Settlement scheme leaves open the possibility of ‘EU citizens being left out’

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The Home Affairs Committee has declared in a report that problems relating to the government’s EU settlement scheme—combined with the uncertainty surrounding the future rights of EU citizens in the UK—risks a repeat of the Windrush scandal. The committee has expressed concern that current design of the scheme leaves open the possibility of leaving out some EU citizens. It has called on the government to introduce legislation to ensure that all EU citizens legally living in the UK at the time of Brexit are allowed to remain in the country. The scheme would therefore move from being a time-limited opportunity to guarantee the rights of EU citizens, to merely the method by which individuals can obtain proof of their status. Dr Catherine Taroni, barrister at Richmond Chambers, outlines the various criticisms the committee has levied against the scheme. Gary McIndoe, solicitor at Latitude Law, corroborates some of the technical issues allegedly affecting the scheme’s application process, especially for non-EEA applicants. Stephen Slater, senior caseworker & in-house advocate at OTS Solicitors, argues that the scheme falls short of international law and settled conventions.

The committee has recommended the following:

• EU citizens legally resident in the UK before Brexit should have their rights protected and entitlement to remain enshrined in law

• the scheme should operate as a means for EU citizens to obtain formal, physical confirmation of their status, not just as a digital system

• the granting of legal rights and the scheme should operate in the same way if the UK leaves the EU with or without a deal

• improvements must be made to the application process which has been blighted by technical issues

• the scheme must identify ways of supporting children and vulnerable individuals to apply

• the government must clarify its intentions towards those who fail to apply

The difficult path to settled status

As Taroni explains, the committee is concerned that the scheme ‘does not automatically protect EU citizens’ but rather ‘requires an active step to be taken and an application to be made’. It fears that ‘this could lead to many EU citizens being left out of the scheme, or not knowing that they are eligible, or that it is mandatory that they apply before a deadline, ultimately leaving them as undocumented migrants after 2020 or 2021’. The committee has therefore asked ‘the government to extend the deadline for applications in the event of a no deal scenario beyond 31 December 2020’.

Taroni also notes that the committee’s criticisms go beyond calling on the government to guarantee in law the right of all EU citizens to remain. The technology for a EU citizen to apply for settled status ‘remains imperfect and there are still lengthy delays at times’. Indeed, the committee’s report, ‘criticised the reliance on technology as an error of judgment and called on the government to properly remedy the technical issues reported’.

Taroni also highlights that the committee was concerned that the scheme ‘does not issue documentation to EU nationals’. It therefore recommended that the scheme become a ‘mechanism to obtain a documentary proof to show employers and landlords, rather than simply recording a reference on a database’.

Technical issues

McIndoe agrees with the committee insofar as he has ‘concerns over a scheme that requires an application and a grant of status to an individual, rather than one that is simply confirmatory of status conferred…by force of law.’

He also corroborates the committee’s assertion that there have been technical issues with the application process: ‘For EEA nationals, use of the app is user-friendly, with decisions being issued quickly. [However] for non-EEA family members the situation is not so positive.’ According to Latitude Law’s casework team, ‘the online system crashes frequently, and does not clearly set out the entire process they need to go through’. McIndoe admits that Latitude Law has ‘had significant problems uploading documents for non-EEA nationals. The system sometimes does not permit upload, and it is not possible to upload to the UK Visa and Citizenship Application Services—even though the client is enrolling biometric information there’.

Finally, McIndoe notes that, ‘the different service for “Surinder Singh” applicants, and those with a derivative right of residence, does not inspire confidence’. Applicants that fit into these categories ‘are not permitted to use the app—instead they must call UK Visas and Immigration and undergo pre-screening questions before being sent a paper application form in the post’.

Failing short of retrospective law

However, Slater contends that even the committee's demands fall short of the commitments outlined in section 5(1) of the Immigration Act 1971, 'which preserved the free movement rights of the spouses and children of commonwealth citizens'. He goes on to compare the settlement scheme with former Home Secretary James Callaghan's Commonwealth Immigrants Act 1968, arguing that both examples represent a breach of international law. Specifically, that 'what James Callaghan did in 1968 and what [current Home Secretary] Sajid Javid proposes to do today is to unlawfully deprive citizens of their entrenched rights by the application of retrospective legislation. It was breach of international law and settled conventions then and it remains so today'.

Javid recently declared that over 750,000 applications have now been received for the scheme. According to the Home Secretary, 'EU citizens are our friends, neighbours and colleagues who contribute so much to this country. Whatever the outcome of Brexit we want them to stay'.

For further reading on the EU settlement scheme, see News Analysis: A look at the EU settlement scheme

Source: House of Commons Home Affairs Committee—EU Settlement Scheme