

Guaranteeing the rights of EU citizens living in the UK post Brexit: Position paper

We call on the EU to:

1. Preserve the existing rights of EU citizens in the UK, and UK citizens in the EU, through an early agreement on Article 50 between the UK and the EU 27, which must be decoupled from negotiations on all other issues
2. Recognise that the existing rights of EU citizens and their family members are indivisible and must be guaranteed in any treaty concluding the process of the UK's withdrawal from the EU
3. Work with the UK Government to resolve current issues preventing many EU citizens living in the UK from exercising their treaty rights
4. Work with the 27 EU national governments on those issues where joint agreement and policies can address specific problems for EU nationals in the UK in the future
5. Acknowledge the impact of the outcome of the referendum on the lives of EU nationals living in the UK
6. Recognise EU and UK citizen groups as key stakeholders in the negotiations by both UK and EU institutions.

Background

the3million is a grassroots organisation created by EU citizens living in the UK in the aftermath of the June 2016 referendum¹. It campaigns to preserve and guarantee their existing rights in a post Brexit context, provides a support network to the estimated three million EU citizens living in the UK and its Forum² has a membership of over 26,000 members. **the3million** was invited to give evidence to the Commons Select Committee on Exiting the EU and has published an Alternative White Paper³ setting out its aims for the preservation of the rights of EU citizens living in the UK.

1. Preserve the rights of EU citizens post Brexit through a separate, early agreement

Since the referendum of June 2016, **the3million** has been calling for the rights of EU citizens currently living in the UK to be preserved post Brexit, as the uncertainty that has prevailed over their fate since demands an urgent agreement. This was recently supported by the conclusions of the report by the House of Commons Select Committee on Exiting the EU *The Government's negotiating objectives: the rights of UK and EU citizens*⁴. We strongly believe that such an agreement must be decoupled from the broader negotiations on the UK's withdrawal from the EU as a matter of common sense, decency and mutual interest between the UK and the EU. This could be achieved through a separate bilateral deal, as early as the next European Council meeting due to take place this Spring. Without a decoupled agreement, people will be left further in limbo for two years or more while the negotiations between the UK and the EU27 progress.

Should the negotiations break down irrevocably, causing an unprecedented situation, the legal status of EU citizens residing in the UK will be a lot less clear, creating even more uncertainty and anxiety. The House of Lords' EU Justice Sub-Committee's report, *Brexit: Acquired Rights*⁵ concludes that "in the absence of a negotiated settlement, the consequences of the loss of EU citizenship rights for EU nationals in the UK, and

¹ www.the3million.org.uk

² <https://www.facebook.com/groups/Forum4EUcitizens/>

³ <http://bit.ly/2mJGJ6l>

⁴ <http://bit.ly/2nGMuSZ>

⁵ <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf>

for UK nationals in other EU Member States, will be severe” (p.15). In addition, the report points out that EU nationals in the UK will be subject to national immigration rules which would significantly restrict their current rights under UK legislation. This type of legislation which is used for non-EEA nationals has been described by the Court of Appeal as “Byzantine” due its complexity and restrictions⁶.

2. Guarantee the indivisible rights of EU citizens living in the UK post Brexit

The current status of EU citizens and their families in the UK is based on EU treaty rights, which will cease to apply from the first day of Brexit, unless they are preserved by a meaningful and enforceable agreement. In the future, no EU nationals residing in the UK should be treated as second class citizens post Brexit. These EU citizens should not be deprived, through no fault of their own, of these rights as this would jeopardise every single aspect of their lives.

The House of Lords’ report⁷ strongly recommends that full EU law rights be safeguarded for existing EU citizens resident in the UK. The report is very clear that these rights, which derive from the right of residence (such as the right to work, to access education, to establish a business, to access welfare provisions, the mutual recognition of qualifications, etc.), should be treated as *indivisible*⁸. This would allow these EU citizens to continue enjoying the same rights and benefits, and to enjoy full inclusion and participation in society.

the3million strongly supports the Lords’ report findings and asks that these rights are not diluted, reduced or removed in the future. It is therefore imperative that any future treaty concluding the process of the UK’s withdrawal from the EU not only recognises the continuing rights of EU citizens and their families, but also that adequate guarantees and safeguards are enshrined in such a treaty.

3. Work with the UK Government to resolve current issues preventing many EU citizens living in the UK from exercising their treaty rights

There is a consensus that the current process of registering EU citizens is not fit for purpose⁹. Problems stem from the fact that the UK, unlike many other EU countries, has historically chosen not to register EU nationals. This has resulted in the current situation, made worse by the recent hardening of the Home Office’s position, especially on EU residents who do not, or may not have, or cannot easily prove a “right of residence” under Directive 2004/38/EC.

The legal base for permanent residence in an EU member state¹⁰ states that there are no conditions attached to acquiring permanent residence, other than five years’ continuous residence. EU citizens who have been living in the UK for five or more years automatically acquire ‘permanent residence’ rights, provided they have been able to exercise their treaty rights. They can then apply for the ‘permanent residence’ certificate (PR) which is offered to ‘qualified persons’, their family members and people who have a retained right of residence. This certificate represents not only the preferred way of proving their rights of residence, it is also now the mandatory first step towards applying for British citizenship¹¹.

However, applying for the certificate is an overly and unnecessarily complex and burdensome process.

the3million were tasked by the Commons Select Committee on Exiting the EU to research what process other member states follow. We found that the UK, uniquely, insists on far more requirements than any other EU country, all of which have a much simpler, less costly and more straightforward registration process. We therefore call on the EU to work with the UK Government to agree a simple, efficient and rapid regularisation process of all EU nationals residing in the UK at the time of the UK leaving the EU. Significantly, **the3million**

⁶ *ibid*, p.12

⁷ *Ibid*, p.3

⁸ *ibid*, p.40

⁹ <http://bit.ly/2nGMuSZ>

¹⁰ Article 16 of the 2004/38 directive on free movement: <http://bit.ly/2np9EQx>

¹¹ This first mandatory step towards applying for citizenship was introduced in November 2015. However, if someone has been granted Indefinite Leave to Remain (ILR), they do not need PR to apply for citizenship

have made several practical suggestions to reform the process in its Alternative White Paper¹². The latest data from the Office for National Statistics show that 28%, or 40,000, PR certificate applications were rejected by the Home Office in Q3/Q4 of 2016. This figure, however, does not include the tens of thousands of EU citizens who are excluded from applying for permanent residency because they do not meet current criteria. The procedure is not only complex and onerous, it also highlights several significant hurdles, making the registration of EU citizen residents impossible for many who find out they do not qualify for permanent residency in the process because they do not meet certain requirements. Unless the system is urgently reformed, these citizens will be unable to secure their legal status by the time the UK leaves the EU. This leaves them in an extremely vulnerable position.

Among these hurdles:

The issue of Comprehensive Sickness Insurance

The UK Government's failure to recognise access to the NHS as sufficient to fulfil the requirements for Comprehensive Sickness Insurance (CSI) is particularly discriminatory against thousands of EU nationals among the most vulnerable population groups. These include individuals who, during their period of residence in the UK were at any time either a student, or a self-sufficient person including carers, stay-at-home parents and retirees. This little-known requirement would, for instance, penalise an EU national who worked full-time for four years and then enrolled at a UK university or left work following the birth of a child without having CSI, thus interrupting the five-year residency rule. [the3million](#) has collected a lot of evidence from people who made extensive inquiries of various institutions about what they needed to do in order to live or study in the UK, and CSI was never mentioned. Rather, they were informed that they were entitled to use the NHS. Students have recently reported informing their university about CSI rather than the other way around, or being told that their home country EHIC card was sufficient. The Home Office does not provide information on authorised providers, and insurers do not advertise 'comprehensive' insurance for fear of litigation and are therefore unable to guarantee that their products will be considered compliant by the Home Office. As with many health insurance products, certain pre-existing medical conditions carry a premium, or are subject to expensive moratoriums.

The imposition of a minimum income requirement on EU workers

The UK's interpretation of what constitutes "genuine and effective employment" for workers (employees and self-employed) is discriminatory against part-time workers and all those not earning enough to cross the threshold set by the UK Government, for instance people on 'zero-hour' contracts, people who only work on an irregular basis due to health conditions, disabilities or due to caring duties. This arbitrary threshold is in contradiction with Article 7.1.a of the Citizens' Directive which does not require or set a minimum income for workers to exercise their treaty rights. This is another little-known requirement from 2014, which few are aware of.

EU citizens in the process of acquiring their rights

EU citizens who will have been residents in the UK for less than five years by the time the UK leaves the EU will not be able to apply for permanent residence as they will not have had enough time to exercise their treaty rights. This group should have their rights guaranteed and safeguarded in the same way as those EU citizens who have been residents for five years or more. This could be achieved either through a regularisation process or a mechanism that allows them access to the same legal status as those EU citizens who have been residents for five years or more.

¹² <http://bit.ly/2mJGJ6l>

Complex cases and lack of affordable legal support

People's lives rarely run smoothly, circumstances change, which can make compliance with exercising one's treaty rights far harder, if not impossible. This calls for the process of registering people (current 'permanent residence certificate' or any new system) to be implemented in a much more flexible way to fully reflect the different factors that may affect people's circumstances. This may also have implications for human rights when people are elderly, vulnerable and or have disabilities. Complex cases would benefit from input and support from certified immigration lawyers. However legal aid for immigration cases is limited to exceptional cases and the cost of using their services is often too prohibitive for many. This not only leaves many without legal help but also creates opportunities for uncertified solicitors to prey on this potential clientele.

The path to British citizenship

The application process is extremely expensive compared to other EU countries, and onerous. The UK could be encouraged to initiate a fast track system, for those who want that option. This would also send a very clear signal that the UK is willing to embrace these new citizens.

Long absences from the UK

People who already have PR status lose their residence rights if they leave the UK for more than two years. This means that if these EU nationals, some long-term residents in the UK since birth or childhood and see the UK as their home, travel abroad to pursue career opportunities or look after family members, they face losing their residency rights in the UK.

EU children in care

EU children and young people in care with no parents may have no ID papers and may be asked to leave the UK by the time they reach the age when the state is no longer obliged to care for them, even though some of these children may have spent their entire lives in the UK and have no ties (cultural, social and possibly familial) with the EU. Their status could be considered the same as those people who are stateless, which prevents them from accessing basic services such as education and healthcare, and renders them vulnerable to discrimination and persecution.

4. Work with the 27 EU national governments to implement joint agreement and policies to address specific problems for EU nationals in the UK in the future

EU citizens returning to an EU country post Brexit with British family members and partners

Some EU nationals are considering returning to their country of origin or moving to another EU country with their British family members or partners, for example to retire, in the short term or post Brexit. They are concerned that, post Brexit, their British relatives and partners will be discriminated against and treated as third country nationals. We ask that the EU27 consider such British family members and partners as a special case, treating them in the same way as EU nationals.

Citizenship and Dual nationality

In order to feel safer, guarantee their future and obtain full voting rights, many EU citizens in the UK are now envisaging applying for British citizenship. Many EU countries do not allow their citizens to adopt another nationality, resulting in people feeling that the choice that is presented to them is unfair. They do not necessarily want to lose their original EU citizenship, for emotional and practical reasons. Although [the3million](#) recognises that each EU country implements its own citizenship rules, we would request that an arrangement is found to address the circumstance of this exceptional situation and to allow dual nationality where it is not normally allowed.

Loss of access to benefits associated with living in an EU member state

Once the UK has left the EU, EU citizens living in the UK will be treated as non-EU citizens by member states when it comes to accessing certain benefits which come with residing in an EU country. This is because some of these benefits are linked to the country of residence and cover a wide range of issues such as access to pensions, tax regime, etc. Currently, for instance, an EU citizen living in the UK wishing to do a long-distance degree in an EU country will be paying that country's EU fees. Post Brexit the same student will be required to pay non-EU fees. It will not just be British citizens losing out, but EU nationals residing in the UK too.

5. Acknowledge the impact on the lives of EU nationals living in the UK

The outcome of the referendum has brought a profound change to the way EU citizens, who moved to the UK in good faith, are now envisaging their future. Until now they were people, who had felt safe and welcomed, encouraged and able to contribute to the life of their host nation. Today, their status has been damaged by continuing uncertainty and anxiety, which have had a negative impact on families and individuals. People of all ages, including people who have lived in the UK for many decades, simply do not know what their and their family's future will look like in a post Brexit context, and whether they will be allowed to stay on the same terms as now.

Although the UK has not yet left the EU, [the3million](#) has collected evidence through its Forum that some organisations (e.g. banks, employers, landlords, hospitals, etc.) are now asking EU citizens for proof of their right of residency, which is neither a customary nor a legal requirement. We have received reports of discrimination in the rental sector where private landlords, fearful of perceived problems with the Home Office, are turning EU citizens down. This is an over interpretation of the Immigration Act 2014 (amended 2016) which requests landlords to (only) check the nationality of potential tenants. There are also anecdotes of potential employers and employment agencies which do not consider EU passports as valid proof of the right to work in the UK and of people being told not to bother applying because they are EU nationals. The on-going uncertainty regarding the future status of EU nationals in the UK, coupled with the burdensome registration process, has led many people to think about leaving the country as they no longer feel welcome in a country they had come to regard as 'home'. Some are already preparing to leave and many more are now more reluctant to move to the UK. For instance, the latest immigration statistics show that 41,000 fewer international students have come to study in the UK in 2016. Some Eastern European citizens who were subject to Work Permits and the UK Workers Registration Scheme are concerned that they may be treated differently in the Article 50 negotiations, and about 30% of them have started to leave the UK. They also fear renewed discrimination once the UK leaves the EU as they often work in low skilled jobs. Most worryingly, however, there has been a drop by 92% since June 2016 in the number of EU nationals registering to work as nurses in England, and a record number quitting the NHS.

6. Recognise EU and UK citizen groups as key stakeholders in the negotiations

We feel very strongly that organisations representing the views and interests of EU citizens in the UK and British citizens in the EU must be recognised, supported and fully involved at all stages of the negotiations concerning the preservation of their existing rights, and the implementation of guarantees and safeguards for the future. At the very least, this will include regular communication between these citizen groups and UK and EU institutions engaged in the process, as well as mechanisms to support their active involvement (e.g. funding to attend meetings).

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