



McGILL & CO

RIGHTS OF EU CITIZENS IN THE UK AFTER BREXIT

Negotiations of the terms of the UK's withdrawal from the European Union have now begun between the EU Commission and the UK Government. One of the first issues to be decided is the position of EU citizens residing in the UK and UK citizens residing in the rest of the EU after Brexit.

The EU's position

Under the EU Commission's proposal EU citizens in the UK and UK citizens in the rest of the EU would continue to enjoy their current rights for life. They would continue to enjoy the right to acquire permanent residence after a continuous period of 5 years' legal residence in the UK, even after Brexit. In practice, this would mean that EU citizens in the UK on Brexit day could leave the UK without jeopardising their ability to acquire permanent residence at a later date. They could return at any point, even years after Brexit, and acquire permanent residence after accumulating 5 years' continuous legal residence. The requirements for acquiring permanent residence would remain the same as they are now: the EU citizen would need to be exercising treaty rights in the UK (i.e. working, studying, or self sufficient) and must not have been absent from the UK for more than 6 months in any 12 month period. Students and the self sufficient must have comprehensive health insurance. These rights would be enforced by the EU Commission and ongoing jurisdiction of the Court of Justice of the European Union.

The UK's position

In contrast, the UK would bring an end to EU free movement law (including the right to acquire permanent residence) on Brexit day. In its place, they will introduce a "grace period" of at least 2 years during which EU citizens will need to apply for settled status under UK law. Those who have not yet accrued 5 years' residence by the end of the grace period will be able to apply for temporary status so that they can remain in the UK and apply for settled status once they have reached 5 years. All EU citizens (even those who have already been granted permanent residence documentation) will be legally required to make an application before the end of the grace period.

To qualify for settled status, the EU citizen must have been resident in the UK before a specified date (March 2017 at the earliest and March 2019 at the latest) and must have completed a period of 5 years' continuous residence in the UK. Only the "essential conditions" are outlined in the UK Government's policy paper so the full eligibility criteria are not yet known. The UK Government has indicated that they will no longer require evidence that economically inactive EU citizens have previously held comprehensive sickness insurance in order to be eligible for settled status.

These rights would be enforced by UK courts, applying UK law. EU law would not be taken into account and the Court of Justice of the European Union would not have jurisdiction to settle disputes. >



› EXAMPLES

Example 1

Chris is a European national who first came to the UK in September 2012 and studied for 4 years before beginning work in September 2016. He did not have comprehensive health insurance during his studies. He has worked in the UK since September 2016.

EU proposal: Chris will continue to have the right to reside in the UK as an EU worker after Brexit and will not be legally required to apply for any documentation to prove this right. Due to his lack of health insurance, he has not yet acquired permanent residence however will automatically acquire permanent residence in September 2021, after 5 years of exercising treaty rights as a worker. If the UK Government refuses his application for permanent residence documentation, he will be able to rely on the case law of the Court of Justice of the European Union and any question of EU law could be referred by a UK court to the European court for clarification.

UK proposal: Chris would be able to apply for settled status as soon as it becomes available (which is expected to be in 2018). He would meet the requirement of entering the UK before the specified date (which will be no earlier than March 2017) and, by the time he is able to apply for settled status, he will have lived in the UK for over 5 years. He will have until March 2021 to apply for this new settled status. He is legally required to apply before this time. If he fails to do so, he will have no right to continue living in the UK and will be committing a criminal offence. If the UK Government does not accept that he has lived in the UK for 5 years or refuses his application for any other reason he will be able to enforce his rights in the UK courts. The court will apply only UK legislation (most likely a combination of a newly enacted Immigration Act and new provisions of the Immigration Rules) to determine the dispute and will not be able to take into account EU law or the case law of the Court of Justice of the European Union.

Example 2

Petra is a European national in the UK. She first came to the UK in 1995, studying initially and then working. She has worked in the UK for over 15 years. Following the EU referendum, she applied to the UK Home Office for a document certifying permanent residence to recognise that she had acquired the right to permanent residence after 5 years' continuous working in the UK. This document was issued in December 2016.

EU proposal: Petra will not need to do anything. She has already acquired the right to live in the UK permanently under EU law. This right will continue to be recognised after the UK leaves the EU. It can only be lost through 2 consecutive years' absence from the UK.

UK proposal: Petra's right to permanent residence will cease when the UK leaves the EU in March 2019. She will be legally required to apply for settled status before the end of the grace period in March 2021. This process will be "streamlined" as she already holds documentation. Failure to apply for settled status will mean she no longer has the right to continue living in the UK and would be committing a criminal offence. Alternatively, she can apply for British citizenship prior to March 2019.