.gov.uk/guidance/european-temporary-leave-to-remain-in-the-uk>
2. See our paper, 'Assessment of the White Paper on immigration after Brexit', January 2019, URL: <https://www.migrationwatchuk.org/briefing-paper/458>
3. Department for Exiting the EU, 'Citizens' Rights - EU citizens in the UK and UK nationals in the EU', December 2018, URL: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/762222/Policy\\_paper\\_on\\_citizens\\_rights\\_in\\_the\\_event\\_of\\_a\\_no\\_deal\\_Brexit.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762222/Policy_paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf)
4. BBC News, January 2019. URL: <https://www.bbc.co.uk/news/uk-politics-46950719>
5. Written statement by Immigration minister, March 2019, URL: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-07/HCWS1387>
6. Department for Exiting the EU, 'Citizens' Rights - EU citizens in the UK and UK nationals in the EU', December 2018.
7. Ibid.
8. EU citizens who have a criminal record and have lived in the UK for more than five years can only be deported as long as they pose 'a genuine, present and sufficiently serious threat' to society and the public. More than ten years of residency requires 'imperative grounds of public security'. This is a much higher threshold than that which is currently applied to non-EU criminals. See the Home Office's November 2017 paper, 'Technical note: Citizens Rights - Administrative Procedures in the UK', URL: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/657694/TECHNICAL\\_NOTE\\_CITIZENS\\_RIGHTS\\_-\\_ADMINISTRATIVE\\_PROCEDURES\\_IN\\_THE\\_UK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657694/TECHNICAL_NOTE_CITIZENS_RIGHTS_-_ADMINISTRATIVE_PROCEDURES_IN_THE_UK.pdf)
9. Non-EU citizens who are jailed for more than 12 months face automatic deportation.
10. Law Society of Scotland, Written submission on Immigration and Social Security Co-ordination (EU Withdrawal) Bill to Public Bill Committee, February 2019, URL: <https://publications.parliament.uk/pa/cm201719/cmpublic/immigration/memo/ISSB15.htm>
11. Immigration and Social Security Co-ordination (EU Withdrawal) Bill, URL: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/18309.pdf>
12. Explanatory Notes for Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced in the House of Commons on 20 December 2018.
13. Written submission on Immigration and Social Security Co-ordination (EU Withdrawal) Bill by UNISON to Public Bill Committee, February 2019, URL: <https://publications.parliament.uk/pa/cm201719/cmpublic/immigration/memo/ISSB24.pdf>
14. Home Office guidance, 28 January 2019, URL: <https://www.gov.uk/guidance/european-temporary-leave-to-remain-in-the-uk>
15. *The Sun*, December 2018, URL: <https://www.thesun.co.uk/news/brexit/8012454/immigration-enforcement-staff-may-be-redeployed-to-borders-to-deal-with-potential-chaos-at-ports-and-airports-under-a-no-deal-brexit/amp/>

16. Quoted by former Independent Chief Inspector of Borders and Immigration, 2014, p.57. URL: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546975/European-Casework-Report-June-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546975/European-Casework-Report-June-2014.pdf)
17. Oral evidence by Immigration Minister to Commons Home Affairs Committee, October 2018.
18. ITV interview quoted by *Daily Telegraph*, November 2018.
19. 'The UK's future skills-based immigration system', December 2018, URL: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf)
20. MW paper 421, 'Movement between the UK and EU after Brexit', October 2017, URL: <https://www.migrationwatchuk.org/briefing-paper/421>
21. Free Movement, March 2019, URL: <https://www.freemovement.org.uk/the-practical-implications-of-a-no-deal-brex-it-for-british-citizens-travelling-to-the-eu/>
22. European Commission press release, 13 November 2018, URL: [http://europa.eu/rapid/press-release\\_IP-18-6402\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6402_en.htm)
23. For more detail read our paper: 'Arrangements for skilled Britons seeking to work in the European Union after Brexit', April 2017, URL: <https://www.migrationwatchuk.org/briefing-paper/406>