TRADE AND HUMAN RIGHTS

Part 1: Exiting the EU and human rights
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The Labour Campaign for Human Rights is a campaign within the Labour movement that seeks to ensure that human rights remain at the heart of Labour Party policy and practice.

In January 2019 we launched our ‘Britain and Her Allies’ campaign which seeks to develop a human rights-based foreign policy for the Labour Party. We work with a range of human rights organisations, charities and activist groups to draw attention to human rights violations by countries around the world that the UK has close economic, cultural or historical ties with and to develop policy proposals for the UK government to help end these abuses.

For further information please contact us at the below.

Contact details:
Matthew Turner, Chair and Executive Director - matthew.turner@lchr.org.uk
Jonathan Harty, Director of Britain and Her Allies Campaign - info@lchr.org.uk
Josh Holmes, Head of Research - jpdholmes@gmail.com

LCHR general email - info@lchr.org.uk

How to join: If you are interested in getting involved in our campaigns, you can sign up as a member here: www.lchr.org.uk/join/

Design by Lucy Slade.

Writers
Hayden Banks
Josh Holmes
Olivia Williams
Sam Knights

Editors
Aladdin Benali
Steve Delahunty
Josh Holmes
Alin Martin
Matthew Turner
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SECTION A
EMPLOYMENT RIGHTS

1. Overview

UK employment law derives from three main sources: (1) common law – particularly contract law – which forms the legal basis of the employer/employee relationship; (2) UK legislation, such as the Equal Pay Act 1970 and the National Minimum Wage Act 1998; and (3) European law. EU law is upheld by the Court of Justice of the EU (CJEU) but many categories of European employment rights have over time been transposed into UK domestic law through primary and secondary legislation, and are enforceable by UK courts.

In some employment law areas where the EU has legislated, the UK already had laws in place. For example, the UK had established legal standards on equal pay, maternity rights, sex, disability and race discrimination when the EU passed directives covering these areas. Nevertheless, the EU has enhanced and extended these rights, and EU law prevents UK governments from undermining them unilaterally. EU employment law provides a minimum standard below which domestic employment law must never fall.

In many areas, such as maternity leave and holiday entitlement, UK governments have set domestic standards above the EU benchmark. However, Brexit removes this minimum standard, enabling the UK government to reduce the rights guaranteed by EU employment law. Additionally, UK courts and tribunals will no longer be required to follow CJEU case law interpreting EU employment rights, which had added an additional layer of protection.

There is every reason to fear that the current government intends to reduce workers’ rights, as past Conservative governments have staunchly resisted the EU social policy agenda. The Major government fought hard to negotiate an opt-out of the social chapter of the Maastricht treaty in 1992, though the last Labour government signed the UK up to it and introduced key measures deriving from EU legislation, including the Working Time Directive.

Before becoming Prime Minister, David Cameron pledged to remove the UK from the social chapter, and later committed to revising the Working Time Directive, although he was unable to do so given the fragility of the coalition government. Brexit poses a real threat to employment rights because even if a UK government were to legislate for higher employment standards, it will always be open to a future government to reduce those standards where no external body guarantees them.

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1 TUC, UK employment rights and the EU, 25/02/16.
2 The Guardian, Cameron prioritises exit from EU social chapter, 06/03/07.
3 House of Commons, Hansard, 18/01/12.
4 Institute for Government, Workers’ rights after Brexit, 17/03/19.
2. EU-derived workers’ rights

a. Working Time Regulations

The EU Working Time Directive was introduced as a health and safety measure and ‘practical contribution towards creating the social dimension of the internal market’.\(^5\) When the Labour government brought it into domestic law through the Working Time Regulations in 1998, UK workers gained a statutory right to paid annual leave for the first time. The regulations were amended in 2003 to extend the measures to all non-mobile workers on road, sea, inland waterways and lake transport, and all workers in the railway and offshore sectors.\(^6\)

Key features of the Working Time Directive include:\(^7\)

- a maximum weekly working time of 48 hours on average, including overtime;
- at least four weeks paid annual leave;
- a minimum rest period of 11 hours in each 24-hour period, and one day in each week; and
- a rest period if the working day is longer than six hours.

The UK negotiated an opt-out to the directive, meaning that employees could voluntarily work for longer than 48 hours a week by signing an additional opt-out agreement. The Working Time Regulations have nevertheless had a positive impact on British working culture. A government analysis concluded that: ‘since 1998, there has been a decline in the incidence of long-hours working in the UK and a general trend towards shorter working hours. It is possible that this is,

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\(^5\) European Council, EU Directive 93/104/EC on Working Time, 13/12/93.

\(^6\) Health and Safety Executive, The Working Time Regulations, 03/09/18.

\(^7\) European Union Select Committee, The Working Time Directive: a response to the European Commission’s review, 30/03/04.
at least in part, due to the introduction of the 48-hour maximum working week despite the existence of the opt-out.8 The Working Time Regulations have long been a key target of the Conservative Party. The Major government brought a case against the European Commission, claiming that there was no legislative basis for the directive because working time did not represent a health and safety issue. In 1996, the European Court of Justice (ECJ) ruled against the UK government.9 Many prominent Brexiteers, including Boris Johnson and Michael Gove, have previously argued in favour of repealing the Working Time Regulations.10

b. Part-time, fixed-term and agency workers

Three EU directives transposed into UK law govern atypical workers and ensure the right to equal treatment comparable to permanent employees.11

The Temporary Agency Work Directive 1998, which came into force in the UK in 2011, applies the principle of equal treatment to temporary agency workers by mandating that they receive equal treatment on basic working and employment conditions. For example, they are entitled to the same access to facilities such as staff canteens, childcare and transport as employees. After 12 weeks, they are essentially treated as the equivalent of a permanent member of staff, and have the same rights in relation to working time, overtime, breaks, holidays and pay.12 The agency workers regulations have frequently been criticised by those in favour of leaving the EU. For example, the Beecroft review on employment law commissioned by the coalition government recommended that it not be implemented, even if that meant the UK facing legal action.13

The Fixed-term Work Directive 1999, which was brought into force in the UK in 2002, forbids employers from treating fixed-term workers (including seasonal workers) less favourably than permanent workers, unless this can be objectively justified.14 The TUC writes that it ‘led to significant improvements in pay and conditions and better access to occupational pensions for many temporary staff in the UK, particularly in the education sector.’15

The Part-time Work Directive 1997, brought into UK law in 2000, applies the principle of equal treatment to part-time workers with the stated aims of removing unjustified discrimination, improving the quality of part-time work and helping develop part-time work on a voluntary basis. Less favourable treatment must again be justified on objective grounds, namely that it is necessary to achieve a business objective.16

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8 Department for Business, Innovation and Skills, *The Impact of the Working Time Regulations on the UK labour market*, 01/12/14.
9 European Court of Justice, *Press release*, 12/12/96.
10 TUC, *What is the Working Time Directive that Boris and Gove are planning to scrap?*, 18/12/17.
12 House of Commons Library, *Temporary Agency Workers*, 21/01/10.
15 TUC, *UK employment rights and the EU*.
16 House of Commons Library, *Part-time work*, 15/05/00.
c. TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 – the UK’s implementation of the European Union Transfer of Undertakings Directive – introduced three concepts into UK employment law:

- the automatic transfer principle whereby the contracts of employment of employees transfer to the company acquiring a business or service provision;
- protection against dismissal if the sole or principal reason for the dismissal is the transfer unless the employer can show demonstrate that the reason was ‘an economic, technical or organisational reason entailing changes in the workforce’; and
- the obligation to inform and consult with representatives of the affected employees. 17

In 2014, the coalition government diluted the protection offered by TUPE by making it easier for transferee employers to impose contractual changes. Some commentators have suggested that this directly breached the Acquired Rights Directive. 18

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17 Department for Business, Innovation and Skills, A guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for employees, employers and representatives, 31/01/14.
3. **UK rights strengthened by the EU**

   a. **Maternity rights**

   Although UK maternity leave entitlement already exceeded the EU minimum of 14 weeks introduced by the EU Pregnant Workers Directive 1992, the EU directive nevertheless improved the UK legal framework.\(^\text{19}\) It mandated immediate eligibility; previous UK legislation required to be employed for two years first, excluding thousands from maternity entitlements. It also introduced a duty to make workplace adjustments to reduce perceived risks to pregnant workers and new mothers, provided the right to paid leave for pregnant women to attend ante-natal appointments, and obligated employers to maintain the terms and conditions of employment during maternity leave.\(^\text{20}\) ECJ case law has helped tackle workplace discrimination. For example, discrimination against women because of pregnancy or maternity is now classified as sex discrimination.

   In 1999, the Parental Leave Directive gave UK parents of young children the right to 13 weeks’ care leave. In 2013, after negotiations between unions and employers at the EU level, this was increased to 18 weeks per child.\(^\text{21}\)

   b. **Equal pay**

   UK equal pay provisions represent an example of domestic legislation strengthened by EU law. The 1970 Equal Pay Act enshrined the right to equal contractual pay and benefits between men and women for like work, while the Equal Pay Directive established the principle of equal pay for work proven to be of equal value. In 1983, the European Commission took enforcement action against the UK government, resulting in the introduction of an amendment to

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\(^{19}\) UK and EU, *Will UK working parents lose out after Brexit?* 20/07/18.

\(^{20}\) Ibid.

\(^{21}\) TUC, *Women workers’ rights and the risk of Brexit*. 
the Equal Pay Act to incorporate the ‘equal pay for equal value’ concept into the UK law. Several ECJ rulings have bolstered UK equal pay provisions. For example, Enderby v Frenchay Health Authority and Secretary of State for Health (1993) shifted the burden of proof onto employers to demonstrate a material factor other than gender explaining the pay difference between men and women engaging in equally valued work.

c. Anti-discrimination rights

The EU’s Equal Treatment Directive strengthened existing UK anti-discrimination legislation by extending anti-discrimination protections to age, religion and sexuality classifications. ECJ case law has also extended sex discrimination measures to include discrimination on grounds of gender reassignment. Other EU directives have indirectly bolstered anti-discrimination rights in the UK. For example, the Burden of Proof Directive reverses the burden of proof in discrimination cases, making it easier for claims to be brought: once a claimant has provided sufficient evidence to suggest that discrimination has occurred, the employer has to prove that it did not. EU law also requires that there not be an upper limit for compensation in cases of unfair dismissal. It is noteworthy that the Beecroft report recommended that compensation be capped, although the coalition government was prevented from doing this by EU law.

22 TUC, UK employment rights and the EU.
23 Personnel Today, EU Referendum: 12 EU cases that have shaped UK employment law, 31/03/16.
24 European Council, Directive 2006/54/EC, 05/07/06.
25 TSSA, What impact has membership of the EU had on UK employment rights?, 01/03/16.
26 TUC, UK employment rights and the EU, 25/02/16.
4. UK government position

During the Brexit negotiations, in an attempt to secure Labour’s support for her deal, Theresa May gave a guarantee that workers in the UK would lose no rights as a consequence of the UK leaving the EU, and inserted provisions ringfencing workers’ rights in the legally binding withdrawal agreement that was negotiated with the EU and the Withdrawal Agreement Bill that derived from it.

The Bill contained a lock on EU derived rights at the end of the transition period - meaning that the UK would accept any additional changes from the EU during this period. It set out that, before the government could amend a workers’ right, it would first have to consult employer bodies and trade unions, and issue a ‘non-regression statement’ confirming that the right was no weaker than the rights derived from the EU.

Provisions were also included putting ECJ rulings on a par with UK Supreme Court rulings, meaning that only the UK Supreme Court could depart from a ruling of the ECJ.27 Aidan O’Neill QC concluded:

‘In the absence of any continuing jurisdiction of the [ECJ] on UK law after Brexit, and standing the fact that workers’ rights can no longer be entrenched against adverse decision of the national authorities, it seems inevitable that the level of protection for workers’ rights in the UK will decline as compared to the level of protections which will be maintained in the EU.’28

In December 2019, the Johnson government published a revised Withdrawal Agreement Bill that removed the clauses on the protection of EU-derived workers’ rights.29 The government placed them instead in the revised non-legally binding political declaration on the future relationship between the UK and the EU. Indeed, along with environmental protections, they are the most significant omissions from the new drafting, suggesting that they will be a target of the Johnson government.

This is not the only indication that the government is planning a significant reduction in workers’ rights. For example, the Financial Times has reported on internal documents that suggest that the government intends to pursue significant divergence from EU employment law, and that it sees binding arbitration from the EU as ‘inappropriate’.30

In the December 2019 Queen’s Speech, it was announced that protection for EU workers’ rights will be included in a forthcoming Employment Bill. No date has yet been announced for the Bill, and no details have been published. However, given that the government is no longer tied to their previous commitments, it will have great leeway over what it can contain.

5. Recommendations

The government must ensure that the UK is a world leader in workers’ rights. At the very least, it must ensure that there is no reduction in UK rights below the EU minimum standards in the aftermath of Brexit, COVID-19 and the coming economic crisis. Where possible, it should aim to push rights further than the EU floor.

EU workers’ rights should be replicated in UK law with a Bill enshrining minimum standards. Such a Bill could be introduced in conjunction with legislation enshrining other economic, social and cultural rights in UK law, such as the right to housing. It could, for example, include a requirement to consult with trade unions when passing any new employment legislation to ensure that there is no reduction in standards.

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27 Ibid.
29 House of Commons Library, Removal of workers’ rights in the new EU Withdrawal Agreement Bill, 20/12/19.
30 Financial Times, Fears rise over post-Brexit workers’ rights and regulations, 25/10/19.
As the UK leaves the competence of the CJEU, it is crucial that the government explore new mechanisms of enforcing and adjudicating workers’ rights. As a minimum, a statutory body should be set up and resourced sufficiently to investigate and enforce the rights in UK legislation. Any such body should work closely with trade unions to ensure that it is adequately informed about UK employment practices.
SECTION B
ENVIRONMENTAL STANDARDS

1. Overview

A large proportion of existing UK environmental policy - covering areas including biodiversity, air pollution, water quality, and climate change - derives from the EU, and its implementation is largely monitored and enforced by EU institutions. Over 150 EU Directives affect the work of the Department for Environment and Rural Affairs, and there are over 1,110 pieces of EU environmental legislation currently incorporated into UK law. The revised Withdrawal Agreement Bill removes the government commitment to introduce a non-regression clause on environmental protection. Additionally, the Johnson government is refusing to agree to measures in relation to level playing field areas, including the environment, which go beyond those included in previous EU bilateral trade agreements, which has deadlocked talks with Brussels.

31 House of Commons Library, Commons Library analysis of the Environment Bill 2019-20, 06/03/20.
32 Caroline Lucas MP, Exiting the EU not the environment, 2017.
33 Pickstone, S, Environmental non-regression clause absent from Withdrawal Agreement Bill, 20/12/19
34 Financial Times, Brussels and Britain clash over climate conditions in trade deal, 06/05/20.
2. Air Pollution

The Royal College of Physicians estimates that there are approximately 40,000 pollution-related deaths annually in the UK.\(^{35}\) The WHO includes safe air pollution levels as a marker of progress in its Sustainable Development Goals and has set guidelines for levels of fine particulate matter to be met by all countries by 2030.\(^{36}\) While guided by international standards, EU directives have obliged the UK to ensure safe levels of nitrogen dioxide (NO\(_2\)) and other air pollutants, including setting standards for ambient air quality and requiring annual reporting to the European Commission.\(^{37}\)

Several environmental groups have taken the government to court in relation to its environmental record. For example, ClientEarth won a case requiring the UK government and devolved governments to co-ordinate annual clean air plans to keep NO\(_2\) levels below 40 micrograms per cubic metres of air.\(^{38}\) However, analysis in October 2019 revealed that 83% of local authority reporting zones had illegal levels of air pollution, 11 years after the European deadline for achieving compliance with NO\(_2\) levels limits.\(^{39}\)

\(^{35}\) Royal College of Physicians, *Every breath we take: the lifelong impact of air pollution*, 23/02/16.
\(^{36}\) WHO, *Delivering on air quality, climate change and health*, 01/03/18.
\(^{37}\) European Council, Directive 2008/60/EC, 17/06/08.
\(^{38}\) ClientEarth, *UK Government loses third air pollution case as judge rules air pollution plans ‘unlawful’*, 21/02/18.
\(^{39}\) ClientEarth, *UK Air Pollution: How clean is the air you breathe?*, 02/10/19.
Greener UK has rated air pollution as ‘high risk’ in every one of its periodic reviews of the risks posed by Brexit between June 2016 to September 2019. This is attributable to the loss of the EU enforcement mechanisms, which environmental groups have argued must be maintained and strengthened in the forthcoming Environment Bill. Departments were previously required to report to the European Commission and prepare implementation plans in response to EU directives, a vital method for ensuring transparency and accountability in measuring progress. The EU also has a range of institutional structures and competence to grant scientific and policy recommendations to governments (including the European Environment Agency) and states’ failure to comply with directives could be challenged at the ECJ.

The Environment Bill has attracted three principal criticisms:

1. It does not contain a legal obligation to meet World Health Organisation (WHO) guidelines for fine particulate concentrations by 2030.

2. It does not include a non-regression clause prohibiting future governments from rolling back environmental protections and ensuring advancements in environmental protections (the ‘progression principle’). Twenty QCs wrote an open letter to the government stating that: ‘In its existing form, the Bill allows for weaker environmental standards to be introduced in future. Its architecture means that binding EU standards across key areas of environmental quality could be repealed, including air and water quality standards that are currently not being met and which require urgent Government attention’.

3. The new Office for Environmental Protection (OEP) lacks both independence from government and sufficient mechanisms to enforce targets and penalise relevant government departments and polluting industries. The non-executive board members and budget would be decided by the Secretary of State for DEFRA, while the strongest non-compliance action the OEP could take would be the initiation of judicial review proceedings. This is far weaker than the enforcement powers of the ECJ and European Commission.

3. Free trade agreement negotiations

There is a risk that UK climate change and emissions obligations will be diluted during trade negotiations with the US and other countries. Recent studies have shown that free trade agreements tend to have a poor effect on environmental protection, as they often include Investor State Dispute Settlements (ISDS), which enable companies to sue the host government for actions that adversely affect the profitability of investments. ISDSs have benefited companies engaged in large-scale fossil fuel projects including fracking.

The free trade agreement with the US may prove particularly problematic for environmental protections. The US is the second-largest carbon polluting country in the world, and the Trump administration has reneged on its commitment to reduce emissions by 26-28% by 2025 after withdrawing from the 2015 Paris Climate Agreement. The Green Alliance argues that the UK should ‘place the Paris Agreement at the heart of UK trade negotiations’ and that ‘the UK should use the agreement’s Intended Nationally Determined Contributions (INDCs – to signal contribution to maintaining global temperature rises below 1.5 degrees from pre-industrial levels) as a guide to determine which countries to trade with’.

40 Greener UK, Risk Tracker, 01/09/19.
41 Greener UK, Briefing on non-regression in the Environment Bill, 04/10/18.
42 Ibid.
43 Greener UK, Briefing for Commons Second Reading of the Environment Bill, 01/02/20.
44 Open Democracy, Is Liz Truss planning to sell out our environment for a trade deal after Brexit? 17/09/19.
45 New York Times, Trump serves notice to quit Paris Climate Agreement, 04/11/19.
46 Green Alliance, Britain’s trading future A post-Brexit export strategy led by clean growth, February 2018.
The US performs worse than the OECD average in seven environmental measures, and the Trump administration has repealed or weakened almost 100 environmental regulations. The UK negotiating position for the UK-US FTA was published in March 2020, and it contains few barriers to the reduction of environmental protections. Only five pages in the 184-page document discuss environmental issues, and it states: ‘the extent to which the UK-US FTA impacts the environment is dependent on the negotiated outcome, which will determine changes in the pattern of trade and economic activity’.

Withdrawal from the European Investment Bank, which has invested over £3.6 billion in renewable energy in the UK, and Emissions Trading Scheme (ETS) are particularly concerning in relation to the financing of a low-carbon transition. Although the UK has signalled its intention to create a domestic ETS-equivalent, this has been criticised by the LSE Grantham Institute for Climate Change for not including a wide enough range of businesses that trade emissions and thereby failing to incentivise companies and jeopardising commitments to cap emissions.

Another environmental issue of high priority is agricultural and food standards. When the Agriculture Bill was introduced in Parliament in May 2020, MPs voted against an amendment brought by farming groups, including the National Farmers Union, to ensure that future trade agreements do not weaken standards on food imports. The NFU warned that importing products not produced to the same level of UK environmental or animal health and welfare standards would undermine attempts to establish a comprehensive and ambitious domestic support policy.

The Green Alliance has identified several risks related to food and agricultural standards and trade, including lower standards, fewer controls and greater environmental damage. With the removal of tariffs in a US-UK FTA, imports of beef, pork and chicken from outside the EU are estimated to be more than 10 times greater, increasing the risk of importing meat produced using chlorinated washing or hormone growth practices.

4. Recommendations

With the UK due to host the COP26 Climate Summit in 2021, the government must ensure that the UK does not undermine its legally binding national and international environmental commitments. The government must include legal targets for air pollution and emissions in the Environment Bill, including criteria for determining targets to ensure that they are aligned to the UK commitment for net-zero carbon emissions by 2050 and obligations under the Paris Climate Agreement. The government must:

- provide a better framework for the realisation of targets on air-pollution and emissions by outlining support provided to businesses and industry;
- include a non-regression clause in the bill and strengthen the role of the Office for Environmental Protection to ensure accountability and transparency;
- suspend US trade negotiations on the condition that the Trump administration reinstate the US as a party to the Paris Agreement;
- undertake a thorough and rigorous Environmental Impact Assessment of a potential UK-US FTA covering emissions from transport, energy production, agriculture and their potential impact on meeting UK climate commitments, and present this evidence to parliament.
- review the Agriculture Bill to ensure that domestic standards on agricultural products are matched in trade.

47 Edie, From climate action to chlorinated chicken: How will a US-UK trade deal impact the environment?, 02/03/20
48 Environmental and Energy Law Programme, Regulatory Rollback Tracker, 11/06/20
49 DIT, UK-US Free Trade Agreement, 02/03/20
50 Greener UK, EU baseline, 01/09/19.
51 LSE, Creating a separate UK trading scheme for emissions the worst system of carbon pricing after Brexit, 02/08/19.
52 Speciality Foods, MPs reject amendment to uphold British farming standards post-Brexit, 18/05/20.
54 Green Alliance, Protecting standards in UK food and farming through Brexit, 11/06/18.
• suspend trade negotiations if parties do not commit to stringent food and agricultural standards or if an Environmental Impact Assessment finds that an FTA is likely to significantly hinder UK climate commitments.
SECTION C
IMMIGRATION RULES

1. Overview

Brexit will significantly change the nature of migration. Central to this is the Immigration and Social Security Co-ordination (EU Withdrawal) bill. The Immigration Bill will bring to an end the EU’s rules on free movement of persons into the UK, a cornerstone of Union citizenship that allows EU citizens and their family members to move and reside freely within the territory of EU member states.\(^5\) Nationals and their family members from the European Economic Area and Switzerland will fall under new UK immigration control and will require permission to enter and remain in the UK. During the EU referendum campaign, Boris Johnson claimed that ‘there will be no change for EU citizens already lawfully resident in the UK’ as ‘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’.\(^6\)

However, these assurances appear to have subsequently been abandoned in favour of a more restrictive environment potentially leaving many EU citizens on tenterhooks about their future rights in the UK.

Currently, EU citizens wanting to stay in the UK after 31 December 2020 and their family members will need to apply to the EU Settlement Scheme. As of 2018, there were an estimated 3.6 million EU citizens living in the UK.\(^7\) However, currently approximately 1 million applications are yet to be made, until the 30 June 2021 deadline.\(^8\) After this deadline, any EU citizen who has failed to apply will be considered undocumented, and subject to the Home Office’s ‘hostile environment’, which denies access to healthcare, welfare provision, education and the right to rent. This policy applies regardless of whether an EU citizen is eligible for settled status (i.e. resident in the UK for more than five continuous years) or pre-settled status (resident for less than five continuous years).

2. Accessing civil rights

The Home Office has assured that those granted settled status under the EU settlement scheme will enjoy the same rights to live, work, access healthcare and welfare as UK citizens.\(^9\) Limitations apply, however, to those with pre-settled status, who will face severe obstacles in accessing the welfare systems.\(^10\) Given the welfare restrictions for those deemed ‘economically inactive’ - often those most in need of welfare - those who have lost their job or are homeless will have no access to support.\(^11\) Concerns over the flaws in the government’s welfare eligibility requirements for those with pre-settled status have been exacerbated by the ongoing loss of many thousands of jobs under the UK lockdown.\(^12\)

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\(^{5}\) Free movement of workers under the Article 45 of the Treaty enshrined in of the Treaty on the Functioning of the European Union. The principle has since developed from the Treaty of Maastricht in 1992 into the right of Union Citizens (and their families) to move and reside freely within the territory of the Member States under Directive 2004/38/EC.

\(^{6}\) Michael Gove, Boris Johnson, Priti Patel, and Gisela Stuart, Restoring public trust in immigration policy - a points-based non-discriminatory immigration system, 01/06/16.

\(^{7}\) The Migration Observatory, EU Migration to and from the UK, 30/09/19.

\(^{8}\) House of Commons, The Progress of the EU Settlement Scheme so far, 16/04/20.

\(^{9}\) Free Movement, How to apply for “settled status” for EU citizens, originally written 13/01/18, updated subsequently.

\(^{10}\) Financial Times, European citizens in UK at risk of losing out on jobless benefits, warn campaigners, 20/04/20.

\(^{11}\) The Migration Observatory, Not Settled Yet? Understanding the EU Settlement Scheme using the Available Data, 16/04/20.

The process for people with pre-settled status gaining settled status is laden with risk and insecurity. There are severe limitations in the government’s definition of a ‘continuous qualifying period of five years of residence’, the threshold for an EU citizen to gain settled status\textsuperscript{63}. Absence from the UK for more than six months in any 12-month period during the five years it takes to qualify for full settled status generally restarts the five years all over again. Returning to the UK after 31 December 2020 may result in losing the right to settled status entirely.

The current pandemic will mean that many EU citizens may have returned home to care for family. This has left a large number of those with unsettled status in a precarious position. The government must provide clarity on this issue, given the extraordinary circumstances under which many EU citizens have returned home.

An environment appears to have already been set that runs against the grain of the Withdrawal Agreement. Article 23 of the Withdrawal Agreement grants all citizens and their families ‘equal treatment with the nationals of that State’\textsuperscript{64}. The failures of the Settlement Scheme must be taken into consideration and resolved to give EU citizens with a legitimate right to reside in the UK recourse to public funds in times of need.

3. The European Union (Withdrawal) Act 2018

Rights supposedly guaranteed by the Immigration Bill are not in fact guaranteed post-Brexit as they rely on secondary legislation yet to be made. The European Union (Withdrawal) Act gives relatively unchecked powers to government Ministers to reform the immigration system. The Withdrawal Act’s Henry VIII powers give the government discretion to repeal or amend the Act as it ‘considers appropriate’\textsuperscript{65}. This could see the rights of EU citizens at risk of being without substantive Parliamentary scrutiny. There are longstanding concerns regarding the use and limited scrutiny of secondary legislation, especially in relation to immigration, security and Brexit. Scrutiny of secondary legislation is often cursory, with Parliament only having the opportunity to vote for or against the measure, without the ability to amend it.\textsuperscript{66}

The Act gives the Government a blank cheque, instead of setting out proposals for comprehensive immigration reform.

\textsuperscript{63} Free Movement, Lengthy absences from the UK can put EU pre-settled status at risk, 06/04/20.
\textsuperscript{64} Eur-Lex, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2/11/19.
\textsuperscript{65} See Part 1 Section 4 of Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC Bill 104).
\textsuperscript{66} See for example, Institute for Government, Parliamentary Monitor 2020.
Britain’s immensely complex immigration law is spread across a range of legal sources and has been described as ‘Byzantine’ by judges.\textsuperscript{67} Multiple amendments to existing Acts and changes to the Immigration Rules via secondary legislation could cause acute problems for EU citizens if there is no detailed and expert scrutiny.

It also calls into question the future of rights for those with pre-settled status, secured only by secondary legislation in the form of Immigration Rules, which could be subject to change upon ‘no-deal’ Brexit.\textsuperscript{68}

EU citizens’ right to justice is at risk. Even the prospect of judicial review may be subject to the government’s discretion. Judicial review is an essential constitutional mechanism by which the courts decide whether the government has behaved lawfully. However, section 11(3) of the European Union (Withdrawal Agreement) Act allows the government to use its Henry VIII powers to legislate in connection with ‘reviews (including judicial reviews) of decisions’ in connection with restricting the rights of certain people to enter the UK. The Public Law Project and Liberty has stated, that it is ‘wholly unclear what the purpose of this power is.’\textsuperscript{69}

Judicial review, especially immigration cases, is a key foundation of English common law and central to the rule of law, giving individuals the right to hold government to account.

The Immigration Bill presents an unprecedented opportunity to change key aspects of Britain’s Byzantine immigration system for good. It must not be used by the government to disenfranchise immigrants or complicate their circumstances further. The Labour Campaign for Human Rights endorses the Joint Council for the Welfare of Immigrants’ recommendations set out in its ‘Second Reading Briefing on the Immigration Bill 2020.’\textsuperscript{70}

\begin{footnotesize}
\textsuperscript{67} Free Movement, \textit{How complex is UK immigration law and is this a problem?}, 24/01/18.
\textsuperscript{68} Joint Committee on Human Rights, Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill, 20/03/19.
\textsuperscript{69} PLP and Liberty, \textit{EU (Withdrawal Agreement) Bill: PLP and Liberty’s Joint Briefing for Second Reading in the House of Commons}, 19/12/19.
\end{footnotesize}
4. Failures of the EU Settlement Scheme

The greatest challenge facing this programme is how to enable participation for all those who are eligible. To secure settled status, EU citizens must (1) know about the need to apply; (2) be able to navigate the system and make an application; and (3) be able to demonstrate that they have been living in the UK. Without settled or pre-settled status, families, children and vulnerable individuals will be left with no recourse to civil protections under the UK’s ‘hostile environment’ policy, including being stripped of social security entitlement and facing deportation.\(^\text{71}\)

No scheme can reach the whole of its target audience, and inevitably some will fall through the cracks.\(^\text{72}\) However, some may not be aware that they need to apply to the EU Settlement Scheme, including:

- children whose parents do not themselves need to apply or incorrectly believe that their UK-born children automatically qualify as UK citizens;
- very long-term residents who may not think they need apply;
- those who have already applied for permanent residence, but are not yet British citizens; and
- those who believe they are ineligible – whether that be because they have already been rejected from permanent residence under the current system, or those with minor criminal convictions.

Others may also face difficulties applying if they are vulnerable or have reduced autonomy. For example, the Oxford Migration Observatory suggests that survivors of domestic abuse may be victim to coercive control or rely on their partner for evidence to complete the process. According to the Office for National Statistics, 50,000 female EU citizens reported experiencing some form of abuse in the year ending March 2017.\(^\text{73}\) These vulnerable people are at risk.

Many risk missing the application deadline if they have not been paid for work due to exploitation or are in precarious housing. Others will struggle to navigate the digital system due to:

- language barriers;
- age or disability – in 2017, 56,000 EU citizens in the UK were 75 or above;\(^\text{74}\)
- digital exclusion – in 2017 an estimated 64,000 non-Irish EU citizens had reported that they had never used the internet.\(^\text{75}\)

Technical problems have exacerbated difficulties accessing the application process, with applicants struggling to navigate the online system without Home Office assistance.\(^\text{76}\) EU citizens have already expressed concern after having been granted the wrong status, receiving pre-settled status while in fact being eligible for settled status.\(^\text{77}\)

5. Vulnerable and at-risk groups

In order to apply for the Settlement Scheme, EU citizens must prove both their identity and continuous residence. There are some, however, for whom this will be difficult:

- people without bank accounts.

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71 The Guardian, EU nationals lacking settled status could be deported, minister says, 10/10/19
72 the3million, European Union (Withdrawal Agreement) Bill Briefing on changing the EU Settlement Scheme to be declaratory, 01/01/20.
73 The Migration Observatory, Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?, 12/04/20.
74 Office for National Statistics, International immigration and the labour market: UK regional data, 12/03/17.
75 The Migration Observatory, Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?, 12/04/20.
76 House of Commons Home Affairs Committee, EU Settlement Scheme (Fifteenth Report of Session 2017–19), 14/05/19.
77 The Guardian, Rise in EU citizens not getting UK settled status causes alarm, 30/08/20.
• non-working partners or carers,
• cash-in-hand workers,
• young people not in education employment or training, and
• people without passports or national identity documents.

Homelessness levels among EU citizens illustrate how vulnerable people can fall through the net. A significant number of homeless EU citizens have little knowledge of the Settlement Scheme. The government will struggle to reach the people who are most in need.

Even with extra funding, there will be challenges in accessing the required documentation. In a survey of organisations working in homelessness and migrant sectors, 62% of respondents identified Brexit as their biggest concern for future impact on migrant homelessness. A recent report for Crisis and Homeless Link suggested a range of measures that could make this process easier for homeless people, including reducing or waiving the application fee, allowing applications to be made by a trusted third party, and reducing documentation requirements for homeless people.

The lengthy and bureaucratic process of EU citizen re-documentation via their national embassy could cause them to miss the June 2021 deadline. Embassies often have long waiting times for appointments or impose conditions that vulnerable individuals cannot meet. Moreover, the Home office often delays processing complex cases, meaning that vulnerable homeless people are unable to access state support for months on end. In short, homeless EU citizens are at immediate risk from dying on the street, not just after Brexit.

6. Lessons from the Windrush scandal

The Windrush scandal meant that many undocumented but lawful immigrants to the UK struggled to prove their legal right to live in the UK. With the dawning of the hostile environment policy, many were wrongly detained, denied legal rights, threatened with deportation, and, in at least 83 cases, wrongly deported from the UK by the Home Office. However, there was at least a legal safety net – these citizens had a legal status under the Immigration Act 1971.

The EU Settlement Scheme, however, is a ‘constitutive’ system. EU immigrants do not have a new immigration status until they apply for it. This risks a repeat of the tragedy of the Windrush scandal, during which many vulnerable people fall through the net, and potentially having their lives uprooted, even if they meet the eligibility criteria. The UK government should instead consider implementing a ‘declaratory’ system. This would mean all EU citizens who meet the eligibility criteria would automatically have the right to reside in the UK. The Settled Status application system would instead be a registration system, where EU citizens register to gain documentary proof of status.

A ‘declaratory’ system would mean that those who fail to register before the deadline do not automatically lose their legal status, but just lack proof of status. Presently built into the design of the Settlement Scheme are cliff edges that could see European citizens losing access to healthcare, jobs, rent and benefits if they simply fail to apply by the deadline.

EU citizens will not be issued with physical documents on receiving settled or pre-settled status. Instead, they will be the only group of people in the UK who will need to navigate the hostile environment with a digital status. Non-EU citizens are issued with a residence card, which acts as proof of status.

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78 The Independent, Hundreds of homeless people will be at risk of deportation after Brexit, charities warn, 26/11/19.
79 WPI, Homelessness and the Impact of Brexit: Tackling the challenges and grasping the opportunities, 25/07/18.
80 The Guardian, Windrush: 11 people wrongly deported from UK have died - Javid, 12/11/18.
81 the3million, Legal safety net for those the government fails to reach in time.
In order to prove their status to employers, and welfare and healthcare providers, EU citizens will have to obtain a one-off code online, with which the organisation can check the person’s status. This new procedure is time-consuming. It has been suggested that a lack of physical documents may lead to discrimination, as it increases the workload on employers and landlords. Moreover, the enormous increase of millions of EU citizens’ personal data will become a key target for hackers. Regardless, the inevitable time during which the system is offline (for example, for maintenance reasons) potentially affects work start dates, and the receipt of emergency healthcare or benefits. The use of physical documentation has been recommended by a range of groups, including the largest EU citizen campaign group, the3million, and landlords across the country.

7. The hostile environment

Announced in 2012, the UK Home Office hostile environment policy creates an administrative and legislative environment to make life as difficult as possible for people without leave to remain, in the hope of coercing them to ‘voluntarily leave’. It includes limiting access to employment, housing, healthcare, confiscating a driving licence, freezing bank accounts and restricting rights of appeal against Home Office decisions.

After the EU settlement scheme deadline of 30 June 2021, EU citizens will be subject to the hostile environment if they have not received settled or pre-settled status. If the UK leaves the EU with a deal, they will be granted a six-month grace period. If the UK does not leave with a deal, there will be no grace period. The hostile environment policy has

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82 Ibid.
included the removal of homeless citizens of EU countries, later found unlawful in EU law. With many homeless people at risk of slipping through the net of the EU settlement scheme, this could happen again in the future.

The hostile environment policy also includes requirements for landlords, the NHS, charities, community interest companies and banks to carry out ID checks. The Right to Rent scheme is a core plank of the hostile environment. It dictates that private landlords must check the immigration status of tenants. Landlords must carry out ‘reasonable checks’ as to whether prospective tenants have the right to live in the UK or face a £3,000 fine or up to five years in prison. Despite having been ruled as discriminatory and in breach of human rights law by the High Court in March 2019, the scheme was ruled legal in April 2020.

Despite not instructing the landlords to discriminate, the Right to Rent regime encourage discriminatory behaviour. When surveyed, 53% of landlords were less likely to rent to those with limited time to remain in the UK, while 20% said that they were less likely to consider letting property to EU or EEA nationals. This poses serious concerns for EU citizens who are in need of rented accommodation post-Brexit, especially those with pre-settled status.

8. Deportation

Coupled with the backdrop of the hostile environment, new regulations will make it far easier to deport EU citizens. Under current law an EU citizen only be deported on the grounds of public policy or public security. Where the EU

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85 The Guardian, Home Office policy to deport EU rough sleepers ruled unlawful, 14/10/17.
87 Sections 20-37 Immigration Act 2014 were found to be incompatible with Article 14 European Convention of Human Rights when read with Article 8; R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2020] EWCA Civ 542.
88 National Landlords Association, Right to rent post-Brexit: How will it work?, 07/11/19.
citizen has established a permanent right of residence, a decision to refuse admission, exclude, revoke residence or remove the person from the UK, is only permitted on serious grounds of public policy or public security.\textsuperscript{87} The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (INA Regulations) take effect at the end of the transition period.

The new INA regulations, however, state that EU citizens can be deported for conduct where that deportation would be ‘conducive to the public good’.\textsuperscript{90} This is a major policy change disguised in a statutory instrument, subject to considerably less parliamentary scrutiny. It is even accepted expressly in the Regulation that it gives the government ‘considerable discretion, acting within the parameters set by the law, to define its own standards of public policy and public security’.\textsuperscript{91} It will now be easier for the UK government to deport EU citizens, regardless of how long they have been living in the UK or the status of their residence. Moreover, a prison sentence of 12 months will give rise to a presumption of deportation.\textsuperscript{92} This is despite the earlier statements that statutory instruments facilitating Brexit would not be a ‘vehicle for policy changes’.\textsuperscript{93} In short, EU citizens’ right to remain is precarious. There remain few statutory safeguards to protect the rights of vulnerable EU citizens, which presently are ultimately subject to the vagaries of future government policy.

9. Recommendations

The Home Office should guarantee that time spent returned home during the Coronavirus pandemic should not constitute an absence for the purposes of the ‘continuous qualifying period’ for settled status under Annex 1 (Definitions) Immigration Rules, Appendix EU.

Britain must ensure that all future policy decisions are taken in line with its commitment under Article 23 of the Withdrawal Agreement to treat EU citizens on an equal basis with British nationals.

The government must make a commitment not to obstruct the operation of judicial review in relation to its exercise of powers to create secondary legislation under section 11(3) European Union (Withdrawal Agreement) Act to restrict the rights of certain people to enter the UK.

The Immigration Bill should require the government to simplify current immigration law and should make provision to restrict the power delegated to the Secretary of State which enables the government to make immigration policy by way of Immigration Rules.

The Home Office and Ministry of Housing, Communities and Local Government must work together to commit to a clear policy to relax evidentiary requirements for vulnerable people and expedite applications in urgent cases where essential welfare entitlement is conditional on settled status.

The government should amend the Immigration Bill to follow the recommendations of the Home Affairs Select Committee to implement a declaratory process at least in respect to EU citizens legally resident in the UK for more than five years.\textsuperscript{94}

To provide security and peace of mind, EU citizens should be issued with physical proof of status to allow them to navigate the ‘hostile environment’ post-Brexit and make easier and more secure application for mortgages, bank accounts, rent contracts, social security.

Substantial safeguards should be written into the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 to (i) repeal the ‘conducive to the public good’ ground, allowing only concrete factual grounds for deportation, and (ii) remove the presumption in favour of deportation.

\textsuperscript{89} Free Movement, How new immigration regulations will make it easier to deport EU citizens after Brexit, 13/03/19
\textsuperscript{90} Regulation 27A Immigration (European Economic Area) Regulations 2016, as amended by Regulation 43(9) Immigration, Nationality and Asylum (EU Exit) Regulations 2019.
\textsuperscript{91} Regulation 27(12) amending 27A of the Immigration (European Economic Area) Regulations 2016.
\textsuperscript{92} Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745, s7.
\textsuperscript{93} Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (White Paper), 01/03/17.
\textsuperscript{94} Home Affairs Committee, EU Settlement Scheme, 14/05/19.