Who needs leave to remain? The uncertain legal consequences of missing the EU settlement scheme deadline

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Introduction

This note addresses the implications of an individual's missing the 30 June 2021 deadline for applications to register under the EU settlement scheme. Article 18(3) of the EU-UK Withdrawal Agreement appears to protect individuals' rights from the time that they make a late application.[1] The focus here is on the status in United Kingdom law of persons eligible to apply under the settlement scheme, who fail to apply on time, and who stay in the United Kingdom. It makes no distinction between three scenarios where a person may be unregistered: (i) prior to a late application and successful registration; (ii) where a late application is made which is unsuccessful; and (iii) where no application is made.

The analysis here of the status of those who are unregistered takes a historical starting-point. It shows that, from 1982, those exercising free movement rights in the United Kingdom were exempt from a requirement to obtain leave to enter.[2] That led to an interpretation - set out in particular by Lord Hoffman in the House of Lords in *Wolke* in 1997 – that those who ceased to be eligible for free movement rights were *lawfully present* in the United Kingdom if they stayed on.

Subsequently, a different view emerged, that persons who cease to be exempt under the Immigration Act 1971 – including EEA+ nationals who no longer qualify for free movement rights - "require leave".[3] This different interpretation is of broad significance, as many legislative provisions use versions of that formulation. This terminology appears central to the Government's understanding of the legal position of those who miss the EU settlement scheme application deadline. In its view, EEA+ nationals and family members will "require leave" from 1 July 2021 at the latest; and, even if they go on to make a successful late application, their lack of status prior to late registration will means that they "required leave", but did not possess it, in the intervening period.

It is argued in this note that the underlying legal position as regards the status and rights of those who miss the 30 June 2021 deadline remains uncertain. Accordingly, it recommends that clarification be sought from the Home Office as to its legal interpretation of the phrase "requires leave". If the Home Office position is that those who fail to register "require leave", that could be tested in litigation. Legislation could be sought to exempt those who exercised free movement rights in the United Kingdom, and who

[1] According to Article 18(3): "Pending a final decision by the competent authorities on any application referred to in paragraph 1 … all rights provided for in this Part shall be deemed to apply to the applicant." As paragraph 18(1) includes provision for late applications where there are "reasonable grounds", the most straightforward reading of Article 18(3) is that rights are guaranteed from the point that a late application is made.

[2] The term 'free movement rights' refers to rights based directly upon EU free movement law and/ or recognised in the implementation of EU free movement law in the United Kingdom.

[3] The term 'EEA+' is used to refer to the EU 27 states, Iceland, Liechtenstein, Norway and Switzerland.

have not subsequently left the United Kingdom, from a requirement to obtain leave to remain, either generally, or in respect of particular rights.

1. The 'lawfully present' interpretation

The Immigration Act 1971 dates from a time when immigration control took place primarily at ports. That context is reflected in fundamental provisions of the Act treating the grant of leave to enter as the pivotal event. In particular, section 3(1)(a) sets out what may be termed an 'administrative law' obligation upon persons other than British citizens to obtain leave to enter upon arrival in the United Kingdom ("shall not enter"). [4] In contrast, section 3(1) contains no equivalent obligation to obtain leave to remain in order to authorise continued presence. Instead, according to section 3(1)(b), leave to remain "may" be granted to those already present in the United Kingdom. This reflected the understanding that leave to remain would be sought only when a person who had been granted limited leave to enter or remain wished to extend their lawful stay in the United Kingdom.

Other aspects of the 1971 Act reinforce that understanding of section 3(1). The description of the Immigration Rules in section 3(2) of the Act states that they "regulat[e] the entry into and stay in the United Kingdom of *persons required by this Act to have leave to enter*" (emphasis added). The core criminal offences in section 24 of the Act cover illegal entry, overstaying and breach of a condition of leave, but do not contain an offence of illegal presence. The removal provisions of the 1971 Act had the same scope as the criminal offences, and that remained the position after the addition of provision for administrative removal by the Immigration and Asylum Act 1999.

This absence in the 1971 Act of any obligation to obtain leave to remain was - and is - relevant above all to non-British citizens who were exempt from a requirement to obtain leave to enter, but who then ceased to be exempt while within the United Kingdom. One case is that of persons who cease to benefit from an express exemption under the Immigration Act 1971, such as former members of diplomatic missions, consular staff, and staff of international organisations.[5] Since 1 January 1983, another case has been that of children born in the United Kingdom who are not British citizens: they effectively have an exemption from leave to enter at the moment of birth, which immediately comes to an end.

Persons with free movement rights based on EU law are a third case, and the one of primary concern here. In response to the Court of Justice ruling in *Pieck* (1980), from 1982, individuals who arrived in the United Kingdom with free movement rights were not subject to a requirement to obtain leave to enter. [6] That approach was confirmed in legislation by section 7(1) of the Immigration Act 1988, with effect from 20 July 1994, according to which:

[4] The provisions concerning British citizens also apply to a small historic category of other persons with the right of abode: Immigration Act 1971, section 2(2).
[5] See Immigration Act 1971, section 8 and Immigration (Exemption from Control) Order, SI 1972 No. 1613, as amended.
[6] *R v Pieck*, Case 157/79 [1980] ECR 2171.

> A person shall not under the [1971] Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

Because of the lack of a requirement to obtain leave to enter upon those benefitting from free movement right, in *Castelli* (1996), *Wolke* (1997) and *Abdirahman* (2007), the courts concluded that individuals who ceased to have free movement rights were not unlawfully present, as there was no obligation upon them to obtain leave to remain.[7] The most authoritative statement of that view was given by Lord Hoffman in *Wolke* in 1997:

> The key concept in UK immigration control is that of having "leave to enter" the United Kingdom …. The [1971] Act … contemplates that persons who are not British citizens will be entitled to be present here only if they have been given leave to enter and that their right to reside in the United Kingdom will be a consequence of the terms of that leave. The whole scheme relies upon the exercise of control at the frontier…
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> As a result of *Reg.* v. *Pieck,* the Home Office admitted nationals of other member states without leave. But this produced a novel problem. Community law gave nationals of other member states rights to reside here only for defined and limited purposes. I shall refer to people duly exercising those rights as "qualified persons." What could be done about those who entered without leave but ceased to be qualified persons? Under the old scheme of things, anyone entering for a limited purpose would be given limited leave and, if he overstayed, would commit an offence and be liable to deportation. But this method of control could not be applied to Community entrants. [8]

Drawing upon this analysis, Lord Hoffman stated that, after their free movement rights had creased, "the appellants were lawfully present in the United Kingdom" and were "doing nothing unlawful in public or private law."[9]

It was presumably because of this analysis that, previously, secondary legislation implementing free movement rights in the United Kingdom *did* place an express obligation to obtain leave to remain upon those who ceased to have the protection of section 7(1) of the 1988 Act.[10] However, from 1 February 2017, when the Immigration (European Economic Area) Regulations 2016 took effect, secondary legislation was silent on the point. [11] Nor was provision for leave to remain made in the Citizens' Rights Regulations 2020, which permitted those with free movement rights as of 31 December 2020 to retain those rights during the six-month grace period.[12]

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[7] See *R v City of Westminster, ex parte Castelli* [1996] HLR 616 (Court of Appeal); *Chief Adjudication Officer v Wolke* and *Remilien v Secretary of State for Social Security* [1997] 1 WLR 1640 (House of Lords); *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.

[8] *Wolke* [1997] 1 WLR 1640, 1652-1653.

[9] Ibid, 1656. For similar reasoning concerning a British-born person who was not a British citizen, see *Akinyemi v. Secretary of State for the Home Department* [2017] EWCA Civ 236. *Wolke* was cited in argument, but not specifically endorsed in the judgment of Underhill LJ.

[10] See Immigration (European Economic Area) Regulations 2006 (SI 2006 No. 1003), Schedule 2, para 1(1).

[11] See Immigration (European Economic Area) Regulations 2016 (SI 2016 No. 1052), Schedule 3.

[12] Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (SI 2020 No. 1209), Reg 3.

Because of the silence concerning leave to remain in the 2016 Regulations, the analysis in *Wolke* is potentially relevant to those who fail to register by 30 June 2021, but who stay in the United Kingdom. From a legal perspective, they are in the position of having entered and stayed in the United Kingdom with an exemption from leave requirements under the 1971 Act, but of having lost that exemption once the special legal regime for free movement rights came to an end on 30 June 2021.

Legally, they appear to be in the position as those exempt under the 1971 Act, British-born children without British citizenship, and unqualified EEA+ nationals in the past. it is arguable that they are not in breach of any administrative law obligation to obtain leave to remain, as they are not covered by section 3(1) of the 1971 Act, or by any other express provision in immigration law. As we shall see below, this legal position has potential implications for many other provisions of legislation and the Immigration Rules.

2. The 'requires leave' interpretation

An alternative understanding of the legal status of persons who were initially exempt from a requirement to obtain leave to enter, but who have ceased to be exempt, is that they "require" leave to remain, even in the absence of a specific obligation. Judicial support for this approach is to be found primarily in the judgment of Buxton LJ in *Ismail* (2006), which concerned the eligibility of unqualified EEA+ nationals for homelessness assistance.[13] His judgment was endorsed by the Court of Appeal in *Ebiahor* (2008), concerning the eligibility for homelessness assistance of a British-born child who was not a British citizen.[14]

In *Ismail*, Buxton LJ initially referred to the statement in section 1(2) of the 1971 Act, that persons who lack the right of abode

> may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act.

Buxton LJ's reading of section 1(2) was that it meant that "a person without right of abode has to have leave to be here unless exempted".[15] As against that, the reference in section 1(2) to "such regulation and control … as is imposed by this Act" may be thought to require an express obligation elsewhere in the legislation (which is lacking). That may explain why Buxton LJ went on to state that the terms of section 1(2) were "far too general and prefatory to impose, in themselves, any positive obligation on anyone to do anything".[16]

Instead, Buxton LJ reasoned that a person's being "required" to have leave did *not* necessitate a formal obligation upon them:

[13] *Ismail* v. *Barnet London Borough Council* [2006] 1 WLR 2771.
[14] *Ebiahor* v. *Royal Borough of Kensington and Chelsea* [2008] EWCA Civ 1074.
[15] *Ismail*, at 2775 (para 9).
[16] Ibid, at 2776 (para 12).

> to say that a person requires *x* is to use the verb to refer to that person's needs or requirements, in this case that he needs leave to remain. It is not to say that that person is under an obligation to seek or apply for such leave.[17]

Accordingly, his understanding of the term "requires leave" was that it meant a person's "needing such leave to regularise their immigration status".[18]

This interpretation is directly relevant to the case of eligible persons who fail to register under the EU settlement scheme by 30 June 2021. Even if the 'lawful presence' theory is correct, nevertheless an individual who ceases to be exempt on that date may be understood to "require leave" for the purposes of any legislation using that phrase.

It is therefore significant that Buxton LJ's conclusion on this point is open to question in two key respects. Firstly, one may doubt the proposition that a person may have a "need or requirement" to obtain leave, without being under any *obligation* to do so. While that conclusion is defensible linguistically, it is difficult to defend in a legal context such as immigration control. What could the basis for any such 'need' be, if not a legal obligation or duty, or (at least) a specific legal consequence of failure to obtain leave? Secondly, a limitation of Buxton LJ's judgment is that he declined to address *Castelli* and *Wolke*, on the grounds that they were not concerned with the same questions of statutory interpretation.[19]

As a result, considerable uncertainty remains as to whether, or how, the two lines of authority may be reconciled. Is the approach in *Ismail* correct? If so, can the 'lawful presence' theory stand at the same time? These questions may well require a resolution by the courts.

3. Legislative provisions which depend on having an immigration status

What are the implications of these two interpretations of the legal position of those who cease to be exempt under free movement law, and who fail to apply to register under the EU settlement scheme? To answer that question, this section will identify legislative provisions where it appears *not* to matter which interpretation is preferred, or whether both are accepted. These may be distinguished into (a) cases where the individual faces no detriment on either theory, and (b) cases where the lack of a specific legal status means that a given entitlement cannot be obtained on either theory. Legislative provisions where the 'requires leave' theory does matter are considered in section 4.

(a) No breach of immigration law

[17] Ibid, at 2775 (para 8).
[18] Ibid (para 10).
[19] Ibid, at 2776-2777 (paras 14 and 15).

Neither theory set out leads to the conclusion that a person who fails to apply by the deadline is in breach of immigration law. This is relevant both to possible criminal offences and to sanctions arising within the Immigration Rules.

- *No criminal offence*. A person who ceases to be exempt on the basis of free movement rights, and who then remains in the United Kingdom without registration, cannot commit the criminal offences of overstaying or breach of condition in section 24 of the Immigration Act 1971. These offences depend on leave having previously been granted to the individual, which is not the case in such a scenario.

- *No breach of immigration laws*. For the same reason, a person who fails to register will not be subject under the Immigration Rules to restrictions on in-country switching, or to mandatory re-entry bans, because of a "breach of immigration laws". These require the previous grant of leave, and either overstaying or the breach of a condition.[20]

(b) Rights dependent on a lawful status

Conversely, on either theory, a person who fails to apply by the deadline will be ineligible for entitlements which depend upon possession of a lawful status.

- *Acquisition of British citizenship*. Failure to register is relevant to provisions of the British Nationality Act 1981 which require that a person was not at a relevant time "in the United Kingdom in breach of the immigration laws" in order to naturalise, and in order for their British-born child to acquire British citizenship automatically.[21] This test requires possession of a specific status, including leave to enter or remain or being entitled to reside under legislation implementing free movement rights.[22] That legal position led to a mitigation measure, that a person born in the United Kingdom on or after 1 July 2021, to a parent who was eligible for indefinite leave to remain under Appendix EU immediately before 1 July 2021, will become a British citizen automatically once such leave is subsequently granted to the parent. [23] No mitigation has however been announced in respect of the impact of unregistered periods upon applications to naturalise.

- *Right to reside test for certain benefits*. Even if those who fail to register are accepted as 'lawfully present', that will be insufficient to satisfy the 'right to reside' test for specified non-contributory benefits.[24] In *Abdirahman* (2007) the Court of Appeal held that a person who ceased to have free movement rights, and who remained in the United Kingdom, did not have a 'right to reside' for those purposes.[25]

[20] Immigration Rules, para 6.2, definitions of "breach of immigration laws" and of "overstayed".
[21] British Nationality Act 1981, section 1(1), Schedule 1, paras 1(2)(d) and 3(d), read together with sections 50(2), 50(5) and 50A.
[22] British Nationality Act 1981, section 50A.
[23] Draft British Nationality Act 1981 (Immigration Rules Appendix EU) (Amendment) Regulations 2021.
[24] The test applies to the following: child benefit, child tax credit, council tax support, income-related employment and support allowance, housing benefit, income support, income-based jobseeker's allowance, pension credit and universal credit.
[25] *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.

- *Higher education*. The 'lawful presence' interpretation also appears insufficient to ensure that an unregistered person will be classed as a 'home' student for student support and fees in higher education.[26] In England, for courses commencing on or after 1 August 2021, a person will be eligible as a home student *inter alia* if they (a) are "settled" in the United Kingdom, with three years' prior ordinary residence in the United Kingdom and islands, or (b) have a status under the EU settlement scheme, and three years' prior ordinary residence in the United Kingdom and EEA+. Those who fail to register on time will potentially fall foul of the "ordinary residence" requirement, as that requires that the person "lawfully resides" in a given place at the relevant time.[27]

- *Marriage or civil partnership.* From 1 July 2021, the scheme of referral and potential investigation of planned marriages and civil partnership will apply to EEA nationals. There is an exemption *inter alia* for persons who have been granted a status under the EU settlement scheme.[28] A referral will not be made for any person who is "settled", but in order to classed as such, a person must provide evidence of indefinite leave to a registrar.[29] There appears therefore to be no scope for a person who has not applied or registered under the EU settlement scheme to argue that they are nevertheless 'lawfully present'.

4. Legislation which uses the phrase 'requires leave'

The correctness or otherwise of the "requires leave" interpretation of the legal position of those who cease to be exempt matters to the many legislative provisions that use that language. The following is a list of the main legislation where the phrase appears.

- *Administrative removal*. As a result of an amendment by the Immigration Act 2014, the power of administrative removal arises where "a person requires leave to enter or remain in the United Kingdom but does not have it."[30] This has a more general scope than the previous powers of removal, which concerned illegal entry, overstaying and breach of a condition.

- *Employer penalties*: Employers face possible civil penalties and criminal liability for employing an adult who lacks the right to work. That depends on the person's being "subject to immigration control", which is defined to mean that the person "requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)".[31] Civil and criminal liability depends upon such a person

[26] The legal position in Northern Ireland, Scotland and Wales is different, but is likely to throw up similar issues in respect of unregistered periods in the three years preceding the commencement of a course.
[27] Education (Student Support) Regulations 2011 (SI 2011 No. 1986), as amended, Schedule 1, para 1(2A).
[28] Definition of "relevant national" in Marriage Act 1949, section 78(1); Marriage (Scotland) Act 1977, section 26(2); Marriage (Northern Ireland) Order 2003, Article 2(2); and, Civil Partnership Act 2004, section 30A. Each of these was amended by SI 2020 No. 1309.
[29] Immigration Act 2014, section 49(2), as amended by SI 2020 No. 1309 and Schedule 1, para 3 of each of Referral of Proposed Marriages and Civil Partnerships Regulations 2015 (SI 2015 No. 123) and Sham Marriage and Civil Partnership (Scotland and Northern Ireland) (Administrative) Regulations 2015 (SI 2015 No. 404).
[30] Immigration and Asylum Act 1999, section 10.
[31] Immigration Asylum and Nationality Act 2006, section 25(1)(c).

not having been granted leave to enter or remain in the United Kingdom, or having leave to enter or remain which is invalid, which has ceased to have effect, or which is subject to a condition preventing the person from accepting the employment. There will not be liability for a person who obtains leave under Appendix EU, as that confers a right to work in all cases.

- *Illegal working*. The offence of illegal working may be committed by a person "who is subject to immigration control", defined in the same way as for employer penalties. The offence is committed if the person works while disqualified by reason of their immigration status, and knew or had reasonable cause to believe that that was the case.[32] This offence will not be committed by a person obtains leave under Appendix EU, as that confers a right to work in all cases.

- *Right to rent*. Landlords and agents may face civil penalties and criminal liability if they authorise an adult who lacks a right to rent to occupy premises under a residential tenancy agreement. Lacking the right to rent is defined to include being a person who "requires leave to enter or remain in the United Kingdom but does not have it". [33]

- *NHS charging provisions*. The authorities in the four jurisdictions of the United Kingdom may impose charges for NHS services upon persons who are not "ordinarily resident". That concept has both a factual dimension and a legal one. The latter is now governed by section 39 of the Immigration Act 2014, according to which the term "not ordinarily resident" includes "persons who require leave to enter or remain in the United Kingdom but do not have it."

- *Driving licences.* The Immigration Act 2014 introduced a lawful residence requirement when a driving licence is applied for, and a power to revoke a licence where it appears that the holder is not lawfully resident.[34] A person who "requires leave to enter or remain in the United Kingdom but does not have it" is deemed not to be lawfully resident.

- *Bank accounts.* The Immigration Act 2014 introduced a mechanism for preventing a person in the United Kingdom who "requires leave to enter or remain … but does not have it" from opening a current account.[35] As a result of the Immigration Act 2016, banks and building societies must also make repeat checks of whether individuals have been disqualified from holding a current account on these grounds, which may lead to the freezing or closure of all the person's accounts by the Home Office.[36]

- *Social benefits*. Eligibility for means-tested benefits not covered by the right to reside test (above) is denied to a person who is "subject to immigration control", unless they fall within exceptions set out in

[32] Immigration Act 1971, as amended, section 24B, inserted by the Immigration Act 2016.
[33] Immigration Act 2014, section 21.
[34] See Road Traffic Act 1988, sections 97, 97A and 99, and the Road Traffic (Northern Ireland) Order 1981 (SI 1981/1540) Articles 13, 13A and 15, as amended by the Immigration Act 2014, sections 46 and 47.
[35] Immigration Act 2014, section 40.
[36] Immigration Act 2014, sections 40A-40G.

Regulations. That concept is defined *inter alia* to include a person who "requires leave to enter or remain in the United Kingdom but does not have it".[37]

- *Housing*: Eligibility for social housing and homelessness assistance is denied - with scope for exceptions - to persons "subject to immigration control".[38] That term is defined to mean "a person who under the 1971 Act requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)."

It is clear that the Government takes the position that, from 1 July 2021, EEA+ nationals and their family members will "require" leave for all of this legislation. That interpretation is apparent for example from the following developments.

- *Employer penalties*. Home Office guidance concerning employer checks of the right to work, published on 18 June 2021, states that "from 1 July 2021, EEA citizens and their family members require immigration status in the UK," and "will be required to provide evidence of lawful immigration status in the UK."[39]

- *Right to rent.* Similarly, Home Office guidance concerning right to rent checks by landlords and their agents provides that, from 1 July 2021, EEA nationals and family members will "require immigration status", and will "be required to provide evidence of lawful immigration status".[40]

- *NHS charges*. Legislation has been adopted for England and Wales to provide that those who successfully make late applications (for pre-settled status, or to upgrade to settled status) will not be liable to NHS charges from the date of an application.[41] By implication, those eligible to register *will* be liable for NHS charges for the intervening period *prior to* a late application.[42]

- *Housing*. In England, the express intention is that those who do not register under the EU settlement scheme will be classed as persons subject to immigration control, and so liable to be denied social housing and homelessness assistance.[43]

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[37] Immigration and Asylum Act 1999, section 115. The benefits in question are personal independence payments, attendance allowance, carer's allowance, and disability living allowance.
[38] In relation to housing, see Immigration and Asylum Act 1999, section 118. In relation to homelessness assistance, see Housing Act 1996, section 85 (England), Housing (Wales) Act 2014, Schedule 2, para 1 and Immigration and Asylum Act 1999, section 118 (Northern Ireland and Scotland).
[39] Home Office, *Employer right to work checks: Supporting guidance* (18 June 2021), p. 39. For those who commenced employment before 1 July 2021, the guidance states that retrospective checks are not required: ibid.
[40] Home Office, *Landlord's guide to right to rent checks* (18 June 2021), p. 52. Here too, the guidance states that retrospective checks on EEA nationals who entered a tenancy before 1 July 2021 are not required: ibid.
[41] *England*: National Health Service (Charges to Overseas Visitors) Regulations 2015, Reg 13A, inserted by SI 2020 No. 1423; *Wales:* National Health Service (Charges to Overseas Visitors) Regulations 1989, Reg 13A, inserted by SI 2020 No. 1607.
[42] This was confirmed for England by Health and Social Care Minister, Edward Argar, in a written answer on 19 May 2021: https://questions-statements.parliament.uk/written-questions/detail/2021-05-14/1299.
[43] This was confirmed by the Housing Minister, Eddie Hughes, in a written answer on 19 May 2021: https://questions-statements.parliament.uk/written-questions/detail/2021-05-11/514.

- *Entry from the Republic of Ireland*. Section 1(3) of the Immigration Act 1971 provides that those arriving in the United Kingdom from elsewhere in the common travel area do not require leave to enter. There had been an exception for a person arriving from the Republic of Ireland who previously entered it from the United Kingdom or islands, having entered one of those "unlawfully", or after having overstayed in one of those.[44] As a result of an amendment which took effect on 16 June 2021, the exception instead refers to any person who "requires leave to enter or remain in the United Kingdom", who "left the United Kingdom at a time where [they] required such leave but did not have it", and who has not subsequently been granted admission, or leave to enter or remain.[45] The timing of this amendment suggests that it is intended to cover persons who fail to register under the EU settlement scheme, who travel from the United Kingdom to the Republic of Ireland, and then return to the United Kingdom.

Concluding remarks

It can be seen therefore that the Government's approach to EEA+ nationals and their family members rests upon the theory that such persons will "require" leave to remain from 1 July 2021. The correctness of that approach must however be considered uncertain: it is in tension with the older 'lawful presence' analysis; the interpretation that leave may be "required" without being obligatory, lacks persuasiveness; and, that interpretation has not been tested before the Supreme Court.

In order to address the analysis in this note, the following steps could be taken:

- clarification could be sought from the Home Office as to its legal interpretation of the phrase "requires leave", as used in legislation.

- assuming that the Home Office position is that those who fail to register indeed "require" leave, the correctness of that interpretation could be tested by litigation.[46]

- a legislative statement could be sought that those who have exercised free movement rights in the United Kingdom at any time, and who have not subsequently left the United Kingdom, should not be considered to have "required" leave to remain. This could be done either generally, or as a mitigation measure in respect of specific rights.

[44] Immigration (Control of Entry through Republic of Ireland) Order 1972 (SI 1972 No. 1610), Article 3(1)(b)(iii), as amended by Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 1979 (SI 1979 No. 730). The 'islands' are the Channel Islands and the Isle of Man.
[45] Immigration (Control of Entry through Republic of Ireland) Order 1972, Article 3(1)(b)(iii), as amended by SI 2021 No. 600.
[46] In the author's view, NHS charges incurred prior to a successful late application to the EU settlement scheme, and the rules concerning higher education support and fees, are especially likely to provide opportunities for test litigation.