The3million – Written evidence (CIT0010)

Following the evidence session of 25 May 2021, where I was part of the first panel (EU Citizens in the UK), I have been asked to supply a short memo expanding on my comment that there is in our view a mismatch between the Withdrawal Agreement provisions and the way in which the EU Settlement Scheme operates.

Background: Article 18 of the Withdrawal Agreement (WA)

Those who are in scope of the WA are set out within the terms of Article 10. In short, those who were exercising treaty rights by the end of the Transition Period (31 December 2020) are in scope of the agreement. 'Exercising of treaty rights' means that an EU citizen was a worker, jobseeker, self-sufficient with Comprehensive Sickness Insurance etc. To remain in scope, those exercising treaty rights must continue to do so until they are eligible for Permanent Residence under Article 15 WA.

Those in scope of the WA are able to acquire confirmation of their status via a registration process. The WA provides for two processes that the UK and 27 EU member states can choose from: a constitutive system (Article 18(1) - 18(3): requiring citizens to apply for a new residence status) or a declaratory system (Article 18(4)).

The UK has chosen to implement a constitutive system which requires those in scope apply for their status by a certain deadline. The EU Settlement Scheme has been created by the UK Government to meet its obligations under Articles 18(1) to (3). The grants of pre-settled status or settled status are supposed to be confirmations of a person being in scope of the WA. However, there is a problem.

The EUSS does not test for 'exercising of treaty rights', i.e. it does not check whether people are e.g. workers, jobseekers, self-sufficient with Comprehensive Sickness Insurance etc. Instead, the UK has been more generous by allowing anyone who can evidence simple residence (alongside ID and criminality checks) to apply for pre-settled or settled status under the Scheme. As such, both those who are in or out of scope of the Withdrawal Agreement are eligible for status via the EUSS. Regrettably there is no way of telling them apart.

Mismatch between the EUSS and WA

Article 18(1) in Title II of the WA states:

> "*The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.*
>
> *Applying for such a residence status shall be subject to the following conditions:*
>
> (a) *The purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status.*"

In other words:

a) applying for the status is *necessary* to obtain the rights; and

b) the status should be *sufficient* to prove entitlement to WA rights

The EUSS does not fulfil either of these two conditions, because:

a) Not everyone who has WA rights is *able* to obtain evidence of those rights through the EUSS; and
b) Not everyone who *has* EUSS status is considered by the UK Government to have WA rights

Therefore the EUSS fundamentally does not implement what the WA demands, namely a scheme to allow *everyone* who has rights under the WA to obtain a (digital) document to *evidence* those rights.

- **Not everyone who has WA rights can obtain evidence of their WA rights**

  There is a group of people who, as EU citizens, exercised their free movement rights to move to the UK, and subsequently naturalised as dual EU-British citizens. (I personally fall into this category myself, as a Dutch-British citizen). These dual nationals are known as *Lounes* dual nationals (so named after a case in the CJEU), and have rights under the Withdrawal Agreement (this is not contested by either the EU or the UK, and follows established CJEU case law).

  Although many of the Title II WA residence rights are not needed for dual citizens, the rights of recognition of professional qualifications in Chapter 3 of Title II WA do apply to these *Lounes* dual nationals.

  Equally, *Lounes* dual nationals have the right under the WA to be joined in the UK by certain family members in the future.

  The European Commission has stated that EU countries which have chosen the constitutive Article 18(1) route should allow *Lounes* dual nationals to apply to those constitutive schemes in order to evidence their WA rights. For example, the Luxembourg website states that dual nationals "*are not required to apply for a new residence document, but they are free to do so if they so choose;*"

  However, in the UK, Lounes dual nationals are barred from obtaining evidence of their WA rights, as the EUSS does not allow applications from citizens who hold British nationality.

  (On a personal level this concerns me as I may wish, at some unknown future date, to bring my dependent mother to the UK, and I will have no simple way of evidencing my WA rights to do so. I have raised this with the Home Office via an extensive correspondence with my MP, Dominic Raab, since October 2018.)

- **Not everyone who has been granted EUSS status is considered to have WA rights**

  More concerning however, is the fact that EUSS status does not constitute evidence of WA rights.

The Government considers that there are two groups of citizens, namely the 'true cohort' and the 'extra cohort', where the extra cohort are those who were not exercising treaty rights (most commonly through not being aware of the need to have Comprehensive Sickness Insurance when not economically active).

The cohorts are treated differently, for example when holders of pre-settled status apply for universal credit. The WA guarantees equal treatment rights to those in scope of the WA (with only a potential derogation during the first six months' presence in the UK), but pre-settled status is not treated as evidence of being in scope of the WA. Instead, people are subjected to a complex test to see whether they were exercising treaty rights on 31 December 2020 and at the time of applying for universal credit.

Another example is found in family reunion rights. As the UK's immigration rules are currently constructed, anyone with pre-settled or settled status (regardless of which cohort they are in) is entitled to WA rights to be joined by dependent parents/grandparents at a future date. However, if someone with settled status naturalises to become a dual British citizen, then they are only deemed to have WA family reunion rights if they were part of the true cohort. Testing for true cohort / extra cohort will become increasingly difficult with the passage of time, as people will struggle to evidence that they belonged to a 'true cohort' years in the past.

A further example is eligibility for social security coordination - Title III of the WA. Anyone falling within scope of Title II automatically falls within full scope of Title III via Article 30(3) WA. It therefore leads to complex determination yet again if holders of pre-settled/settled status have to be subdivided into true/extra cohort to establish being in full scope of Title III.

The two cohorts are given identical pre-settled / settled status - with identical wording saying "*Issued under the EU Exit Separation Agreements*". It is impossible to tell from someone's pre-settled or settled status whether they are 'true cohort' or 'extra cohort' citizens, and therefore it is impossible to tell from the EUSS status whether someone has WA rights or not.

This is a fundamental design flaw of the EUSS as it cannot fulfil the most basic requirement from an Article 18(1) implementation - namely to give someone unambiguous evidence of their WA rights.

- **Additional note on full scope vs family scope**
  A further distinction ought to be made between those in full personal scope of the WA (Article 10(a)-(d)), and those who are family members (Article 10(e)-(f)), as family members do not themselves have family reunion rights (see Article 17). However, no such distinction is given on the EUSS documentation – so in future people will find it hard to determine what family reunion rights they have. This is in contrast to British citizens and their family members in Europe who will all be issued with a common format residence card evidencing their WA rights, and whose details will include whether they are primary WA rights holders or family member rights holders (see Annex (a)(10) of Regulation (EU) 2017/1954).

Way forward

There may well be some disagreement among legal experts as to whether it is legally possible to expand the personal scope of the Withdrawal Agreement. Some would argue using Article 10 WA that it is not, others would look to Article 13(4) to say that it is. However, we posit that this disagreement could be moot if legislation were altered and simplified such that:

- Everyone with pre-settled status has identical rights, without further tests down the line to determine true/extra cohort membership, and similarly everyone with settled status has identical rights.
- *Lounes* dual nationals are given a way of documenting their WA rights now, to be used as simple evidence of WA rights in the future when needed for example for family reunion.

It is worth noting that following a recent Specialised Joint Committee session between the UK and EU a number of issues were raised of concern (https://www.gov.uk/government/news/specialised-committee-on-citizens-rights-joint-statement-28-april-2021). Amongst them the parties identified " *the verification of beneficiary status under the Withdrawal Agreement*" as being an issue between them. This, we understand, is a reference to the problem I have set out above.

There is a serious difference of opinion between the UK and EU on this fundamental point and regrettably could see tens of thousands of people being disadvantaged because of it.

Other breaches of the WA

For completeness, we would like to draw your attention to two other ways in which we consider the UK to be in breach of the Withdrawal Agreement.

- **Rights pending application**
  As explained during our evidence session, those who make a late application are not granted a right to work or a right to rent until a final decision is made on that late application.

  However, Article 18(3) WA very clearly and unambiguously states: "Pending a final decision by the competent authorities *on any application referred to in paragraph 1*, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, *all rights provided for in this Part shall be deemed to apply to the applicant*, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4)."

  Note that where it refers to 'any application referred to in paragraph 1', this therefore explicitly includes late applications as provided for in paragraph 1(d).

  We therefore submit that to not grant rights pending a decision is in breach of the

WA.

- **Loss of residence rights for pre-settled status holders**
  Holders of pre-settled status *can* apply for settled status as soon as they have acquired five years of continuous residence in the UK, and they *must* do so before their pre-settled status expires.

  Article 20 WA sets out the circumstances in which someone can lose their WA rights - which is essentially for reasons of criminality or fraudulent applications. Article 14 and 15 WA allow for loss of rights due to extended absence.

  However, the WA does not allow for loss of WA rights (once obtained and established by being granted *pre-settled* status) for merely the administrative error of not applying for a new *settled* status.

See also

We also highlighted these issues in our report to the Independent Monitoring Authority, which can be found at https://www.the3million.org.uk/ima-report. See in particular:

- paragraph 5.1 relating to our main point, with paragraph 3.4 containing more examples of people falling into WA scope who cannot make applications to the EUSS
- paragraph 4.2 relating to rights pending application
- Paragraph 5.2 first bullet, relating to loss of rights for pre-settled status holders who omit to apply for settled status

2 June 2021