

The Right to Reside?

Comprehensive Sickness Insurance and residency in the United Kingdom

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I. Summary

An obscure requirement of UK Immigration policy demands that EU citizens residing in the UK that are either self-sufficient or students must provide evidence of Comprehensive Sickness Insurance (CSI) coverage for a continuous five year period in order to be considered eligible for British permanent residency. This issue has come to light recently, after several accounts have surfaced reporting cases in which EU citizens were asked to make arrangements to leave the UK after their applications for British permanent residency were denied, on the grounds of a lack of CSI coverage.

In the wake of Brexit referendum, the ability of EU citizens to gain British permanent residency has become particularly significant, and EU citizens living in the UK currently face considerable uncertainty and fear about their futures in the country. Furthermore, the CSI requirement resonates with the wider concerns surrounding additional criteria that EU citizens must fulfil in order to be lawfully present in the UK. These additional criteria have, in the past, been applied discriminatorily by the Home Office, and are likely to have a disproportionate impact on more vulnerable groups within British society.

While the first position paper issued by the UK government regarding citizen's rights after Brexit does address the issue of CSI coverage for EU citizens seeking 'settled

status' after Brexit, it is phrased ambiguously and fails to define key and does little to dispel the uncertainty of EU citizens about their future in the UK.

II. Comprehensive Sickness Insurance (CSI)

Under a little known rule, EU citizens residing in the UK that are classified as either students or self-sufficient persons, are required by the government to have Comprehensive Sickness Insurance (CSI) coverage in order to eligible for permanent residency status.

The UK Visas & Immigration publication *EEA (PR): Guidance notes Version 3.0*, stipulates that EU applicants seeking permanent resident status in the UK, who are either students or self-sufficient, must provide:

“One of the following documents which was valid for the relevant period of study/self-sufficiency:

- *Schedule or other document from a private medical insurance provider outlining the level of cover, this must have covered you/your sponsor/your family member(s) for the majority of risks while in the UK*
- *European Health Insurance Card (EHIC)(formerly E111) issued by an EEA Member State (not the UK)*
- *Form S1 (formerly E106, E109, E121, Form S2 (formerly E112), or Form S3*

Note: the definition of comprehensive sickness insurance does not include cash-back health schemes, travel insurance policies, or access to the UK’s National Health Service (NHS).”¹

Applicants for British permanent residency must demonstrate that they have been present in the UK for a continuous period of five years, and must provide evidence of having CSI coverage for the entire five-year period.

The application process for permanent residency itself is restrictively long and difficult. Applicants are required to complete an 85-page form, requiring the provision of extensive documentation, including P60s for five years, historic utility bills, and records of every occasion the application has left the country since originally settling in the UK.²

a. Who is affected by the CSI requirement?

¹Gov.Uk. “EEA (PR): guidance notes.” *UK Visas & Immigration*.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/608088/Form-EEA-PR-guidance-notes-v3.pdf. (Emphasis included in original).

²Gov.UK. “EEA (PR) Application for a document certifying permanent residence or permanent residence card under the EEA regulations.” *UK Visas & Immigration*.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505032/EEA_PR_03-16.pdf

Three groups of people are particularly affected by the CSI requirement:

1. Self-sufficient EU citizens living in the UK who do not have CSI coverage. The spouse of a British citizen who has chosen not to work in the UK, and who does not have CSI coverage would be an example of this group.
2. EU citizen students living in the UK who do not have CSI coverage.
3. EU citizens that are present in the UK, but who are not considered qualified persons, or who do not have recourse to public funds. An EU-citizen that is street homeless would be an example of this group.

Many EU citizens living in the UK are unaware of this requirement, as they have been able to access NHS services during their stay in the UK and believed these to be sufficient. Additionally, a British-issued EHIC card is not considered adequate proof of CSI coverage. This distinction has particularly affected EU citizen youths and students, who may have spent the majority of their lives in the UK, and thus have not had access to social security entitlements in other EU Member States.

b. Why is permanent resident status important?

The ability and ease with which EU citizens living in the UK are able to apply for British permanent residency has become particularly significant in the past year, due to the result of the 2016 Brexit referendum. EU citizens living in the UK have expressed concern about their right to continue living in there, as well as potential discrimination if they are unable to provide proof of their right to stay in the UK.

Fear and uncertainty in the wake of Brexit

In the wake of the Brexit decision, EU citizens in the UK face great uncertainty about their right to continue living in the UK. Those who have lived in the country for considerable periods of time, and have spouses, families, jobs and support networks in the UK equally experience this sense of uncertainty. These citizens believe that they will be vulnerable once Britain formally exits the European Union.

The UK government has failed to provide specific reassurance to EU citizens living in the UK that they will be allowed to remain after Brexit. In addition to a formal lack of reassurance by the government, media coverage of cases in which individuals have been warned to make arrangements to leave the UK after being denied permanent residency status have expounded upon the growing sense of fear and uncertainty experienced by EU citizens living in the UK³.

³ Carroll, Lisa. 2017. "Dutch Woman With Two British Children Told To Leave UK After 24 Years". *The Guardian*.
<https://www.theguardian.com/politics/2016/dec/28/dutch-woman-with-two-british-children-told-to-leave-uk-after-24-years>.

In response to this sense of uncertainty, there has been a growing demand for UK permanent residency and citizenship requests, as EU citizens seek to secure their status in the UK.

A Liberal Democrat analysis of statistics released by the Home Office show that there has been a 50% increase in the number of EU citizen applicants seeking British Permanent Residency since the result of the Brexit referendum on the 23 June 2016. The number of applicants rose from 36 555 between April to June 2016, to 56,024 between July to September 2016.⁴ More than a quarter of these applications were refused, with a 12,800 requests for permanent residency by EU⁵ citizens denied, and 5,500 deemed invalid – a rejection rate of approximately 28%.⁵

Discrimination

There have been reports that employers have been asking prospective employees proof of the right to remain in the UK after the UK exits the EU.⁶ If true, these demands would be in violation of the Equality Act 2010.

Patricia Connell, a French national who has lived in the UK for the past 30 years, serves as the elected delegate of the French consulate in London, and is the founder of the Website France in London. Connell says that she has heard reports of EU citizens being denied mortgages by British banks if they were unable to provide a British permanent residency permit. She also claims that some employers have only offered fixed term contracts to EU citizens who are unable to provide proof of their permanent residency status.⁷

c. Conclusion

The inability of eligible EU citizens living in the UK to apply for British Permanent Residency, on the basis of a lack of CSI coverage, is of great importance at the present time due to the uncertainty and fear these citizens have in regards to their status and future ability to reside in the UK after the result of the Brexit referendum. There have already been reports of EU citizens facing discrimination in areas of employment and housing if they are unable to provide proof of their right to permanent residency. This is likely to worsen if the UK government does not clarify or provide reassurance to EU citizens regarding their right to remain in the UK after Brexit.

⁴ Boffey, Daniel, and Lisa Carroll. 2017. "Plight Of EU Nationals Seeking UK Residency To Be Investigated". *The Guardian*.

<https://www.theguardian.com/politics/2017/jan/25/plight-of-eu-nationals-seeking-uk-residency-to-be-investigated-brexit-vote>.

⁵ Boffey, Daniel and Lisa Carrol. 2017. "Plight of EU Nationals".

⁶ Boffey, Daniel and Lisa Carrol. 2017. "Plight of EU Nationals".

⁷ White, Tom. 2017. "EU Nationals Already Being Denied Mortgages 'Due To Brexit'". *The Independent*.

<http://www.independent.co.uk/news/uk/politics/brexit-eu-nationals-denied-mortgages-s-patricia-connell-article-50-a7657941.html>.

III. Legal status of EU citizens residing in the UK

The introduction of new immigration regulations have prompted new questions surrounding the legal status of EU citizens and their right to reside in the UK. Such questions have triggered further doubt and confusion for EU citizens who are unsure of their futures in the country.

In March 2017, an article published by The Guardian reported that a German PhD student living in the UK would be at risk of removal from the UK, if she could not provide proof of CSI Coverage.⁸ This report reflected wider issues surrounding additional requirements of lawful residence in the UK for EU citizens.

A briefing on the legal status of EU citizens in the UK published on the website of Free Movement⁹ draws attention to critical legal issues surrounding the “rights of residence” of EU citizens currently living in the UK, and has provoked an emotional public response.¹⁰

a. The Immigration (European Economic Area) Regulations 2016

According to the briefing, new regulations introduced on the 1 February 2017, issued under Directive 2004/38/EC suggest that the Home Office has the right to remove EU citizens from the UK at any time, if it is determined that they do not have the right of residence”.

Formerly, EU citizens were permitted to live in the UK without proving their residency status. However paragraph 22 of the Immigration (European Economic Area) Regulations 2016 states that the Home Office now has the ability to verify the right of residence of any EU citizen in the UK. This includes the right to request proof of the right of residence, and the right to request the person’s presence at an interview with Home Office staff. Where the person fails to comply with these requests, the Secretary of State is entitled to determine whether or not the person has the right to reside in the UK.

⁸ Carroll, Lisa. 2017. "EU Students Told Health Insurance 'Just A Technicality', After German Woman Threatened With Removal". *The Guardian*.
<https://www.theguardian.com/uk-news/2017/mar/07/uk-tells-eu-students-it-will-not-deport-them-for-lacking-health-insurance>.

⁹ Yeo, Colin. 2017. "Briefing: The Legal Status Of EU Citizens In The UK - Free Movement". *Free Movement*.
<https://www.freemovement.org.uk/briefing-legal-status-eu-citizens-uk/>.

¹⁰ Bulman, May. 2017. "EU Nationals Express Panic After Home Office 'Changes Residency Rules'". *The Independent*.
<http://www.independent.co.uk/news/world/europe/brexit-latest-eu-national-right-to-live-uk-theresa-may-panic-a7602191.html>

Paragraph 23(6) of these regulations grants the Home Office the power to remove an EU citizen from UK territory, if it determines that the person does not possess the right of residence.¹¹

The formal wording of Paragraph 23(6) is included below¹²:

- (6) *Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—*
- (a) *that person does not have or ceases to have a right to reside under these Regulations;*
- (b) *the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with regulation 27;*
- *or*
- (c) *the Secretary of State has decided that the person’s removal is justified on grounds of misuse of rights under regulation 26(3).*

b. Treaty Rights

Article 21 of the Treaty on the Functioning of the European Union (TFEU) is the most relevant treaty pertaining to the rights of EU citizens to freedom of movement between EU Member States, and details,

“every citizen of the Union shall have the right to move and reside freely within the territory of Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect.”¹³

Directive 2004/38/EC, commonly referred to as “The Citizen’s Directive,” grants every EU citizen a “primary and individual right to move and reside freely within the territory of Member States,” which is “conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.”¹⁴

Article 7 of Directive 2004/38/EC includes reference to a right of residence. This stipulates that all EU citizens have the right to reside in a Member State for longer than three months, if they:

- are working or self-employed in the host state
- or
- have sufficient resources to fund themselves and their family members, and have comprehensive sickness insurance cover in the member state

¹¹ “The Immigration (European Economic Area) Regulations 2016”. 2017. *Legislation.Gov.Uk*. <http://www.legislation.gov.uk/uksi/2016/1052/made>.

¹² “The Immigration (European Economic Area) Regulations 2016”.

¹³ “Consolidated version of the Treaty on the Functioning of the European Union.” *OJ C 326*, 26.10.2012, p. 47–390.

¹⁴ “Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.” *OJ L 229*, 29.6.2004, p. 35–48.

- or
- are enrolled in an official institution for the purpose of study or vocational training and have comprehensive sickness insurance cover in the member state
- or
- are family members accompanying an EU citizen and satisfy the above conditions

There is an apparent contradiction between Article 21 of the TFEU, which states that all EU citizens have the right to reside and move freely within EU member states, and Article 7 of Directive 2004/38/EC which says that only EU citizens with a right of residence may exercise their Treaty rights to live in and move between Member States. This contradiction is commonly understood by interpreting the TFEU as giving EU citizens the right to be physically present in a Member State, while Directive 2004/38/EC gives EU citizens additional entitlements, such as the right to access welfare services, and to be joined by family members.

The Home Office takes the position that the right of residence is only present when the criteria of Article 7 have been met. The Home Office interpretation of the law is that Article 21 of the TFEU adds nothing to Directive 2004/38/EC, and thus the right to reside is expressed entirely within the Directive. It does not accept that there is a wider right of EU citizens to residence established by Article 21.

Thus, if EU citizens wish to exercise their Treaty rights after the initial period of 90 days, they must satisfy the requirements of the right of residence, which includes having CSI coverage if the person is either self-sufficient or a student. Failure to meet these requirements automatically entitles the Home Office to remove the individual from UK territory if they deem fit.

There is a strong argument that the position taken by the Home Office in their interpretation of Article 21 of the TFEU and Article 7 of Directive 2004/38/EC is incorrect, as the language used in Article 7 is not exhaustive, and the decision of the Home Office to completely ignore Article 21 is highly unusual.¹⁵

c. Response of the UK Government and Implications

The Home Office has responded to the briefing by stating that its interpretation is incorrect, and that the regulations are neither new, nor will the UK government remove any EU citizens if they do not have proof of CSI coverage.

A spokesperson for the Home Office stated, “It is completely wrong to say that we have new powers to deport EU citizens without comprehensive sickness insurance. EU citizens will not be removed from the UK or refused entry solely because they do not have this insurance. Their right to remain will remain unchanged while we are a member of the European Union and they do not need any additional documents to prove their status.”¹⁶

¹⁵ Yeo, Colin. 2017. "Briefing: The Legal Status Of EU Citizens In The UK."

¹⁶ Bulman, May. 2017. "EU Nationals Express Panic".

While this statement suggests that the CSI coverage requirement is a formality, it is important to note that the position reflected in the Home Office's statement has not been written into any official policy.

Barrister Colin Yeo, author of the Free Movement briefing, also cautions that the Home Office "are categorically NOT saying that they will recognise a right of permanent residence for a self-sufficient person or student who did not have comprehensive sickness insurance, only that they will not be refused entry or removed."¹⁷ Additionally, while EU citizens may not be refused entry or removed from the UK, failure to comply with the requirements of lawful residence may subsequently have implications for future immigration applications made by EU citizens to the UK.

While it is unlikely that the new regulations introduced under Directive 2004/38/EC will lead to a mass expulsion of EU citizens from the UK, there are concerns that these regulations will be selectively enforced, particularly upon street homeless Eastern European and Baltic state nationals. There have been reports of a significant increase in the number of removals and deportations of this group.¹⁸

Free Movement argues that the tougher approach of the UK government towards the right of residence requirement has been building up over time on an informal legal basis. This approach reflects the hardening of the Home Office position towards EU citizens that were present in the UK prior to the Brexit referendum.¹⁹ It is possible that the Home Office is hoping to reduce the importance of legal protection provided by the EU for citizens residing in the UK, with a view to eventually abolishing freedom of movement for EU citizens in the UK after Brexit.²⁰

d. Conclusion

New regulations introduced under Directive 2004/38/EC apparently grant the UK government the power to remove EU citizens if they do not meet the requirements of the right of residence. This includes having Comprehensive Sickness Insurance for those citizens who are self-sufficient, or students.

While the UK government denies having this power, these regulations have sparked panic amongst EU citizens living in the UK, who face increasing uncertainty and doubt about their status in the country after the result of the Brexit referendum. The

¹⁷ "Can EEA Nationals Studying In The UK Be Removed If They Do Not Have Medical Insurance?" 2017. *Gherson*.

<https://www.gherson.com/blog/can-eea-nationals-studying-uk-be-removed-if-they-do-not-have-medical-insurance>. (Emphasis included in the original).

¹⁸ McIntyre, Niamh. 2017. "New Powers Are Being Used To Deport Homeless Migrants". *The Independent*.

<http://www.independent.co.uk/news/uk/home-news/migrant-refugees-homeless-deportation-home-office-eu-eea-rough-sleepers-a7600701.html>.

¹⁹ Yeo, Colin. 2017. "Briefing: The Legal Status Of EU Citizens In The UK."

²⁰ Yeo, Colin. 2017. "Briefing: The Legal Status Of EU Citizens In The UK."

Home Office is thus perpetuating this uncertainty and causing unnecessary alarm to EU citizens.

If the UK government does indeed hold this power, it seems unlikely that it will seek to expel large numbers of EU citizens. However, there is a much greater chance that the UK government will selectively apply these regulations, with street homeless Eastern European and Baltic state nationals being particularly at risk, despite their legal equality as EU citizens.

IV. Initial Proposal by the UK government

As part of the commencement of Brexit negotiations, the UK government issued its first White Paper regarding the future status of EU citizens in the UK at the end of June 2017. It is entitled “The United Kingdom’s Exit from the European Union: safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU”²¹.

The paper makes specific reference to the current CSI requirement for permanent residence, stating:

The application process (for settled status after Brexit) will be a separate legal scheme, in UK law, rather than the current one for certifying the exercise of rights under EU law. Accordingly we will tailor the eligibility criteria so that, for example, we will no longer require evidence that economically inactive EU citizens have previously held “comprehensive sickness insurance” in order to be considered continuously resident”

While this clause seems to indicate that EU citizens resident in the UK will not need to demonstrate CSI coverage in order to be considered continuously resident and thus eligible for “settled status” after Brexit, the clause itself is ambiguous, and raises several critical questions.

The phrasing of the passage is ambiguous, and it seems to disparage the eligibility criteria of residence for EU citizens in the UK as an unnecessary imposition by the EU, rather than the deliberate decision of the Home Office. The reference to the removal of the CSI coverage requirement is given as an example of the possible changes that may take place in eligibility criteria after Brexit. It is not a direct assurance of the removal of the requirement.

If economically inactive EU citizens are indeed no longer required to provide proof of CSI coverage in order to be considered continuously resident, there is no further

²¹ Gov.UK. ““The United Kingdom’s Exit from the European Union: safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU.” *Department for Exiting the European Union*.
<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>

information specifying the finer points of this new policy. This is significant because it is unclear what proof is necessary in order to demonstrate continuous residence, and who may be asked for such proof. Furthermore, in the case that EU citizens without CSI coverage are granted ‘settled status’ after Brexit, the terms of this status are unclear. Is it certain that the requirement for CSI coverage will not be reintroduced, and which bodies will be responsible for monitoring this?

Importantly, while the paper states that proof of CSI will not be necessary in order for EU citizens to prove continuous residency and thus apply for ‘settled status’ after Brexit, it does not address the current requirement that economically inactive EU citizens demonstrate CSI coverage in order to possess the right of residence in the UK. It is thus unclear whether the new regulations enforced under Directive 2004/38/EC will continue to be applied up until the formal exit of the UK from the EU.

Given the history of discriminatory enforcement of immigration restrictions by the UK Home Office, as well as a consistent assignment of the burden of proof to citizens, it is critical that the UK government’s position and use of the CSI requirement be carefully monitored, to ensure that until the formal exit of the UK from the EU, EU citizens are able to continuously and equally access their Treaty rights, and that after this exit, EU citizens with ‘settled status’ or not left completely at the mercy of the UK government.

V. Conclusion

The Comprehensive Sickness Insurance (CSI) coverage requirement that is applicable to EU citizens seeking to gain British permanent residency raises important questions that are particularly poignant at the beginning of the Brexit negotiations, as an estimated three million EU citizens residing in the UK contemplate their futures in the country.

Given the anxiety and doubt experienced by these citizens, it is vital that the UK government take immediate measures to clarify its position regarding the removal the requirement of proof of CSI coverage, and its implications for EU citizens living in the UK both before and after the official exit of the UK from the EU.

In light of the historically discriminatory enforcement of immigration restrictions by the UK Home Office, and the ambiguity of the conditions of ‘settled status’, the UK government must provide specific and comprehensive reassurance to EU citizens living in the UK that their rights will be respected, and their futures in the UK certain. This could take the form of a formal reassurance by the UK government that it will adopt the broader legal interpretation of Article 21 of the TFEU until the time of Brexit, as well as a comprehensive legal definition of ‘settled status’ and a formal guarantee that the CSI requirement will not be reintroduced at will by the Home Office in the future.