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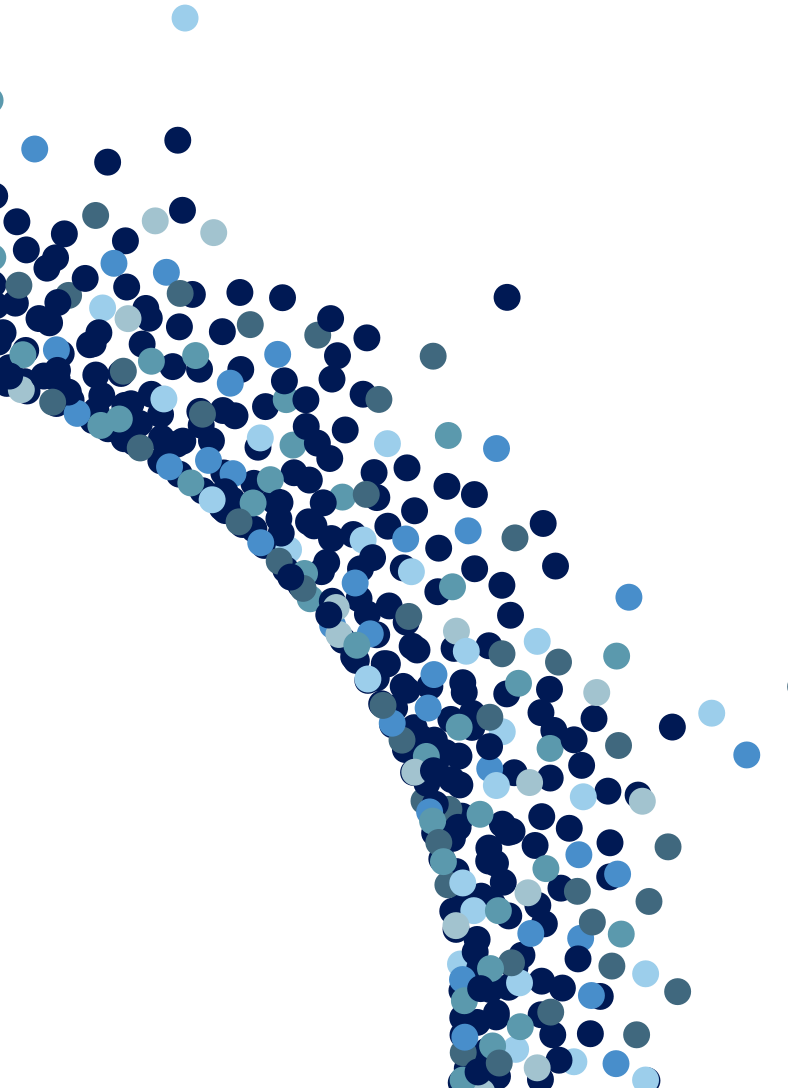
THE MIGRATION OBSERVATORY
AT THE UNIVERSITY OF OXFORD

REPORT

The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?



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Executive Summary

One of the key questions arising from Brexit has been how to resolve status of EU citizens already in the UK and, specifically, what kind of application process will be required.

In December 2017, the EU and the UK reached agreement on the basic outline of the future rights of EU citizens in the UK and their UK counterparts in the EU. Under this agreement, the application criteria will be the same as under current EU law: 5 years continuous residence, with exclusions on the basis of serious criminal offences committed before Brexit. Both sides have agreed that the application process should be "transparent, smooth and streamlined".

However, the government will face tricky operational and political questions as it implements this system. Its task is to send more than three million applicants through the process as quickly and efficiently as possible while excluding people who are not eligible (for example because they were not living in the UK before the cut-off date).

Mistakes made on either front can be controversial – whether it is eligible applicants wrongly rejected or ineligible ones who slip through the net. A key dilemma is that there is a trade-off between these two risks: a process designed to minimise the risk of fraud using strict evidence requirements is likely to exclude eligible people who can't provide the necessary documentation, push up the cost of the registration programme and increase the risk of people slipping into unlawful status.

The current application process for EU citizens seeking permanent residence has been much criticised for its complexity and strict requirements. It leans in the direction of preventing ineligible people from being accepted, rather than facilitating the process of getting documentation for people who are entitled to it. A document-heavy process and a relatively narrow interpretation of who qualifies (including a controversial requirement for some EU citizens to have private health insurance), have contributed to a high rejection rate. In the 15 months after the referendum, approximately 34,000 (14% of) applications were rejected and a further 20,000 (9%) were sent back to applicants as invalid or incomplete.

The government has responded to these concerns with proposals to significantly simplify the process. A new system will drop some of the more complex requirements, reduce the burden of evidence on individuals and rely where possible on information the government already holds, such as tax records. This is expected to make the process much simpler for the majority of people with straightforward applications.

The question how more complex cases will be addressed is still to be resolved. People who were not working or who were working in the cash economy may not have left an official paper trail. The current permanent residence application requires relatively 'fraud-proof' evidence such as bank statements or NHS letters, but not informal letters from friends they were living with, non-official mail or online activity. Even if only a few percent of the estimated 3.8 million EEA citizens and roughly 140,000 non-EEA partners were unable to provide the evidence required, the number affected could run into the tens or even hundreds of thousands.

Introduction

As the UK prepares for Brexit, the most immediate question on the migration agenda has been the status of EU citizens already living in the UK.

In December 2017, the UK and the EU reached high-level political agreement on the rights that EU citizens in the UK and their UK counterparts in EU countries will receive after Brexit and the conditions for securing these rights. The agreement – which is expected to be incorporated into a Withdrawal Agreement following further negotiations – preserves most of the rights of mobile EU citizens and notes that the application process should be 'transparent, smooth and streamlined'.

This report focuses on one of the key questions for the future of EU citizens in the UK: how the application process will be designed and implemented, bringing together relevant data and statistics to inform the discussion. In particular, it asks:

- How will EU citizens currently living in the UK be registered after Brexit? Who will be eligible and who will be excluded?
- Where will the burden of proof lie – how much evidence will applicants have to produce, how much scrutiny will applications receive?

In the interests of simplicity, the report refers to 'EU citizens' although in practice any policy changes are expected to apply to all EEA citizens except Irish nationals. To facilitate comparison with administrative statistics, some data tables include EU citizens only while others include all EEA citizens. Because the number of citizens of non-EU EEA members Norway, Liechtenstein and Iceland living in the UK is small (less than 20,000 according to the Labour Force Survey), the choice of EU vs. EEA does not make a significant difference to the figures.

Future policy changes are also expected to apply to non-EEA family members of EEA nationals, who currently have free movement rights under EU law but who have received less attention in public debate. While most EEA nationals are either single or in a couple with another EEA national, roughly 140,000 were estimated to have non-EEA partners in Q2 2017 (Table 1).

Table 1: EEA nationals by family type and citizenship of partner, Q2 2017

Number of people	London	Rest of UK	Total
Single EEA national age 18+	400,000	636,000	1,050,000
EEA citizen with non-EEA partner	73,000	66,000	138,000
EEA citizen with British partner	130,000	364,000	494,000
EEA citizen with EEA partner	426,000	934,000	1,360,000
Children under 18	190,000	556,000	731,000
Total	**1,217,000**	**2,557,000**	**3,774,000**

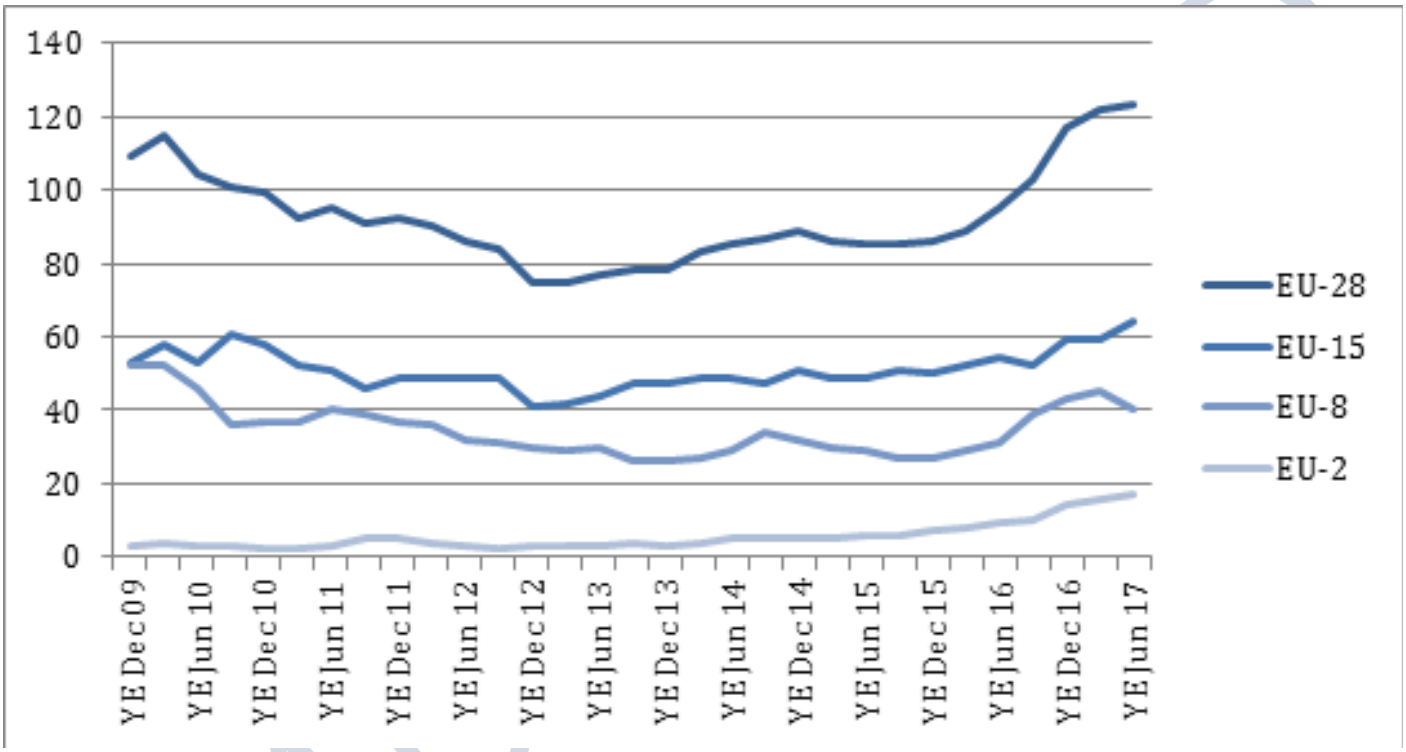
Source: Migration Observatory analysis of Labour Force Survey, Q2 2017. Note: breakdowns (but not total) exclude families where the nationality of one partner is not reported; single EEA nationals are reported separately by age (below 18 or 18+); data on EEA citizens in couples, however, include a small number of under 18s who are reported as being the head of a family unit or their partner. Totals may not sum due to rounding. LFS data are likely to undercount the number of migrants in the UK, due to factors such as the exclusion of certain people in communal accommodation and lower response rates among recent arrivals and young people. Data include approximately 340,000 Irish citizens not expected to be affected by changes to the status of EEA citizens post-Brexit.

How have EU citizens responded to the referendum result?

Since June last year there has been great interest in data on EU citizens already in the UK and how they have responded to the uncertainty of Brexit.

Immigration of EU citizens coming to the UK for at least one year fell by 19% in the year following the referendum, reaching 230,000 in YE June 2017. Emigration of EU citizens also increased, from 95,000 in the year leading up to the referendum to 123,000 in the year after it (Figure 1). Increased emigration was driven by increased numbers of EU citizens saying they were leaving the country both for work reasons and simply 'going home to live'.

Figure 1: Long-term emigration of EU citizens, 2004 – YE June 2017



Source: Migration Observatory analysis of ONS International Passenger Survey. Note: Croatia only included from July 2013 onwards.

While EU emigration increased in the year after the referendum, it remained below the level of 134,000 recorded during the financial crisis in 2008. It is small relative to the total population of EU citizens living in the UK (Table 1, above)—less than 4%. It also remained well below EU *immigration* levels, as a result of which migration was still positive (107,000 in YE June 2017) and the population of EU citizens living in the UK continued to increase.

Relatively low emigration is perhaps not surprising given that many of the European citizens in the UK have lived here for some time. By Q2 2017, 64% of EEA citizens were either born in the UK or had been in the country for 6 years or more (Table 2).

Table 2: EEA citizen population by years of UK residence, Q2 2017

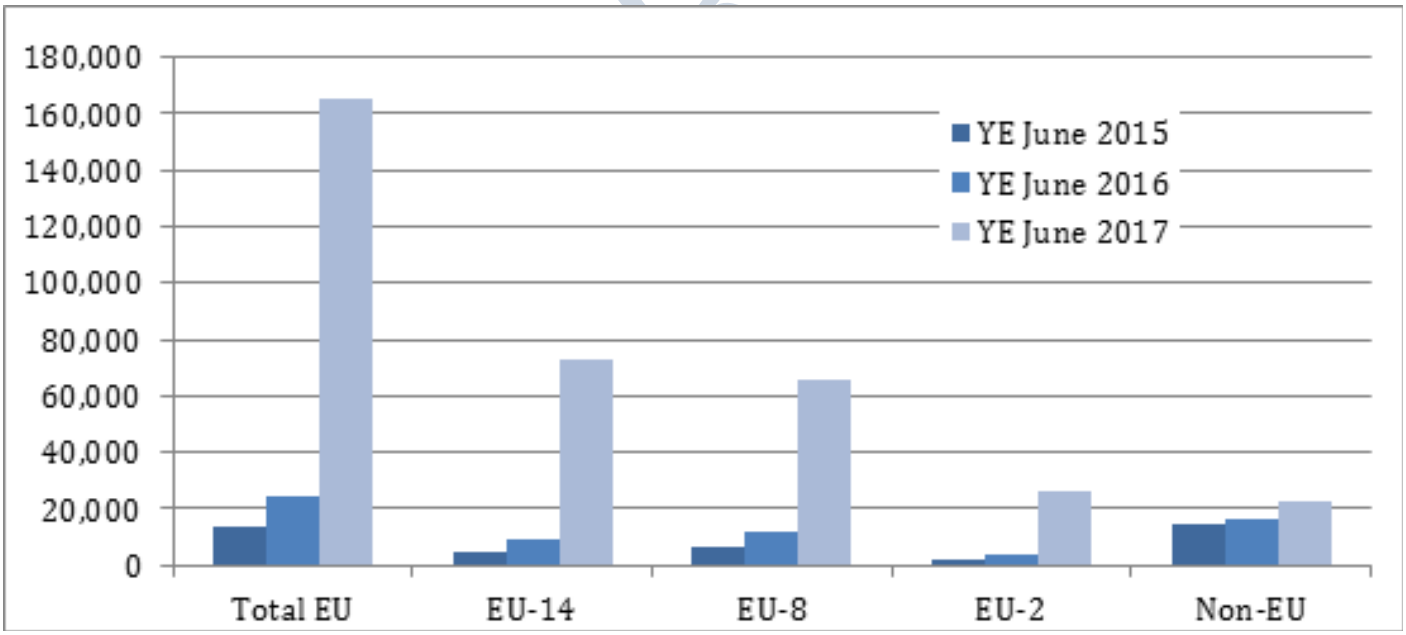
	London		UK total	
	Number	Percent	Number	Percent
Born in the UK	85,000	7%	291,000	8%
Arrived 0-5 years ago	411,000	34%	1,337,000	35%
Arrived 6-10 years ago	291,000	24%	885,000	23%
Arrived 10+ years ago	421,000	35%	1,237,000	33%
Total	**1,217,000**	**100%**	**3,774,000**	**100%**

Source: Migration Observatory analysis of Labour Force Survey. Note: years of residence calculated from year of arrival (i.e. 0-5 years ago = arrived 2012-2017); people with no reported year of arrival are included in total but not breakdowns. LFS data are likely to undercount the number of migrants in the UK, due to factors such as the exclusion of certain people in communal accommodation and lower response rates among recent arrivals and young people.

Another immediately visible trend in the statistics since the referendum is a sharp increase in applications for permanent residence (PR). EEA citizens do not need to apply for paperwork demonstrating their status while the UK is still an EU member (although since 2015 the UK government has made PR documents a pre-requisite for applying for citizenship).

Nonetheless, the total number of EU citizens' PR applications processed by the Home Office increased by a factor of 12 between the years ending June 2015 and June 2017, reaching 165,000 in the 12 months following the referendum (Figure 2), or 188,000 if non-EU family members are included. The increase in applications processed was particularly large among EU-14 citizens, where there was a fifteen-fold increase.

Figure 2. Permanent residence applications processed, by citizenship, 2015-2017 (years ending June)



Source: Migration Observatory analysis of Home Office immigration statistics, table ee_02. Note: includes all granted, refused and invalid applications; individuals will be counted more than once if they apply unsuccessfully and reapply successfully. Non-EU category includes a small number of non-EU EEA citizens. Data are given for applications processed rather than applications submitted because the Home Office statistics on applications do not report the latter separately from registration applications for people with less than 5 years residence.

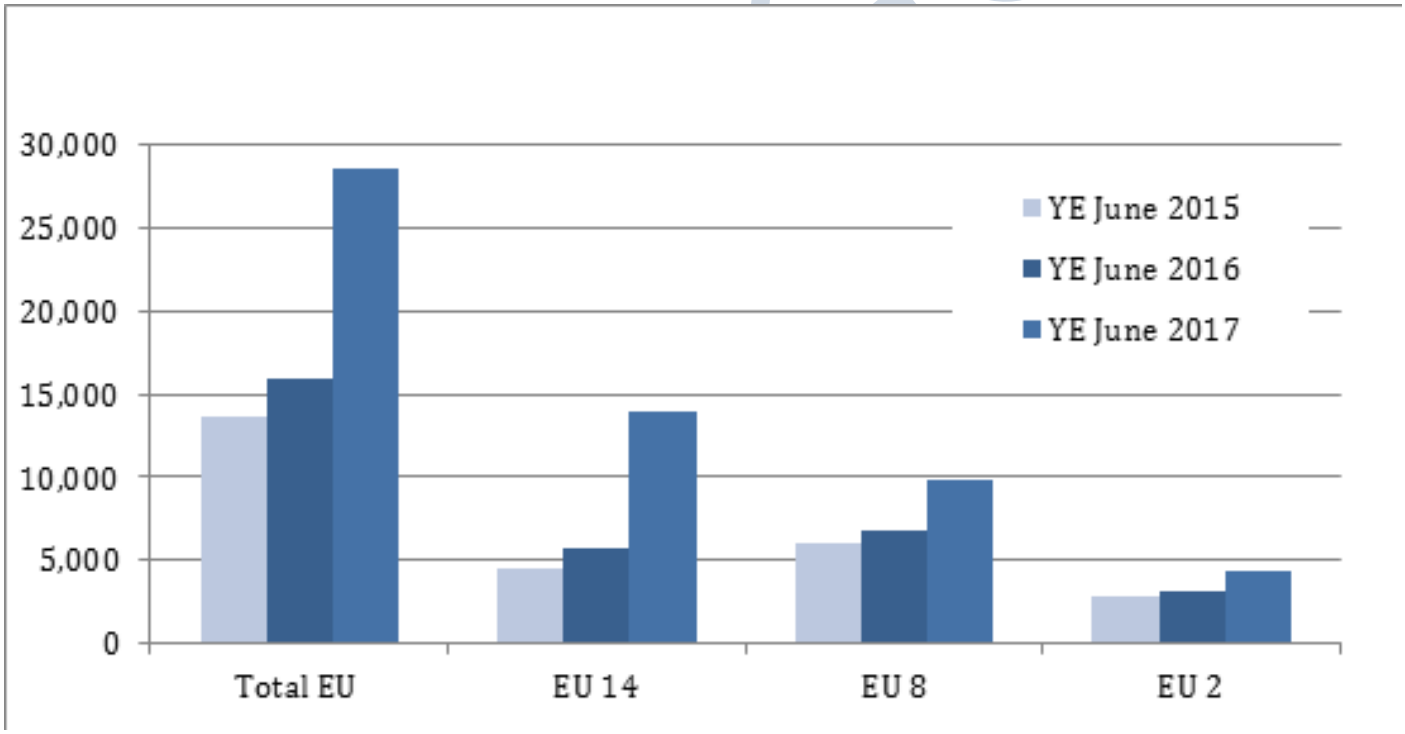
These figures mostly predate the government's June 2017 proposal that EU citizens would need to apply for 'settled status' after Brexit even if they had already successfully applied for PR. Recently, the government has implicitly discouraged PR applications by noting this fact on the web page explaining how to apply. Combined data on PR and registration (for people with less than 5 years' residence) suggest that application numbers peaked in Q1 2017 and have fallen since that point.

While PR applications increased sharply in percentage terms, the total numbers are—again—small compared to a population of approximately 3.8 million people estimated to be living in the UK. The number of EU citizens' PR applications processed in the year after the referendum was equivalent to less than 5% of the total EEA population living in the UK and less than 10% of the number who arrived in the UK 6 or more years ago (and thus likely to meet the residence requirement for PR). These percentages do not vary significantly by subgroup (EU-14, EU-8, and EU-2). They would increase somewhat, but not dramatically, if one includes a share of the 58,000 cases that had been submitted but were waiting to be processed as of Q3 2017 (discussed further below; these data do not separate out PR from registration applications).

In other words, the vast majority of EU citizens have not applied. The reasons for relatively low application numbers are not clear but could include the complexity of the process or the fact that the application is still not necessary—and thus EU citizens may be adopting a 'wait and see' attitude, perhaps in the expectation of any easier process after Brexit.

The number of EU citizens applying for citizenship is even lower. In the year after the referendum, UK citizenship applications from EU nationals increased by 80%, reaching 28,500 (Figure 3). A further 8,500 applications in Q3 2017 took the total number of EU citizenship applications between the referendum and September 2017 to just under 37,000. However, these application numbers represent only about 1% of EU nationals in the UK and do not vary meaningfully by subgroup (EU-14, EU-8 and EU-2).

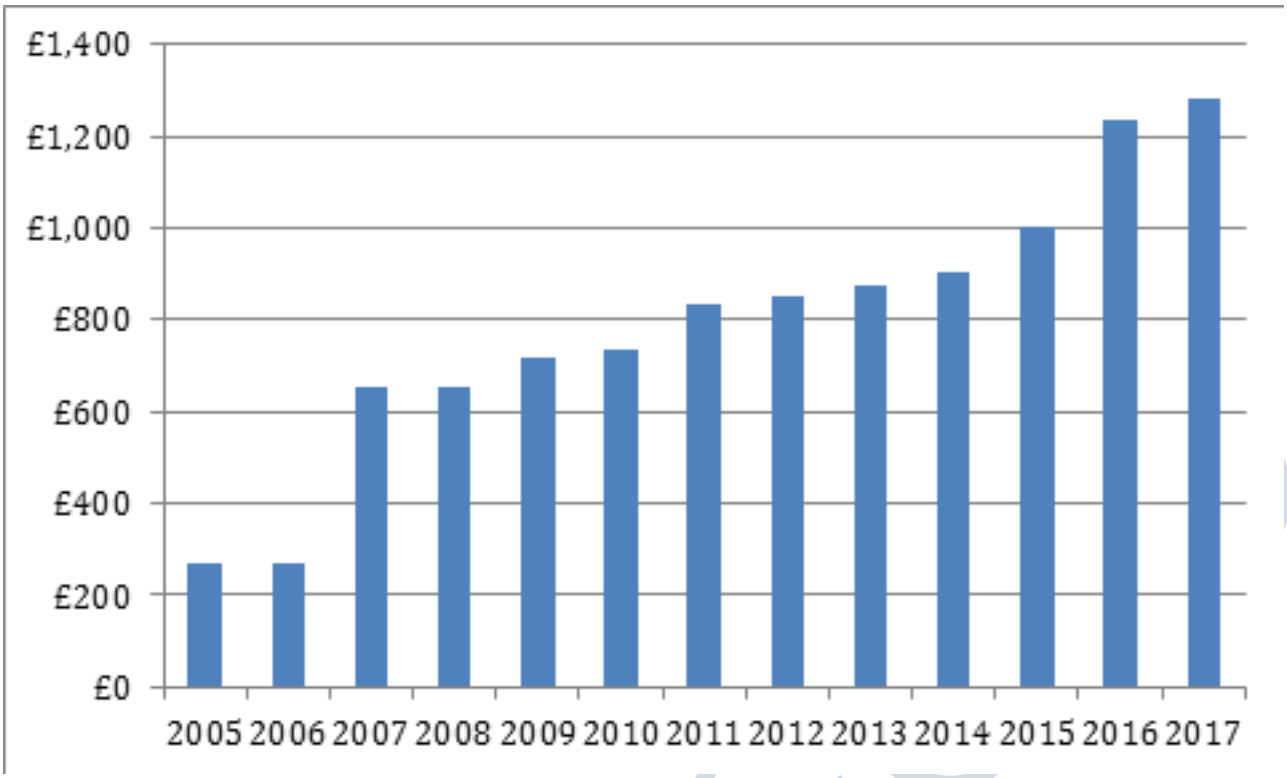
Figure 3. Citizenship applications by EU citizens, 2013 to 2017 (years ending June)



Source: Migration Observatory analysis of Home Office immigration statistics, table cz_01_q_a.

Why are so many fewer people applying for citizenship than for PR? Motivations for applying for citizenship are complex and there are many possible explanations, ranging from the lack of immediate need to uncertainty about whether the previous citizenship will be lost. Another potential explanation is the cost: naturalisation is almost 20 times more expensive than the PR application, at £1,282 and £65 respectively (Figure 3). Some prospective citizenship applicants may also have been delayed by the requirement to seek PR first, in which case a more significant increase in citizenship applications could be in the pipeline.

Figure 4: Cost of naturalisation application including ceremony fee, 2005-2017



Source: Migration Observatory analysis of www.legislation.gov.uk and UK Government Web Archive. Note: figures not adjusted for inflation.

Registering EU citizens after Brexit

Because EU citizens already living in the UK are likely to have different rights from EU citizens who arrive after the date of Brexit, they will need documentation to prove it (for example to prospective employers).

Under the December 2017 agreement on citizens' rights, the basic eligibility criteria for new applicants who have not already received permanent residence documents will not change: 5 years of continuous residence as an employee, self-employed, jobseeker, student or self-sufficient person. ('Continuous' means no absences of more than 6 months per year, although an absence of 12 months can be allowed 'for important reasons' such as childbirth or an overseas posting.) The threshold for excluding people on the basis of pre-Brexit criminality is also to remain the same—that is, only on 'serious grounds of public policy and public security'.

This means that there should in principle be relatively few EU citizens in the UK who do not meet the eligibility criteria either immediately or after they have accrued the necessary 5 years of residence. Ineligible people would include those with serious criminal records (people who would already be deportable under current law – although statistics on the number of EEA nationals who have been removed due to criminality are not released). They could also include people who are living in the UK but not exercising their free movement rights or are deemed to be misusing these rights. For example, Home Office guidance currently states that rough-sleeping EEA nationals may be considered to be abusing free movement rights and can therefore be liable to be removed from the UK. Indeed, the number of enforced returns of EU citizens, for reasons such as rough sleeping, has grown in recent years from 3,158 in 2014 to 4,905 in 2016.

How are individual cases decided?

The outstanding questions are less about who will be eligible in principle and more about how individual cases will be decided—the nuts and bolts of the application process. In the UK, the government will be responsible for developing an application process that implements the terms agreed with the EU (although it will do so under constraints, and the Withdrawal Agreement may include specific procedural requirements).

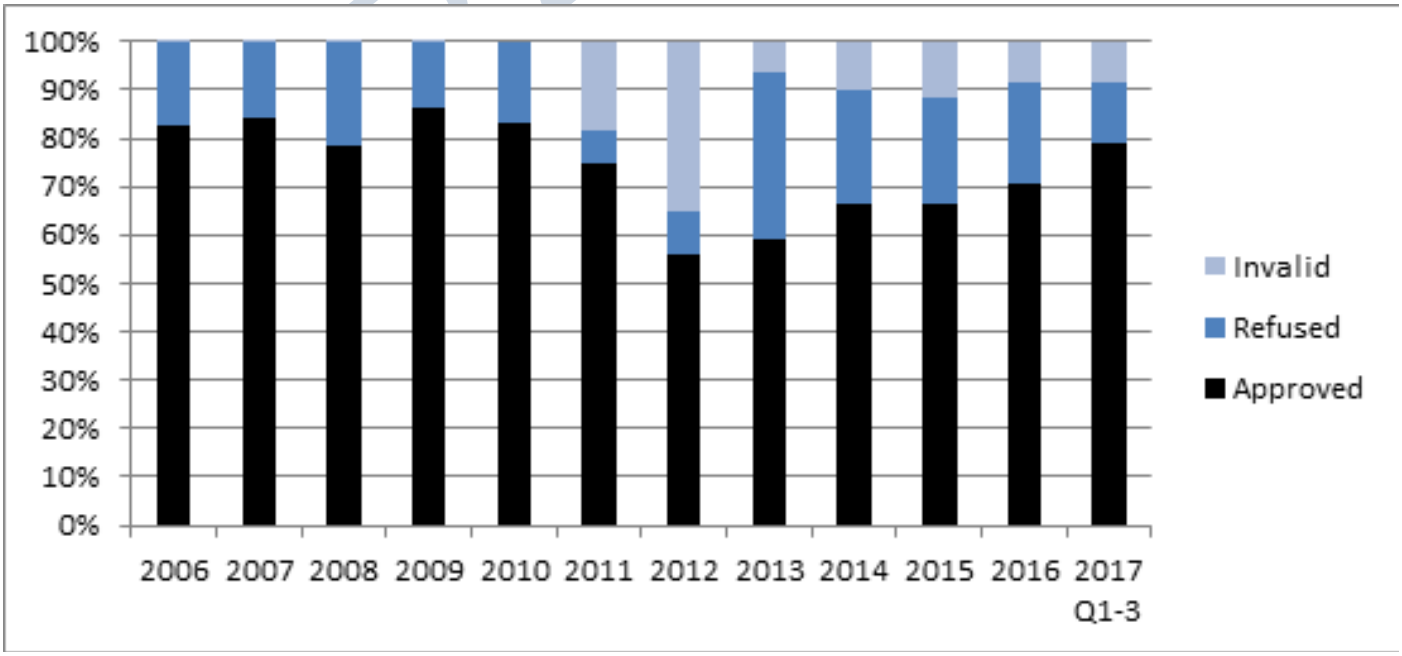
What has made the current system so complex?

There is already a process in place for EU citizens to register for documents certifying permanent residence (PR). The current system has been criticised for its complexity, the amount of paperwork applicants have to produce and the high rates at which applications are rejected. The government has responded to these concerns with proposals for a new system that will be 'completely different', requiring less paperwork from applicants and dropping some of the requirements.

An overview of the current system illustrates some of the challenges that arise. The existing PR system was not designed for the sheer number of applicants who will need to receive documentation after Brexit. From 2011 to 2015, fewer than 20,000 permanent residence documents were issued on average per year, a tiny task compared to the 3.8 million EU citizens estimated to be in the UK as of Q2 2017 (Table 1, above).

A significant share of PR applications under the current system are not accepted the first time around (Figure 5). In 2015, one third of applications were either rejected or sent back to applicants as invalid (for example because they did not include sufficient evidence or were sent in without the fee). The approval rate has increased over the past two years. In the 15 months following the referendum, 183,000 or 77% of applications were approved and 54,000 (23%) were either rejected (34,000 or 14%) or sent back to applicants as invalid (20,000 or 9%). If invalid applications are excluded, the approval rate for this period rises to 84%.

Figure 5: Share of PR applications approved, refused or deemed invalid, 2006- September 2017



Source: Migration Observatory analysis of Home Office immigration statistics table ee_02q.
Note: individuals may be repeated in the data, since invalid or refused applications may be followed by a successful re-application. Data include both EEA nationals and their non-EEA family members. The Home Office attributes the larger number of invalid applications in 2011 and 2012 to a 'pre-consideration sift' of applications that identified those missing key information or documentation, but was discontinued in late 2012.

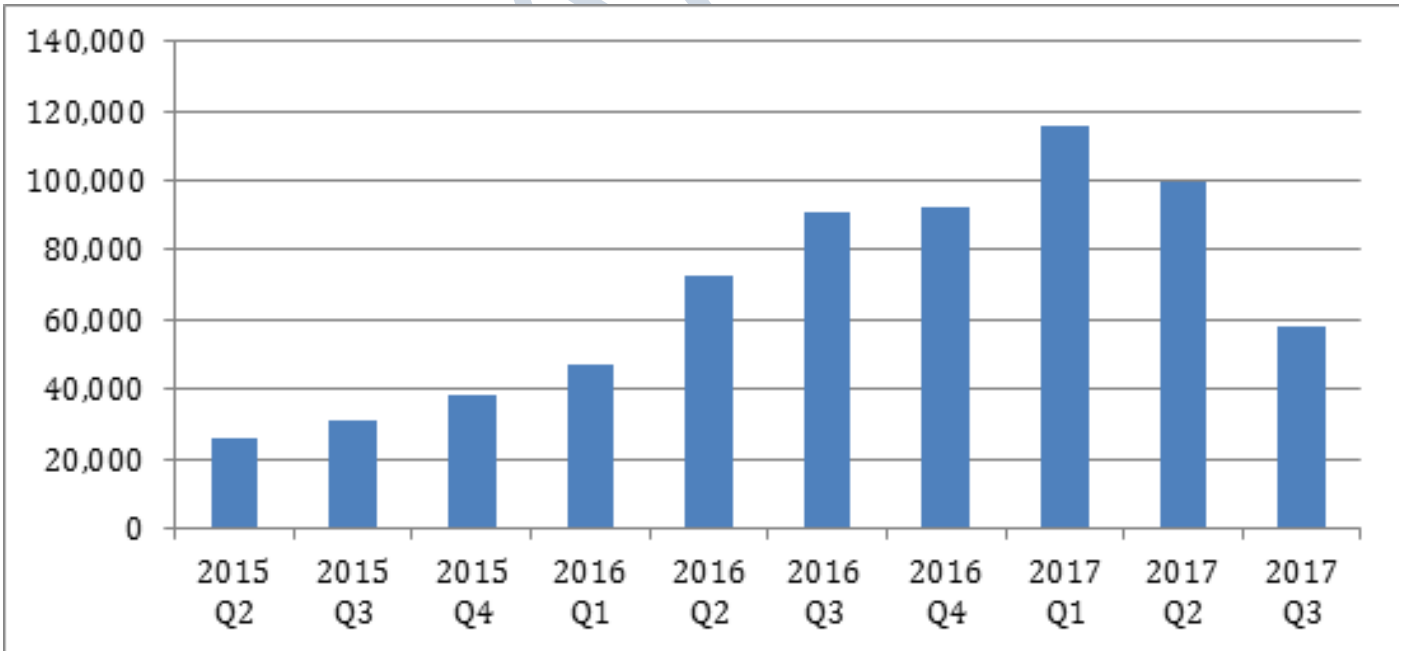
Data on the reasons for rejection are not available but commonly cited reasons include a lack of sufficient documentation showing a full 5 years continuously exercising treaty rights and the requirement for students and self-sufficient people to hold comprehensive sickness insurance (CSI). The CSI requirement meant that many people who had lived in the UK for some time were in fact not considered to have been lawfully present; however, relatively few people knew about this rule, which only attracted widespread attention when EU citizens started applying for PR in larger numbers after the referendum.

A further indication of the complexity of the PR system is that of applications received in the second half of 2016, 21% were categorised as 'non-straightforward' cases (Home Office 2017, table InC_02). Applications are classified in this way if the caseworkers determine that they need more time to adjudicate because of their complexity. One consequence of this classification is that the Home Office's 'service standards' for how quickly a decision will be made (6 months in the case of PR) are not applied.

Interestingly, the share of 'non-straightforward' applications appears to have dropped sharply in the first quarter of 2017 to only 3%; the reasons for this are not immediately apparent but could include a change in the characteristics of applicants as numbers increased sharply, or the greater publicity paid to factors such as the CSI requirement that could complicate an application (discouraging those affected from applying).

The increase in EEA casework following the referendum initially led to a growing backlog (Figure 6), and average waiting times for PR certificates increased from 43 days in 2015 to 116 days in Q4 2016 (with longer waits for PR cards issued to non-EEA family members). However, although the rate at which applications were processed has since increased and numbers of applications slowed, as a result of which the backlog has declined. By Q3 2017, there were approximately 58,000 outstanding European casework applications (both PR and registration applications).

Figure 6. Pending PR and registration applications, Q2 2015 to Q3 2017



Source: Migration Observatory analysis of Home Office migration transparency data. Note: includes both 'work in progress' and outstanding cases that have not yet been entered onto the computer system.

How will the new system work?

In response to concerns about the complexity of the current system, the government has proposed significant changes that would simplify the application process and require less paperwork from applicants. Its proposal, which notes that the current system is "not fit to deal with the situation after we leave the EU", includes relying more on existing information the government holds, such as tax records, so that applicants do not have to source these documents themselves. The government has also proposed dropping some of the requirements that have contributed to high rejection rates in the current PR process, such as the requirement for comprehensive sickness insurance and the test of whether work counts as 'genuine and effective'. These latter requirements are discussed in more detail in a previous Migration Observatory commentary on the status of EU citizens in the UK.

If these simplifications go ahead, they should be expected to reduce the burden on most applicants and reduce the amount of time Home Office staff must spend reviewing each application. This in turn would free up resources to deal with more complex cases.

Who might struggle under a simplified system?

Under a simplified application system, most cases are likely to be relatively straightforward. However, a minority of people's circumstances could be more complex. This could include:

- *People who cannot provide the necessary evidence*. Depending on what documentation is required, some people may not be able to meet the burden of proof. For example, people working in the cash economy and not declaring their earnings could struggle to show that they were working in the UK for 5 years (especially since they did not know at the time that they would need to do so).
- *People who do not apply*. Some eligible people may not apply within the proposed 2-year time period, for example because they do not realise they are required to, think they are not eligible, do not speak good enough English to navigate the process, do not have access to a computer, or have other problems such as destitution or disabilities that stand in the way. If applying is mandatory and there is a deadline for submitting applications, these people would become unlawfully resident after the application deadline expires.
- *Complicated cases*. Some people might not meet the criteria on paper—for example, due to significant absences from the UK—but be able to show mitigating circumstances that would need to be weighed up by a case worker.

It is not possible to estimate the likely size of these groups, which will depend on individual's decisions and the registration process itself. However, because of the large number of people who will need to apply—more than three million—even if only a few percent were affected the number could be in the tens or even the hundreds of thousands.

The burden of proof

In designing a registration process, the government will have to manage a tension between the goal of ensuring that people who are eligible are given their status quickly and without excessive cost or administrative burden, and the goal of ensuring that people who are not eligible (for example because of not having lived in the UK before the cut-off date) are excluded.

Applications that would be ineligible may include those presenting fraudulent documentation (e.g. fabricated evidence of residence in the UK before the cut-off date) or failure to declare circumstances such as criminality or long absences from the UK. In practice, the government can check UK criminal records as part of the application process, so uncertainty about eligibility is more likely to arise from the residence requirement.

Real or perceived mistakes either in favour of or against an applicant can be controversial, and are common themes in media reporting about immigration decision-making, illustrated by headlines such as:

- "US physician assistant may be forced to quit UK because of visa nightmare" – *Guardian, August 4 2017*; or
- "EXPOSED: Illegal migrants were trained to 'act Polish' so they could sneak into Britain" – *Express, August 18 2016*.

From a policy perspective, both wrongly rejected and wrongly accepted applications are problematic. The first imposes costs on individuals who could face long periods of uncertainty due to lengthy processing times and/or appeals, may not be able to prove their legal status in the meantime to employers, banks or landlords, and in some cases may be required to leave the UK or become illegally resident. It is also costly for the government, because rejected cases could undermine confidence in the management of the registration process and are likely to generate costly appeals, increase the numbers of people who are liable for removal (a difficult and expensive process) and—for local government—increase the number of people with no recourse to public funds. The second type of error, meanwhile, undermines the integrity of the system.

Of course, it is not possible to minimise both types of error at once: there is likely to be a trade-off between them. This is a well-recognised phenomenon in public policy. The stricter the process to prevent ineligible people receiving a particular benefit, the more likely it is that people who should have received it will be excluded.

By way of illustration, one question to be resolved is what evidence can be used to demonstrate previous years of UK residence. Current PR applicants can rely on common documents such as council tax statements, HMRC letters and bank statements, as well as tenancy agreements and NHS letters showing regular attendance. Non-official documents such as a declaration from another individual confirming that the applicant was living with them, non-official mail or online activity are not accepted, presumably because they are easier to obtain fraudulently. However, if the government decided not to accept them, people whose accommodation in the UK was genuinely based on an informal agreement might be rejected. People who arrived in the UK shortly before the cut-off date may not have had time to generate a paper trail demonstrating their residence here, since securing proof of address and opening bank accounts can in some cases take several months.

Regardless of the decisions the government takes on how to address questions such as this, it will face political risks. A process designed to register people quickly and efficiently without requiring lengthy scrutiny will be criticised if cases of fraud or criminality come to light. But a process designed to minimise this risk would also be criticised if it led to long waiting times as applications were carefully scrutinised and if apparently deserving candidates were rejected.

The existing PR process leans strongly in the direction of preventing ineligible people from being accepted, rather than facilitating the process for people who are entitled to it. Implementing a new system that instead minimized rejections of eligible applicants would mean moving towards a presumption of success—a potentially significant change in the 'culture' underpinning the rules.

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The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

COMPAS

The Migration Observatory is based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford. The mission of COMPAS is to conduct high quality research in order to develop theory and knowledge, inform policy-making and public debate, and engage users of research within the field of migration.

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