

Independent Monitoring Authority – Written evidence (CIT0006)

Introduction

We are pleased to present written evidence to the House of Lords European Affairs Committee in relation to your short inquiry into citizens' rights issues.

The Independent Monitoring Authority for the Citizens' Rights Agreement was established to ensure the rights of EU and EEA EFTA citizens living in the UK and Gibraltar are upheld by public authorities after the UK has left the EU.

We have been in operation for almost six months and our evidence below details the work we have undertaken during that time and includes a number of observations about the challenges facing EU citizens and public authorities during this period of change.

Of particular interest to us, given the impending deadline, has been the implementation of the Home Office's EU Settlement Scheme. Our evidence outlines some areas of concerns shared with us including a backlog of outstanding applications; delays in processing applications and a current absence of late application guidance for applicants. These areas are a continued focus of our monitoring work.

We make a number of suggestions including that the Home Office should consider producing additional guidance for citizens who may need to make late applications and further review its caseworker guidance. We also highlight several areas where we feel that greater clarity would be helpful.

We will continue to monitor the upholding of citizens' rights by public authorities and look forward to updating the Committee in future.

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The role of the IMA

The Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) is an independent body that makes sure the rights of EU and EEA EFTA citizens living in the UK and Gibraltar are upheld following the departure of the UK from the EU. The citizens covered by the Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement ("the Citizens' Rights Agreements") are those from the 27 EU Member states as well as Iceland, Lichtenstein and Norway, along with their family members.

We were established in 2020 by the European Union (Withdrawal Agreement) Act 2020, which implements in the UK the Citizens' Rights Agreements. We became operational at 11pm on December 31st, 2020.

We monitor UK public bodies to make sure they adequately and effectively implement the rights provided for by the Citizens' Rights Agreements. In broad terms these rights relate to:

- residence,
- work and self-employment,
- recognition of professional qualifications, and
- social security

The right to equal treatment and non-discrimination also flows through the rights contained in Part 2 of the Citizens' Rights Agreements.

We can receive complaints; launch inquiries; and consider legal action to remedy breaches in how the agreements are implemented or applied.

Although we do not resolve individual complaints, we consider every complaint to assess whether they indicate a general or systemic failing and decide whether to carry out an inquiry. Individual complaints provide intelligence to help us build a wider picture of possible systemic issues. While an individual complaint may not indicate a general or systemic failing and therefore would not of itself trigger the threshold for the carrying out of an inquiry, we maintain the information as it may help form part of a wider set of intelligence gathered over time which could indicate a systemic failing.

More detailed information can be found on our website including our [Annual Plan for 2021/22](#) and [operational guidance](#).

Our power to conduct inquiries

Our powers to conduct inquiries are set out in paragraph 25 of Schedule 2 of the European Union (Withdrawal Agreement) Act 2020.

The purpose of an IMA inquiry is to:

- establish whether the United Kingdom has failed to comply with the Citizens Rights Agreements;
- establish whether a relevant public authority has acted or is proposing to act in a way that prevents a person exercising a relevant right (see definition in paragraph 41 of Schedule 2 to the Act); and/or
- to identify any recommendations for relevant public authorities appropriate to promote the adequate and effective implementation of the Citizens' Rights Agreements.

We may decide to conduct an inquiry in one of three situations:

- I. Following a request from a Secretary of State, Devolved Administration or the Gibraltar government.
- II. As a result of a complaint or series of complaints received.
- III. Of our own initiative.

When considering whether to carry out an inquiry we will consider the importance of addressing general or systemic failings (as required by paragraph 24 of Schedule 2 to the Act). We may not carry out an inquiry in the situations in (ii) or (iii) above unless we have reasonable grounds to believe that the inquiry may conclude that a failure to comply with the Citizens' Rights Agreements has occurred or that a public authority has acted or is proposing to act in a way that prevents a qualifying person exercising a relevant right.

Before beginning an inquiry, we must conclude there are reasonable grounds on which to proceed. We will usually do this after completing pre-inquiry investigations. Such investigations can also enable the resolution of issues in a more timely way than proceeding to full inquiry.

To date we have not started any full inquiries. Pre-inquiry investigations are proceeding in regard to eight issues. One issue in relation to European Health Insurance Cards (EHIC) has been resolved and details can be found on our [website](#). Our Call for Evidence about the EU Settlement Scheme (EUSS) is part of a pre-inquiry investigation and will be discussed further later in this document.

Our power to take legal action

Our powers to take legal action are contained in paragraph 30 of Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 and provide:

30 (1) The IMA may, if it considers it appropriate to do so in order to promote the adequate and effective implementation or application of Part 2 –

- a) make an application for review, or*
- b) intervene in any legal proceedings (including proceedings on an application for review).*

(4) In this paragraph, "application for review" means –

- a) in relation to England and Wales or Northern Ireland, an application for judicial review, and*

b) in relation to Scotland, an application to the supervisory jurisdiction of the Court of Session.

Our approach on whether to exercise these powers is detailed in our [operational guidance](#).

To date we have used our powers to intervene in existing legal proceedings on one occasion. This was an intervention in the case of *R (Fratila and Tanase) v Secretary of State for Work and Pensions* which is currently before the Supreme Court. This case concerns the interpretation of Article 18 of the Treaty on the Functioning of the European Union. The reference to this provision in Article 12 of the Withdrawal Agreement and Article 11 of the EEA EFTA Separation Agreement means that the Supreme Court's judgment in this case will have an impact on the interpretation of the Citizens' Rights Agreements.

The IMA's recent activities

Awareness raising

As a new body we face a significant challenge to make stakeholders aware of our existence and role.

A comprehensive stakeholder engagement programme has been underway since the middle of 2020. For example, meetings have taken place with organisations supporting and representing EU citizens such as Settled, the 3Million, and Citizens Advice Services. We have also met with representatives of each of the devolved home governments and Gibraltar.

We have written to every elected member of the governments of England, Gibraltar, Ireland, Scotland and Wales. We have undertaken regular and wide-ranging media interviews, including a number of briefings for the Foreign Press Association and are continuing to meet with EU Embassies as well as organisations that work with EU citizens.

We continue to attend many events and networks including recently an Institute for Government public [event](#) on our role and work.

Involving EU Citizens in our work

We consider it important to be able to connect directly with EU citizens. We have just closed recruitment of members for a Citizens' Panel which will act as a critical friend to the IMA. Further information can be found [here](#).

We were pleased that almost 300 EU citizens completed an application and we are aiming for the panel to first meet in September.

Seeking the views of citizens

In February we launched a [survey](#) to understand the level of concern EU nationals felt about living in the UK and Gibraltar after Brexit.

The survey, the first of its kind to take place after the UK left the EU, saw almost 3,000 respondents from EU and EEA EFTA nations take part.

While most respondents felt that they were treated equally a range of concerns were highlighted including mixed awareness and lack of confidence in their rights. Overall, the survey identified that 1 in 4 respondents do not feel they are

treated equally to UK citizens; 1 in 2 are not aware of their citizens' rights; and 1 in 10 are considering leaving the UK after 30 June.

Further, 30% of respondents are not confident their rights will be upheld by public bodies; 1 in 25 already believe their rights have been breached; and 1 in 10 wouldn't complain about a breach of their rights.

The reasons for the lack of confidence were lack of trust in the government (31%); the impact and negativity associated with the Brexit process (11%); a hostile environment (9%) and fears over another Windrush-type scandal (7%). While 10% said the digital nature of their status under the EU Settlement Scheme was already leading to discrimination.

The survey results gave us an important insight into how citizens feel since the UK left the EU. It demonstrated there is a need for public authorities to build trust through their actions and recognise their role in promoting citizens' rights.

Early case resolution

An early case resolution is an agreed intervention with a public authority to make improvements or changes to overcome potential issues.

We undertook a [successful early case resolution](#) with the Department for Health and Social Care and the NHS Business Services Authority following several complaints from EU citizens about delays and uncertainty in obtaining European Health Insurance Cards (EHIC).

The IMA wrote to both authorities about our concerns highlighting how it could lead to issues for complainants if they left the UK and then travelled to the EU and needed medical care.

DHSC and NHSBSA agreed to implement several changes to improve awareness of the delays and speed up the processing of applications.

Complaints

We have received 95 complaints to date with the majority relating to the EU Settlement Scheme (EUSS). The IMA has received complaints involving a range of public authorities (from Whitehall departments to Local Authorities) and related to every citizens' right within the Withdrawal and Separation Agreements.

We do not solely rely on complaints. Our proactive intelligence gathering involves developing relationships and we meet regularly with stakeholders ranging from representative stakeholder networks to organisations that provide employment and immigration advice to citizens, including EUSS advisers. We also attend the EU Delegation to the UK's Citizens' Rights Monitoring Network. This approach has enabled us to develop our understanding of the impact or potential impact on citizens of reported issues, as well as to identify emerging issues.

We continue to collect and assess open source information, from media reports to academic publications and data published by public authorities (such as EUSS statistics). We consider all information we gather in addition to our complaints, all of which is informing our current pre-inquiry work on the EUSS and where relevant we make reference to this below.

The IMA's approach to complaints and intelligence is set out in our [operational guidance](#).

The IMA's current assessment of operation of the EU Settlement Scheme

Home Office figures published on 10 June 2021 show that as of 30 May 2021 more than 5.6 million applications to the EUSS had been received and 5.27 million had been concluded, leaving approximately 334,500 applications to be determined.

Processing this volume of applications is a considerable achievement by the Home Office. A significant number of the applicants who have received their status will have experienced a satisfactory and timely outcome. We also recognise the steps taken to raise awareness of the scheme and to fund organisations to support applicants.

However, it is inevitable in an exercise of this scale mistakes will be made. Our conversations with stakeholders have highlighted citizens' growing concerns about the impending deadline and a potential 'cliff edge' situation for those who have not applied for settled or pre-settled status. We have also received a number of complaints about difficulties with the process; these were summarised in our [press release](#) on 10 May, 2021.

We meet regularly with the Home Office to discuss the issues raised.

Call for evidence

On 24 May 2021, we launched our first Call for Evidence in relation to the EUSS.

This asks specifically about the experience of citizens applying to the scheme, waiting for a decision, resolving queries with the Settlement Resolution Centre, upgrading their status and utilising the digital app to view and manage their status.

To date the IMA has received more than 950 responses. At least 90% of the submissions have been from citizens with direct experience of applying to the EUSS. The remainder have been submitted by representative organisations.

We aim to share early findings with the Home Office in a timely way in order that they can respond. We will also use the information to decide whether an inquiry into aspects of the EUSS would be appropriate and, if so, to focus the terms of reference for such an inquiry.

Vulnerable applicants

We note the Home Office has run communication and outreach campaigns and liaised with grant-funded organisations to raise awareness and understanding of the scheme and the deadline among vulnerable cohorts.

Published stakeholder reports detail increasing concerns about a lack of awareness and an inability to navigate the process by elderly people, looked after children, adults in receipt of social care services, the homeless, minority communities such as the Roma community, and offenders in custody.

There is a lack of data about how many individuals are in these cohorts and data on the characteristics of applicants is not collected by the Home Office so it is

difficult to know how many might be affected. This will be a key test for the way in which the Home Office deals with late applications to the scheme.

Processing applications ahead of the EUSS deadline

The Home Office has confirmed an increase in applications in the last quarter and that numbers of applications awaiting conclusion are increasing. While some of these may be from applicants who are only now applying, or are applications categorised by the Home Office as 'protracted' due to differing complexities, this is a significant number and is a concern raised by external stakeholders publicly and by citizens alike.

Delays with the processing of applications is a recurrent theme in many of the complaints we receive (22%). Another common theme in complaints we receive is that eligible citizens are having varying experiences with the Settlement Resolution Centre.

Many report long delays waiting for calls or emails to be answered; conflicting advice; inability to update the status of applications or provide explanations for delay, and difficulties in correcting any errors or making updates to applications.

We believe that the resourcing, quality assurance and effectiveness of this service is going to be of increased significance and is something we will continue to explore in our engagements with the Home Office.

Late application guidance

We welcome the publication of the Home Office's position and guidance to caseworkers on Reasonable Grounds for Late Applications to the EUSS. Having taken the time to review the guidance we note that it is pragmatic and inclusive and provides some detailed 'categorisations' of vulnerable groups and some explanation of what may be considered to be compelling and compassionate circumstances when late applications are received.

We will be writing to the Home Office to provide feedback on this late application guidance. We note that the guidance has been drafted to support caseworkers who will, after 30 June, be making decisions on late applications to the EU Settlement Scheme, rather than being aimed at applicants themselves.

We believe that easy to follow guidance designed specifically for potential applicants is required urgently. We will also be highlighting some areas where the guidance could be further developed. We have summarised some of the key suggestions below that are not otherwise covered in this submission.

While the existing guidance reiterates the Home Office's position to look to grant rather than refuse status it is not clear how this position will be maintained in the future. The guidance explicitly states that reasonable grounds will become more difficult to justify with the passage of time.

The guidance does not include details on how, or if, digital and paper application forms and processes will be amended to invite or accommodate details of the grounds for late application, or how additional supporting evidence might be added. It also does not specify how long it might take to process an application.

The guidance is not clear whether certificates of application will be issued to applicants who make late applications. Article 18(1)(b) of the Withdrawal

Agreement provides that 'a certificate of application for the residence status shall be issued immediately.'

It is also not clear from the guidance how the Home Office will ensure consistency in decision-making when case workers have discretion over decisions.

It is not clear how formal immigration enforcement will operate following the end of the grace period. We note that currently there is no published information about this process available, especially the processes other related enforcement agencies will need to follow. We consider that the provision of information about this is required urgently.

We would like to see further clarity on the position of children who may have to rely on the late application process as they come of age.

Proof of status, including the lack of a physical document

The UK government has the discretion under the Citizens Rights Agreements to opt for a digital form of proving settled status.

We are aware the absence of physical documented proof of settled status has been highlighted by numerous citizens and support groups who anticipate it may cause issues for citizens with border entry, accessing healthcare, securing accommodation and employment, opening bank accounts and using financial services.

Our call for evidence asks specific questions to identify experience of using digital proof, and prospective concerns have also featured in some complaints received.

As we move closer to the end of the grace period it is imperative the digital systems required to support these requirements and processes are fit for purpose and clear guidance is provided to those who will examine digital proof.

The relationship between pre-settled status and settled status

The Home Office's published statistics of 27 May indicate that 2.17 million citizens have already been granted pre-settled status. Noting that the administrative burden is placed on the applicant to submit a new application to the scheme when switching status, any potential difficulties that may be associated with this are largely anticipatory. We have included a question in our call for evidence about switching status.

The Home Office has said that it will issue 'reminder correspondence' and this provides some reassurance, however, this may not be wholly effective where citizens have not kept their details up to date, do not realise they need to switch or miss their opportunity.

We note that the Specialised Committee on Citizens' Rights have [confirmed](#) that technical discussions are to take place between the UK Government and the EU Commission on the UK Government policy to require holders of pre-settled status to re-apply to the EUSS once the requisite continuous five years of residency has been met.

The impact of COVID-19 on the settlement scheme

The suspension of face to face services has impacted the ability of citizens to seek support to make their applications, but, perhaps most significantly, to access documents and information to support their applications. We are aware that access to passports and documents from EU Embassies has been difficult resulting in some citizens being unable to provide the evidence required by the Home Office. This is a theme in complaints we have received.

There is a possibility that citizens who returned to their home countries during the Covid-19 pandemic may lose their ability to achieve full settled status as their continuous residency will be broken if their absences from the UK exceed the relevant periods.

Although there is some provision for this type of situation in the late application caseworker guidance, we think it would be useful for the Home Office to give consideration to specific advice in relation to Covid-19.

Whether the UK Government is at risk of breaching any of its obligations under the Citizens' Rights Agreements

We continue to monitor the application and implementation of the Citizens' Rights Agreements by public authorities in the UK and Gibraltar.

We are investigating issues from a variety of sources, including complaints. As part of this investigative work we are in discussion with public authorities such as the Home Office for example in relation to EUSS.

The aim of this early investigative work is to inform our next steps. This could include conducting an inquiry to identify whether any breaches of the obligations under the Citizens' Rights Agreements have or are occurring. We would not wish to pre-judge the outcome of that investigative work and any subsequent inquiries.

Regular updates regarding our work will be published, including where we propose to carry out an inquiry and reports on completed inquiries.

18 June 2021