EU Rights and Brexit Hub – Written evidence (CIT0005)

About the Hub

The EU Rights and Brexit Hub[1] ['the Hub'] is a legal action research project led by Professor Charlotte O'Brien of York Law School in collaboration with Professor Simon Parker of the Politics Department of the University of York and Madeleine Sumption, Director of the Migration Observatory at the University of Oxford.

This submission draws on four streams of research conducted by the Hub in the build-up to the June 30th deadline. Specifically (1) a systematic review of existing guidance and legislation conducted by legal scholars at the HUB;[2] (2) a recent study conducted by the Hub into the implications of the EUSS for local authorities;[3] (3) an ongoing legal ethnography of the Law Clinic, which provides a free second-tier advice and advocacy service on EU welfare rights; (4) and an ongoing study of the work done by the 72 Home Office funded organisations supporting vulnerable EU citizens.

As part of this submission we have been asked to comment specifically on

- The issues facing vulnerable EU citizens in the UK - who they are, why they are vulnerable, and what more could be done to support them;
- The impact of COVID-19 on the implementation and experience of the Settlement Scheme;
- Our assessment of the quality and timeliness of the Home Office's guidance, decision-making, and collaboration with other government departments and public bodies in relation to the Settlement Scheme;
- Our assessment of the Government's approach to post-deadline issues, such as late applications and pre-settled status; any deficiencies in this approach and how it could be improved;
- Any other issues which we think are relevant to the inquiry.

We have structured our response around these themes using concrete examples from our research and have expanded on the themes when appropriate.

The issues facing vulnerable EU citizens in the UK

We would like to focus on two particular features of the EUSS that increase the vulnerability of EU citizens: (1) the complex regulatory arrangements around pre-settled status and (2) the digital-only nature of the EUSS.

(1) Pre-settled status

Evidence gathered from local authorities, Home Office funded organisations and the Law Clinic indicate two important risks to vulnerable EU citizens in the UK relating to pre-settled status:(i) the risk of misclassification as pre-settled; (ii) barriers to accessing welfare benefits.

(i) The risk of misclassification as pre-settled

The requirement to provide documentary evidence of five years of continuous residence in the UK has led to some receiving pre-setted status incorrectly and risks others losing status altogether if they cannot secure the necessary documentation in the next five years. As noted in the Home Office's Policy Equality Statement on the EUSS[4] the use of automated checks on employment and some welfare records disadvantages women, disabled people and those over 65 who are less likely to have continuous work or benefits records and must therefore supply additional documentation to demonstrate their continuous residence.

Our research has also found that the requirement to supply additional documentation is a meaningful barrier for many of the most vulnerable EU citizens, in particular those who have precarious living conditions, limited cognitive capacity or are victims of domestic abuse or modern slavery. As example cases 1 and 2 show, it has already led to incorrect pre-settled status awards, where applicants have been resident for over five years. This classification is important; pre-settled status is only a temporary status. Without the required documentation, many vulnerable and precarious EU citizens will see this temporary status expire, without being able to upgrade to settled status. Thus long-term residents will lose their rights to reside, work, or receive welfare support.

Example case 1:

A local authority officer in Wales reported a case where a EU citizen who had resided in the UK for over five years but with irregular and occasionally informal employment as a cleaner. She was unable to secure settled status because she had lost all of her records and due to language barriers it was not possible for her to phone her previous employers and ask for copies of their records, if they still existed. She was also unaware of the EUSS until she came into contact with the local authority and required digital support to submit her application.

Example Case 2:

A local authority officer in an English county council reported a case where a gangmaster had brought in about 100 EU citizens to be registered with the EUSS, but who did not have full records of arrival, residence or employment and many were also missing basic nationality and identity documents.

(ii) Barriers to welfare rights for pre-settled citizens

Pre-settled status has been excluded from qualifying as a 'right to reside' for the purpose of accessing means-tested welfare benefits[5]. However, individuals with pre-settled status can continue to demonstrate an alternative right to reside through the EEA Regulations 2016.[6] The Hub's Law Clinic has seen evidence that decision makers are prone to misunderstanding the rights of EU citizens with pre-settled status, often leading to their exclusion from welfare benefits and housing (example case 3).

Example Case 3

A welfare benefits adviser made contact with the Hub's Law Clinic in November 2020 about confusion in their local authority housing team about the rights of EEA nationals with pre-settled status. The local authority had taken the decision that an EEA national with pre-settled status who had been on the housing waiting list, should be removed from that list as she did not have settled status. There was no attempt to explore another qualifying right to reside, despite the individual having a child in school and a history of work in the UK.

It took the intervention of the adviser to correct this error and explain that those with pre-settled status could rely on a separate right to reside under the EEA regulations 2016 to establish eligibility for social housing.

There are a number of problems with the application of the right to reside test, and cases seen by the Hub's Law Clinic have shown that it is susceptible to decision maker error (example cases 3 & 4). Demonstrating a right to reside under the EEA Regulations 2016 typically means being in 'genuine and effective' employment or self-employment, (or being a family member of someone who is) although there are some limited exceptions for some circumstances where work has stopped. This excludes vulnerable EU citizens from benefits, including long-term residents, workers (especially when in insecure, temporary or casual work), people with caring responsibilities, and those fleeing domestic abuse, exploitation or trafficking.

The right to reside test also has a discriminatory impact on disabled EU nationals, and women whose work history may have been punctuated by periods of care – for children, or older or disabled relatives. The imposition of extra conditions on people with pre-settled status, and resulting denial of benefit support is particularly concerning as these groups, and vulnerable citizens more generally, are also more likely to be dependent on this support.

Example Case 4:

A case referred to the Hub's Law Clinic involved an EEA national with pre-settled status who had been in work since late 2020, with interruptions during COVID related lockdowns. Despite having worked full time, and taking on extra overtime, he was denied Universal Credit several times between March and May 2021 because he had not been in employment for more than 3 months since his last gap of work. He was thus deemed not to be a 'worker' and could not meet the 'qualifying right to reside' criteria.

This was not the appropriate test to apply for 'worker' status. The criteria under EU law is that work must be 'genuine and effective'. CJEU case law finds that this test cannot be modified by national law such as thresholds for earnings or hours worked.[7] The CJEU have also identified that temporary work of just 16 days can be genuine and effective.[8] Caseworker guidance for Universal Credit also states that the minimum earnings threshold (which requires workers to earn £184 for three months) is just the first part of a two-tier test - after which decision makers should look to all the circumstances of work and to EU case law to determine if it is genuine and effective.

In order to remove these barriers we would recommend that the government considers streamlining the regulations around pre-settled status.

1. In order to ensure a smooth transition from pre-settled to settled status we would recommend introducing a streamlined upgrade process, rather than requiring a full, new application from scratch, reducing the evidence requirement and creating a presumption in favour of the applicant.
2. To ensure that all vulnerable EU citizens are not incorrectly denied access to welfare and benefits we would recommend that pre-settled status is recognised as a qualifying right to reside criteria for benefits.

(2) Digital Only Status

The digital only nature of status awarded has an impact on all EEA nationals within the EUSS, but is particularly problematic for those who required support to make an application in the first place. The need to regularly access the online EUSS system to

demonstrate their status as part of regular eligibility checks disproportionately disadvantages the socially, economically and technologically excluded . As the Public Law Project explains, this is a nine step process with significant scope for use error.[9]

Those who have digital literacy or access issues, or who experienced precarious living conditions, or who have relied on a third party to make an application to the EUSS are particularly at risk. Local authorities have explicitly raised concerns about both adults receiving care and support and rough sleepers, who relied on third parties to make their application. This means that they may not have access to their email addresses or phone numbers that they used to make the application or, as a result of precarious or chaotic living conditions they may not be able to keep stable records of their EUSS account details. These vulnerable groups will face a significant additional barrier to accessing welfare support or even transitioning into more stable living arrangements as they will struggle to demonstrate that they have rights to rent and to work.

The Law Clinic is already seeing cases, such as example case 5, where EU citizens are being denied Universal Credit due to the barriers created by the digital status checks. That the DWP is already encountering user error does not bode well for when landlords and employers begin conducting these checks after the 30th of June.

Example Case 5

The Hub's Law Clinic saw a case where an EEA national who has lived in the UK for over 16 years and has settled status made three separate applications for Universal Credit from December 2020, all were refused. It was not until he sought help from an adviser that he managed to overturn these decisions. The adviser reported to us that the client had struggled with his language skills and had not understood what he needed to do when the DWP requested the 'share code'. The DWP did not support this individual with the process or provide guidance on how a new digital immigration status could be shared with them. As a result, the EEA national did not receive UC for over 3 months, was at risk of eviction and homelessness and became reliant on food banks until a mandatory reconsideration overturned the decisions in March 2021.

While some of these issues with Universal Credit may be resolved with the introduction of cross-departmental checks this does not address the risk of user error from landlords or employers who, when threatened with legal penalties for non-compliance with immigration regulation, will err on the side of caution when recruiting employees and choosing tenants. The accuracy of cross-departmental checks introduced for some public services will also need to be closely scrutinised. In order to overcome this barrier we recommend that:

1. The government provides a 'physical' version of settled and pre-settled status.
2. In the alternative, a physical immigration status must be offered to those who are disproportionately disadvantaged by the policy.
3. In lieu of a physical immigration document the government will need to provide extensive training to both benefits officers at the national and local levels alongside accessible training for landlords and employers.

The impact of COVID-19

Our research into local authorities and the EUSS indicates that COVID-19 has had a mixed effect on the roll-out of the EUSS and vulnerable groups. To an extent COVID-19 has strengthened local community networks and enabled local authorities to gain access to groups they did not previously have contact with as a result of the need to provide care and support under lockdown.

A prominent example of this was the "everybody-in" policy where rough sleepers were housed in hotels and other accommodation during the pandemic. This enabled local authorities to establish regular contact with a particularly precarious group of people, identify those who were eligible to apply to the EUSS and support their applications.

In a similar manner the use of local lockdowns has significantly increased the subscription by residents to local authority digital media accounts and newsletters to receive updates about local restrictions. This has enabled them to deepen their communications about the EUSS and signpost to local support providers through both informal community connections and digital media.

On the other hand, other vulnerable groups, in particular those that are digitally excluded, socially isolated or do not have access to community networks, were placed at increased risk due to the COVID-19 restrictions. Our research found that COVID-19 led to the closure of local assisted digital services as face-to-face contact ceased. While some authorities and community organisations have also provided telephone support, the end of face-to-face support significantly impedes access to the online system for applicants with literacy, disability or technological barriers. In a similar manner local authorities have reported that the closure of embassies and consulates has prevented some from securing valid identity documents, in some cases preventing them from accessing the scheme.

Finally, the reliance on local community networks and digital media by many local authorities to identify eligible residents and provide them with support raises the risk of advice deserts where vulnerable groups, in particular the socially and digitally isolated and those who are not proficient in English, have only received partial information about the EUSS and have been unable to access support.

In short, while COVID-19 has worked to increase the support available to some vulnerable communities, in particular rough sleepers and those with strong community networks, it has also worked to further isolate and disadvantage others, in particular those with digital access barriers or who are socially isolated. We recommend that the government recognise this by explicitly including social exclusion and digital access barriers as reasonable justifications for making a late application to the EUSS.

Home Office guidance, decision-making, and collaboration with other government departments and public bodies

Our research with local authorities and Home Office funded organisations provides a mixed picture of the Home Office's roll out of the EUSS. We found that the Home Office EUSS team had been very successful in communicating about the EUSS to different stakeholders, who in turn felt confident about their role in supporting EEA citizens to make applications. The Basecamp system was also well regarded as a dynamic and useful platform where those with access could raise technical concerns about applications and receive prompt feedback and information.

However, we also found that many local authority officers and community stakeholders felt that the EUSS rollout lacked a more strategic approach. Local authority case workers and those involved in delivery reported that they would often

only receive formal technical guidance late or just before it was due to be implemented. There was also a concern raised that when guidance was issued it was only sufficient for current operations and did not allow long term planning. The release of guidance for late applications on the 1st of April 2021 for example was considered by some as "too late" for strategic planning for service provision.

Concerns were also raised about the late release of funding for community organisations which was at one point renewed only after some organisations had to start redundancy processes for staff. Furthermore current funding only offers continuity of support only until September 2021. Local authorities raised this question of strategic budgeting as a key concern given the long term costs of supporting EU citizens with late applications and the need for upgrading from pre-settled status to settled status over the next five years. To date there has been no public declaration from the Home Office about whether or how long term support will be provided to local authorities and advice organisations.

Our work with local authorities and Home Office funded organisations also revealed how the Home Office tended to approach its role in the EUSS roll-out as one of providing information to local stakeholders rather than proactive coordination. Two examples were raised where the Home Office could have taken a more proactive approach to responding to local concerns by coordinating between national and local bodies.

The first is the lack of coordination of adult social care and social services to ensure that all adult EU citizens receiving care had been supported to apply to the scheme. Providers of adult social care varied significantly in their approach to the EUSS, some conducting full systematic reviews and others taking no steps to identify users who needed to apply to the EUSS. This contrasted significantly with children's services, where the Home Office had conducted regular surveys on EUSS enrolment .

The second was the lack of coordination between local authorities and embassies. Local authorities reported problems accessing national embassy and consulate services to secure identity documentation and records. One local authority raised the issue with national government agencies, explaining that they would benefit from national leverage and coordination to create a single local authority contact point for each embassy. However, this was never implemented.

Finally, with regard to collaborating with other government departments, we have noted throughout the life of the scheme that the Home Office should work with the Department of Work and Pensions, which has records of residents subjected to a habitual residence test, and their contact details, helping the Home Office to communicate with people who need to apply to the EUSS. However, this collaboration only commenced in April 2021. This was too late, creating a risk of last minute and late applications, and could patently have begun a lot earlier.

A key lesson to be learnt from the EUSS is that rather than a system of "contacts" responsible for disseminating information to stakeholders, local stakeholders would benefit from a system of "coordinators" who take active responsibility for both providing strategic funding plans and policy guidance for the full life cycle of a scheme and actively responding to implementation issues raised by local stakeholders.

The Government's approach to post-deadline issues

We would like to focus on three particular features of the government's approach to post-deadline issues that place EU citizens rights at risk, (1) reasonable grounds for late applications; (2) 'status gap' problems; and (3) late decisions.

(1) Reasonable grounds for late applications

Guidance on how late applications will be dealt with was only issued in April 2021 - very close to the deadline. There has been no opportunity to scrutinise and feedback on the guidance during a 'proposal' stage. We have identified a number of specific shortcomings:

- Caseworkers are directed to examine the immigration histories of victims of abuse/slavery - but not of other applicants, suggesting that victims should be treated with suspicionChildren's rights to make late applications are not codified in Appendix EU (unlike the rights of some other late applicants)
- Children's rights to make late applications do not explicitly entail equivalent rights for their primary carers
- A complete lack of capacity is only described as 'normally' being a good reason for a late application
- Pregnancy/ maternity at/around the deadline is described as only a good reason if there are extra difficulties
- Having permanent residence is only described as a good reason for making a late application if the holder has a 'residence document' but many EEA citizens will have permanent residence without a physical document.

(2) 'Status gap' problems

Those who make late applications face a status gap from the date of the deadline, to the point of having their EUSS status confirmed. During this gap they will have no legal right to reside in the UK, potentially exposing them to the hostile environment, and creating liabilities for employers and landlords.

Ministerial responses to questions have spoken to an intention for the Home Office to 'work with employers', or a suggestion that the 'law will be merciful', while Kevin Foster MP stated during a debate on the EUSS that no employer will be expected to conduct a retrospective check on EEA nationals who have passed a previous right to work check. However, this does not deal with a situation where an employer knows (or has reasonable grounds to believe) that someone does not have EUSS status. And in any event, none of these assurances as to non-enforcement of the law are formally codified in any guidance or legislation. This lack of codification is key because ultimately welfare officers, landlords and employers comply with rules and regulations, not political sentiment or intent.

(3) Late decisions

Those who make in-time applications, but who have not yet received a decision by the deadline, are protected while they wait for a decision, so long as they meet certain extra conditions - namely that they must have been exercising a right to reside under the Immigration (EEA) Regs 2016 on the 31 December 2020, and they must continue to do so, as their preserved right to reside is by virtue of the saved 2016 regs. This potentially creates a substantial administrative burden, checking on right-to-reside criteria at two different points in time - and on an on-going basis. It also creates precarity and uncertainty for those who risk falling outside of the scope of the 2016 regulations (due to domestic abuse, caring responsibilities, etc) while a decision is still pending. The potentially stark difference in outcome between two identical applicants applying at the same time, on the basis of whether the Home Office reached a decision by the deadline, creates an arbitrary difference in treatment beyond the applicants' control.

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[1] EU Rights and Brexit Hub. https://www.eurightshub.york.ac.uk/

[1] O'Brien C & Welsh, A. 2021. *The Status of EU Nationals: Emergency Measures Needed.* EU RIghts and Brexit Hub Report No.1. https://www.eurightshub.york.ac.uk/project-news/new-report-from-the-hub-emergency-measures-needed

[2] Evemy, J. 2021. *Local Delivery of the EUSS.* EU Rights and Brexit Hub Report No.2. https://www.eurightshub.york.ac.uk/project-news/new-report-local-authority-delivery-of-the-eu-settlement-scheme

[3] Home Office. 2020. Policy Equality Statement: EU, other European Economic Area and Swiss citizens resident in the UK and their family members. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936478/EUSS_PES_November_2020.pdf

[4] The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 No. 872.

[5] The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 No.1309, Schedule 4.

[6] C-75/63 Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] ECR I-0177

[7] Case C-357/89 Raulin [1992] ECR I-1027

[8] Tomlinson, J. & Welsh, A. 2020. Digital Immigration Status: A Monitoring Framework. https://publiclawproject.org.uk/content/uploads/2020/10/PLP-Report-Digital-Immigration-Status.pdf