

# Protecting EU citizens in the UK from a Brexit ‘Windrush on Steroids’: A Legislative Proposal for a Declaratory Registration System

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## **Abstract**

Three years after the Brexit referendum, the more than 3 million EU citizens residing in the UK still have no clarity what their legal status will be after Brexit. It is uncertain whether the Withdrawal Agreement will ever be adopted, while national measures adopted by the UK Government do not provide proper protection. The ‘EU Settlement Scheme’ has been adopted through secondary legislation, which can be easily changed over time, thus providing limited security. Moreover, the Scheme introduces an application system which will turn legally residing EU citizens into illegal immigrants if they do not apply successfully by the deadline, leading to scenario’s similar to those seen with the Windrush scandal.

It is high time that the UK legislator takes appropriate action. This paper presents a full legislative proposal to turn the EU Settlement Scheme into a declaratory registration scheme that will ensure that EU citizens receive a document proving their status, while avoiding turning them into illegal immigrants. It equally provides a proposal to define the rights of these citizens into primary legislation so they cannot be easily undermined.

## 1. Introduction

As the UK's path to Brexit is ever more unpredictable and chaotic, the more than 3 million EU citizens in the UK remain in profound uncertainty about their legal status post-Brexit. The Government states their status is fully covered by its 'EU Settlement Scheme'. However, this scheme has profound weaknesses. Firstly, it introduces a constitutive application system, which implies that all those who do not apply by the deadline will become illegal overnight, and lose immediately all residence rights and entitlements. This will lead to very similar situations as witnessed in the Windrush scandal,<sup>1</sup> but on a much larger scale. In the Windrush scandal,<sup>2</sup> immigrants from the Caribbean who had legally lived in the UK for decades suddenly were deported, refused re-entry in the UK, denied healthcare and benefits due to a tightening of immigration control introduced by Home Secretary Theresa May, particularly from 2014 onwards. As subjects of a former British colony these citizens had the right to reside indefinitely in the UK, but they were never given any documentation proving their status.

After having resided legally for decades, enjoying the same rights as British citizens, they were suddenly asked to provide proof they had legally entered and permanently resided. As they were never given a particular document testifying their status, and were never asked to keep documents that might prove their entitlement, many were considered suddenly illegal and had to endure the most dramatic consequences of that. It is not difficult to imagine similar risks for EU citizens as they will move from a status under EU law, under which they only needed their national identity card or passport to have the right to reside and entitlements nearly identical to British citizens, to a new status they would achieve only after successfully applying for it. After hearing the opinion of an expert panel in the House of Commons, Labour MP Yvette Cooper concluded that the EU Settlement Scheme will result in a 'Windrush on steroids'.<sup>3</sup> Tory MP Alberto Costa similarly refers to a 'Windrush writ large'.<sup>4</sup>

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\* Stijn Smismans is Professor of EU law and Director of the Centre for European Law and Governance at Cardiff University. This proposal has been developed as part of my volunteering work for the3million, the main civil society organization representing EU citizens in the UK. It is the outcome of discussions with several people, Luke Piper and Monique Hawkins in particular. Luke Piper has also co-authored on specific provisions of the legislative proposal of Section 5 in this paper. I am equally indebted to very valuable comments on an earlier draft by Charlotte O'Brien, Bernard Ryan, and Joelle Grogan. However, while developed in the context of advocacy work for the3million, this paper is not a position paper of the3million, and I am the sole responsible for inaccuracies or positions taken in this paper.

<sup>1</sup> The Week, 'Who are the Windrush Generation and how has the scandal unfolded', <[www.theweek.co.uk/92944/who-are-the-windrush-generation-and-why-are-they-facing-deportation](http://www.theweek.co.uk/92944/who-are-the-windrush-generation-and-why-are-they-facing-deportation)>, visited 14 July 2019.

<sup>2</sup> HMT Empire Windrush was the name of the ship with which many of those citizens arrived during the 1950's.

<sup>3</sup> House of Commons, Home Affairs Committee, Oral Evidence: EU Settlement Scheme, HC 1945, 12 February 2019, at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/eu-settlement-scheme/oral/96447.html>.

<sup>4</sup> PoliticsHome, 28 March 2019, at <https://www.politicshome.com/news/uk/home-affairs/immigration/house/house-magazine/102869/alberto-costa-if-we-get-it-wrong>.

Secondly, even those who register successfully by the deadline will receive an insecure status, which is partially defined in secondary legislation and therefore at risk of being eroded at any time.

The draft Withdrawal Agreement (WA) is assumed to provide EU citizens with a more solid protection. However, the risk of the WA not getting adopted is only increasing. Moreover, while the adoption of the WA, or a citizens' rights agreement, remains quint essential to provide citizens with international protection and address issues that require international coordination, the WA itself does not resolve the issue of a potential Windrush scenario.

Therefore, one urgently needs to address how the UK Parliament can guarantee the rights of EU citizens and avoid a new Windrush, independently of whether or not there will be a WA or a citizens' rights agreement. In essence, an Act of Parliament should turn the current EU Settlement Scheme into a declaratory registration system in order to avoid a repeat of Windrush. At the same time, it should clearly define the rights of EU citizens, so they cannot be changed at the whim of Government.

This paper provides a detailed legislative proposal for such primary legislation. The paper is composed of two parts. In the first part (sections 2 to 4), I will first set out the current regulatory framework that would affect the status of EU citizens post-Brexit, analysing its shortcomings. I will then argue how these shortcomings can be addressed. To do so I will first debunk some of the misunderstandings surrounding the idea of a 'declaratory registration' as opposed to a 'constitutive system' like the current Settlement Scheme. I will subsequently propose the key features of a declaratory system that would avoid a repeat of Windrush. Finally, I will clarify what appears to be the most appropriate way to define the rights of EU citizens in an Act of Parliament.

The second part of the paper (section 5) provides a full legislative proposal to achieve these two objectives (introducing a declaratory registration system, and consolidating the rights of EU citizens in primary legislation). This is written by way of amendments to the Immigration and Social Security Coordination (EU Withdrawal) Bill (ISSCB), given that this appears at the moment the best 'legislative vehicle' to include such provisions, as the Bill is pending in Parliament and removes existing rights without providing a proper alternative.

## **2. From the current regulatory framework to a declaratory system and guarantees in primary legislation**

### ***2.1. The current and the proposed regulatory framework***

The proposed regulatory framework for the post-Brexit status of EU citizens already residing in the UK is made up of a complex set of legal instruments, partially in place and partially under proposal.

Most discussed is obviously the draft WA.<sup>5</sup> Adopting the citizens rights provisions of the WA and its enforcement mechanisms is essential to guarantee internationally the rights of EU citizens on the basis of reciprocity with the British citizens living in the EU. Therefore, it remains utterly important to aim at adopting either the WA or a separate citizens' rights agreement that would stand in the case of a no deal.<sup>6</sup> However, even if a WA or a citizens' rights agreement were adopted, it would not guarantee avoiding another Windrush. The current provisions of the WA leave Member States and the UK the option to adopt either a constitutive or declaratory registration system.<sup>7</sup> Although the WA does provide some procedural guidance in setting up a constitutive system, it does not prescribe a system that avoids the Windrush trap. A balanced declaratory system thus has to be worked out within national law. Moreover, there is now a considerable risk that neither a WA nor a citizens' rights agreement will be adopted, so it is extremely urgent to adopt proper protection in national legislation.

At the moment, the regulatory framework set out at the national level to affect the status of EU citizens is constituted of three elements.

Firstly, the EU WA<sup>8</sup> keeps in place all retained EU law as long as the UK does not replace it with new laws. In theory, this would cover EU citizens even in case of a no deal, but only until the UK adopts other provisions. Now, the Government has already introduced a Bill precisely to remove the existing rights. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill (ISSCB)<sup>9</sup> intends to remove all EU retained law in relation to free movement of persons. This not only has consequences for future immigration from the EU; it also entirely removes the legal status of the more than 3 million EU citizens and their families already living in the UK. Remarkably the Bill does not put in place an alternative legal framework for the 3 million EU citizens, except for Irish citizens. The only thing the Bill does is to give a wide delegation to the Government to deal with the status of EU citizens via secondary legislation. This means that EU citizens move from a solidly protected status, guaranteed supranationally under EU law and control of the EU Court of Justice, to a status that is not even set out solidly in national primary legislation.

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<sup>5</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Community, Official Journal 2019/C 66 1/01 (19 February 2019), p. 1-184.

<sup>6</sup> I have set out in detail the arguments for such 'ring-fencing' citizens rights in a previous paper in this series. See Smismans, Stijn, Ring-Fencing Citizens' Rights in the Brexit Negotiations: Legal Framework and Political Dynamics (January 28, 2019). DCU Brexit Institute - Working Paper N.1 - 2019. Available at SSRN: <https://ssrn.com/abstract=3324156> or <http://dx.doi.org/10.2139/ssrn.3324156>.

<sup>7</sup> Article 18(1) (constitutive), and Article 18(4) (declaratory) of the WA.

<sup>8</sup> The European Union (Withdrawal) Act 2018, at <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>.

<sup>9</sup> The Immigration and Social Security Coordination (EU Withdrawal) Bill, HC Bill309, as introduced in Parliament 20.12.18, at [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/cbill\\_2017-20190309\\_en\\_1.htm](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/cbill_2017-20190309_en_1.htm).

So far the status of EU citizens post-Brexit has been dealt with via changes to the Immigration Rules. The so-called Appendix EU of the Immigration Rules,<sup>10</sup> traditionally setting out the residence status of EU citizens in the UK, has been amended to introduce the new EU Settlement Scheme. This has three key weaknesses:

Firstly, the Immigration Rules are secondary legislation, which can easily be changed over time, with minimal or no involvement of the Parliament.

Secondly, the Rules mainly set out the criteria and procedure for the application but do not comprehensively define the rights one holds under ‘settled status’ or ‘pre-settled status’. Settled status is defined with reference to Indefinite Leave to Remain (ILR) and pre-settled status with reference to Limited Leave to Remain (LTR). However, while the basic rights of residence regarding ILR and LTR are set out in primary legislation, rights attached to it are not always fully set out in primary legislation. Moreover, ILR and LTR do not cover the full set of rights EU citizens hold today, or those promised in the WA. Hence, there remains ambiguity over the exact rights EU citizens will hold, and whether these rights will not be undermined over time.<sup>11</sup>

Thirdly, the constitutive nature of the EU Settlement Scheme will lead to people becoming illegal residents overnight if they have not successfully applied by the deadline, hence opening all the problematic scenarios seen with the Windrush scandal.

Therefore, as the ISSCB intends to wipe out the existing rights of EU citizens, a solid legal framework has to be set in place in primary legislation, which has to ensure two elements:

- a) turning the constitutive application system into a declaratory registration system
- b) define in primary legislation the rights covered by settled status and pre-settled status

This paper provides a proposal for such a legislative framework. It is based on two starting assumptions:

- a) it respects the Government’s promises on who will be entitled to pre-settled and settled status. It does not amend the eligibility criteria currently set out in the Appendix EU to the Immigration Rules.
- b) it aims at achieving the promise made during the referendum campaign, even by the Leave side, that EU citizens will not be deprived of their current rights.

The aim of this proposal is to turn these promises into a solid legal framework rather than a set of political promises and volatile provisions of secondary legislation. At the same time, it changes the constitutive application scheme into a declaratory registration procedure in order to avoid another Windrush.

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<sup>10</sup> <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu> Appendix EU of the Immigration Rules and <https://www.gov.uk/guidance/immigration-rules/appendix-eu-family-permit> Appendix EU (Family Permit) of the Immigration Rules.

<sup>11</sup> For a more detailed analysis of this argument, see Stijn Smismans (2018), ‘EU citizens’ rights post-Brexit: why direct effect beyond the EU is not enough’, *European Constitutional Law Review*, 14 (3), p. 443-474.

The question then rises what would be the best legislative vehicle to set out such a declaratory scheme and to consolidate the rights of EU citizens in primary legislation. In theory the Immigration Rules can be amended to turn the constitutive system into a declaratory one; but this wouldn't resolve the problem that the registration procedure and definitions of status are set out in secondary legislation and thus insecure.

An entire new EU Settlement Bill could be introduced. Alternatively, two legislative proposals under discussion can be used as vehicle.

If finally a WA (or a separate citizens' rights agreement) between the EU and the UK were to be adopted, the declaratory system can be set out in the implementation bill of that agreement. The WA does not provide details for a declaratory system as proposed here, but an implementation bill can surely be more detailed in its provisions as long as the WA is respected. Defining the registration system and the definition of settled and pre-settled status would also clearly anchor the entire EU Settlement Scheme within the context of the international guarantees of the WA.

However, in the case of no deal, such an implementation bill is not available. Moreover, the Government has already introduced in Parliament the ISSCB, which would remove all the rights of EU citizens without providing any alternative regime. As guarantees need to be set out in primary legislation before this Bill comes into force, the most appropriate solution would now be to introduce the declaratory system via amendments to this Bill.

The detailed provisions for such amendments are defined in Section 5 of this paper, but first I will set out the key features of the proposed declaratory system, and the proposed technique to enshrine the status of EU citizens within primary legislation.

### **3. From constitutive application to declaratory registration system**

As mentioned at the start of this paper, there is increasing awareness that the current EU Settlement Scheme will lead to a new Windrush debacle due to the constitutive nature of the scheme. The idea of a declaratory registration is gradually gaining more attention. Michael Gove, for instance, made it a pledge in his campaign for the Tory leadership. However, there remains much confusion about what declaratory registration means, not at least because the Government and the Home Office have been claiming that not its EU Settlement Scheme but a declaratory registration system would result in a new Windrush type scandal. I will clarify why that claim is erroneous and why a declaratory system is indeed the only way forward to avoid another Windrush.

### ***3.1. Two main reasons why the EU Settlement Scheme means a new Windrush***

The current EU Settlement Scheme allows EU citizens to obtain ‘settled status’ if they reside since at least five years in the UK prior to the cut-off date (which would be Brexit date in the case of no deal, or end of the transition period in the case of a deal), or ‘pre-settled status’ if residing less than five years. However, to obtain that status they need to apply successfully prior to the application due date, which would be 31 December 2020 in case of a no deal, and 30 June 2021 in case there is a deal. This system is thus a constitutive system, namely, one only acquires settled status or pre-settled status by successfully applying.<sup>12</sup> If your application was not successful, or you have not applied by the registration due date, you will not have acquired the status and you become illegal overnight. Absence of successful application immediately has the most dramatic consequences. Simply by remaining in the UK without successful application one commits a criminal offence, becoming liable to removal from the UK how ever long one has been in the country. Being entirely illegal in the country, one has no right to work, to rent, to free healthcare, to benefits etc. The consequences of such illegality will be immediately felt due to the so-called ‘hostile environment’ policy. This policy was developed by Theresa May when she was Home Secretary with the explicit objective to create a ‘hostile environment’ for illegal immigration. The ‘hostile environment’ engages many public and private actors to establish those who have not the required papers and to enforce a policy that makes their life practically impossible.

In this context, the constitutive nature of the EU Settlement Scheme will lead to ‘Windrush situations’ on a massive scale since people might fail to re-enter the country after a visit to family abroad, be refused free health care treatment, miss job offers or be sacked, lose benefits, or ultimately get removed because failure to apply by the deadline would mean they have not acquired any status. Whatever the efforts undertaken to reach the more than 3 million EU citizens in the UK to register, even a minor percentage of them failing to do so will still lead to a high amount of people facing dramatic consequences; and it will be particularly those less informed and the weaker in society who will fail to apply in time.

The EU Settlement Scheme is more problematic than Windrush not only because of the number of people involved. The people affected by Windrush were not illegal on the territory, but they failed to prove their status. In the case of the EU Settlement Scheme, somebody who was previously legal on the territory becomes by law fully illegal because failing to apply in time.

The second key shortcoming of the EU Settlement Scheme is that even those who have successfully applied for (pre-)settled status do not receive any physical document proving that status. They only receive a digital code as proof of their application. Such a lack of physical document of

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<sup>12</sup> It is, therefore, more appropriate to talk about an application system than a registration system. In the latter case one only registers a status one already holds.

proof will lead to numerous dramatic situations. Temporary system failure, full blown hacking of the system, or people forgetting their code, will cause people to get stranded abroad, or fail to board planes, or be unable to get access to services etc. Private actors inquiring about the legal status of EU citizens may not be able or not be inclined to check this status via electronic means. All other categories of immigration status do receive a physical document. It is unreasonable and unjustified to deprive holders of pre-settled and settled status of such a basic guarantee.

### ***3.2. The difference between a constitutive and a declaratory system***

To avoid another Windrush style scandal, the current EU Settlement Scheme needs to be turned into a declaratory registration scheme. It is important to clarify the difference between a constitutive application system, such as the EU Settlement Scheme, and a declaratory registration, as the concepts are often misunderstood.

In a constitutive scheme, the act of application is constitutive of acquiring the rights of residence. So, one might be residing since 20 years in the UK, and although the EU Settlement Scheme only requires five year residence to acquire settled status, if one does not register by the deadline of the scheme, the status is not acquired and that person will be illegal on the territory. Under certain conditions, a constitutive scheme might still allow people to regularise their status after the deadline. The EU Settlement Scheme, for instance, allows people to regularise their status if there is ‘good reason’ that can justify the delay. Yet, proving ‘good reason’ comes with an extra evidentiary burden, the contours of which are still not exactly clear under the EU Settlement Scheme, but experience from other immigration areas suggests the benchmark for ‘good reason’ is high.<sup>13</sup> This extra burden of proof will hit precisely those who most likely are in a more vulnerable position, which made them miss application by the deadline in the first place.

Moreover, late application in a constitutive system only makes one legally resident from the date of successful application. It does not change the illegal status in the period between the application deadline and the date of late application. This can have far-reaching consequences. A person who was hospitalised in that period, for instance, may receive a hefty bill from the NHS since she was not entitled to free healthcare. Equally, a person might have been sacked during that period as the hostile environment penalises employers employing illegal immigrants. Successful late application does not mean that that person was unlawfully sacked.

In a declaratory system, instead, people acquire settled status or pre-settled status automatically by complying with the eligibility requirements; i.e. minimum five year residence for settled

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<sup>13</sup> Simply having forgotten to register definitely will not suffice. Acceptable reasons are, for instance, being in hospital incapable of filling in form, and medical evidence will need to be provided. See Chris Desira, ‘EU Settled Status: the story so far’, 23 July 2019; at <https://www.freemovement.org.uk/eu-settled-status-story-so-far/>.

status, or less than five year for pre-settled status. Registration is simply a means of providing you with a document that proves this status. Absence of registration does not mean you are in the country illegally. The advantage of a declaratory system is that people who are entitled to the status do not become illegal overnight simply by not registering. Registration is just one way to prove their entitlement, and alternatives to prove that entitlement may be possible, or procedures are provided to still register beyond the deadline.

### ***3.3. Deconstructing the misunderstandings about a declaratory system***

The disadvantage of a full (voluntary) declaratory system is that people might not have strong incentives to register and administrations would potentially struggle with different assessment systems to establish whether somebody has (pre-)settled status or not. The EU's system of registration for permanent residence, for instance, is declaratory. Few felt the need to register as holding a European ID and proof of habitual residence other than via a Permanent Residence card was generally sufficient to exercise rights.

However, once the UK has left the EU, it is important for EU citizens already residing in the UK to be able to prove their status, as EU citizens arriving after Brexit will not have the same rights. In order to allow those EU citizens already residing in the UK to prove their status easily in daily interactions with both private actors, such as banks or employers, and public services, they should be provided with a document certifying that status. Registration is to the benefit of those citizens, and the sooner they register the less likely they will face practical problems in daily life when asked to prove their special status. Moreover, it may be easier now to gather the proof of residence prior to Brexit in order to register rather than having to collect this evidence years down the line.

However, it is a misconception that a constitutive system is the only or most appropriate way to ensure effective registration. It is important to realise that a constitutive system and a full-blown voluntary declaratory system are the opposite extremes on a continuum. It is perfectly possible to create a declaratory system in which people still acquire (pre-)settled status automatically by complying with the eligibility requirements, even in absence of registration, but where, by a certain date, proof of registration becomes a requirement for the exercise of certain rights. The key difference with a constitutive system is that failure of registration does not imply that one becomes entirely illegal. Obviously, if proof of registration were to become extensively used as a requirement to exercise certain rights, the practical effect of such a system would be very close to a constitutive system.

Therefore, the importance is to design a system which provides a fair balance between, on the one hand, providing incentives so that people register, and on the other hand, providing protection so that people who comply with the eligibility requirements but fail to register do not become illegal overnight or are not suddenly deprived of all their existing entitlements. I will set out a proposal for such a balanced declaratory system in the next section.

### ***3.4. Proposal for a declaratory system providing a fair balance between ensuring registration and protection***

#### *3.4.1. Declaratory principle*

A declaratory EU settlement scheme should take the declaratory principle as starting point. EU citizens and their families in the UK acquire settled or pre-settled status *automatically* by complying with the eligibility requirements, namely being an EU citizen residing in the UK (more than five years for settled status, less than five for pre-settled status) and not falling under any of the criminality grounds that would justify exclusion from entitlement. Registration provides them with a means to prove that status. This implies there is no particular deadline that makes them illegal, and registration is always possible at a later date.

#### *3.4.2. A “soft deadline” and incentives to register*

A declaratory system does not imply that there are no ‘deadlines’ or ‘cut-offs’ that would trigger negative consequences in the absence of registration, and that citizens have no incentive to register.

First of all, the date on which the UK leaves the EU, or the end of the transition period in the case of an agreement, will be a natural ‘trigger point’ in any case. Even if one does not introduce by law requirements of proof of registration in order to exercise entitlements, private or public actors might be inclined to ask for it, or erroneously require it, since they will be faced with both EU citizens who were already in the UK and new arrivals who have different entitlements. So even under a fully declaratory system, EU citizens would soon feel under pressure to register.

Moreover, a declaratory system does not impede that after a certain date (not earlier than the end of the transition period in the case of a deal, and in any case not prior to the Government’s promised ‘grace period’ for registration), proof of registration may be required by certain types of private or public actors to access services. The type of actors that could ask for proof of registration and the conditions under which they can do so can either be set out in primary legislation, or could be delegated to the Secretary of State to be adopted via statutory instruments. The latter option is proposed here but such statutory instruments should be adopted via the so-called affirmative procedure so that Parliament can still retain some overview on an issue that will affect so profoundly the

rights of people. Moreover, in order to protect citizens properly, two procedural safeguards are introduced, which are explained in the following section.

#### *3.4.3. Procedural protection*

While the Secretary of State could be allowed to set out conditions in which certain private actors or public services are allowed to require proof of registration, primary legislation should provide the following safeguards:

- a) Public and private actors who are allowed to ask proof of registration should retain the discretion to waive the requirement and establish proof of entitlement otherwise. This means there is no absolute obligation on public or private actors to require proof of registration; it is at their discretion to consider whether compliance with the eligibility requirements can be established otherwise.
- b) When public or private persons who are allowed to do so by law do ask for proof of registration, and somebody has not registered by the registration due date, that person should be given the opportunity still to register. If that person has already an existing entitlement, such as already receiving benefits, or already holding a contract with a bank, these entitlements should not be interrupted for a reasonable period during which that person can register. For instance, one can provide in a three months period to start registration followed by an additional period during which the certificate of initiating the registration counts as basis for continuing entitlement.

#### *3.4.4. A physical document as proof of registration*

The Government should provide a physical document of proof for who has applied successfully. Holders of all other types of immigration status do receive a physical document as proof. It is difficult to understand why 3 million EU citizens should be deprived of such an essential tool to prove their status in daily life.

#### *3.4.5. Moving from pre-settled to settled status*

In the EU Settlement Scheme, holders of pre-settled status will need to apply again once they are entitled to settled status. There is a big risk of a bottleneck with people failing settled status application now, being granted pre-settled status, and facing problems further down the line. In theory their continued residence for five years will normally lead to settled status. However, some people are given pre-settled status not because they have been less than five years in the country but they failed to prove it. These people are likely to face similar problems when applying for settled status later on. There is a risk that all the more difficult cases will resurface within five years. Under the current EU Settlement Scheme, people then face a second ‘Windrush deadline’ since pre-settled status is granted for five years, which means those who have failed to register for settled status by the end of that period will become completely illegal residents overnight. At the same time, while efforts are

now made to inform people to register, people with pre-settled status will be entitled to move to settled status at different moments in the future, when there will be no focused effort to inform people, and these are likely to be proportionally less informed people.

A declaratory registration can overcome much of these pitfalls. Firstly, the declaratory principle means that people acquire settled status automatically once they comply with the criteria. They thus do not become illegal if they have not registered for settled status by the five year expiry of their pre-settled status registration. They still need to be provided with a document certifying their settled status. Yet, absence of the document does not mean they are illegal, although its absence might create some problems when private actors or public services ask for it as proof.

Secondly, the registration system could be organised in such a way that the Government could initiate itself the registration for settled status for those moving from pre-settled status to settled status.<sup>14</sup> Such initiative is difficult for registration pre-Brexit since the Government is not entirely aware of the full amount of EU citizens residing in the UK. However, once the system is running, the Government has data of those who have registered for pre-settled status, and it knows when their five year expiry date is coming to an end, at which stage they will be entitled to settled status. Hence it can provide them with a settled status document automatically or where needed approach them for providing further evidence. Obviously, given that the system is declaratory, anybody who for some reason had still not registered for pre-settled status but complied with the criteria, can still register at any time. Equally, the current Scheme establishes that registered pre-settled status expires after five year. Those five years count from the moment of application. This means that people may comply with settled status criteria considerably prior to the end of the expiry date on their pre-settled status document. For instance, somebody was resident in the UK three years prior to Brexit, but registered for pre-settled status two months prior to Brexit. That person will only be contacted by the Government for automatic registration of settled status five years after registering for pre-settled status, but under the declaratory scheme will already have acquired settled status two years after Brexit, at which stage she can register at her own initiative.

#### *3.4.6. Protection for dual nationals*

At the moment, the EU Settlement Scheme does not allow dual nationals (British and EU27 country) to register for settled status.<sup>15</sup> This can have important negative consequences for these dual nationals. The WA provides certain rights that are specific for people who have built up a life in

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<sup>14</sup> I am grateful to Charlotte O'Brien for suggesting that the Government could play a pro-active role at this stage.

<sup>15</sup> The problem appears one of practical organisation rather than of legal entitlement. Dual nationals cannot access the application system. However, this appears contradictory with the current legal provisions. The Settlement Scheme is applicable EEA citizens as defined in the Appendix EU. This defines an EEU citizen as a national of an EEA country "who (unless they are a relevant naturalised British citizen) is not also a British citizen".

more than one country. These rights are not covered by British citizenship (such as social security coordination rights, or some aspects of family reunion). It is essential that dual nationals are not deprived of these rights. Although the WA has a different personal scope of application regarding residence rights than regarding social security coordination rights, there is a very high risk that public officials when dealing with an EU national claiming rights under the WA will ask for proof of settled status.

In the future, public officials will be regularly confronted with two categories of EU citizens; those arriving post Brexit, and those who were in the UK prior to Brexit, who will be holders of pre-settled or settled status. They may not be aware of the much smaller group of dual nationals, who also have entitlements under the WA.<sup>16</sup> Without a proof of settled status, a dual national may face serious problems, for instance, in explaining to a public administration that his/her pension entitlements should be calculated on the basis of the rights guaranteed in the WA.

Dual nationals are likely in that case to be able to defend their rights by going to court, but having to rely on repeat litigation is hardly an enviable situation. Dual nationals should therefore be allowed to register for settled status. Not allowing this is punishing those who have decided to integrate fully by taking up citizenship. Taking up citizenship does not mean these people have not built up rights elsewhere or do no longer have family elsewhere. They should not be deprived of the rights protecting people who have moved. Therefore, the proposal includes a provision, which allows dual nationals to apply for Settled Status.

This provision remains relevant even in case there is no WA. In the absence of a WA some international treaty on social security coordination will have to be signed anyway. Again, dual nationals without a registered settled status might risk being told by public officials they are not covered by such a treaty.

#### *3.4.7. How it would work in practice: some examples*

The proposed declaratory registration system does not alter the conditions of who is entitled to settled status or pre-settled status under the current EU Settlement Scheme. Neither does it change the current practice in relation to the mechanism and documents to be provided when registering. However, it takes away the cliff-edge scenario of the current scheme that turns people overnight in full illegality if they have not applied by the deadline. At the same time it provides some incentives

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<sup>16</sup> Bad implementation of EU citizens' rights by badly informed administrators has already been a considerable problem while the UK is still part of the EU and the full control of EU enforcement is supposed to be in place. See Charlotte O'Brien (2017), *Unity in Diversity. EU citizenship, social justice and the cautionary tale of the UK*, Oxford: Hart, p. 201-242. One does not need a crystal ball to picture the difficulties a dual national could face trying to claim his entitlements while not holding a settled status document while the administration's default is to ask for the latter.

for people to register sooner rather than later, while having in place safeguards to avoid people falling in full illegality or losing existing entitlements merely because not registering in time.

Let's assume the registration due date is 30 June 2021, which is the promised end of grace period in case of a deal.

Person A has been living in the UK since several decades. He is now retired and struggles with health issues. He did not register by 30<sup>th</sup> June 2021 as he was simply not aware of the requirement. Under the current constitutive scheme, on the 1<sup>st</sup> July 2021, he will be completely illegal in the country, and loses immediately his rights to, for instance, healthcare, or disability allowance.

Under the declaratory scheme, instead, person A is a holder of settled status by the mere fact that he complies with the criteria of being an EU citizen having more than five year of residence prior to Brexit. His lack of registration does not make him illegal. It could be open to the Secretary of State to introduce rules that administrations providing benefits can ask for proof of settled status. However, the law would provide that these administrations can also waive that requirement in favour of conducting their own assessment if someone has the status. The administration can easily establish that Person A has been in the country since a long time and decides to go on providing the disability allowance.

Person B started working in the UK two years prior to Brexit and failed to register by 30<sup>th</sup> June 2021. In the declaratory system, on 1<sup>st</sup> July 2021 person B does not become illegal. However, the Secretary of State may have introduced rules that allow employers and banks to ask for proof of registration.

Person B applies for a new job but the employer asks him to provide proof of registration. B considers registering but two days later and before he starts registration he hears the employer has already employed somebody else. Non-registration thus has a negative consequence for B, as the employer was entitled to ask proof of registration and was too impatient to wait for him to register.

B soon finds another job offer, and the employer again asks whether he has registered pre-settled status. The employer though is satisfied B complies with the requirements of pre-settled status as he can show he was already resident prior to Brexit, although he has not registered. The employer is allowed by law to waive the registration requirement. B is happy he is employed, but follows the wise advice of his new employer who suggested that it is probably not a bad idea to register to avoid problems in the future.

Person C, who is the wife of B and started working in the UK at the same time as him, equally did not register by the registration due date. Her bank now requires her to provide proof of registration. The bank is allowed to do so by the measures adopted by the Secretary of State, but given that she has already an existing contract with the bank, the proposed declaratory system

would ensure that her bank account cannot be closed immediately on this basis. She has three months to start the registration process, and once she has received proof she has started the registration the bank needs to respect her current entitlements until the end of the registration process.

Hence, unlike what the Government claims, a declaratory system does not lead to a new Windrush. It does provide incentives for people to register, which in the end is better for them and easier for administrations. A declaratory system, therefore, also requires that the Government informs EU citizens properly about what consequences they may face if not registering by the registration due date. People will soon be documented, in a way that avoids Windrush situations. At the same time, it provides protection for those failing to register quickly avoiding that they fall into a status of full illegality. The current EU Settlement Scheme instead means those who fail to register face immediately all the dramatic consequences of the hostile environment. At the same time it is remarkable that the Government attacks the idea of a declaratory scheme for leaving people undocumented, while its own constitutive system does not even provide those who register with a physical document.

#### **4. Defining eligibility and content of pre-settled and settled status**

In addition to setting out a declaratory registration system, primary legislation should define both who is eligible for settled and pre-settled status, and which rights one holds under such a status. Since this affects the most fundamental rights of citizens to reside, work, have access to health care etc, these definitions cannot simply be set out in secondary legislation.

In terms of defining who is eligible for settled status or pre-settled status, the proposed amendments follow the Government's declared and published policy, but set it out in primary legislation instead of secondary legislation. This is done by copying into a new Schedule to the ISSCB the eligibility requirements currently set out in the Appendix EU of the Immigration Regulations. Given the detail of these requirements it is easier to define them in a Schedule than within the core text of the clause.

In terms of the definition of rights held by those with pre-settled or settled status, the amendments consolidate in primary legislation the promise that EU citizens will not lose rights compared to current practice under EU law.

One can imagine different legal drafting mechanisms to enshrine into the ISSCB the rights EU citizens currently hold. One could define the rights of those holding settled status in a new clause that refers extensively to all relevant EU legislation and keep these rights in place for the life time of those having such status. Similarly, one could provide an exception to clause 1 of the IS-

CCB (which removes all retained EU law) by stating retained EU law as set out in Schedule 1 of the ISSCB remains applicable for defining the rights of settled status.

Yet, such explicit exception to the main principle of the Bill or the extensive referencing to rules of EU law in the main text of the Bill as remaining in force without an explicit time limit, might face political resistance, even if more for symbolic than legal reasons.

Alternatively, one can define the rights that EU citizens currently hold directly in the ISSCB as a reformulation in UK law. This is the approach taken in the amendments proposed below. However, if one defines the right to reside, to work, to healthcare etc directly as a matter of UK law, these new provisions will come with their own interpretation. In order to ensure that these new provisions or their interpretation do not provide less protection than current rights, the solution proposed below includes a ‘fall-back provision’ stating that entitlements of Settled Status will not be less than those of Indefinite Leave to Remain and those provided by the WA (if the latter is adopted).

Defining pre-settled status in the ISSCB faces identical challenges to those for settled status. In addition, it is extremely difficult to define explicitly in the Bill the entitlements equal to what EU citizens hold in a similar condition today, namely those residing in the UK since less than five years. The latter is largely defined in case law of the Court of Justice, which is extremely hard to define in legislative provisions. Hence, the approach taken below is to give holders of pre-settled status the same rights as those with settled status, except regarding access to benefits. For the latter, current rules of EU law will be respected, which is the current promise by the Government. This is done by keeping relevant retained EU law set out in Schedule 1 of the Bill applicable for benefit access under pre-settled status. Given that pre-settled status is a category that will fade out over time, the exception to clause 1 of the Bill is limited.

A more straightforward solution would be to give holders of pre-settled status the same rights as those having settled status, except for the indefinite right to reside. This would simplify considerably the complexity of the EU Settlement Scheme. Moreover, it would protect better the most vulnerable, such as those in unstable work, disabled, carers and children, particularly since current administrative practice increasingly rejects by default benefit claims by EU citizens, even when they are entitled, requiring them to appeal decisions and creating hardship until a final decision is taken.<sup>17</sup> Providing holders of pre-settled status with the same rights as those holding settled status, except for the indefinite right to reside, would overcome this hardship, as well as considera-

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<sup>17</sup> See Charlotte O’Brien (2017), *Unity in Diversity. EU citizenship, social justice and the cautionary tale of the UK*, Oxford: Hart; and Patrick Butler and Jennifer Rankin, ‘Surge in EU citizens unfairly refused access to universal credit’, *The Guardian*, 5 August 2019, at <https://www.theguardian.com/society/2019/aug/05/surge-in-eu-citizens-unfairly-refused-access-to-universal-credit>.

bly simplify administrative procedures. Moreover, this ‘more generous’ policy only applies to a closed group, which will soon disappear over time as pre-settled status will gradually disappear as a category.

However, the proposal developed in this paper sticks to current criteria of eligibility for settled and pre-settled status and for the rights attached to these categories, so policy-makers cannot use the excuse of changed entitlements as an argument to refuse a declaratory registration system and the consolidation of settled and pre-settled status in primary legislation.

The result of the proposed amendments is a system that respects the Government’s intention, namely EU citizens in the UK acquire settled or pre-settled status on the basis of residence in the UK, and not on criteria such as being in work or having sufficient resources. However, those with pre-settled status may face the same limits to access to benefits as currently allowed by EU law. This may imply that people who do have the temporary right to reside under pre-settled status leave the UK if they are out of work and thus lose their right to build up settled status.

## **5. Legislative proposal for a declaratory registration system**

To create a declaratory registration scheme and to guarantee the rights of EU citizens in primary legislation, the following amendments to the Immigration and Social Security Coordination (EU Withdrawal) Bill are proposed:

- 1) a new clause defining right of settled status
- 2) a new clause defining right of pre-settled status
- 3) a new clause setting out the registration procedure
- 4) a new Schedule X to be included in the Bill.

The four amendments would need to be adopted together.

### ***5.1. New clause ‘Right of settled status’***

Right of settled status

(1) A person has settled status in the United Kingdom if that person meets the criteria set out in part 1 or 2 of [new schedule: x], on the cut-off date.

*This subsection clearly states that one has settled status when meeting the requirements. Registration is thus not a condition to acquiring settled status. One acquires settled status automatically by complying with the eligibility requirements. The requirements are those set out by the Government in the Appendix EU to the Immigration Regulations, which relate to identity as a EU national (or family member thereof), five year residence, and not falling under one of the exclusion grounds based on criminal behaviour. However, in order to consolidate these requirements in primary legislation, this proposal ‘copies’ the relevant provisions of the Appendix EU into this Bill, by way of a Schedule. The new Schedule X is defined below.*

*Since registration is not required to obtain settled status, the system becomes declaratory instead of constitutive in nature. This avoids the situation in which people who actually comply with the criteria but who fail to register in time would otherwise become illegal, and irreversibly lose their accrued entitlement to settled status, regardless of length of residence. This proposal would avoid the dramatic consequences that a constitutive system would entail. However, this does not preclude the setting of a requirement that holders of settled status provide proof of registration in order to get access to certain services (see below).*

(2) A person who has settled status is entitled to remain in the United Kingdom indefinitely, subject to the limitations set out in subsection (6).

*Subsections (2) to (5) define the rights one has when holding settled status. The aim here is to protect the rights that EU citizens and their families currently hold by defining these rights in primary legislation. The rights protected are in substance the same as those, which the Government has promised to protect, but these provisions create a solid legal basis to guarantee these rights, rather than the less secure secondary legislation mechanism that the Government is relying on. The current ISSCB does not protect or define settled status. The current EU Settlement Scheme is only set out in secondary legislation, and refers to the status of Indefinite Leave to Remain (ILR). Yet, while the core right of residence for those holding ILR is set out in primary legislation, attached rights are set out in a variety of different acts of primary and secondary legislation; and thus more open to change. The 'hook' to attach settled status to ILR is in any case only set out in secondary legislation. Moreover, the EU Settlement Scheme is unclear on how the rights provided by the Withdrawal Agreement would be guaranteed.*

*Therefore, this clause takes the current rights of EU citizens and their families under EU law as a starting point and defines them in primary legislation under UK law.*

*Subsection (2) confirms that holders of settled status have the indefinite right to remain, except for limitations set out in subsection (6).*

(3) A person who has settled status has the same rights to –

- a) work, establish and hold a company, and provide services;
- b) use the National Health Service;
- c) enrol in educational and vocational courses; and
- d) access all benefits and pensions

as a British citizen.

*Subsection (3) turns the basic principles of free movement rights under EU law into the same entitlements under UK law for those already here.*

(4) Any professional or educational qualification, which is –

- a) obtained in an EEA country prior to the cut-off date by a person who has settled status; and
- b) which is recognised by an EEA country as a professional or educational qualification

must be recognised as a professional or educational qualification in the United Kingdom.

*Subsection (4) turns current rights held under EU law into UK primary legislation in relation to professional and educational qualifications obtained prior to the cut-off date in the UK (which is as promised by the Government in the Withdrawal Agreement and in its no deal policy).*

(5) A person with settled status also holds any other right held by a person with indefinite leave to remain in the United Kingdom under the Immigration Act 1971, even if not listed in (3) or (4). [and holds the rights provided by the Withdrawal Agreement for those holding permanent residence as defined in Article 15 of the Agreement].

*Subsection (5) is a 'fall-back clause' to ensure all current rights under EU law will remain guaranteed for those holding settled status. The provisions of subsection (3) and (4) are new provisions under UK law and thus do not automatically come with all guarantees offered by EU law and EU case law. In the case that some current rights are not covered by subsection (3) and (4), subsection (5) provides a fall-back option, by stating that holders of settled status hold also the rights of those with ILR, and by referring to the rights under the Withdrawal Agreement. The latter will only be included in the case that there is a Withdrawal Agreement.*

- (6) A person who has settled status in the United Kingdom loses this status if they are –
- a) absent from the United Kingdom for a period exceeding five continuous years;
  - b) the subject of an order made under section 5(1) of the Immigration Act 1971 by regulation 32(3) of the Immigration (European Economic Area) Regulations 2016; or
  - c) the subject of an order made under section 5(1) of the Immigration Act 1971 by regulation 3(5) or section 3(6) of that Act in respect of criminal conduct committed after the cut-off date; or
  - d) the subject of an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of conduct committed before the cut-off date, where the Secretary of State has decided that deportation is justified on grounds set out in Article 28 of Directive 2004/38/EC.

*Subsection (6) defines the grounds on which settled status is lost. These are literally taken from the Appendix EU of the Immigration Rules and correspond with promises made in the draft Withdrawal Agreement.*

(7) In this section, ‘ cut-off date’ means –

- a) the date on which the United Kingdom ceases to be a member of the European Union; or
- b) the end of the transition period agreed between the United Kingdom and the European Union

whichever is later.

*Subsection (7) defines the ‘cut-off date’ taking into account the different Brexit scenarios still possible.*

## **5.2. New clause ‘Right of pre-settled status’**

Right of pre-settled status

(1) A person has pre-settled status in the United Kingdom if that person meets the eligibility requirements set out in part 3 of [new schedule: x];

*As with settled status, this subsection ensures people acquire pre-settled status automatically by complying with the eligibility requirements, rather than making acquisition of status dependent on registration. The eligibility requirements are those set out by the Government in the Appendix EU to the Immigration Regulations, but in this proposal are integrated in primary legislation via a Schedule (see below). This declaratory system does not preclude the requirement that holders of pre-settled status provide proof of registration to access certain services.*

(2) A person who has pre-settled status is entitled to reside in the United Kingdom as long as that person continues to comply with the eligibility requirements set out in part 3 of [new schedule: x], subject to the limitations set out in subsection (9).

*Subsection (2) to (8) define the rights of those holding pre-settled status. Subsection (2) confirms the right to reside as long as one complies with the eligibility criteria and as long as one is not excluded on the basis of the grounds set out in section (9).*

(3) A person who has pre-settled status acquires settled status when that person meets the criteria as set out under section [Right of settled status] even if the continuous qualifying period defined in [new schedule: x] is completed after the cut-off date.

*One of the rights for those with pre-settled status is to have the opportunity to build up settled status after the cut-off date. Given that the system is declaratory one moves automatically to settled status as soon as one complies with the criteria of settled status. Conform with the promises of the Government in the Withdrawal Agreement and its no-deal policy, EU citizens and their families who were resident prior to the cut-off date can build up settled status even if part of the required five year residence is after the cut-off date. Subsection (3) is phrased in such a way that it also covers those who arrive in the UK on the basis of family reunion post cut-off date respecting the current eligibility requirements in the Appendix EU. As will be further explained below, given that the system is declaratory, somebody who has not registered by the cut-off date (Brexit date or end of transition) or by the registration due date (end of grace period, see below) can still register after that date, as long as they were resident prior to the cut-off date. Equally, if they fail to register for settled status before the end of the expiry of their pre-settled status, that shall not mean they lose their entitlement to settled status. Please note the distinction between moving from pre-settled status to settled status in terms of acquiring the status, which is automatic as soon as eligibility criteria are complied with, and the process of receiving a new registration document certifying one has settled status instead of pre-settled status, which is set out in subsection (12) to (14) of new clause [Registration of pre-settled and settled status].*

(4) A person who has pre-settled status has the rights described in subsections (3), (4), and (5) of [Right of Settled Status], except for the right to reside indefinitely in the United Kingdom and the limitations set out in subsections (5) to (8) of [Right of Pre-Settled Status].

*This proposal respects current EU law provisions and Government policy regarding EU citizens residing in the UK since less than five years. This clause confirms equal treatment with British citizens on the basic rights to work, pensions and healthcare, as well as recognition of EU qualifications obtained prior to cut-off date, in the same way as for those with settled status. Those with pre-settled status have obviously no*

*indefinite right to reside. Moreover, in line with current EU law, they can face certain limitations in access to benefits, as is further set out in the following two subsections.*

(5) For the purpose of social security entitlement, pre-settled status, or limited leave to remain by virtue of this Act, shall not automatically constitute a right to reside for the purposes of habitual residence.

(6) For the purpose of social security entitlement, persons with pre-settled status, or limited leave to remain by virtue of this Act, shall be entitled to demonstrate an alternative right to reside for the purposes of habitual residence, as defined in retained EU law, including EU derived domestic legislation, retained direct EU legislation and EU derived rights, as outlined in Schedule 1.

*Subsection (5) makes clear that holding pre-settled status does not automatically imply that one has social security entitlements. The standard test for social security entitlements under UK law is the 'habitual residence' test. Subsection (5) establishes that holding pre-settled status does not automatically imply one complies with the habitual residence test.*

*However, subsection (6) sets out how those holding pre-settled status can comply with the habitual residence test in another way, namely by complying with the conditions of relevant retained EU law regarding social security entitlements for those residing less than five years. This retained EU law is already defined in Schedule 1 of the ISSCCB.*

(7) For the purpose of social security entitlement, retained EU law, as outlined in Schedule 1, remains applicable to persons with pre-settled status until such time as they acquire settled status. Rights under this subsection shall be interpreted in accordance with Section 6(3)(a) of the European Union (Withdrawal Act) 2018.

*For the purpose of social security of those with pre-settled status, this proposal provides an important exception to the Bill's starting clause of fully revoking all relevant retained EU law. Yet, it is worth pointing out that the continued application of retained EU law is only to a closed category of persons and that this will fade out over time. Five years after the cut-off date, the category of pre-settled status becomes obsolete because those who were present prior to cut off date and are still residing by then would move to settled status (unless intervening factors). An exception to this are those who might acquire pre-settled status after the cut-off date via family reunion. They are equally protected by this provision.*

*Given that much of the relevant EU principles are set out in case law in this field, this subsection makes an explicit reference to Section 6(3)(a) of the European Union (Withdrawal Act) 2018, which ensures that retained EU law is interpreted according to the case law of the Court of Justice on the cut-off date.*

(8) The conditions for a right to reside laid down in retained EU law as outlined in Schedule 1, shall apply only to the social security rights of persons with pre-settled status, and shall not alter the eligibility criteria for pre-settled or settled status defined under subsection 1 of section [right of settled status] and for pre-settled status defined under subsection 1 of section [right of pre-settled status].

*This provision states explicitly that the retained EU law is only in relation to defining social security rights, and will not alter the eligibility criteria set out in the ISSCB for either pre-settled or settled status. Put differently, acquiring pre-settled and settled status is based on residence, and not on criteria such as being in work or having sufficient resources. However, such criteria will affect whether those with pre-settled status have access to benefits, in accordance with EU law.*

*Example:*

*Somebody who arrives five months before the cut-off date but is not in work is eligible for pre-settled status on the basis of residence. If that person resides for five years, he/she will acquire settled status if there are no intervening factors, such as absence or criminality (as set out in Appendix EU, copied in the new Schedule).*

*However, in respect of retained EU law that person who has never worked will, for instance, not be entitled for unemployment benefit. Without sufficient access to benefits that person is unlikely to stay in the country, even if he or she could build up settled status merely by residence.*

(9) A person who has pre-settled status in the United Kingdom loses this status if they are –

- a) absent from the UK for a continuous period of more than 2 years ;
- b) the subject of an order made under section 5(1) of the Immigration Act 1971 by regulation 32(3) of the Immigration (European Economic Area) Regulations 2016; or
- c) the subject of an order made under section 5(1) of the Immigration Act 1971 by regulation 3(5) or section 3(6) of that Act in respect of criminal conduct committed after the cut-off date; or
- d) the subject of an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of conduct committed before the cut-off date, where the Secretary of State has decided that deportation is justified on grounds set out in Article 28 of Directive 2004/38/EC.

*Subsection (9) sets out the conditions under which pre-settled status is lost.*

*Point (a) results from current Government policy which states that pre-settled status is lost after 2 years of continuous absence; which is a principle the Government has copied from indefinite leave to remain.*

*Point (b), (c) and (d) are copied from Appendix EU.*

(10) In this section, ‘ cut-off date ’ means –

- a) the date on which the United Kingdom ceases to be a member of the European Union; or
- b) the end of the transition period agreed between the United Kingdom and the European Union

whichever is later.

### **5.3. New clause ‘registration of settled or pre-settled status’**

Registration of settled status and pre-settled status

(1) The Secretary of State must ensure a smooth, transparent and simple registration system, which allows those holding pre-settled or settled status to receive proof of that status.

*This gives the Secretary of State the task to set up a registration system that is ‘smooth, transparent and simple’. This wording is inspired by a similar provision in the Withdrawal Agreement.*

(2) The Secretary of State shall ensure a registration system that provides those seeking registration with help to prove their eligibility and to avoid any errors and omissions during the registration process. They shall be given the opportunity to furnish supplementary evidence, and to correct any deficiencies, errors or omissions, including regarding evidence that constitutes ground for exclusion.

*This confirms the collaborative effort of the public administration to gather the required evidence. Errors or omissions, including regarding exclusion grounds, will be addressed by seeking to clarify issues during the registration process rather than constituting an immediate ground for rejection.*

(3) The system of registration under subsection 1 must only require proof of –

- a) identity; and
- b) compliance with the eligibility criteria set out in [new schedule: x] to register a person's settled or pre-settled status

(4) Employment status, income level, or possession of sickness insurance cannot be required as criteria for eligibility, neither directly nor via residence requirements.

*The EU Settlement Scheme has created a registration based on proof of identify, residence and a criminality check. These criteria are confirmed here in primary legislation, and detailed in Schedule X, so they cannot be amended by simple governmental intervention. Subsection (4) stresses that previously applicable criteria under EU law, such as employment status and possession of comprehensive sickness insurance are no longer applicable. It is worth stating this explicitly as there is a risk that test on income might indirectly creep into the test on residence.*

(5) Supporting documents other than identity documents, such as civil status documents, may be submitted in copy. Identity documents may be submitted as certified copies. Originals of supporting documents may be required only in specific cases where there is reasonable doubt as to the authenticity of the supporting documents submitted.

*This ensures that the registration does not require a disproportionate burden of proof. It copies the Withdrawal Agreement provision that most documents can be submitted in copy. It goes beyond the Withdrawal Agreement in also allowing certified copies of identity documents, given the difficulties that arise when people have to send their original passport and might need travelling, particularly as most have family relations abroad.*

(6) No charge or fee may be levied for any registration of settled or pre-settled status.

*This confirms the Government's promise not to charge a fee for registration.*

(7) Any person who registers their settled or pre-settled status under this section must be provided with a physical document issued by the Secretary of State confirming and evidencing that person's status within 28 days of the Secretary of State having registered that status.

*This is a fundamental change compared to the current EU Settlement Scheme. It ensures EU citizens will be in a better position to prove their status with a variety of actors.*

(8) The document certifying pre-settled status shall indicate an expiry date at five years and six months from the registration of that status.

*Pre-settled status is temporary, but should allow the opportunity to build up entitlement to settled status; since this requires five years residence, and one needs time for registration, it makes sense to set five years and six months as validity on the document. Current practice of the EU Settlement Scheme is to give five year pre-settled status from the date of registration (although no physical document is provided). It is important to note here that under a declaratory system many will move to settled status prior to the expiry date on the pre-settled status document, since they move automatically to settled status once they comply with the criteria. However, that does not mean they are automatically registered for settled status. See though subsections (12) to (14).*

(9) The document certifying settled status shall indicate an expiry date not earlier than 10 years from registration of that status.

(10) Persons holding settled status shall not be required to provide updates on identity documents and contacts details unless at the moment of renewal of the document certifying their status. Such renewal will be provided, free of cost, on the basis of proof of identity, current residence address in the United Kingdom and declaration of not having been absent for more than five years by the person holding settled status.

*Settled status is indefinite in time, but the Government could decide to require renewal of the document, in a similar way as is the case for Indefinite Leave to Remain. However, one has to avoid that renewal of the document turns into a re-application process. Subsection (10) sets out which proof can be required when renewing the document. It equally states that no regular updates of data can be required. The current EU Settlement Scheme requires holders of pre-settled and settled status to give the Home Office regular updates of contact details and renewed passports (of which it requires to see the original). This turns settled status in something not very 'settled' at all.*

(11) A person who has settled or pre-settled status under sections [*Right of settled status*] and [*Right of pre-settled status*] who has not registered their settled or pre-settled status by the registration due date, or by the expiry date indicated on their pre-settled status registration document, can register at any time after that date under the same conditions as those registering prior to that date.

*This confirms the declaratory nature of registration. Although there is a registration due date, after which absence of proof of registration may have consequences for access to certain services, one has not lost the status itself if not registered by the due date. Equally, one holding pre-settled status does not lose the right to register once the expiry date on the pre-settled status card is passed.*

(12) The Secretary of State shall ensure that the registration of settled status of a person who moves from pre-settled status to settled status under Subsection (3) of [Right of Pre-Settled Status] shall be automatically commenced six months before the expiry date indicated on the document certifying proof of registration of pre-settled status.

(13) Where an automatic registration of settled status is commenced under (12) above, the person moving to settled status will be notified of any data gaps in the records available to the Home Office and invited to provide evidence of entitlement to settled status.

(14) A person who moves from pre-settled status to settled status under Subsection (3) of [Right of Pre-Settled Status] prior to the automatic registration provided under Subsection (12) above, can register their settled status as soon as they comply with the eligibility criteria of settled status, under the same conditions as those registering their settled status prior to the cut-off date.

*Under the declaratory principle, one moves from pre-settled status to settled status automatically as soon as one complies with the eligibility criteria. However, that does not mean one has automatically a document proving registration of settled status. Unlike for those who manage to register for settled status prior to the cut-off date, the Government will have data of all those who registered for pre-settled status, and can thus take the initiative to start their registration for settled status once their five years of residence has been achieved.*

*Yet, the current EU Settlement Scheme is only recording the date of registration for pre-settled status and counts five years from there. Some people will thus have acquired settled status prior to these extra five years as they were most likely already some time in the country when they registered for pre-settled status. Subsection (14) allows them to register at their own initiative as soon as they comply with the criteria of settled status. Subsection (12) and (13) are a protective system for those who have not done so, or believe they are only entitled by the expiry date of their pre-settled status card.*

(15) A person who holds both British nationality and the nationality of one or more EEA Member States, who meets the criteria for settled status set out in part 1 or 2 of [new schedule: x] or for pre-settled status in part 3 of [new schedule: x] is entitled to register that status and has the same rights as those provided by that status .

*This provision ensures that dual nationals are not deprived of their EU rights and avoids these individuals would face difficulties in proving their entitlements under the WA, or any citizens' rights agreement in case of a no deal.*

(16) A person holding pre-settled or settled status cannot be removed from the United Kingdom for not having registered that settled or pre-settled status.

*Subsections (16) to (20) clarify the consequences of registration or not-registration. As the system is declaratory, non-registration does not imply one is illegal or can no longer register after the registration due date.*

*Subsection (16) states clearly that one cannot be removed simply for not having registered.*

(17) After the registration due date, a person or agent may require proof of registration of settled or pre-settled status under the conditions set out by the Secretary of State, acting under the affirmative procedure and with respect of subsections (18) to (20).

(18) Any person or agent who is allowed under subsection (17) to require proof of registration has discretion to waive that requirement where the eligibility requirements for pre-settled or settled status under the provisions of this Act have been met.

(19) When a person within the scope of this section is requested to provide proof of registration of settled or pre-settled status as a condition to retain social security benefits, housing assistance, access to public services or entitlements under a private contract, that person shall be given a reasonable period of at least three months to initiate the registration procedure set out in this Section if that person has not already registered.

(20) During the reasonable period under subsection (19), and subsequently on the provision of proof of commencement of the registration procedure and until a final determination on registration, a person under subsection (19) cannot be deprived of existing social security benefits, housing assistance, access to public services or private contract entitlements on the grounds of not having proof of registration.

*Subsections (17) to (20) set out the potential negative consequences of not-registration after the registration due date, which is the end of the grace period.*

*After the registration due date, a person or agent (public or private) may require proof of registration under the conditions set out by the Secretary of State, for instance, employers, banks or landlords can be allowed to require proof of registration, as well as public administrations providing benefits.*

*There is a fine line here between a declaratory and a constitutive registration system. Under a declaratory system one may hold the right to reside even if not registered (and is thus not illegal), but if one is asked for an increasing amount of services to provide proof of registration, the effects in practice will often come close to a constitutive system.*

*Therefore, subsections (17) to (20) provide several elements of protection:*

*according to subsection (17) the Secretary of State can set out the services for which proof of registration can be asked, but this has to be adopted with the affirmative procedure. Moreover, even for services for which private or public actors are allowed to ask proof of registration, two other elements of protection*

remain:

*Subsection (18) ensures that a public or private actor retains the discretion to waive the requirement to provide proof of registration, if they consider the eligibility requirements of pre-settled or settled status have been complied with.*

*When a person has not registered and is asked by a person or agent (public or private) to provide proof of registration as a condition to retain benefits, access to public services or entitlements under private contract (e.g. holding a bank account), that person should be given the time to still 'regularise' his registration. Subsection (19) and (20) give that person a reasonable period of at least three months to initiate registration. (three months may well be needed for somebody who first has to apply for a passport in his own country). Subsequently, that person will receive notification of having started the registration process. During this period and until a final decision on registration is reached (including potentially through an appeal) that person cannot be deprived of ongoing entitlements and benefits on the grounds that he was not registered.*

*This protects those with ongoing entitlements but not new claimants - those who, for instance, were not already receiving benefits or did not already have bank accounts and who are asked to provide proof of registration. However, public and private actors are still able to waive the requirement for them.*

(21) In this section –

- a) 'cut-off date' means –
  - i. the date on which the United Kingdom ceases to be a member of the European Union; or
  - ii. the end of the transition period agreed between the United Kingdom and the European Union  
whichever is later;
- b) 'registration due date' means 30 June 2021 or any later date decided by the Secretary of State
- c) 'final determination' means a final decision on which no further administrative or judicial recourse is possible.

*This subsection defines the cut-off date (identical as in the clauses on settled status and pre-settled status) and the registration due date. The registration due date is defined as 30 June 2021 or any later date decided by the Secretary of State. 30 June 2021 is the date of the end of the grace period provided in the case the Withdrawal Agreement is adopted. We have kept this date also for a no deal scenario, as there are serious concerns on whether registration of all EU citizens can be realised by the date of 31 December 2020, as proposed by the Government in the case of no deal. The provision also allows an extension of the grace period.*

#### **5.4. New Schedule X**

In addition to the three new clauses (defining settled status, pre-settled status, and the registration procedure) a new Schedule will need to be included in the ISSCB. The ISSCB already includes three Schedules: Schedule 1 defining retained EU law on citizens' rights; Schedule 2 defining power of devolved authorities in the Bill; and Schedule 3 defining Statutory Instruments in the Bill. A fourth Schedule should be attached which mainly copies the eligibility requirements and definitions of the Appendix EU to the Immigration Rules. These eligibility requirements are too detailed to be included in the clauses proposed above.

In substance, they provide settled status for holding residence for a ‘continuous qualifying period’ of five years prior to the cut-off date, and pre-settled status for those holding less than five year residence prior to that date, if they are an EU citizen or family member thereof, and as long as some criminality grounds do not exclude them.

In order to facilitate understanding of the clauses proposed above, I copy here the most relevant aspects of the Appendix EU which will need to be included as a new Schedule. The text is slightly amended to adapt to the language of the proposed clauses without changing the substance of current requirements and Government promises.

*“SETTLED AND PRE-SETTLED STATUS: ACQUISITION AND DEFINITIONS*

*PART 1: Acquisition of settled status –Relevant EEA citizens and family*

- 1. A person has settled status if, at the cut-off date, they meet one of the conditions set out in paragraphs 2 to 6 below .*
- 2. The condition in this paragraph is that*
  - (a) the person is:*
    - (i) a relevant EEA citizen, or*
    - (ii) a family member of a relevant EEA citizen, or*
    - (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen, or*
    - (iv) a person with a derivative right to reside, or*
    - (v) a person with a Zambrano right to reside; and*
  - (b) the person has completed a continuous qualifying period of five years in any, or any combination, of those categories, and since then no supervening event has occurred.*
- 3. The condition in this paragraph is that the person is a relevant EEA citizen who is a person who has ceased activity, and since they did so, no supervening event has occurred.*
- 4. The condition in this paragraph is that*
  - (a) the person is a family member of a relevant EEA citizen who is a person who has ceased activity, and*
  - (b) the relevant EEA citizen has settled status under the condition in paragraph 3, and*
  - (c) sub-sub-paragraph (a) was met at the point at which the relevant EEA citizen became a person who has ceased activity; and*
  - (d) since the relevant EEA citizen became a person who has ceased activity, no supervening event has occurred.*
- 5. The condition in this paragraph is that*
  - (a) the person is a family member of a relevant EEA citizen who has died and the relevant EEA citizen was resident in the UK as a worker or self-employed person at the time of their death; and*
  - (b) the relevant EEA citizen was resident in the UK and Islands for a continuous qualifying period of at least two years before dying, or the death was the result of an accident at work or an occupational disease; and*
  - (c) the person was resident in the UK with the relevant EEA citizen immediately before their death and since then no supervening event has occurred.*
- 6. The condition in this paragraph is that*
  - (a) the person is a child under the age of 21 years of a relevant EEA citizen, or of their spouse or civil partner, and either:*
    - (i) the marriage was contracted or the civil partnership was formed before the cut-off date; or*
    - (ii) the person who is now their spouse or civil partner was the durable partner of the relevant EEA citizen before the cut-off (the definition of durable partner being met before the cut-off date and the partnership remained durable at the cut-off date; and*
  - (b) the relevant EEA citizen or, their spouse or civil partner, has settled status.*

*PART 2: Acquisition of settled status – family member of a qualifying British citizen*

*7. A person has settled status as a family member of a qualifying British citizen, or as a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen, where at the cut-off date, one of the conditions set out in paragraphs 8 or 9 is met.*

*8. The condition in this paragraph is that*

*(a) the person is:*

*(i) a family member of a qualifying British citizen; or*

*(ii) a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen; and*

*(b) the person has completed a continuous qualifying period in the UK of five years in either, or any combination, of those categories; and*

*(c) since completing the continuous qualifying period of five years, no supervening event has occurred.*

*9. The condition in this paragraph is that*

*(a) the person is a child under the age of 21 years of the spouse or civil partner of the qualifying British citizen, and the marriage or civil partnership was formed before the cut-off date;*

*PART 3: Acquisition of pre-settled status*

*10. A person has pre-settled status when, at the cut-off date, the following conditions are met:*

*11. The condition in this paragraph is that*

*(a) the person is:*

*(i) a relevant EEA citizen; or*

*(ii) a family member of a relevant EEA citizen; or*

*(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or*

*(iv) a person with a derivative right to reside; or*

*(v) a person with a Zambrano right to reside; and*

*(b) the person does not have settled status solely because they have completed a continuous qualifying period of less than five years.*

*12. The condition in this paragraph is that*

*(a) the person is:*

*(i) a family member of a qualifying British citizen; or*

*(ii) a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen; and*

*(b) the person does not have settled status solely because they have completed a continuous qualifying period in the UK of less than five years.*

*13. The condition in this paragraph is that*

*(a) the person is a child under the age of 21 years of the spouse or civil partner of the qualifying British citizen, and the marriage or civil partnership was formed before the cut-off date;*

The Appendix EU equally includes a long set of definitions (Part 4) which will need to be copied within the new Schedule. I only copy here the most immediately relevant to understand the proposed declaratory scheme, namely the definition of ‘continuous qualifying period’:

*a period of residence in the UK and Islands (save for the purpose of meeting the conditions in paragraph 3 or paragraph 8(c) of this schedule, where the period of residence must be in the UK):*

*(a) which began before the cut-off date; and*

*(b) during which none of the following occurred:*

*(i) absence(s) from the UK and Islands which exceeded a total of six months in any 12-month period, except for:*

*(aa) a single period of absence which did not exceed 12 months and was for an important*

*reason (such as pregnancy, childbirth, serious illness, study, vocational training or an overseas posting); or*

*(bb) any period of absence on compulsory military service; or*

*(cc) any period of absence on a posting on Crown service or (as a spouse, civil partner, durable partner or child) any period of absence accompanying a person on a posting on Crown service; or*

*(ii) the person served or is serving a sentence of imprisonment of any length in the UK and Islands; or*

*(iii) any of the following, unless it has been set aside or no longer has effect in respect of the person:*

*(aa) any decision or order to exclude or remove under regulation 23 or 32 of the EEA Regulations (or under the equivalent provisions of the Immigration (European Economic Area) Regulations of the Isle of Man); or*

*(bb) a decision to which regulation 15(4) of the EEA Regulations otherwise refers, unless that decision arose from a previous decision under regulation 24(1) of the EEA Regulations (or the equivalent decision, subject to the equivalent qualification, under the Immigration (European Economic Area) Regulations of the Isle of Man); or*

*(cc) an exclusion decision; or*

*(dd) a deportation order, other than under the EEA Regulations; or*

*(ee) an Islands deportation order; or*

*(ff) an Islands exclusion decision; and*

*(c) (where the period is less than five years) which continues at the date of application*