

Guaranteeing the rights of EU citizens living in the UK post Brexit: An alternative White Paper on behalf of **the3million**

This paper is intended as a working response to the urgent need to guarantee the rights of (non-British) EU citizens living in the UK.

What we ask for

- We call on the Prime Minister to unilaterally guarantee the right of residence of EU citizens currently living in the UK before Article 50 is triggered
- We call on the Home Secretary to reform the current application process for the ‘permanent residence’ card
- We call on the UK Parliament to enact primary legislation to safeguard the rights of residence of EU citizens in the UK and all associated rights before the UK leaves the EU
- We call on the UK Government and the EU institutions to include these guarantees and safeguards in any future Treaty which concludes the process of the UK’s withdrawal from the EU
- We call on the UK Government to agree on a cut-off date for benefitting from these rights: this should be the date the primary legislation on the future status of EU citizens is voted or when the UK leaves the EU

1. Background

the3million¹ is a grassroots organisation created by EU citizens living in the UK in the aftermath of the June 2016 referendum. It aims to provide a support network to the estimated three million EU citizens living in the UK and, together with its partner organisation New Europeans, is campaigning to guarantee their rights in a post Brexit context. It has a Forum membership of over 15,000² (to date) with a strong social media following. It has attracted significant media attention since the referendum and is supported by all the major organisations of British citizens living in other member states. **the3million** was invited to give written and oral evidence to the Commons Select Committee on Exiting the EU³ on the issue of the rights of EU citizens living in the UK.

The June 2016 referendum has brought a profound change to the way EU citizens living in the UK are now envisaging their future in this country. Until now they were people who had moved to the UK in good faith, who had felt safe and welcomed, encouraged and able to contribute to the life of their host nation in many different ways. Today, this status has been damaged by continuing uncertainty and anxiety, which have had a negative impact on families and individuals. The level of reported hate crimes has risen drastically from 2015. There are many reports on our Forum of people of all ages, including people who have lived in the UK for many decades, who 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.

¹ www.the3million.org.uk

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

³ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/exiting-the-european-union-committee/news-parliament-2015/negotiating-objectives-for-eu-withdrawal-8-evidence-16-17/>

2. What is at stake?

The safeguarding of the rights of EU citizens living in the UK post Brexit

EU citizens are worried about their long term life in a post Brexit UK. This is an important issue because the current status of EU citizens in the UK is based on EU treaty rights, something that will cease to apply from the first day of Brexit. The length and breadth of the consequences can only be guessed at but they are bound to be dire; every single aspect of these people's residency of will be put in jeopardy. At the very least EU citizens will require a new status to confidently guarantee not only their right of residence but also all other rights associated with living in the UK.

EU citizens living in the UK now should not be deprived, through no fault of their own, of the rights they currently enjoy. The House of Lords EU Justice sub-Committee Inquiry and the think-tank British Future have published reports which explore what this could look like, each offering a very different perspective^{4 5}. British Future suggests transitional measures which support access to citizenship, while the report from the House of Lords, *Brexit: Acquired Rights*, assumes that freedom of movement will end and that the Home Office will need to have registered all EU citizens currently living in the country by the time the UK leaves the EU. The House of Lords' report also strongly recommends that full EU law rights be safeguarded for existing EU national residents of the UK. Furthermore, the report is very clear that these rights should be treated as indivisible:

“In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement” (Paragraph 121, p. 40)

Therefore, it is imperative that legal measures are taken to ensure that those rights are guaranteed, and on the same basis as now. This includes the following (non-exhaustive) rights:

- Right to remain: this is the governing principle from which all other rights derive. While it is the most pressing issue, and we ask the Government to unilaterally guarantee this right before Article 50 is triggered, it must not be allowed to become meaningless. This could easily happen if the Government was in the future allowed to cherry-pick what other rights EU citizens could or could not enjoy as residents. It is our position that it is meaningless to allow EU citizens to remain but not safeguard all the associated rights they currently enjoy which permit them to become fully established residents
- Right to equal treatment with any UK citizen: this is the second principle attached to the right of residence. Ultimately it allows an EU citizen to be treated as a full resident on an equal footing with any other UK citizen. This would also fulfil the Prime Minister's vision for a “shared society”
- Right to work and enjoy the same conditions and employment laws as British citizens
- Mutual recognition of professional qualifications currently established under Directive 2005/36
- Right of establishment for those who wish to set up as self-employed
- Right to study and to enjoy the mutual recognition of degrees from another EU member state (The Bologna Process/European Higher Education Area (EHEA), of which the UK is a member and which allows quality assurance of degrees between member nations
- Right to access the NHS and social care provisions on the same footing as UK citizens: no imposition of private sickness insurance
- Right to rent or buy property

⁴ *Brexit Acquired Rights*: <http://www.publications.parliament.uk/pa/ld201617/ldselect/lddeucom/82/8202.htm>

⁵ British Future report: <http://www.britishfuture.org/publication/report-inquiry-securing-status-eea-nationals-uk/ibid>

- Right to own a bank account, and arrange bank loans
- Right to draw welfare benefits: to be treated on par with any British citizen
- Right of residence for non-economically active citizens, including people with long term health conditions and disabilities, and pensioners
- Right to enjoy aggregated pensions: will pension payments in another EU country count towards an overall pension in the UK? (transferable and ‘passporting’ arrangements)
- Right to vote in local elections

These rights must continue to be treated as *indivisible* and must not be diluted or reduced in the future. They must be guaranteed in their current state and, wherever appropriate improved on, such as the right to vote.

3. The Government’s response to the current situation: the reciprocity argument

The Government has argued that it will not grant unilateral rights to EU citizens until the same rights have also been granted to British citizens in the EU.

the3million, New Europeans and organisations of British citizens in the EU have argued from the beginning that this stance is simply unethical and not worthy of a nation which has always taken pride in its tolerance towards new comers. It is also incorrect. While the EU as a block cannot say anything until negotiations start, there have been statements and proposals by several European politicians – in Germany⁶, Italy (including the then Prime Minister Renzi) and in the European Parliament - regarding options to offer Britons abroad the benefits of EU citizenship in the future. We also have no evidence of hostility against British citizens being stirred up in EU-27 by the media or politicians, contrary to what is happening in the UK.

Using people’s lives as leverage to score points is immoral and will damage the international reputation of the United Kingdom. In **the3million**’s written and oral submissions to the Commons Select Committee on Exiting the EU, we have exposed the unethical nature of the reciprocity approach thus:

The moral argument: ‘We are not bargaining chips; we are people’

The reciprocity argument means that a potentially large proportion of the three million EU citizens living in the UK is potentially at risk of being asked to leave the country should the forthcoming Brexit negotiations fail to guarantee the rights of residence of British citizens in other member states. If the Government waits until after Article 50 is triggered, the rights of EU citizens (and UK citizens in other member states) will be thrown into the full Brexit negotiations with absolutely no guarantee of succeeding in getting an agreement. This could mean two or more years of limbo, continuing uncertainty and anxiety.

The legal argument

The reciprocity argument is much more complex than it is often portrayed and will depend largely on the mechanisms that are yet to be decided and which will define how both parties, the UK and the EU, determine the attribution and implementation of the rights of EU citizens in the UK, and UK citizens in the EU. Not being able to secure these rights through a sensible collective process (rather than country by country) may lead to 4.2 million citizens not having rights of residence, with many possibly facing deportation despite having lived and exercised their treaty rights in their country of residence. Attempts to compel EU citizens to leave the UK would breach the European Convention on Human Rights (ECHR), leaving the UK open to litigation.

The family and social connections genuinely forged between EU citizens and UK nationals during their legal residence in the UK means that removals are likely to trigger extensive human rights litigation, particularly in the context of Article 8 of the European Convention of Human Rights, which protects the right to family and private life. Any removal prior to the UK exit of EU citizens living in the UK in accordance with their free movement rights, would indeed be a breach of for instance, Articles 20, 21 and 45 of the Treaty on the

⁶ Germany: <http://bit.ly/2krEvl7>

Functioning of the European Union (TFEU). In effect, EU citizens living in the UK will be net losers of Brexit.

The political argument

How can it be acceptable to discriminate against three million people who are meant to be full stakeholders of Theresa May's "shared society"? These people have British spouses, children, colleagues and friends. The current hostile climate towards EU citizens is already having a damaging impact on the perception of this government by EU negotiators^{7 8} and how credible its vision for a "shared society" truly is. This could undermine the forthcoming Brexit discussions rather than strengthening the hand of the UK's negotiating team.

As a result of media reports on the difficulties experienced by EU citizens, the European Parliament has already set up a task force to discuss our situation. Only by unilaterally granting the rights of EU citizens as soon as possible, will the Government restore its international reputation before conducting the Brexit negotiation.

The economic argument

EU citizens are positive contributors to the United Kingdom even when they receive state assistance^{9 10} (which is the case only for a minority and in smaller numbers compared to UK citizens receiving benefits in the EU 27¹¹). Offering them guarantees therefore makes good economic sense, as key sectors are heavily reliant on EU workers where skill shortages have made it difficult to recruit British nationals (hospitality, healthcare, universities, engineering etc.). This is not forgetting that EU citizens contribute to the economy in many other ways too. The risk of deportation created by the reciprocity argument is affecting the morale of EU citizens and this could have an impact on their decision to stay or to take their skills and businesses elsewhere. We have plenty of evidence from our Forum that many people are planning to leave, and that others have cancelled plans to settle here.

4. The urgent need to reform the current way EU citizens are registered

EU citizens who have been living in the UK for five or more years automatically acquire 'permanent residence' rights under current EU immigration regulation. The acquisition of the 'permanent residence' card (PR) by EU citizens is offered to 'qualified persons' (people in work, students, the self-employed, the self-sufficient and people looking for work), their family members and people who have a retained right of residence. This card represents not only the preferred way of proving their rights of residence, it is also now the mandatory first step towards applying for British Citizenship¹². However, despite the fact that the UK has not yet left the EU, unwelcome developments are already taking place. For instance, **the3million** has received reports through its Forum that a number of institutions and organisations (banks, potential employers) are asking EU citizens for proof of their right of residency, something that is illegal under EU legislation.

The current uncertainty has led to applications more than doubling in 2016¹³. Some 18,064 'permanent residence' cards were granted in 2015. Given this rate of processing, it would take up to 150 years to clear 2.8 million applications; an application for permanent residence can also take up to six months to process. The basic premise of permanent residence in an EU member state can be found in the 2004/38 directive on free movement¹⁴. Article 16 confirms that there are no conditions attached to acquiring permanent

⁷ British Future report found that 84% of the British public supported letting EU citizens stay: <http://www.britishfuture.org/articles/15131/>

⁸ <https://www.ucl.ac.uk/news/news-articles/1114/051114-economic-impact-EU-immigration>

⁹ e.g. study by the Centre for Asylum and Immigration at UCL: <http://www.cream-migration.org/files/FiscalEJ.pdf>

¹⁰ *ibid*

¹¹ <http://www.ibtimes.co.uk/britons-claiming-benefits-across-eu-outnumber-immigrants-getting-welfare-uk-1484091>

¹² 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

¹³ ONS figures: from 28,857 in Q1 2016 to 73,901 in Q3 2016.

¹⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> ,

residence, other than 5 years' continuous residence. However, the UK's 'permanent residence' application process is nothing short of a blunt, crude, inefficient and unworkable instrument which often fails applicants. By comparison, other countries have a much simpler and more straightforward registration process¹⁵.

Uniquely among other member states:

- The UK insists on a very complex and lengthy application process
- The UK also insists on demanding information and documentation beyond the usual 5 years of residency in a couple of areas, travel (section 5.3) and the receipt of welfare benefits (section 16.2) for the entire time the applicant has lived here (which can mean decades and is therefore almost impossible to obtain).

In the short term, there is therefore an urgent need to reform the process so that the Home Office is able to register EU citizens so that they can 'prove' their right to stay. **the3million** makes the following demand:

Administrative reform needed

The form:

- Drastically reduce the length and complexity of the form. Make it short, simple and user friendly; go back to the pre-2008 form or even earlier
- Introduce a fully online application process with the possibility for applicants to scan and upload documents
- For those who do not have access to the Internet, introduce a fast and user-friendly local process
- Make applications free: the UK is permitted to charge for applications but should cease doing so to encourage more people to 'register'

Documentation requirements:

- Reduce the paperwork required:
 - Most other member states only require a few documents to justify residency rights
 - In EU law a worker can only be asked for an employer certification of employment. The UK Home Office asks for letters from each employer, P60s, wage slips, bank statements and much more
- Align the process with that of the other member states and only ask for documentation for the five years of residency
- Remove all irrelevant questions: e.g. involvement in terrorism
- Travel documents: Only ask for justification if someone has been outside the UK for more than six months during a 12-month period
- Streamline access to information from agencies such as HMRC, DWP, local councils etc.
- Accept certified copies when originals are not available

Assessment process:

- Make access to the NHS count as comprehensive sickness insurance (CSI):
The European Commission made this very request in 2012¹⁶ when it addressed a reasoned opinion to the UK (second step of the infringement procedure) to consider NHS cover as sufficient sickness insurance when assessing whether or not a non-active EU citizen has a right to reside in the

¹⁵ the3million were tasked by the Select Committee on Exiting the EU to provide information on this topic. We produced a quick comparison tool which is available on our website under "Research"

¹⁶ European Commission, Free movement: Commission asks the UK to uphold EU citizens' rights, press release, 26.04.2012.

country. Aside from being a largely unknown conditionality which catches people out¹⁷, the CSI requirement is also discriminatory towards a large number of people, specifically women, retirees, people with health and disabilities issues (therefore in possible breach of human rights/UNCPRD), as well as people on low income. The difficulties caused by the UK Government's hard line on CSI are acknowledged in the House of Lords EU Justice Committee Inquiry report, and in the British Future report which recommends that the Home Office does not refuse PR based on lack of CSI, and that the entitlement to free NHS care should be considered as fulfilling the CSI requirement for EU citizens

- For working people (employees or self-employed):
EU legislation states that the activity must be "genuine and effective". The Home Office interprets this as needing to earn a minimum income and uses the HMRC primary earnings threshold (PET) to make its assessment. However, under Article 7 of the Citizens Directive, if a person is employed or self-employed and has been residing for more than three months "no further conditions apply". Therefore, people should not be assessed on their earnings;
- Demonstrate flexibility and understanding that many people's lives are complex
- Take into account the situation of persons with long term conditions, physical and psychological disabilities who are far less able to exercise their treaty rights as fully as others, and are thus more susceptible to failing and of being failed by the process. This is an issue the House of Lords' report acknowledges.

Some possible routes: All EU citizens living in the UK before the cut-off date must be offered full rights of residence or a pathway to full rights of residence.

EU citizens with over five years of residence by the time Brexit happens:

- To be offered certainty over their rights of residence after Brexit
- Everyone to be granted full rights of residence with affordable (no more than the cost of a British passport as per British Future recommendations) access to citizenship if wanted
- There must be no discrimination between different types of citizens (economically active or not)

EU citizens with less than 5 years of residence by the time of Brexit: They should be offered a clear pathway to be granted full rights of residence when they reach five years of residence.

The case of spouses or widows/ers of British citizens: They should be given a clear and straightforward route to citizenship. It is currently not possible for a British citizen to sponsor an EU national spouse's application, which means that people that have taken time off to look after children and are not self-sufficient are being penalised, and unlikely to ever achieve permanent residency and/or British citizenship.

5. What EU citizens currently living in the UK want

The *Brexit: Acquired Rights* report recognises that it is basically impossible for the Home Office to process applications for permanent residence for three million EU citizens in the time available. Even if it could be managed, EU citizens would be left with far fewer rights than they currently enjoy. The report also tackles, but ultimately ducks, the very difficult question of how rights might be enforced after Brexit. Experience suggests that in the absence of a court with the power to adjudicate and enforce, rights are mere words on

¹⁷ CSI is a mandatory requirement for students and people who are "self-sufficient" (e.g. dependent spouses of British nationals, retirees...)

paper. The report ends by urging the UK Government to offer a unilateral guarantee to residents from other EU member states.

The future status of EU citizens living in the UK will therefore need primary legislation. This will be required soon after Article 50 is triggered, to create a new status to guarantee the rights of EU citizens after the UK has left the European Union, and to enable the Home Office to undertake a vast programme of registration. It is imperative that representatives from EU citizens' organisations are fully involved in the process. In our view, the only viable cut-off point should be either the date when the primary legislation that will define the future status of EU citizens is voted for, or the date when the UK leaves the EU.

The right to remain of EU citizens currently residing in the UK should not be part of the negotiations with the EU. The UK government should offer an unequivocal and unilateral guarantee to EU citizens in the U.K. ahead of the start of Article 50 negotiations. Their rights to remain should not become part of long, protracted and complex negotiations, and risk becoming diluted or annulled. Furthermore, the rights and associated benefits that EU citizens currently enjoy must be guaranteed as recommended by the House of Lords EU Justice Committee report. EU citizens have come to live in the UK in good faith and should not be deprived of these rights through no fault of their own.

***** This alternative white paper was approved by the board of [the3million](#) on 05/02/2017 and is endorsed by New Europeans *****

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