HOUSE OF LORDS
European Union Committee

House of Lords
London
SW1A 0PW

Tel: 020 7219 6083
euclords@parliament.uk
www.parliament.uk/lords

Kevin Foster MP
Parliamentary Under Secretary of State for Immigration
Home Office, 2 Marsham Street
London
SW1P 4DF

25 February 2020

Dear Kevin,

I write, as Chair of the EU Justice Sub-Committee, to raise the Committee's concerns about aspects of the EU Settlement Scheme (EUSS).

With more than 3 million applications having now been made to the scheme, and 2.7 million people granted some form of status, we recognise (and are pleased to find that) the scheme appears to be working well for many people. Our concern is that for those with less straightforward lives, including some of the most vulnerable in our society, the scheme does not appear to be suited to (or sufficient for) their needs.

On 4 February, we heard from organisations (the Refugee and Migrant Children's Consortium, Rights of Women and Crisis) who have been supporting some of these individuals to apply to the scheme and this letter reflects the concerns that they raised with us.

Discretion within the scheme

The EUSS is premised on applicants providing proof of nationality and proof of residency. One of the biggest challenges for the three groups of applicants we heard about on 4 February – children in care, people who have experienced domestic abuse and people who are homeless – is that many will not have the documentation required.

We heard that the Home Office have recognised this very significant barrier and put some exemptions in place. Nicole Masri from Rights of Women explained that the Home Office have "built in an exception to enable it to accept alternative evidence of identity and nationality where it thinks the circumstances require it. The threshold is that you would have to demonstrate circumstances beyond your control or other compassionate or practical reasons why you cannot obtain a document." An individual applicant, however, would not know this and so is likely either not to apply for the scheme or to make an application that may not give them the full rights they are entitled to (pre-settled, rather than settled, status, for example).

Nicole Masri also told us that in cases where non-EU nationals are entitled to apply because of an EU family member, but that family member is an abusive partner, the Home Office has been willing to share the responsibility for proving eligibility by checking the spouse's HMRC

or DWP records, for example, rather than the applicant having to request documents from their abuser. While this is welcome, her concern was that "they have not really built this flexibility into the rules of the scheme … they still refuse to commit to that in any public-facing guidance." Again, this will mean that many applicants are likely to miss out on being granted settled status. Nicole told us: "The women who reach our door and get our assistance are able to access this flexible approach because we are able to advocate on their behalf … we make the necessary arguments to ask the Home Office to exercise the power it has already to overlook gaps in evidence … The concern of course is if people do not access the specialist support to do this advocacy on their behalf, which is probably the majority of people." The witnesses we heard from were clear that Government endorsement of the concept of shared responsibility between the applicant and the Home Office for securing the individual's rights, rather than the sole burden being placed on the applicant to ensure Brexit does not result in a loss of rights, would be a welcome step.

A scheme premised on providing proof of nationality and residency clearly excludes some of the most vulnerable, who will not have access to the documents required. We welcome the anecdotal evidence we have heard that the Home Office is willing to be flexible in such cases but are concerned that most potential applicants would have no way of knowing that such discretion exists. What steps have you taken to inform potential applicants that alternative arrangements can be made where they do not have access to documentation and what further action, if any, do you intend to take?

Responsibility for children's applications

Children are particularly at risk from losing rights, given that they are dependent on someone else to make an application for them. The scheme is designed on an assumption that children will be included in their parents' application, but Marianne Lagrue from the Refugee and Migrant Children's Consortium explained that many will not be, including: "children whose parents do not apply themselves, for whatever reason; children whose parents apply but who do not realise that their children need to apply because, historically, when applying for permanent residence it was not a mandatory application system … ; and children whose parents believe mistakenly that because the child was born in the UK they are automatically British ... There are also children who are living separately from their parents. That includes an estimated 5,000 children in local authority care, an unknown number of children in private fostering arrangements and children across the juvenile justice estate and in secure mental health settings. There are children whose parents choose not to apply on their behalf, or who withhold documents or necessary information because of an abusive relationship." She raised a concern that, so far, the numbers of applications for children to the scheme has been low: "We fear that there are between 450,000 and 650,000 EU, EEA and Swiss national children who have not applied to the Settlement Scheme." What assessment have you made of the number of children who have yet to apply for the scheme and what action do you intend to take as a result? What steps are you taking to ensure parents know what they need to do in order for their children to remain in the UK?

For children in care, there is a particular issue in relation to who is responsible for ensuring they apply for the right to remain in the UK. Firstly, local authorities do not know which children in their care may need to apply as they do not routinely collect nationality data. In response to a Written Question in the House of Lords in June 2019, Baroness Williams of Trafford stated: "The Home Office will shortly be surveying local authorities to benchmark current uptake of the scheme, and to baseline current cohorts of EEA citizen looked after children and care leavers." Please provide us with the results of this survey.

Secondly, while the Government issued guidance to local authorities in July 2019, stating that they expected local authorities to identify eligible children, prepare applications for them and keep records of these applications, the status of this guidance is unclear. It no longer appears to be online and the website of the Association of Directors of Children's Services states that it is currently being revised by the Home Office. Marianne Lagrue told us: "We are firmly of the opinion that local authorities should have a statutory duty to facilitate the resolving of immigration and nationality issues of any child in care." This committee has previously asked whether local authorities have such a statutory duty and on 29 October 2019 we received a letter from Home Office Minister Rt Hon Brandon Lewis MP, which said "local authorities should take responsibility for making applications", but did not state if it was a statutory duty. Marianne Lagrue made clear that she did not think the local authority should be making the application, but they should be ensuring children are referred to specialist services to make the application for them: "It is not for the local authority to take the action, because they are not specialists. These children are often quite complex cases." Do local authorities have a statutory duty to ensure all children in their care secure appropriate immigration/ nationality status? What guidance have you given to local authorities about what action you expect them to take? How are you ensuring that children in care have access to the specialist support they are likely to need in order to make an application?

Need for specialist support and advice

All three organisations we spoke to received grant funding from the Home Office to support their clients to apply to the scheme. It is clear to us that many of these individuals would not be able to make a successful application if this support was not available, but Marianne Lagrue told us that this funding runs out at the end of March. As a result of this, her organisation has already stopped accepting new referrals as they do not know if they can support them for the duration of their application. Witnesses also explained the limitations that had been placed on the types of support they could offer. Matt Downie from Crisis gave the example of individuals who have to physically go back to their country of birth (or find power of attorney in that country) in order to obtain proof of national identity. He told us that "the Home Office takes a dim view of spending grant funding on assisting people achieve their identification requirements", even though these individuals have no other way to achieve settled status and no ability to fund the acquisition of such documents themselves. Given the critical importance of access to specialist support and advice, can you confirm that you intend to continue to provide funding to organisations to support vulnerable applicants (to at least the current level) and, if so, when do you expect to announce the next tranche of funding? What consideration have you given to allowing this funding to be used to cover the costs that applicants face in obtaining the necessary documentation? If this grant is not to be used for these purposes, what other mechanisms are in place to support applicants who cannot meet these costs?

Given the complexity of the applications, we heard how important it was for many of these individuals to have access to legal support. Nicole Masri argued that EUSS cases should be brought within the scope of legal aid, particularly for those cases that reach appeal stage. Legal aid is available for immigration support for children in care, but not for other vulnerable groups. What consideration has been given to extending legal aid for other groups in need of specialist advice to apply to the EUSS or to appeal EUSS decisions?

The difference between settled and pre-settled status for vulnerable groups
Our witnesses highlighted the importance of their clients securing settled, rather than pre-settled, status. Matt Downie explained: "Pre-settled status is no good because that does not give you access to the housing and social security needed to resolve your situation." Nicole Masri agreed: "People who received pre-settled status are not eligible for means-tested benefits or housing. This is a real cause of concern for us ... It means the women … who get that status cannot access a refuge when they are fleeing domestic abuse because they cannot use that status to access Universal Credit or housing benefit." The purpose of pre-settled status is to allow people to stay in the UK long enough to enable them to apply for settled status. It seems perverse, therefore, to deny people granted pre-settled status the access to the support they need to be able to stay in the UK. Denying people access to benefits also risks pushing already vulnerable people into more vulnerable situations. What consideration have you given to allowing those granted pre-settled status the same access to services and benefits that they had before Brexit?

What will happen to those who have not applied by 30 June 2021
Our witnesses were very concerned about what would happen to those who had not applied by 30 June. Nicole Masri told us: "The Government have made it clear that people who fail to apply by the deadline will be unlawfully present. The consequences that flow from that are all the ones that we know face undocumented migrants in the UK—ineligibility to work, ineligibility for housing, ineligibility for benefits, ineligibility for healthcare and social care—and so that means job losses, evictions, refusals of benefit, destitution, denial of healthcare and denial of other care and, ultimately, if the Government chose to, detention and removal from the United Kingdom." When the then DExEU Minister James Duddridge MP wrote to us on 30 January, he told us that "where eligible applicants have reasonable grounds for missing the deadline, they'll be given a further opportunity to apply." Our witnesses were concerned, however, that "reasonable grounds" have yet to be defined. How many people do you estimate will find themselves without a legal right to remain in the UK on 1 July 2021 and how does the Government intend to treat those people from 1 July? What guidance will be issued, if any, on what constitutes "reasonable grounds" for a late application?

Even if people are able to apply after the deadline, there was concern about what would happen in the interim. There is an obvious correlation between vulnerable applicants and complex applications and so it is not surprising that applications from vulnerable people can take some time. Nicole Masri mentioned one client who had to wait five months for a decision, and another whose application took eight months; Matt Downie explained that just reaching the point of being able to apply can take a very long time, given the challenge of obtaining the necessary documentation. Given that, Nicole Masri argued: "Not only do we need to ensure that they can apply out of time but that their status is protected in the intervening period, because it is no good if you can apply two months, three months, a year after the deadline, but in the intervening period you have lost your job, been evicted, become destitute." Matt Downie shared this concern, and said: "We would very much like it to be the case that Immigration Enforcement could not and should not start until a Settlement Scheme application has been tried and exhausted." Where people have made an application by the deadline but have yet to receive a decision, or where people are allowed to make an application after the deadline, will they be able to continue to reside (with the same rights, access to services and benefits etc) until a decision is made on their application?

I appreciate that this is a detailed letter which asks a number of questions. Given the importance of these issues and the need, with the time-pressure created by the application deadline, for them to be resolved urgently, I would ask for a reply within 10 working days.

Yours sincerely,

Lord Morris of Aberavon
Chair EU Justice Sub-Committee