# information sheet

Information sheets provide general information only, accurate as at the date of the information sheet. Law, policy and practice may change over time. ILPA members listed in the directory at [www.ilpa.org.uk](http://www.ilpa.org.uk) provide legal advice on individual cases. ILPA does not do so. The ILPA information service is funded by the Joseph Rowntree Charitable Trust.

An archive of information sheets is available at [www.ilpa.org.uk/infoservice.html](http://www.ilpa.org.uk/infoservice.html)

**Alison Harvey, ILPA Legal Director** [Alison.Harvey@ilpa.org.uk](mailto:Alison.Harvey@ilpa.org.uk)

**Immigration Law Practitioners’ Association** [www.ilpa.org.uk](http://www.ilpa.org.uk) 020-7251 8383 (t) 020-7251 8384 (f) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**BREXIT**

*6 July 2017*

**11. UK negotiating position on EU citizens’ rights (2)**

The UK has published its [negotiating position](https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu/the-united-kingdoms-exit-from-the-european-union-safeguarding-the-position-of-eu-citizens-living-in-the-uk-and-uk-nationals-living-in-the-eu) on EU citizens’ rights after Brexit. This is

discussed in [**Brexit information sheet** **10: UK negotiating positon on EU citizens’ rights**](http://www.ilpa.org.uk/resource/33378/information-sheet-brexit-10-uk-negotiating-position-1)**.**

The UK document is not clear or comprehensive and there are many gaps. This information sheet looks at some of the places where the UK position is unclear. It describes problems in understanding the UK negotiating positon, not in understanding what will be the position in reality after Brexit. Everything described in it is a **proposal**: the ‘worst-case scenario’.

**What will the cut-off date be?**

The UK proposal does not commit to a cut-off date. It says no earlier 29 March 2017, no later than the date of Brexit (expected as to be 29 March 2019).

**Who are ‘qualifying’ EU nationals ‘resident’ in the UK?**

The UK paper refers to “qualifying EU nationals”. Does ‘qualifying’ means those exercising rights under EU law (as interpreted by the UK), or something wider? What does ‘resident’ mean? The UK paper says that the UK will not require people to have comprehensive sickness insurance to qualify for a status on the basis of being an EU national. The equivalents of other requirements for indefinite leave are not mentioned. Does that mean that they will have to be met? It is said that qualifying EU nationals must ‘still be resident’ when they apply for settlement. What does this mean?

What will be the meaning of ‘continuous residence’ for the purposes of deciding whether a person qualifies for settled status? Can periods of residence, between which there is a gap, be aggregated?

Will non EU nationals (from Switzerland, Norway, Iceland and Lichtenstein) and their family members get the same protection as EU nationals?

If a person does have to meet requirements of EU free movement law this still leaves some questions uncertain. Judgments on aspects of free movement are awaited from the Court of Justice of the European Union. UK law on free movement is, in a number of places, in conflict with settled EU law, see [**Brexit Information Sheet 12: UK regulations on free movement that may breach EU Law**](http://www.ilpa.org.uk/resource/33380/information-sheet-brexit-12-uk-regulations-on-free-movement-that-may-breach-eu-law)**.**

**Who is a family member?**

Under EU law family members are spouses or civil partners, dependent children under 21, older if in full time education and the dependency lasts longer, and parents and (great-)grandparents, of a qualified person and their spouse/civil partner. Extended family members are other relatives, including unmarried partners. Which family members will be able to qualify post-Brexit?

**The requirements for settled status**

There will be a requirement pertaining to criminal history and conduct. Can we assume because this is mentioned explicitly and other requirements, such as a life in the UK test, language competence and payment of the health surcharge, are not, that such requirements will not apply? What evidence will be required?

**The requirements for temporary leave**

What will be the requirements for periods of temporary leave to reach settled status during and after the transition period? Will they be the same? Will the requirements during the transition period be the same as (the UK’s interpretation of) the requirements to be a qualified person under EU Law (minus comprehensive sickness insurance)? Will the requirements after the transition period be the same; be those of the Immigration Rules applying to third country nationals or be tailor-made? What evidence will be required?

**Fees**

The UK position suggests that there will be a fee for applications for settled status and for temporary leave but does not indicate how much that fee will be save that they will be ‘at a reasonable level’.

**Will you need to be living in the UK on the date of Brexit to be protected?**

Some persons acquired permanent residence many years ago and have not lost it because they have not been out of the UK for more than two years continuously since acquisition. Will it matter if they are outside the UK, or not resident, when they apply to settle? The UK paper refers to persons who must ‘still be resident’.

**Will persons be able to achieve settled status in less than five years?**

EU law makes provision for certain persons to acquire permanent residence in less than five years, for example on retirement or in the case of frontier works such as persons living in Northern Ireland but working in the Republic or living in Gibraltar but working in Spain. The UK paper talks about aligning the residence criteria ‘with the current EU general standard for permanent residence which is in most cases five years’ leaving it wholly unclear whether accelerated routes to settlement will still exist.

**What will happen to British citizens returning to the UK under free movement rules?**

These are the so-called *Surinder Singh* cases, named after the case which established that returning British citizens who have exercised free movement rights can rely on their EU rights so that their third country national family members need not meet the requirements of domestic immigration law. Will such citizens fall under arrangements for EU citizens or under UK immigration law post Brexit?

**The transition period.**

The UK position says this will be ‘up to’ two years.

It is hard to see that there will be any way of distinguishing between those who arrived before the cut-off date and those who arrived after it during the transition period. The UK position talks about ‘a period of blanket residence permission’ fro Brexit day, which will be a ‘generic umbrella of temporary leave applying to all existing lawful EU residents’. But two days after Brexit day, how will anyone be able to tell which EU nationals lawfully resident on Brexit day? Will the passports of those who arrive after be stamped? What about those who were in the UK before Brexit day, but not ‘lawfully’? This creates challenges given the ‘hostile environment’: how will an employer or landlord/landlady know if a prospective employee or tenant is likely to be allowed to remain post Brexit?

What will happen if a couple divorces during the transitional period? Will a third country national family member be granted temporary leave to progress to settlement? At all? Only if the relationship broke down for particular reasons, such as domestic violence? What of children born after Brexit?

**What will happen to a person who applies for settled status during the transitional period and is rejected?**

Will they be able to stay until the end of the transitional period or, if the reason for rejection is, for example, criminal conduct, will they have to leave?

**Those who arrive post Brexit**

EU nationals and family members who come to the UK after the cut-off date are likely to fall under the Immigration Rules. Those rules change over time and might have to change as a result of Brexit but the UK paper leaves this for another day. The UK position does, however, refer to ‘the same immigration rules as the family of UK citizens or alternatively to the post-exit immigration arrangements for EU citizens who arrive after the specified date’ suggesting a possibility of different rules for EU nationals and family members.