

The Earl of Kinnoull
House of Lords
London
SW1A 0PW

18 October 2023

Dear Charles,

Debate in Grand Committee on citizens' rights - 11 September 2023

Thank you for securing the debate on the report of the European Affairs Committee on Citizens' Rights (1st Report, Session 2021-22, HL Paper 46), which took place in Grand Committee on 11 September.

While I was able to address most of the points raised by noble Lords in their contributions, there were time constraints which limited my ability to respond to all of them. I therefore committed to follow up on those issues in writing and am pleased to address them below.

Please note that my responses are grouped thematically, and the information regarding UK nationals in the EU has been provided by the Foreign, Commonwealth & Development Office (FCDO). Given that a number of these points were raised more than once, I have not attributed my responses to a specific contributor to the debate.

UK nationals in the EU

Funding

Citizens' rights continue to be a priority for the UK Government, and we are determined to ensure that UK nationals in the EU receive the right support. There is a dedicated team in London at the FCDO which monitors implementation of the citizens' rights provisions of the Withdrawal Agreement (WA) across Member States. This team provides guidance and regularly engages with our network of Embassies and High Commissions, with Member States and with the European Commission to address issues faced by UK nationals, including through forums such as the Specialised Committee on Citizens' Rights (SCCR) and the WA Joint Committee. This is informed by extensive work conducted by our Embassies and High Commissions in Member States, including with local groups representing UK nationals.

As residency application deadlines have passed in all Member States with constitutive systems (aside from Denmark), certain programmes - such as the UK Nationals Support Fund – have come to their planned end. However, ongoing assistance to UK nationals resident in the EU continues to be provided as described above.

Progress since the last SCCR meeting and planned bilateral discussions

Since the last SCCR meeting on 25 May 2023, we have continued our regular engagement with the EU and Member States on a range of issues to ensure they understand and address our concerns. This includes making clear to the European Commission and Member States our concerns about the general lack of sufficient guidance and communication on both family reunification and reasonable grounds for UK nationals submitting late applications in constitutive Member States.

A further meeting of the SCCR is planned before the end of the year.

The Justice and Home Affairs Network of Attachés

The Justice and Home Affairs Network of Attachés comprises staff employed in our diplomatic and development offices worldwide, who represent the UK and help promote UK interests abroad.

HMG discussions with the Portuguese Government

The British Embassy in Portugal continues to work with the Portuguese Government to support their roll-out of WA residence cards. More than 32,000 UK nationals resident in Portugal have attended a biometrics appointment and paid to receive their card. This means that the vast majority of eligible UK nationals have now completed the process.

The Embassy understands that just over 38,000 UK nationals had initially registered on the “Brexit Portal” provided by the Portuguese Immigration and Borders Agency (Serviço de Estrangeiros e Fronteiras – SEF) since 2020. We encourage those UK nationals and eligible family members who remain in Portugal and are yet to commence or finalise the process to do so as soon as possible.

Our “Living in Portugal” guide on GOV.UK has up-to-date information on each stage of the process as well as relevant contacts for support. Our consular teams in Lisbon and Portimão continue to work to support UK nationals with complex cases who have faced challenges in completing the registration process, such as being unable to provide biometric data due to disability. The Embassy will continue to follow this closely with the SEF border agency and the Portuguese Interior Ministry.

We are aware of some cases where UK nationals have received a residence card with a shorter validity period than they expected or understood they had paid for. We have raised this issue with the Portuguese authorities; those affected who wish to request a replacement card should contact the SEF directly for advice.

Implementation of the High Court judgment in the judicial review proceedings brought by the Independent Monitoring Authority for the Citizens’ Rights Agreements (IMA)

Expiry dates for pre-settled status

A number of peers asked why pre-settled status under the EU Settlement Scheme (EUSS) continues to have an expiry date and why this is not considered unlawful in light of the judgment. It was also suggested that this may give unlawful information to employers and landlords.

As you know, the judgment found that the WA right to reside of a person with pre-settled status does not expire for failure to make a further application to the scheme. By virtue of our domestic EU exit legislation¹, WA rights are directly effective meaning that WA beneficiaries now have an underlying right to reside in the UK under UK law. This, coupled with our approach to extending pre-settled status by two years, ensures that individuals will not lose their residence rights for failure to make a second application to the EUSS, as per the judgment, and ensures that they can continue to easily prove these rights.

We do not agree that extending pre-settled status is unlawful in light of the judgment and do not consider this approach to be different in practice to that in Member States where relevant documents contain an expiry date. Furthermore, the fact that we are automatically extending pre-settled status before it expires will avoid any practical difficulties rights holders might otherwise face in proving their rights to third parties.

Pre-settled status continues to have an expiry date because there is no concept of 'indefinite temporary leave' in our domestic immigration system meaning that we cannot dispense with the expiry date. The judgment did not hold that pre-settled status cannot expire; instead, it states that the WA right to reside is not lost by virtue of its expiry. Therefore, in order to ensure that implementation of the judgment is consistent with that wider system, the extension of pre-settled status will continue to have an expiry date. We believe that a two-year extension provides sufficient additional time for the person to switch to settled status, once they are eligible for it, should they wish to do so. Settled status under the EUSS, which provides secure evidence of that right, remains the best way for an individual to evidence their right to remain in the UK indefinitely.

The first extensions of pre-settled status have already taken place, and will continue to be applied automatically, around a month before the pre-settled status is due to expire. This ensures that individuals are given the maximum time possible to obtain settled status before we need to extend their pre-settled status. As the extension will be applied automatically, there is no need for individuals to contact the Home Office and they will be notified once the extension has been applied.

Should we find that an individual no longer meets the eligibility criteria for pre-settled status, we will take steps to cancel or curtail it, with a right of appeal. In the course of 2024, we intend to take steps to automatically switch as many eligible pre-settled status holders as possible to settled status without them needing to make a further application.

We have comprehensive guidance for employers and landlords on the EUSS which we are in the process of updating to reflect our response to the judgment. The revised guidance will explicitly note our plans to automatically extend pre-settled status holders' immigration status by two years shortly before their current grant of pre-settled status expires, where they have yet to obtain settled status.

¹ [European Union \(Withdrawal Agreement\) Act 2020 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2020/23/section/23)

In respect of the Right to Work and Right to Rent schemes, employers and landlords are required to carry out checks before they employ, or (in England) let a property to, a person. Any valid period of leave returns a positive verification notice which employers and landlords are obliged to act on and thus not discriminate against those with temporary leave. The Home Office also issues guidance to make clear that checks on eligibility to access work, benefits and services as part of the UK's immigration system must be carried out in a non-discriminatory manner. We are considering whether the wording that employers and landlords see when checking an individual's immigration status needs to be amended to better reflect the judgment.

We note that the UK approach in this regard is more advantageous than the treatment of UK nationals in certain Member States who, as far as we understand, are not able to access employment if their residence card has expired, a matter which FCDO colleagues are investigating.

Encouragement to apply for settled status

During the debate, it was asked why the Home Office is still encouraging pre-settled status holders to apply for settled status once they are eligible for it and how this complies with the judgment.

Continuing to encourage pre-settled status holders to apply to switch to settled status is entirely compatible with the judgment. Indeed, Mr Justice Lane, in paragraph 181 of his judgment,² states:

“Insofar as the individual concerned may wish to rely upon the right of permanent residence as such (for example, because they are no longer a worker), they may apply to the defendant for indefinite leave to remain. Indeed, I can see no reason why the defendant should not continue to encourage those who have been granted pre-settled status to apply for indefinite leave to remain.”

We therefore continue to encourage pre-settled status holders to apply for settled status as soon as they are eligible for it, as this provides secure confirmation of their right to remain in the UK indefinitely. We are continuing to send pre-settled status holders whose status is approaching its original expiry date an email encouraging them to apply for settled status and highlighting the benefits of doing so.

A range of help remains available to applicants who wish to apply to switch from pre-settled to settled status. We have announced a further £2.5 million of grant funding until 31 March 2025 for organisations across the UK working to support vulnerable citizens in applying to the EUSS, including those applying for settled status. This brings the total amount of grant funding for such organisations to £32 million. Alongside the grant-funded network, there is help available through the Resolution Centre which provides telephone and email assistance to applicants, and ‘We Are Digital’ which provides technical support for applicants completing the online application process.

Home Office capacity to cope with settled status applications

² [The Independent Monitoring Authority for the Citizens' Rights Agreements, R. \(On the Application Of\) v Secretary of State for the Home Department \[2022\] EWHC 3274 \(Admin\) \(21 December 2022\) \(bailii.org\)](#)

I was asked to provide assurance that the Home Office is prepared for the influx of settled status applications from pre-settled status holders.

Our most recent statistics show that overall – to 30 June 2023 – 608,380 people have already moved from pre-settled to settled status. UK Visas and Immigration works closely with Home Office analysts to forecast intake across all immigration routes, including the EUSS. Resources are aligned to forecast demand and prioritised accordingly.

Automation of pre-settled to settled status

I was asked why the planned automation of the conversion to settled status of eligible pre-settled status holders is not being introduced until 2024. We note that automatic conversion from pre-settled to settled status is not a requirement of the judgment, just as Member States are not required automatically to issue permanent residency cards to UK nationals.

However, it is our aim to align people's EUSS status with their underlying WA rights where possible and moving eligible people from pre-settled to settled status as soon as possible is key to achieving that. We therefore intend to take steps to automatically to convert as many eligible pre-settled status holders as possible to settled status without them needing to make a further application. To do this, we plan to undertake automated checks of pre-settled status holders against government-held information - for example, in respect of their ongoing continuous residence in the UK. This will mean that we are making one automated decision to either convert an individual to settled status or extend their pre-settled status. We are aiming to have this automated process in place during 2024.

Our main concern throughout our planning has been to implement the judgment in such a way that it continues to be easy for citizens, government departments and third parties to evidence or check rights are in place. It is therefore crucial that the highly innovative work needed to give effect to automation is technically accurate and accompanied by the relevant safeguards, and this will necessarily take some time.

Electronic Travel Authorisation (ETA)

There were some concerns raised over the introduction of the ETA scheme, including how individuals will prove their immigration status, and possible disruption to travel.

Advance Passenger Information (API) systems already exist and are used today. However, once the Universal Permission to Travel (UPT) requirement is fully in place, including the ETA scheme, we will require carriers to check that all passengers have a valid permission before travel to the UK, using API. Carriers will provide API and, in turn, receive confirmation from the Home Office in respect of each individual that they have permission and may be carried to the UK; that they do not have permission and may not be carried to the UK; or that their permission needs to be determined by the carrier.

The ETA scheme and wider UPT requirement will not be enforced until the ETA scheme has been fully rolled out to all non-visa nationals by the end of 2024. It will be initially introduced to Qatari nationals from 25 October 2023, followed by nationals of Saudi Arabia, Bahrain, Kuwait, Oman, United Arab Emirates and Jordan from 1

February 2024. The scheme will then be rolled out in a phased manner to all other non-visa nationalities, including EU nationals, by the end of 2024.

As we have been clear, those with an existing UK immigration status, such as pre-settled or settled status under the EUSS, will not be required to obtain an ETA. Visa nationals, who are required to provide evidence that they have obtained the appropriate permission in advance of travel, currently do so by using physical documents, such as a vignette or biometric residence permit. The decommissioning of these physical documents for those who need to prove to carriers that they have a permission will not begin until carriers are able to receive the new UPT responses via the existing API systems.

We are also aware that some carriers are choosing to make additional status checks on non-visa nationals' travel documents for their own purposes (e.g. to avoid potential removal costs if an EU national travels to the UK using a national identity card instead of a passport when they are not entitled to do so). Therefore, as an interim measure, we have issued carriers with guidance on how to use 'View and Prove' to confirm whether a person is covered by the EUSS and, for example, is entitled to continue to use a national identity card in travelling to the UK. This will continue to be an option for such carriers until they receive this confirmation via the API they provide.

The introduction of the ETA scheme will support our ambition to expand the use of automation in passenger clearance in the longer term. Our intention is to significantly increase the use of automation, so that the majority of arrivals at main UK ports will pass through some form of contactless corridor or automated gate for identity and security checks, with only those who need to see a Border Force Officer being directed to our staffed controls.

Removal of administrative review from the EUSS

I was asked how removing the scope for individuals to request an administrative review of their EUSS decision, where this is made on or after 5 October 2023, may impact the Tribunal and vulnerable individuals.

We are committed to maintaining a good standard of initial decision-making for those applying to the EUSS. An appeal right is required under the WA and will continue to be provided. The WA does not require that applicants for residence status have a dual right of redress, via administrative review. It is fair that more than two years since the main application deadline, we align the EUSS with other immigration routes where a dual right of redress does not exist. Only a small proportion of EUSS refusal decisions result in an application for administrative review, so the effect on the Tribunal is expected to be manageable.

We do not consider that the change will have a significant impact on vulnerable individuals, for whom, as I have described above, significant support in applying to the EUSS remains available. An appeal on the papers carries the same fee as an administrative review, which is £80. HM Courts and Tribunals Service has published guidance on GOV.UK on the assistance available in paying immigration appeal fees.

Estimates of EUSS application volumes

I was asked to explain the apparent disparity between the 7.4 million EUSS applications received to 30 June 2023, and the estimates made by the March 2019 Impact Assessment (IA) for the EUSS.

The published quarterly statistics for the EUSS also contain information on the number of applicants rather than applications. To 30 June 2023, an estimated 6.2 million people had applied to the EUSS, of whom an estimated 5.6 million had obtained a grant of status.

By comparison, the March 2019 IA estimated that 3.5 to 4.1 million EU citizens (excluding Irish citizens, who are included in the EUSS statistics) and their family members might be eligible to apply by the end of the transition period. The IA discussed the assumptions, risks, uncertainties and exclusions surrounding this estimate and made clear it should be considered as indicative and not as a minimum and maximum estimate. It was primarily based on Office for National Statistics Annual Population Survey data (which estimates the resident population), adjusted to estimate how the resident population would change in the future, and therefore cannot be directly compared to applications made to the EUSS.

Certificates of Application

I was asked to set out why the Home Office has not accepted the recommendation made by the IMA in the recent report of its inquiry into the issuing of Certificates of Application (CoAs), which confirm the making of a valid EUSS application, that we should introduce a service standard for this.

We welcome the IMA's report and have given full consideration to its recommendations, which focused on two historical periods: June 2021 (when there were unique demands on the EUSS ahead of the 30 June 2021 application deadline) and June 2022. As the report acknowledged, CoAs are generally issued quickly, via the online application process for the EUSS.

In addition, as you are aware, we have recently made important changes to the EUSS, consistent with the WA, to maintain the integrity and effective operation of the scheme. Those include making the need to demonstrate 'reasonable grounds' for the delay in applying a requirement for a valid late application. As this change was announced in July 2023, it was not considered as part of the IMA inquiry, but it is necessarily part of the context in which we considered the IMA's recommendations. We will continue to monitor closely our performance in validating EUSS applications and issuing CoAs.

My thanks again for securing the debate on these important issues.

I am copying this letter to all those Peers who spoke in the debate: Baroness Anelay of St Johns, Lord Wood of Anfield, Lord Hannay of Chiswick, Viscount Trenchard, Lord Balfe, Lord Ricketts, Baroness Ludford and Lord Collins of Highbury.

A copy of this letter will also be placed in the Libraries of both Houses.

Yours sincerely,

Lord Murray of Blidworth
Parliamentary Under Secretary of State for Migration and Borders