

Fair and Serious?

On the same day as the word “stable” slipped back into Theresa May’s vocabulary (upon announcing her party’s confidence and supply agreement with the DUP), the government adopted a new sound bite – fair and serious – being used to describe the post-Brexit offer to EU citizens living in the UK. The sound bite accompanies the publication of a new policy document: “[*The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens living in the UK and UK Nationals Living in the EU*](#)”, essentially – what happens to the children when the divorce is finalised?

The policy document does clarify several matters in relation to the rights of EU nationals living in the UK, however, their position remains uncertain in two key respects. Firstly, the offer is made in the hope that it will be reciprocated, the policy document stresses the importance of UK citizens living in other member states being able to access health care, benefits and other public services, if they are not, nor will EU nationals be able to access such services in the UK. EU member states do not want the rights of EU citizens living in the UK, or UK citizens living in EU member states, to change at all post Brexit, and the terms of the policy document are therefore unlikely to remain unchanged by the end of negotiations; Angela Merkel has already described the offer as a “good start”. The rights of EU citizens residing in the UK, and UK citizens living in the EU will further not be negotiated in isolation so these individuals remain bargaining chips in the negotiations.

Secondly, the status which EU nationals will be able to apply for when the UK ceases to be a member of the EU will depend on whether they arrive on or after a specified date which is, at present, unspecified. It is known that the date will be no earlier than 29th March 2017. The policy does hint at a date being set closer to the actual day on which the UK leaves the EU (March 2019), however, for recent and future arrivals the possibility that they have already, unknowingly, missed the boat cannot be ruled out, although EU member states would be unlikely to agree to such a date.

One thing that is clear is that EU nationals living in the UK will have to apply for a new immigration status when the UK leaves, even those individuals who have already acquired permanent residence under the EEA regulations, and have been issued with a residence permit as confirmation of this. The application process will, however, be more “streamlined” for those already holding a permanent residence permit. Applications will not have to be made straight

away, there will be a “grace period” during which all EU nationals living in the UK at the date of Brexit, regardless of whether they arrived before or after the specified date, will have blanket residence permission during which they can apply for a new status and their application can be processed without them becoming an over stayer. The policy document suggests that this grace period will last for two years. In 2015, the number of EU citizens living in the UK was estimated to be 3.2 million, so a shorter period would be unlikely to allow for sufficient time to process all of their applications. EU nationals will have the option to voluntarily apply for status before the UK exits the EU.

The difference between those who arrived before the specified date and those arriving after, is that those who arrived before will have their expectation of obtaining settlement honoured, whereas those arriving after will not.

For those who entered the UK prior to the specified date, if they have resided in the UK for 5 years at the date of Brexit, they will be able to apply for settlement at any point during the grace period. Once they are granted settlement they will be entitled to benefits on the same level as UK nationals.

Those who have not resided in the UK for 5 years at the date of Brexit will be able to apply for limited leave, at any point during the grace period, to take them up to 5 years’ continual residence, at which point they can apply for settlement. Prior to obtaining settlement they will have the same entitlement to benefits as they do at present. Notably, those working in the UK, whose families reside in another member state, will continue to be able to claim child benefit.

These applications will require payment of a fee which is yet to be set, but will be “reasonable”. There will be conditions that must be met in order to be granted settlement, these have not yet been decided but the policy indicates that applicants will need to show that they meet the requisite length of residence and that there are not adverse character reasons that they should not be granted settlement, such as criminal conduct.

Those EU nationals who arrive after the specified date, but before Brexit, will be able to remain in the UK until the end of the grace period. If they wish to stay in the UK beyond the grace period they will need to make an application under the immigration arrangements which are put in place for EU nationals post Brexit. The content of those arrangements is not covered by the policy document.

Family members of EU nationals will be eligible to apply for settlement on the same terms as EU nationals. Future family members, i.e. a spouse where entry to the UK post-dates Brexit, will either have to meet the conditions currently in place for family members seeking to join British citizens, and those with Indefinite Leave to Remain, or under the post exit immigration arrangements for EU nationals. Where an EU national qualifies for settlement, their children will qualify for settlement too, even if they themselves do not meet the residence requirement.

The government hopes that agreement can be reached so that the current healthcare arrangements can be maintained, allowing EU nationals to continue to benefit from NHS services whilst in the UK and for UK citizens to enjoy the same treatment whilst in EU member states.

The policy document will be of some assurance to EU citizens living in the UK, however, their right to remain in the UK post Brexit is far from guaranteed. Reaching agreement on the specified date, which will hopefully be the day on which the UK exits the EU, sooner rather than later, would go a long way towards certainty for those EU nationals currently building their lives in the UK.