

9TH AUGUST 2019 BY STIJN SMISMANS

This is how to stop Brexit causing a new Windrush scandal for EU citizens

Three years after the referendum, the more than three million EU citizens living in the UK still have no clarity on what their legal status will be after Brexit. It is uncertain whether the Brexit deal negotiated by Theresa May's government (formally known as the Withdrawal Agreement) will ever be passed, while the measures put in place by the UK government do not provide proper protection.

The EU Settlement Scheme has been created by secondary legislation, which unlike an Act of Parliament can be easily changed over time. Moreover, the Scheme introduces an application system which will turn legally residing EU citizens into "illegal immigrants" if they do not apply successfully by the deadline, leading to scenarios similar to those seen with the Windrush scandal.

Legally speaking, their situation would be even worse than Windrush. The Windrush generation were always legally in the country but struggled to prove it. With the EU Settlement Scheme, the law will turn citizens who have been always legally residing into fully unlawful immigrants if they fail to apply in time. They will suddenly have no right to reside, to work, to rent, to get benefits or access free healthcare.

The solution is to introduce a declaratory registration system, instead of the current constitutive application system for settled or pre-settled status. That may sound like a lot of jargon, but all it means is passing an Act of Parliament saying that EU citizens living in the UK before Brexit automatically have the right to continue living here afterwards. In this declaratory system, registration is just a way to receive a document proving a status one already holds.

Unlike a constitutive application system like the EU Settlement Scheme, failure to register would not take away rights. Yes, absence of registration can cause practical problems in terms of showing entitlement to employment, benefits etc. But people would not suddenly become "illegal immigrants" with no rights; if they run into problems, they can always register to get proof of those pre-existing rights, just as a British citizen who faces problems travelling abroad without a passport can apply for one when it becomes necessary.

Example

Alexander, a German care worker, has been living in the UK for several decades. He is now retired and struggles with health issues.

Alexander did not register by 30 June 2021 as he was simply not aware of the requirement. Under the current constitutive scheme, on the 1 July 2021, he will lose his legal rights to be in the UK completely, including his right to healthcare and disability allowance.

Under the declaratory scheme, Alexander is a holder of settled status by the mere fact that he meets the criteria of being an EU citizen having more than five years of residence prior to Brexit. His lack of registration does not make him illegal.

All that would be needed to make this happen is to add three new clauses and a new schedule to the Immigration and Social Security Coordination Bill already before Parliament. I have drafted the necessary amendments in a working paper published this week by the DCU Brexit Institute.

The government claims that the EU Settlement Scheme would avoid a Windrush situation, because people will need to have a proof of their status (which was lacking in Windrush). It also claims a declaratory scheme means EU citizens have no incentive to register. This is a misunderstanding.

In the proposal developed in this paper, the declaratory scheme allows organisations to ask for proof of registration in order to access certain services, e.g. a bank to open a bank account, or the Jobcentre to claim benefits. EU citizens have thus an incentive to register.

However, they are much better protected than in the current scheme. Failure to register does not make their presence in the UK unlawful, and the proposal provides for two extra protections:

- 1. public or private bodies who are allowed to ask for proof of registration should always have the discretion to waive that requirement;**
- 2. if they do ask for proof of registration from somebody who already holds entitlements (e.g. is already claiming benefits), these entitlements cannot be stopped immediately and that person should be given a reasonable time to register.**

In the example of Alexander above, the NHS and DWP could decide to go on treating Alexander and paying his disability allowance, either because they can easily establish that he has settled status or as a stop-gap before he registers.

The declaratory scheme is both protective and has incentives for people to register (without registration they will be confused with EU immigrants arriving post-Brexit).

The proposal also requires that those registering receive a physical document proving registration. The current Scheme does not even provide a physical document, only a digital record.

The proposal also provides a mechanism to clearly define the rights of those holding settled and pre-settled status; compared to the current system in which such rights can be easily undermined over time.

Boris Johnson, as part of the Vote Leave campaign, promised that the rights of EU citizens residing in the UK would not be altered. This is the only way to do it.

The full legislative proposals are contained in Protecting EU Citizens in the UK from a Brexit 'Windrush on Steroids', DCU Brexit Institute, Working Paper No. 8 of 2019.