

## The clock is ticking

### UK employment law and immigration in a post-Brexit world

Groundhog Day abounds at the moment – here we are again – will there be a trade deal or not? While the EU and UK reached a Withdrawal Agreement in January, detail on people impacts was scant. The UK is in the EU departure lounge but remains bound by EU law during the transition period until 31 December. COVID-19 or no COVID-19, UK government is adamant this period will not be extended and has legislated to prove it. Fevered negotiations now follow to attempt to reach a deal. The outline of the future shape of UK employment and immigration law is gradually becoming clearer. What do we know and what remains “up for grabs?”

9 July 2020

#### Immigration ★

The EU Settlement Scheme (EUSS) launched on 30 March 2019 and provides the route by which EU nationals in the UK can secure their status in the UK at the end of the post-Brexit transition period.

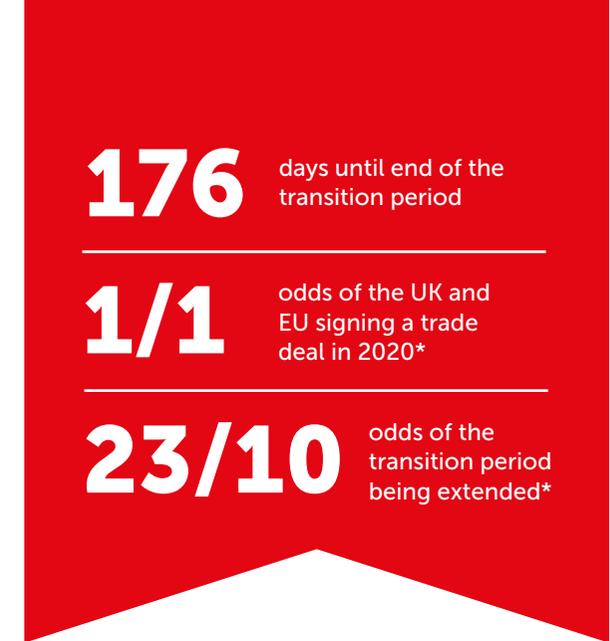
With over a year's worth of applications under the belt, the Home Office data released on 18 June 2020 confirms that the total number of applications received up to 31 May 2020 was more than **3.6 million**. Of these, **3.1 million** have been concluded with **53%** being granted settled status (where the applicant is able to demonstrate over five years' residence in the UK) and **41%** granted pre-settled status. Those with pre-settled status can apply to “upgrade” to settled status on their five year anniversary.

But what of the remaining 6%? The data shows that 28,900 received a withdrawn or void outcome, 14,100 were invalid and 900 were refused. The refusal statistic is an interesting aspect. The EUSS has only a few criteria: the applicant must be eligible (an EU national or a non-EU family member) and be resident in UK (these are the eligibility criteria), be free from serious criminal convictions and have not submitted false or misleading information in their application (suitability criteria). Home Office data shows that only 1% were refused on suitability grounds.

The Home Office only began refusing EU Settlement Scheme applications on eligibility grounds in February 2020. Many of these eligibility refusals relate to cases that had been under consideration for several months and, in most cases, subject to repeated unsuccessful attempts to obtain missing evidence or information from the applicant.

Given that data shows there are 3.7 million EU nationals in the UK, does that mean the job on EUSS is nearly done? Not really. The data presented is applications made, not individuals. Many individuals will have made an application for both pre-settled and settled status, resulting in an element of double counting: in January 2020, the number of applications from Bulgarians was around 155% of the estimated number of Bulgarians in the UK.

We can say that progress is being made though there remains some criticism of the accessibility of the scheme given the reliance on technology. The very low number of refusals on the grounds of suitability should give some comfort to EU nationals that this is a light touch process, and the overwhelming majority of applications are passing through the process with ease. As a reminder, EU nationals who arrive in the UK before the end of December 2020 are eligible for the EUSS and have until the end of June 2021 to apply.



The spectre of Brexit is clearly having an impact on the attractiveness of the UK as a place to live and work for EU nationals. In 2019, 170,000 non-British citizens moved to the UK for at least a year to work, according to ONS estimates. 56% of this cohort were non-EU citizens, as opposed to EU citizens. This is the first time this has happened since 2006 and is a return to the late 1990s through to the mid-2000s, when work migrants were more likely to be from non-EU countries.

This leads us nicely to the January 2021 regime; the plans for a new and improved Tier 2 continue abated - [see our briefing](#). It is more complex and costly than the EUSS for sure, and UK employers would be wise to consider their hiring plans for the short and medium term - and take all steps to capture new hires in the EUSS where possible. Those without a sponsor licence are also wise to consider the need for a licence and overcome if possible the current COVID-19 'to do list' and think ahead. We will be launching a series of briefings on Brexit planning in this area designed to help this thought process.

\*Odds provided by [oddchecker.com](#) – accurate as of 9/7/2020

## Employment ★

In nearly all respects, the current statute book will remain in place. But what of the future? Employment law post-31/12/20 ultimately depends on two factors. The first is whether the UK agrees to maintain future EU employment law standards as part of any future trade relationship. The second is a domestic political question – does the UK government intend to deviate away from the current employment law picture such as to “liberalise” it? Level playing field statements originally in a previous draft of the Withdrawal Agreement were removed after the 2019 general election, while legislation flowing from that added powers for ministers to allow lower courts to potentially overrule current law derived from the EU (and a consultation on this issue was launched by the UK government this week). Some “warm words” did remain however in the political declaration entered into to set the scene before the trade talks, which spoke of continuing high standards in workers’ rights. Will the UK Government seek to avoid binding commitments which continue to track EU law and then make material changes to UK employment law?

Current indications are that UK government aims to avoid any future commitments which tie it to the future direction of EU law. Pre COVID-19 statements suggested that they would not agree to a future “level playing field” between the UK and EU in respect of labour rights, merely that labour law protections would not be reduced in such a way that they would distort future trade with the EU.

This is a far cry from the May government’s promises to allow parliament a future say in whether EU employment law passed after Brexit would also become law in the UK. This area is set to be one of many which will lead to heated debate and discussion in the coming weeks. What results will depend on what trade deal is reached. If no trade deal is reached, the UK will, on the face of it, be able to shape future UK employment law entirely unaffected by EU developments

Does this mean that the UK government intends to use a deal/no deal to water down current employment protections? Our prediction (albeit we have been wrong before!) is that this is currently unlikely. While certain Conservative backbenchers might dream of “Singapore by the Thames”, a government elected on the back of former “Red Wall” Labour seats in the middle of the worst economic crisis in living memory may well not wish to reduce employee protection in the short and medium term. It might be that the government simply seeks to avoid its hands being tied later without wishing to make material changes... we shall see.

It is possible that, in the medium term, we could see minor changes to the Working Time Regulations (particularly in relation to holiday pay), Agency Worker Regulations and TUPE. However, this could all come at the bottom of a very long “to do” list that the UK Government faces as the economy gets back on its feet and once the outcome of the trade talks becomes clear.

## Questions ★

**The second half of this year will be a time of planning for employers in the UK: how will right to work processes and systems need to change? How will recruitment strategies need to change to align with the process and costs of Tier 2 from January 2020? Are there any frontier workers or frequent travellers that will be impacted by the loss of free movement, and if so what can be done? How are current EU national employees supported in a manner that does not raise discrimination or data privacy issues? These are big questions and will vary from employer to employer but do need to be addressed in good time to be ready for the turn of the year.**

**The future of UK employment law post-Brexit remains, to a certain extent, in a state of flux. This depends on the trade negotiations but in our view, this is far more of a political question. If we do not track EU law in future, the UK parliament will be able to shape UK employment law in a manner which reflects its composition and ideological preference. As to what that might look like in five years... it’s probably best for us to leave that to the political scientists.**

## Contacts ★



**Tom Bray**  
Partner

T: +44 292 047 7772  
M: +44 790 003 0806  
tombray@eversheds-sutherland.com



**Audrey Elliott**  
Partner

T: +44 121 232 1523  
M: +44 777 157 7122  
audreyelliott@eversheds-sutherland.com

