EU Settlement Scheme: Statement of Intent
An analysis by the3million

Introduction

The Home Office published its "EU Settlement Scheme: Statement of Intent" (SOI) on 21st June 2018, less than four months from the end of the negotiations on the UK's withdrawal from the EU.

Whilst we welcome the publication of the SOI and the draft Rules, and acknowledge some positives (for example a waived or reduced fee in some circumstances, and a promise to contact applicants in order to remedy an application that is not valid or complete), the3million remain deeply concerned that citizens' rights have not been 'safeguarded'.

Not what was promised

There was a pledge before the referendum that EU citizens already resident in Britain would be entitled to remain without any reduction of their rights.

> "*There will be no change for EU citizens already lawfully resident in the UK. These EU citizens will automatically be granted indefinite leave to remain in the UK and will be treated no less favourably than they are at present*".
> Statement by Michael Gove, Boris Johnson, Priti Patel and Gisela Stuart, 1 June 2016[1]

During the Article 50 negotiations, EU citizens and their family members were promised that they would largely retain their EU rights, through a special status confirmed at international treaty level, permanently safeguarded for their lifetime in the Withdrawal Agreement (WA) between the EU and the UK.

Instead it is now confirmed that the status on offer is the existing 'leave to remain' and 'indefinite leave to remain' of UK immigration law. There are a few minor changes such as being able to leave the UK for up to five years instead of two before losing the status, along with some enhanced family reunification rights – although these are much reduced from our original rights under EU law. In particular, the exclusion of future partners will disproportionately discriminate against young people living in the UK where domestic family reunification legislation is extremely restrictive.

Current EU citizens' rights are derived from a declaratory status. The reverse has been agreed in the draft WA. A constitutive system is not what was promised. This will adversely affect citizens in numerous ways. We have expanded on this discussion previously but will highlight some of the issues here. Citizens will now need to apply for a status, and failing to do so places them at risk of the hostile environment and illegality in the UK post transition.

There will be many who do not acquire the status for a variety of reasons. They may not know that they need to apply. Children who need the status are entirely dependent on their parents making a paid application for them. The Coram Children's Legal Centre has produced a briefing that states, "*Any new system for EU nationals must avoid an increase in children finding themselves undocumented as a result of*

[1] https://www.voteleavewatch.org.uk/leave_campaigners_try_to_drop_their_false_promises

practical barriers or policy decisions." [2] Other citizens may not, or simply fear that they may not, be able to successfully apply for the status, due to the evidential burden placed upon them or the cost of applying.

The restrictions associated with the new status are also in breach of what was promised. There may be many who will lose the status. This loss could be either through an absence of over 5 years for work, study or family care reasons, or through a sentence of over 12 months. This is very much against the spirit of EU Permanent Residence, where citizens can only lose status if they are a genuine, present and sufficiently serious threat to the fundamental interests of UK society.

When the status is lost or not acquired, citizens will be subject to the full force of the Hostile Environment or indeed detention and deportation, often to a country to which the citizen has no material link other than their passport. In the case of children, these consequences will surface far into the future, leading to a potential Windrush 2.0 scandal.

Lack of consultation and review

The Home Office has frequently mentioned, and the SOI repeats, its engagement with EU citizens about the design of the settlement scheme through working groups, its direct mailing list and ongoing community engagement. However, the3million has found that the user group sessions have not been very transparent, have mostly involved the Home Office imparting information rather than consulting, and have on occasion restricted user group members from taking documents away for analysis, or allowing sufficient time for such analysis before requiring feedback. Many points that have been consistently raised by the3million and others have been ignored, such as the need for physical evidence of status, and for face-to-face, local and meaningful advice and assistance.

Moreover, any such consultation that has taken place is limited to these user groups, and we feel there is a need for much wider and more transparent consultation. Written questions[3] were presented to the Home Office some considerable time ago, and have still not been answered in time for legislation to be laid before parliament. There has been no information published as to how vulnerable people will be identified, advised or meaningfully assisted. The SOI has been published, inviting a last-minute rushed consultation that amounts to a box ticking rather than a genuine consultation exercise.

We outline our most urgent concerns regarding the SOI below, and expand on each of these in the remainder of the document.

Legal Certainty

- the3million are concerned about the use of **Immigration Rules** to set out provisions for the EU Settlement Scheme as these offer us no legal certainty that today's promises cannot be changed tomorrow. The introduction of the Settlement Scheme via secondary legislation prior to the Withdrawal Agreement and Implementation Bill is likely to be in breach of section 9 of the European Union (Withdrawal) Act 2018.

- Our status is even more uncertain in case of a **'No deal' scenario** as our rights could very easily be changed, possibly without parliamentary scrutiny.

- Provisions for independent monitoring of the EU Settlement Scheme involving the Independent Chief Inspector for Borders and Immigration and an **Independent Monitoring Authority**, as outlined

[2] https://www.childrenslegalcentre.com/promoting-childrens-rights/policy/brexit-childrens-rights/
https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/European-national-children-in-care_March2018Final.pdf
[3] https://www.the3million.org.uk/questions

in the SOI and the draft WA, are problematic and would need to be further clarified and strengthened.

- There are significant **omissions and ambiguities** in the SOI and the Rules that will need to be urgently addressed in order to provide clarity and certainty to EU citizens in the UK.

- In some instances the SOI potentially provides for **unlawful application of EU law**. These instances, outlined in this paper, need to be urgently reviewed by the UK and the EU.

Transparency and fairness of the application process

- the3million remain strongly opposed to a **lack of a physical document** evidencing settled status and call on the Home Office to review its decision.

- Despite welcoming the fee reductions and waivers outlined in the SOI, we remain concerned about the **cost of application** as a matter of principle and especially for people with limited resources.

- We are concerned that those people who do not have a footprint in either the HMRC or DWP databases will still face an alarming **evidential burden**.

- **Criminality and conduct checks** are not only illegal under EU law, but they are unnecessary given that the UK is already able to identify citizens who are a "*genuine, present and sufficiently serious threat to the fundamental interests of UK society*" and they are able to deport those people under EU law. Self-declarations are also unacceptable, as applicants could easily make mistakes with profoundly negative consequences.

- The **data protection immigration exemption** in the UK's recently adopted Data Protection Bill to implement the General Data Protection Regulation (GDPR) is unacceptable and should be removed as it denies people access to their data exactly when they need it most.

Inclusiveness

- the3million continue to be deeply concerned about the **outreach** required to get all 3.6 million EU citizens and their family members to apply for the new status by the deadline set for 30 June 2021. We ask that the government recognise the difficulties it may face, and therefore provide a free and meaningful face-to-face registration system at the local level, without criminalisation of those who do not apply.

- There are still many outstanding questions and issues regarding the provision of **advice and support** to people applying for a new status. These will need to be urgently addressed and sufficient resources deployed by the UK Government for the successful implementation of the Settlement Scheme.

- The SOI is difficult to read and the language used is hard to understand for lay people. We would expect the UK government to be making efforts to create rules that EU citizens can easily understand, and making their **publications more accessible**.

Legal Certainty

- **Today's promises can be changed tomorrow – the use of Immigration Rules**

  According to section 9 of the European Union (Withdrawal) Act 2018, implementation of the Withdrawal Agreement (WA) via secondary legislation is only possible after the adoption of the Withdrawal Agreement and Implementation Bill. It is hard to see how the proposed Settlement Scheme is not an implementation of the WA. It is therefore questionable that the introduction of the Settlement Scheme via Immigration Rules complies with the EU Withdrawal Act. The Withdrawal Agreement and Implementation Bill would be the correct place to set out the Settlement Scheme.

  The Joint Report of December 2017 promised a double guarantee, namely direct effect and the full incorporation of citizens' rights as defined by the WA into primary legislation.[4]

  The SOI confirms that the UK government is making some commitments to go beyond the draft WA on citizens' rights, for example not to test for Comprehensive Sickness Insurance or 'genuine and effective work'.

  However, the SOI proposes to implement the EU Settlement Scheme via the Immigration Act 1971, through a new appendix EU to the Immigration Rules. Unlike statutory Bills, or some secondary legislation that is subject to the affirmative resolution procedure, changes to the Immigration Rules do not actually require *express approval* from Parliament before they come into effect - they are subject instead to the negative resolution procedure. As such, they may not even be debated, scrutinised or considered at all before they come into effect. Indeed, since 2012, the Immigration Rules have been changed 58 times resulting in over 4000 rule changes. Moreover, this legislation is likely to be subject to EU Withdrawal Act powers, and will therefore be especially easy to change by Ministers as opposed to Parliament (under the so-called 'Henry VIII' powers). How will future Home Office administrations guarantee that this will be not be changed for political policy or convenience reasons?

  The implication of this is that the principle of 'direct effect', as agreed in the Joint Report of December 2017, will be virtually put out of reach of ordinary citizens. It will require costly specialist analysis and legal advice, since it will be impractical if not impossible to identify all statutory instruments to determine what rights have been affected.

  the3million is extremely concerned about the reduction of rights of EU citizens and their family members in the UK, and the obtaining of those rights being governed by Immigration Rules. Instead, we would call for:

  - a Citizens' Rights Protocol[5] to be annexed to the WA, detailing all the implementation details and promises made by the UK government to ensure they remain legally binding at international treaty level
  - all citizens' rights set out in the WA, as well as the key criteria of the registration system as set out in the Protocol, are then to be set out in full in primary legislation, namely the Withdrawal Agreement and Implementation Bill.

[4] https://docs.wixstatic.com/ugd/0d3854_d1770dd5911443c1ac4057325577f468.pdf
[5] https://www.the3million.org.uk/publications - 11/06/2018 section

- **'No deal' scenario**

  There is still much talk at all levels of the government including the Prime Minister of a 'no deal' scenario. Yet there is no contingency plan for EU citizens' rights in the event of such an eventuality.

  We assume that the effect of the EU Withdrawal Act 2018 will ensure that EU citizens' rights and residency will be the same on the day after 29 March 2019 as the day before. However, the same Act allows a Minister to change any provision of EU-related/incorporated law, and the White Paper on the Bill mentioned EU citizens' rights explicitly as one of the areas in which the so-called 'Henry VIII' powers would be used. We therefore assume that in a 'no deal' scenario', our rights can and will be soon changed afterwards, and possibly without parliamentary scrutiny.

  Moreover, many of our rights cannot be guaranteed by the UK alone, since they depend on agreement with the EU. This includes issues requiring immediate collaboration and direct reciprocity such as healthcare, financial social benefit and pension transactions and recognition of qualifications.

  the3million, together with British in Europe, have been calling for the final EU-UK agreement on citizens' rights to be ring-fenced[6] from the rest of the WA so that it may come into force regardless of the outcome of negotiations between the UK and the EU. This is essential to avoid the possibility of an extended legal limbo for over 5 million citizens. We ask the UK and EU negotiators to commit to such ring-fencing by the European Council of October 2018. If there is no full agreement on the WA by that date, the UK and EU should go ahead with a ring-fenced agreement on citizens' rights, including a Citizens' Rights Protocol detailing the UK government implementation details and promises, so that this can still be ratified prior to Brexit.

- **Independent Monitoring Authority and dispute settlement mechanism**

  The draft WA, Article 152 states: "*In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority") which shall have equivalent powers to those of the Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two of this Agreement by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate remedy.*"

  The WA requires the Independent Monitoring Authority (IMA) to be operational from the first day after the end of the transition period (referred to as 'implementation period' in the SOI). That means that the UK should ensure the IMA is up and running from 1st January 2021. However, even at this late stage in the negotiations, there appears to be no agreement on this and the SOI only states that primary legislation will be required to create the IMA. The SOI also states that in the meantime (presumably until 31st December 2020) the implementation of the settlement scheme in the UK will be monitored by the Independent Chief Inspector for Borders and Immigration (ICIBI). The SOI makes no reference to the role of the European Commission or the European Court of Justice, which will respectively monitor and oversee implementation of the WA during the transition period. It is also not clear if and how the ICIBI might interact with the Commission during this time to coordinate the monitoring.

[6] https://www.the3million.org.uk/publications - 16/06/2017 section

Although it is reassuring that during the transition period, citizens will be able to continue relying on the EU institutions to ensure respect of their rights by the UK authorities under the WA, we have serious reservations on the effectiveness of the ICIBI in the UK. This is because the ICIBI is not sufficiently independent of the Home Office and it does not have the necessary powers, mechanisms and resources to effectively monitor delivery of the scheme by the Home Office. The onus will thus be on individual citizens to make complaints to the Commission if their rights are not safeguarded at this critical time when the UK will have already left the EU.

It is assumed that most problems of implementation will arise when the vast majority of EU citizens will apply for their new status, which will mainly coincide with the transition period. Rigorous, real-time monitoring at this crucial stage will be critical to the successful implementation of the Settlement Scheme. It would therefore be far preferable for the IMA to start its work, in coordination with the European Commission, during the transition period rather than once it has ended.

Independent oversight provisions, including an effective dispute settlement mechanism are essential to the safeguarding of EU citizens in the UK and their families. In the absence of the EU infringement procedure and the monitoring power of the Commission beyond the transition period, and with the preliminary reference procedure limited in time by the sunset clause of eight years, much will depend on the role of the IMA. However, the3million is extremely concerned that an eventual IMA, being a UK body, will not be guaranteed a sufficient degree of independence and effective authority to ensure the continued protection of EU citizens' rights under the WA.

We therefore ask that details of the proposed authority are shared as a matter of urgency, and that such an authority be truly independent by being established as a joint UK-EU body, equivalent to the European Commission in EU Member States.

- **Omissions and ambiguities in the SOI**

The SOI states multiple times that the eventual Rules may differ from the approach set out in the SOI, based on discussions. The SOI mentions 7 times how 'straightforward' the application process will be, yet there are 12 mentions of further information being made available 'in due course' on very substantive subjects (including provision for the children of EU citizens and their family members, and children with EU citizenship). the3million is concerned that many of its 150 Questions[7] have not yet been answered. Those answers that were supplied by the SOI may be subject to change and so do not give us certainty, and in fact the SOI has raised several new questions which has led to an update of the Questions document, to be attached alongside this analysis. We therefore feel we are not getting any closer to the clarity and certainty that is needed to protect the millions of EU citizens in the UK and their families who have been living with uncertainty and anxiety for more than 2 years now.

The SOI only provides a sample of the registration scheme, and many aspects are omitted, including, but not limited to:

- Clarification and details on those citizens who apply after July 2021, particularly joining family members.
- Information on entry clearance applications for those citizens and family members who need to apply from outside the UK: for example due to being posted abroad, or caring for family.

[7] https://www.the3million.org.uk/questions

- Full commitment from the Home Office to return identity documents within a certain period of time (Draft WA Article 17 1 (i) states "*Where the identity document is retained by the competent authorities of the host State while the application is pending, the host State shall return that document upon application without delay and before the decision on the application is taken;*"). The SOI merely states in paragraph 1.14 that they "*aim to return them to the applicant as soon as we can*"; this needs to be by return of post. The option to use passport-checking services should be also explored to avoid the risk of loss or delay by having to send the identity document to the Home Office at all.

- Details about the exact circumstances in which the Home Office will deem it necessary to request further information to determine residency.

- Full details about the scope of engagement with applications to avoid error.

- Section 5.17 acknowledges that the draft WA Article 17 1 (b) states "*A certificate of application for the residence status shall be issued immediately*"), but provides no information about arrangements for this under the scheme.

- The SOI includes under the suitability requirements of the draft rules a provision that allows applications to be refused where an applicant is abusing their rights in the UK. There are no details as to how this will be assessed in the application process.

- Details of how deportation decisions will be made have not been provided. The SOI draft rules only make reference to the presence of a deportation order, not how they are to be decided in the context of the WA.

- The SOI embraces the findings of the CJEU judgement of *Lounes*. This means that those dual national British-EU citizens who have exercised freedom of movement rights will be able to benefit from family reunion rights under the WA. However, British citizens who may have acquired an EU nationality (for example as descendants of someone with an EU nationality) but that have never left the UK (thus not exercising treaty rights) fall outside of *Lounes*, therefore their family members will not be able to benefit from these post-transition family reunion rights. The same might apply to children of settled EU nationals who were born in the UK and have never left the country as they are also considered to never have exercised treaty rights and are therefore not covered by the WA. If all EU citizens (regardless of other nationalities) will be able to acquire settled status, how will this work in practice?

- The SOI paragraph 6.6 definition of Child states "*It does not currently include a child cared for by the EU citizen (or their spouse or civil partner) solely by virtue of a legal guardianship order or a formal or informal fostering arrangement, but we are looking further at those and other aspects of the definition*". Further details are required.

- The SOI paragraph 3.9 lacks detail regarding the circumstances in which children born (or adopted by) in the UK or overseas after 31 December to a parent or parents eligible for status under the scheme would not be eligible for settled status. Clarification about these circumstances would be urgently required.

- The type of status to be granted to *Chen* carers, *Ibrahim* and *Teixeira* children and their carers, and *Zambrano* carers is not specified. Our interpretation of the SOI is that *Surinder Singh* family members will not be able to move to the UK after the end of the transition period, even if their British citizen family member is in the UK before the end of the transition period. Furthermore, we are concerned that British citizens returning after the end of the transition period will not benefit from *Surinder Singh* at all.

- There is no clear position on frontier workers or family members of military personnel.
- The SOI section 2.6 states that Irish citizens "*will not be required to apply for status under the scheme (but may do so if they wish), and their eligible family members (who are not Irish citizens or British citizens) will be able to obtain status under the scheme without the Irish citizen doing so*". However, it does not explain the benefit of applying or the risk of not applying for those Irish citizens. Furthermore, how can eligible family members logistically apply without the Irish citizen applying?
- How will a digital only form of status work within the structure of the Hostile Environment, where private actors such as landlords, employers, banks, healthcare and other service providers are delegated border control agents?
- The SOI mentions that HMRC data will be used to establish citizens' continuous residence, and 'in due course' the Department for Work and Pensions. When will DWP data be used?
- The SOI makes reference to an EU citizen or their family member being able to appeal a decision under this scheme, and makes clear that this right of appeal can only exist through the introduction of primary legislation, which would be subject to parliamentary approval. The SOI also states that the UK government 'intends' to introduce a right of appeal. The UK government has committed to introducing a right of appeal to decisions under the scheme within the WA. It is simply unacceptable for the UK merely to state an intention when it has made such firm commitments under the WA, or not to provide a right of appeal on applications before March 2019.

- **Potentially unlawful application of EU law**

  The SOI states that family members relying on their relevant EU citizen's status will need to provide a 'valid' passport or national ID card. Whilst we recognise that the UK will look to adopt a flexible approach to ID, the UK courts have highlighted that there is no clear basis in EU law for family members to provide valid passports of EU citizens when applying for Permanent Residence[8]. The UK's requirement could place family members of EU citizens in a particularly vulnerable position – particularly those who are victims of domestic violence, or otherwise cannot gain access to the relevant and required documentation. Whilst the draft rules set out an exemption where applicants cannot provide valid passports, in light of current legal interpretation, the requirement for a valid document with applications for settled status is arguably unlawful and creates an unnecessary hurdle.

  The SOI's interpretation of a durable partnership for the purpose of settled status is inconsistent with EU law, for example, the requirement of two-year cohabitation. The acknowledgment that 'other significant evidence' can be submitted does not clarify relationships qualifying under the proposed rules.

  The SOI does not include relatives of the spouse or civil partner of an EU citizen as extended family members. Those who had already been issued with an EEA family permit, registration certificate or residence card as an extended family member and have been continuously resident in the UK since its issue are protected but other extended family members are not. This is contrary to the approach of the Court of Justice in *Rahman* (C83/11) to the EU law requirement to 'facilitate' the entry of extended family members.

[8] Barnett and others (EEA Regulations: rights and documentation) [2012] UKUT 00142 (IAC)

EU.16 of the draft rules within the SOI states that applications will be refused (amongst others) where "*whether or not to the applicant's knowledge, false or misleading information, representations or documents have been submitted*". The EU and UK have not agreed this test be included in the WA, and it does not feature in EU law. It is a replication of a general ground for refusal under the Immigration Rules. This clause is arguably incompatible with the agreement and should be removed.

There are references in the SOI to past Permanent Residence rights under EEA regulations (3.4 – exceptions to breaking continuity of residence by a prison sentence, and 2.2 – allowable absences for those who have acquired EU permanent residence rights). The right of Permanent Residence is difficult for many not least due to the UK infringement [9] of the Comprehensive Sickness Insurance requirement: "*The United Kingdom, however, does not consider entitlement to treatment by the UK public healthcare scheme (NHS) as sufficient. This breaches EU law.*"

Transparency and Fairness of the Application Process

- **No physical document evidencing settled status**

The Home Office acknowledges "*non-EU citizen family members in the UK granted status under the EU Settlement Scheme will also be issued with a biometric residence document [...]. This will provide them with a convenient way of evidencing their status to those who may need to see confirmation of it, such as an employer, landlord or service provider.*"[10] Yet on the other hand "*evidence of this status will be given to EU citizens in digital form; no physical document will be issued to them*."[11]

As underlined by the3million, there are pressing concerns about the lack of physical documentation when dealing with the implications of the Hostile Environment policies, and there is clear evidence of discrimination by landlords in cases where the lack of physical proof of a right of residence is an issue. "*Nearly half (49%) of landlords are less likely to rent to someone with limited leave to remain and 44 per cent of landlords would only rent to those with documents familiar to them. In practice, this is likely to again mean a British passport.*"[12] The government have yet to present details of how EU citizens would navigate the Hostile Environment without physical proof of their rights. There is a suggestion of an alternative means of digital status checking. However, in any case we strongly feel that many agents may find even a simple digital check too much of a deterrent, and will again choose to provide their services to someone with familiar (physical) documents.

the3million remain strongly opposed to a lack of a physical document evidencing settled status and urgently call on the Home Office to review its decision.

- **Cost of application**

We welcome the reduced fee for children, the fee waiver for holders of Permanent Residence, and the fact that EU citizens and their family members who acquire pre-settled status will not need to pay again when they apply for settled status.
However, it is still the case that a family of five, regardless of their financial situation, will need to pay £227.50 to apply for a status that they did not need before. It is important to stress, in

[9] http://europa.eu/rapid/press-release_IP-12-417_en.htm
[10] https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent - section 7.3
[11] https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent - section 7.2
[12] https://news.rla.org.uk/right-to-rent-judicial-review-bid-heard-in-high-court/

contradiction to what was promised, that EU citizens will have to *apply* for the right to continue to live in the UK even though the EU and the UK have repeatedly stated that their rights will remain 'broadly' unchanged.

In many cases, long-settled EU citizens may not even have valid passports – the Office for National Statistics estimated that 269,000 non-UK born residents were reported to have no passport.[13] These citizens will be subject to the additional expense and trouble to renew their passports.

As we illustrate below, we consider the offer of no fee for many longer-term residents who hold ILR meaningless, given the challenging evidential burden this would entail.

- **Evidential burden**

Whilst the SOI repeatedly states its scheme will be a straightforward, user-friendly system with three easy steps, the reality is that the Settlement Scheme as currently proposed will be straightforward only for those who have been working under PAYE for 5 years, and can therefore readily prove all the necessary elements. Data from the Department for Work and Pensions (DWP) is said to be available 'in due course'.

Even when DWP data becomes available, many EU citizens and their families will not have a footprint in either of these databases, and they will face an alarming evidential burden, which may disproportionately and negatively affect many thousands of citizens. It is very conceivable that the Home Office will grant citizens, who have been here a long time but struggle to provide evidence, pre-settled status instead of settled status, with an explanation that they can receive settled status after 5 years at no cost. This however, can have far-reaching consequences for these people. Firstly, they will be restricted in their allowable absence from the UK (up to 6 months in any 12 month period, rather than up to 5 years) which will severely constrain any choices they may face in job relocations or needing to care for family. Furthermore, they will be at risk of reassessment of their existing benefits or recourse to public funds, and at risk of discrimination in the workforce as employers face extra checks when employing people with pre-settled status rather than settled status.

The stark reality of the burdens facing EU citizens and their family members was made clear by the Windrush scandal. The Joint Committee on Human Rights published a Windrush generation detention report on the 29th June 2018[14]. This includes in its summary:

"Our analysis of their case files confirmed that Home Office officials discounted ample information and evidence—the individuals' accounts of their lives; evidence and pieces of information on the case files; representations from family members, lawyers and people who had known them for decades".

It states in its conclusions:

"*The Home Office required standards of proof from members of the Windrush generation which went well beyond those required, even by its own guidance; and moreover were impossible for them to meet—and which would have been very difficult for anyone to meet.*" The SOI does not appear to have taken the conclusions from this Select Committee into consideration.

---

13 https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/detailedcountryofbirthandnationalityanalysis/2013-05-16

14 https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/windrush-report-publication17-19/

CASE STUDY: Longer-term resident holding ILR

Katia is an older EU citizen who obtained ILR decades ago, never received benefits, living in a house where the mortgage was paid off in the past, not yet living in a care home, married to a British citizen who has provided income for them both. She has the choice of two application routes.

Katia might consider taking up the SOI's offer of cost-free settled status because she has ILR. However, just like with people affected by the Windrush affair, the burden of proof is on the applicant to show that this decades-old ILR has not lapsed. In other words, for the entire period since the date of the ILR, Katia will need to provide documentation demonstrating that she has not been absent from the UK for at least 2 years. It is unlikely that the documents in SOI Table 1 will be applicable to her, apart from a council tax bill but only then if it featured her name. Very few of the documents in Table 2 will be applicable, or if they are, they will have limited use to Katia. For example, GP or hospital appointments only serve to confirm residence for the month in which the appointment took place. Quite apart from the enormous difficulty of collecting this documentary evidence going back so many years, the sheer volume and weight of paperwork required will be just as onerous as the 85-page PR application form.

Alternatively, Katia can apply for settled status, by paying the fee. She would of course still potentially face the same burden of evidence as above, but this time for 5 years rather than decades. This shows the generous sounding offer of 'free' settled status for longer-term ILR holders is not very meaningful where it entails significant costs of time, effort, money and even impossibility (if documents are not readily available).

CASE STUDY: Citizen struggling to prove residence footprint in the UK

Despite having lived in the UK for almost two decades, Saskia would struggle to provide the required evidence. She obtained two degrees in the UK – however these were with the Open University so she fails to prove 'physical attendance'. She paid for both degree courses in full herself, so cannot rely on student finance documentation. All the bills are in the name of her husband with whom she was living all this time, though they only married last year. She has no stamps in her passport since EU citizens do not get stamps in their passports when entering the UK. Saskia does a lot of voluntary work for a charity, but submits only 2 or 3 invoices for expenses each year – which would certify her residence only for the 2 or 3 months of those invoices. Acceptable evidence appears out of touch with the modern world, why would for example a delivery email from an internet company not provide proof of residence?

The list of acceptable documents required appear to be based on an assumption of guilt (non-residence), placing an unacceptable burden of proof on EU citizens like Saskia. Evidence of life in the UK such as expense reports, GP and hospital appointments only serve as evidence for the month for which they are dated. This could potentially mean producing up to 60 individual pieces of evidence to prove five years' continuous residence. The SOI specifically excludes testimonials from family and friends. Therefore, despite having lived in the country for almost twenty years and being married to a British citizen, Saskia may end up being granted pre-settled status rather than settled status, with a resulting restriction of her rights for up to five years. Furthermore, since she had not been aware of CSI, Saskia has not been eligible for PR, and therefore not able to apply for British citizenship – being granted pre-settled status will delay this for many more years.

- **Criminality and Conduct Checks**

  the3million campaigned strongly during the last 18 months against systemic criminality checks, since they are illegal under EU law. We argue that such checks are unnecessary since the UK are already able to identify citizens who are a "*genuine, present and sufficiently serious threat to the fundamental interests of UK society*" and are already able to deport those people under EU law.

  The SOI's wording on criminal checks appears to imply that the Home Office will perform these checks universally, whereas in user group meetings the3million has been told that the applicant will need to self-declare. Self-declarations are unacceptable, as applicants could easily make mistakes with profoundly negative consequences. This happened to Desmond Johnson who applied for a visa to return to the UK from Jamaica, which was refused "on the grounds that he had not provided details of a historical, trivial and spent criminal conviction on the application form".[15] The conviction had been of a minor offence dating back 20 years and resulted in a small fine at the time. Desmond had forgotten about it, but he was accused of lying on the visa application form.

  We would welcome more details of the policy position the UK intends to take when assessing the criminality and security risk threshold. It is acknowledged that parking fines will not trigger a refusal, however further details are required to ease anxieties. These anxieties have increased recently in the light of a report of children being denied British Citizenship because of a school fight or police caution in the past.[16]

  the3million would like to reiterate its concern with the rules surrounding criminality and loss of settled status. Whereas under EU law, a citizen needed to be a "*genuine, present and sufficiently serious threat to the fundamental interests of UK society*" before being subject to deportation, after Brexit a citizen can be deported after a 12-month prison sentence. This could therefore affect someone who has lived in the UK for most if not all of their life, who would then be deported to a country with which they potentially have no links or family or even language proficiency. Furthermore, there are some aspects of the Suitability criteria in the SOI which are potentially incompatible with the WA.

- **Data protection immigration exemption**

  The House of Commons recently passed a Data Protection Bill to implement the General Data Protection Regulation (GDPR). The Bill includes an immigration exemption that denies people access to their data exactly when they need it most. the3million considers this unacceptable and is in the process of preparing a legal challenge together with Open Rights Group. [17]

[15] https://www.theguardian.com/uk-news/2018/apr/22/how-windrush-scandal-shattered-two-brothers-lives-trevor-desmond-johnson
[16] http://www.legalvoice.org.uk/british-citizenship-for-young-migrants-and-bad-character-provisions/
[17] https://www.the3million.org.uk/gdpr

Inclusiveness

- **Outreach**

  the3million continue to be deeply concerned about the ability to reach all affected citizens and make them aware that they need to apply for the new status. We are worried that the deadline of 30 June 2021 does not provide enough time for all 3.6 million EU citizens and their family members to be granted their new status.

  Quoting from the recent New Philanthropy Capital (NPC) research[18] on registration schemes worldwide:

  "*New Philanthropy Capital examined registration schemes around the world and found that historic take-up rates for large-population registrations ranged from less than 20% in the UK to 43% in the US and 77% in Spain. The only scheme that came close to achieving a 100% take-up was in India, but that was after almost £1bn was spent on an awareness and implementation programme.*"

  "*Many successful registration schemes take several attempts (even if they were initially intended as being one-off), involve a learning process over several years as well as a large resource commitment. Here the UK has little historical experience compared to other European countries [of registering migrants].*"

  This is especially concerning when taken together with the fact that the UK has chosen to make the settlement scheme constitutive rather than declaratory (the draft WA offers each member state the choice). The implication of this decision is that any citizen who does not apply before 30 June 2021 could effectively become an illegal overstayer, fully exposed to the Hostile Environment, and potentially facing criminalisation, ranging from a fine to detention, removal or deportation.

  Whilst the SOI acknowledges the challenge ahead, the task to register well over three million EU citizens and their family is in addition to the existing workload of the Home Office. We have previously expressed concerns about the Home Office's ability to handle the task ahead. This has been echoed and emphasised by the NPC in their report.

  the3million ask that the government recognise the difficulties it may face, and therefore provide a free and meaningful face-to-face registration system at local council level or passport offices, and without criminalisation of those who do not apply.

- **Advice and support for people to make the application**

  The SOI states that the scheme application guidance is planned to be published in English and in the 23 official languages of the EU. It is unclear whether this will be completed before the start of the settlement scheme.

  The SOI refers to assistance that will be provided to citizens. However, the SOI does not provide information on the 'particular circumstances' in which the provision of a paper application form for those applicants who may struggle with the digital application may be appropriate. Moreover, it is still unclear to what extent help provided will indeed be 'helpful'. There are no details on how many caseworkers will be dedicated to the EU settlement scheme, and what level of training they will receive. The scope of the services that the UK is proposing to assist EU citizens and their family to

[18] https://www.theguardian.com/politics/2018/jun/20/brexit-id-scheme-for-eu-citizens-in-uk-will-be-difficult-to-achieve

apply is also unclear. We understand that the digital assist service is to be available at certain places, and that a telephone helpline will be made available. The cost for these services to applicants has not been disclosed, nor is it clear what they will be able to help with; whether they can only help with the practicalities of the process or whether they will be able to provide legal advice to applicants, and what help will be available when things go wrong.

The Home Office have stated in user group meetings that people will not need legal advice, however the3million strongly disagree with this and we continue to highlight the absolute necessity of free legal advice being available to those who need it.

What course of redress would applicants be provided with if it turned out that the caseworker (or any part of the Home Office) had given incorrect legal or immigration advice? The SOI mentions in both 1.15 and 5.15 that it will work with applicants to help them avoid any errors or omissions, but does not explain what will happen if the Home Office makes errors. Given the current 10% Home Office error rate, the3million feel this should be clearly addressed.

Citizens will require help acquiring documents evidencing their residence. The Annex setting out documentary evidence is not explicit regarding how many documents will be required. Table 1, Preferred Evidence, for example refers to dated and signed letters prepared by organisations confirming residence/attendance of courses. This may in practice be difficult for citizens to obtain. Even obtaining letters from past employers can be very difficult, especially when such employers have been the subject of a takeover, have ceased to trade, or are extremely difficult to contact from the 'outside', only supplying call-centre contact information for clients rather than ex-employees. Table 1 does not provide many options that are not work or study related, potentially making it very difficult for stay-at-home parents, carers or vulnerable citizens to evidence their status.

Table 2, alternative evidence, states that the documents referred to will only cover the period specified within the documents, which is very restrictive to establishing residence. There is a presumption of non-residence or guilt here – someone showing a GP appointment in one month of one year, and a hospital appointment in another month of another year is presumed to have not been resident in the UK in the intervening time. This suggests that people who may have to rely on alternative evidence documents from Table 2 may still face an even greater evidential burden to prove five years' continuous residence.

- **Accessibility of the Home Office publications**

Finally, the3million have received feedback from many people stating that the SOI is difficult to read, and that the language used is hard to understand for lay people. Much of the language could, and should be simplified, as there is some confusing and conflicting repetition, and in many cases the use of examples to illustrate legal principles would be very useful. We would expect, in light of the Law Commission's current consultation,[19] the UK government to be making efforts to create rules that EU citizens can easily understand.

[19] https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/