

The EU Settlement Scheme: the greatest story never told?

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With the looming deadline of 30 June 2021 for EU citizens in the UK to apply to the EU Settlement Scheme (EUSS), the scheme under which they are permitted to stay in the UK post-Brexit, the EUSS is once more very much in the spotlight.

KEY POINTS

- The terms of the EU Settlement Scheme are very generous in giving EU citizens the right to stay in the UK permanently, both absolutely and in comparison with the EU freedom of movement regime.
- However, those EU citizens that do not successfully apply through the EUSS will suffer serious consequences. Their cases will need careful and sensitive attention by the Home Office.
- Much has been said about the operation of the EUSS, but little about the context. Yet the context is remarkable; a country that in 2016 voted to leave the EU in part over EU migration is now offering permanent residency to more than 5 million EU nationals, some of whom were not entitled to permanently stay here before that vote. Even more remarkable, this is being done without a murmur of dissent.
- At the same time, the opportunities for non-EU migrant workers to not only come to the UK, but to stay here, have been significantly expanded as part of the Brexit reforms to the UK's immigration regime.
- All while the salience of immigration as a matter of concern to the British public has dropped to levels not seen since the turn of the millennium. This is unlikely to last.
- But for now, after all the convulsions of the EU Referendum and the Brexit process, the UK has loudly taken back control to rather quietly set out a sensible compromise on immigration which the majority of the country can feel comfortable with, and, perhaps most importantly, not spend its whole time talking about.

'It was the best of times, it was the worst of times'

Charles Dickens, A Tale of Two Cities

The best of times

As we have written before, Dickens' classic start to the novel might be thought to perfectly sum up the EU Settlement Scheme (EUSS).¹

The "best of times" element is EUSS's generosity, in four key respects, in terms of allowing EU citizens in the UK the right to stay in the UK forever (settled status), and make their life here.

The first, and most material, is the EUSS's eligibility and evidential requirements. These are far more generous than those which applied under the EU freedom of movement regime. That regime allowed easy access to the UK for EU citizens, but it did not allow those citizens a formal right of permanent residence in the UK unless and until they could provide clear written evidence that they had not only been in the UK but had also been exercising 'Treaty Rights', ie working or otherwise been self-sufficient, here for five continuous years. By contrast the EUSS only requires that EU citizens in the UK show evidence of five years' continuous *residence* in the UK. There is no need for them to evidence what they have been doing here, just that they have been here. So there are EU citizens in the UK who would not have been able to satisfy the evidential burden to successfully prove their right to stay in the UK permanently under the EU freedom of movement rules, but who will be able to gain settled status to permanently stay in the UK under the EUSS.

The second generous aspect is the long grace period; an EU citizen had until the end of 2020, fully four-and-a-half years after the EU referendum, in which to come to the UK to avail themselves of the right to claim their right to stay in the UK permanently under the EUSS. Of course, those more recently arrived will not have the five full years of living in the UK required to obtain settled status. This is where the third generous aspect of the EUSS kicks in.

This is the concept of "pre-settled status". If an EU citizen in the UK cannot show evidence of five years' continuous residence in the UK, the system defaults to allocating them pre-settled status. This gives them the right to simply stay in the UK until they have reached the five-year threshold, and then claim settled status.

The fourth generous aspect is that the Home Office has approached its decision-making under the EUSS in the opposite way than it did in its decisions on permanent residence under the EU freedom of movement regime. It has approached its decisions under the EUSS with the mindset of exercising discretion *in favour* of applicants. This is very different from its approach taken to permanent residence applications under the EU freedom of movement regime, which were generally marked by a tortuous process, a high evidential bar, and a significant rate of refusal.

In terms of the right to permanently settle in the UK, the transition from the EU freedom of movement regime to the EUSS has therefore been a transition from tough requirements (five years continuous exercise of treaty rights) toughly applied (high

evidential bar) to much more benign requirements (simply five years continuous residence) relatively benignly applied (lower evidential bar). All at the touch of an app, and the time taken to make a cup of tea, according to the Home Office.²

The worst of times

However, under the EUSS there is a requirement on the part of EU citizens in the UK to apply through the Scheme, ie they must take positive action in order to obtain settled status to lawfully stay in the UK. The EUSS will thus inevitably create -- and potentially make much more visible - a portion of the migrant population in the UK that is irregular. Whereas EU freedom of movement did the opposite, effectively covering up irregular migration from the EU.

The EU freedom of movement regime decreased the visible irregular migrant population in the UK in two ways. First, it provided a de facto regularisation of a number of migrants who were in the UK irregularly from Eastern European countries when those countries subsequently joined the EU. Second, the regime provided a degree of ambiguity of which the Government took full advantage. Unlike in many other EU countries, no meaningful steps were taken to keep tabs on EU citizens after their arrival, nor to enquire (unless they themselves applied for permanent residence or otherwise came to the notice of the immigration authorities), whether they were actually exercising treaty rights under the EU freedom of movement regime, which in theory was required for them to be entitled to remain in the UK.

The EUSS brings an end to that ambiguity. All EU citizens in the UK will fall on one side of the line or the other. And falling on the wrong side of the line will, on the face of it, have significant consequences. Whereas those EU citizens who successfully apply under the EUSS will maintain their entitlements to work, study, and to access public services and benefits in the UK, those who do not successfully apply will not. They will in effect fall into irregular immigrant status; their ability to work, to be housed, in practice to live, in the UK will consequently potentially be severely impaired and impacted. They can be removed from the country.

These people will need to be very carefully attended to, both by those who advise and assist them, and by the Home Office who will need to decide what action to take, if any, regarding them and whether or not to allow them to make a late application to the EUSS.

This has led to suggestions that the outcome of the EUSS could be 'Windrush on steroids', in terms of the potential numbers impacted and the severity of the impact they could face. It has also been suggested that this could potentially be addressed by instead making the EUSS declaratory of immigration status, with the registration process only serving to furnish proof of that status. (Here it should be noted that of course the motivations of the Government in structuring the EUSS as they did were at least partly due to their concerns that the problems with the Windrush scheme ultimately arose, decades later, partly did so as a consequence of its declaratory nature).³

Even for those on the right side of the EUSS line, there is a concern that because their right to work, rent, access services, is dependent on demonstrating their status, and

that status will only be acknowledged by the Government through a digital record – not a hardcopy document – EU citizens in the UK will in practice find themselves at best inconvenienced, at worst discriminated against, by employers, landlords, and public services.

There is also the lurking issue of pre-settled status, which a large number of EU citizens in the UK have been granted – over 2.25 million⁴ – either because they have arrived in the UK within the last five years or because they cannot prove that they have been here continuously for that period of time. While this at least puts these people on the path to settled status, there are nevertheless various practical concerns about this. What exactly will be these people's entitlement to various aspects of the welfare system? And how many of these people will not realise that:

- they need to upgrade their pre-settled status to settled status or lose it, or that
- there is a fixed window of time for them to do so, or that
- there are constraints on how long they can leave the UK for without losing their status?

The story that is told

The EUSS has understandably become all about the process; how to get as many people through the process and make those falling on the wrong side of the line as small in number as possible. The Government is now engaging in a final push in this regard.⁵ Given the positive aspects of the scheme, one might have thought that, in order to encourage people to go through the process, the EUSS would have been positioned as a great opportunity that EU citizens should take advantage of, rather than a terrible imposition inflicted on them by the British public and politicians which they just need to get through to be able to stay. At least, the more generous aspects of the EUSS would have been better advertised. But that has not been the case.

Perhaps ministers did not want to risk the more generous aspects of the EUSS becoming widely known, either to those EU citizens not yet in the UK – who could come to the UK before the end of December 2020 and take advantage of the EUSS – or to those British voters who backed Leave out of unhappiness at EU immigration. Perhaps ministers worried at public reactions if it became too widely understood that the EUSS would actually allow some people to stay in the UK who would not have been able to stay permanently under the previous EU freedom of movement regime. In this sense the workings of the EUSS might therefore increase, not decrease, the UK's permanent immigration population.

Meanwhile on the other “side” of the migration debate, perhaps those migrant rights groups criticising the more concerning aspects of the EUSS thought their message might be blunted if they acknowledged that there were in fact rather generous aspects of the EUSS.

As a result, the EUSS has largely been presented to the public and to EU nationals as an imposition. Depending on who you listen to, it is either a relatively small imposition that can be dealt with on an app in the time it takes to make a cup of tea. Or it is potentially huge imposition that threatens your ability to continue to make a life in the

UK. Messages from the Home Office and its critics largely agree: the EUSS is an imposition rather than an opportunity.

However, it is hard to avoid the conclusion that, as an administrative exercise, the EUSS represents a huge success in terms of the numbers who have applied, and the very low number of rejected applications. Around 5.3 million people have applied for EUSS; the Home Office had predicted a total in the range of 3.5 million to 4.1 million⁶.

But at the same time, no matter how successful the process has been, there are still going to be significant numbers who for whatever reason will not have applied in time and will therefore fall on the wrong side of the line going forward, and what the consequences of this will be.⁷

So the story of the EUSS is one of administrative success, but one with defects and limitations and the potential severe consequences of those defects. This story is important. But it also masks another story that is not being told; a story about the numbers who have applied to the EUSS and the broader public atmosphere in which the EUSS has operated.

“But haven’t all the migrants left?”

There is a constant stream of news stories in the UK about numbers of migrants. The difference is that for most of recent memory that news has about numbers arriving. Whereas in most recent times it has been about numbers leaving; a slew of reporting about a ‘Brexodus’ or a COVID-19-influenced exodus of migrants.

Net immigration from the EU certainly dropped off significantly following the EU Referendum, and while the main contribution to this decline was fewer numbers of EU citizens arriving for work, there was also a gradual increase in the numbers of those leaving.⁸ Given the nature of the COVID-19 pandemic, and the number of EU migrants in the UK who could both logistically arrange and financially afford to return home, it is not surprising that, a number of them in the UK chose to do so. It is equally unsurprising that in some cases this may have caused them to more fundamentally reassess their life plans, with the result that some made more permanent decisions to not return to the UK.⁹

By Spring 2021, there were headlines declaring that: ‘A million people have left Britain. What does this mean for the country?’¹⁰ There was a huge caveat though, that the migration data was subject to significant uncertainty, as not just the collection of survey data, but also administrative data, had been disrupted by COVID-19.¹¹ As statisticians tried to grapple with the available data, further data began to emerge which seemed to show the big story was perhaps a smaller story. In the space of a month, from February to March 2021, the *Financial Times* shifted its headline from ‘How EU migrant exodus is reshaping communities across the UK’¹² to ‘Claims of COVID-driven migrant exodus from the UK overstated’¹³. Based on HMRC data, the Office for National Statistics suggested there had been much smaller changes in the overseas workforce in the UK than the Labour Force Survey had appeared to show.¹⁴

Of course none of this data really indicated whether, if people were leaving the UK, they considered themselves to be leaving the UK temporarily, or for good. And there

was little comment on how this might all be interpreted in the light of the EUSS process that was showing huge numbers of EU citizens having applied for the right to stay in the UK forever. It is certainly not the case that just because someone has acquired a right to stay in the UK permanently, or is on a path to do so, that that means that person will necessarily exercise that right. Some may have applied and still returned to their home country for good. But it is still hard to square the EUSS figures – 5.6 million applications from 5.3 million people, 2,754,100 grants of settled status and 2,276,200 of pre-settled status as at May 2021¹⁵ – with the story that lots of EU migrants think they have departed the UK for good. More striking still is that the circumstances and context in which this has all happened are scarcely discussed in a country where EU immigration was, not too long ago, the most important issue in public life.

The story that is not told

Britain's immigration debate is full of inconsistencies and ironies. It is notable that those media outlets most aligned with more liberal approaches to immigration seem to be keenest to run stories saying that all the migrants are leaving. But the statistics from the EUSS, and the atmosphere in which it has operated, suggest that hardly anyone actually wanted EU migrants to leave.

Certain sections of the media have throughout run stories suggesting anti-immigrant hostility attached to Brexit as being a factor in migrants' decisions to leave the UK.¹⁶ As time has passed this factor has been downplayed and the emphasis of the narrative has changed a little. It is said that perhaps if they are leaving, migrants may be leaving for economic reasons related to Brexit, or due to COVID-19. But anti-immigrant sentiment underlying Brexit is frequently still cited as a supporting factor; the New York Times stated that in June 2021 that: "Brexit and the anti-immigrant sentiment that helped drive it made many feel unwelcome"¹⁷

This is not born out by the evidence. This is not to say that there has been no such sentiment, and that this has not been distressing for those subjected to it. But the evidence suggests that, overall, while there was a spike in EU migrants' perception of discrimination around the time of the EU referendum, this was temporary and then dissipated.¹⁸ Our own detailed survey of EU migrants in Fenland in early-2020 did not find any material sense that EU citizens there viewed hostile attitudes or behaviours towards them as a potential factor in their decision-making as to whether or not to remain in the UK.¹⁹

And what of the rest of the UK population? There has been essentially no comment from those who voted to leave the EU on the more generous aspects of the EUSS, no pushback at all on the terms of the EUSS offered to EU citizens. Indeed, there seems to have been almost complete disinterest from this section of society in the terms of the EUSS. Given the fractiousness of the Brexit vote and process in the UK, and the part that the issue of immigration played in that, that seems a remarkable thing little remarked on. It is surely remarkable that a country that in 2016 voted to leave the EU in part over EU migration is now offering permanent residency to more than 5 million EU nationals, some of whom were not entitled to permanently stay here before that vote. And even more remarkable that this fact is scarcely discussed.

When it comes to the EUSS, actions speak louder than words. In this case, that means the actions of British public, and the actions of EU citizens in the UK. 5.3 million people applying to the EUSS. This is not a story of a group that is being hounded out of the country or which feels like it is under pressure to leave. And, if some EU citizens have indeed departed these shores for good, we can be relatively confident that for most this was not because of the terms of the offer that was made to them under the EUSS, or because of the atmosphere surrounding it. Even in the face of lingering Brexit divisions in society, we can surely all at least celebrate that. Can't we?

And in practical terms this is very important for working through the fallout of the EUSS. Because in dealing with those EU citizens falling on the wrong side of the line, some potentially difficult and sensitive issues are going to need to be addressed. And it is better for all if that can be done in an atmosphere of due and proper consideration which is not influenced or distracted by a backdrop of public and political polarisation on this topic. Thus far, this situation looks very much to have been achieved.

At the same time, again with almost no comment or pushback from those who voted to leave the EU, post-Brexit, Britain has opened itself much more widely to immigration from outside the EU. Since the EU Referendum the Government has brought in changes to make it easier for non-EU migrants to come to the UK. The cap on the numbers of 'skilled worker' visas issued to them has now gone. As has the requirement to advertise the job for 28 days in the UK first before offering it to a migrant. Even more important is the significant reduction, versus the pre-Brexit situation, of the required skill level, and the required salary (including the expansion of the eligibility criteria for 'new entrants' at a discounted salary level) for a skilled worker visa. This has a fundamental impact on the number of jobs in the UK that those coming to the UK from outside the EU are now eligible to do, in comparison to the position pre-Brexit. This has been approximated at roughly half of all full-time jobs, roughly double what it was under the pre-Brexit immigration system.²⁰

In addition, the 'graduate route' has been reopened; this is a (re)liberalisation of overseas students' ability to stay on in the UK to work after they have completed their studies, and of the conditions applicable to them then being allowed to switch from a student to a skilled worker visa in order to stay in the UK beyond that, potentially permanently. This route was introduced by the New Labour Government, but scrapped in 2012. Now it is back.

Importantly, as well as liberalisation of the rules on entry, there has also been liberalisation of the rules allowing non-EU migrants to stay in the UK longer term. Over the past decade the majority of work visas issued to non-EU migrants have typically expired within five years, meaning that a large proportion of non-EU workers have only stayed in the UK temporarily. A contributing factor to this has been the permanent settlement minimum income requirement. Under the Government's new UK points-based system, this separate, higher, requirement falls away. The result is that not only will it be easier for non-EU migrants to come to the UK for work, but, having done so, it will also be easier for them to stay, as the Migration Advisory's Committee inaugural annual report points out.²¹

A slight caveat at this point. The lack of debate cannot be taken as evidence that those people animated by immigration concerns in their vote to leave the EU have now changed their minds, and that all are now quite comfortable with immigration. There is some evidence that post-EU Referendum attitudes on immigration have softened.²² But what is not clear is why, and how lasting that change might be. Changes in reported attitudes to immigration should in any case be treated with some scepticism. Recent academic research suggests that, for each person, such attitudes tend to get locked in relatively early in life based on a number of factors and do not tend to shift much after that, other than for short periods before reverting back.²³

However, what can be hugely important in practice is the *salience* of immigration; ie the degree to which immigration is seen as an issue of sufficient importance such that it itself motivates how people act and vote politically. In the UK, immigration is now seen as an important issue by only 5-10% of the country, having peaked at 56% back in 2015; in terms of salience, immigration is now right back down to where it was ranked at the turn of the millennium.²⁴ The salience of immigration in the UK will assuredly rise again one day, but for now it is definitely slumbering.

It is therefore hard to square all this with the stories from either side of the extremes of the Brexit divide. And even across the formerly 'Red Wall' now 'Blue Wall', which encompasses many parts of the UK supposedly most socially conservative and resistant to more open immigration policies, there is clear net positive support for multiculturalism and for the view that "having a wide variety of different ethnic backgrounds and cultures is part of British culture", as well as for the broader view that immigration has "generally been good for the country".²⁵ After all the convulsions of the EU Referendum and the Brexit process, it seems that the UK has loudly taken back control to rather quietly set out a sensible, reasonably liberal, middle way compromise on immigration which the majority of this country can feel comfortable with, and, perhaps most importantly, *not spend its whole time talking about*.

ENDNOTES

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