ILPA

EU RESIDENCE RIGHTS AFTER BREXIT

Produced by a panel of experts on EU residence rights

Chair: Bernard Ryan

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ILPA Lindsey House, 40-42 Charterhouse Street, London EC1M 6JN • 020 7251 8383 • info@ilpa.org.uk • www.ilpa.org.uk

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Recommendations

This report is concerned with the continuing legal protection, after Brexit, of residence rights flowing from EU free movement law.

Following the UK general election on 12 December 2019, which returned a significant majority for the Conservative Party led by Boris Johnson, we are assuming that the October 2019 version of the Withdrawal Agreement will be ratified by both parties, and implemented in the UK through the EU (Withdrawal Agreement) Bill.

The recommendations in this report are addressed to policy-makers, to ensure EU residence rights are given proper protection. The report is also designed to provide information to immigration practitioners and the public about the wider debate on EU residence rights.

An earlier version of this report was published for ILPA members only on 28 November 2019. This is an updated version.

Legislative protection of residence rights

- The rights of EEA+ nationals and their family members to continue to reside in the United Kingdom should be guaranteed in primary legislation (p 10).
- That legislative guarantee should protect all those eligible for settled or pre-settled status at the cut-off date, and those who become eligible later (p 11).
- Persons covered by the legislative guarantee should retain an indefinite right to register, subject to compliance with the rules relating to absences (p 11).
- The legislative guarantee should extend to all persons actually awarded settled status or pre-settled status, provided they did not engage in fraud or deliberate misrepresentation in their application (p 11).
- The legislative guarantee should be binding upon public bodies carrying out state functions (p 11).
- There should be a declaratory model of registration, so that individuals' right of continuing residence would not be conditional upon registration (p 12).
- Official guidance for employers and landlords should allow them to accept specified types of evidence from unregistered individuals, and to give individuals who claim to be eligible the opportunity to register (p 12).
- Legislation should expressly provide that there is a right of appeal both against outright refusals of status under Appendix EU and against grants of pre-settled status by persons seeking settled status (p 13).

- All case law of the CJEU concerning concepts of free movement law should be binding in the United Kingdom, irrespective of when the judgments in question were handed down (p 14).

Registration

- The Home Office should remove the deadline for applications to register. Alternatively, there should be a much longer initial deadline, linked to the period for which the scheme will remain open for specific categories of applicant (p 15).

- If a deadline is retained, the Home Office should set out as soon as possible the range of circumstances in which its discretion to waive the deadline will be exercised (p 15).

- The timeframe of the automated checks of past residence should be widened, either to a ten-year period, or as far back as possible (p 15).

- In any iteration of the system, when offering pre-settled status, the online system should always indicate that settled status is a stronger status, that the core eligibility rule is five years' continuous residence at any time, and that the automated checks are not the only way to demonstrate the requisite five-year period of residence. (p 16).

- Reference in the online declaration to eligibility and residence in the United Kingdom should be removed. Alternatively, applicants ought first to know the period for which the online system assumes they have been resident (p 16).

- Those who register under the EU settlement scheme should have the possibility to obtain a physical document (p 16).

Special cases

- Full details should be published as to the immigration arrangements which will be made for frontier workers after the free movement of persons rules come to an end (p 18).

- Online applications should be permitted for derivative rights categories. If online applications are not permitted, a paper application form should be provided to anyone who requests one (p 20).

- Individuals who are eligible in the *Zambrano* category should be granted status under Appendix EU, irrespective of actual or potential grants of leave under other parts of the Immigration Rules (p 20).

- The provisions concerning the *Surinder Singh* category in Appendix EU should be amended, to require "genuine" residence in the other EEA+ state by the British citizens and family members concerned, but without reference to other factors (p 21).

- Online applications should be permitted in the *Surinder Singh* category. If online applications are not permitted, a paper application form should be provided to anyone who requests one (p 21).

Retention of residence rights

- A specific decision should be required to confirm the lapsing of settled or pre-settled status after a period of absence from the United Kingdom. The individual concerned should be notified, and should have the opportunity to provide evidence of their presence in the United Kingdom in the period in question (p 22).

- The provisions of the Immigration Rules concerning returning residents should be amended, to reflect the five-year period of absence allowed to individuals with settled status, and to remove the requirement in their case that admission be sought for the purpose of settlement (p 22).

- The Government should set out protective arrangements for individuals who obtain pre-settled status but who, despite being eligible through continuous residence, do not go on to apply for settled status. That could be achieved by converting pre-settled status to settled status automatically (p 22).

- It should be possible for persons with pre-settled status to extend that status, as long as they continue to be resident in the United Kingdom (p 22).

- The letter given to those granted pre-settled status, rather than information sheet, state clearly that, if the person spends more than six months in a year outside the United Kingdom, they will not qualify for settled status. (p 23).

- Home Office information should make clear that failure to update contact or identity document details will not cause pre-settled status or status to be lost or removed (p 23).

Dual nationals and their family members

- Appendix EU should be amended so that family members of all dual British/EEA+ nationals may apply under the EU settlement scheme as if the sponsor were eligible (p 25).

- The protection for family members who acquired residence documents prior to the exclusion of dual British/EEA+ nationals on 16 October 2012 should be maintained, by introducing transitional provisions into Appendix EU (p 25).

- Where an EEA+ national naturalises or registers as a British citizen, after acquiring settled status, and loses their EEA+ nationality as a result, the position of their family members under the EU settlement scheme should not be affected (p 25).

- Under the EU settlement scheme, residence in the United Kingdom by former dual British/ EEA+ nationals who have renounced their British citizenship should be treated equally with that by other EEA+ nationals (p 25).

- Where an application was mistakenly made under the EU settlement scheme by a dual national, grants of status to family members should not be called into question, and new grants to family members should continue to be possible (p 26).

- The family members of dual British/ Irish nationals from Northern Ireland should be permitted to benefit from the EU settlement scheme (p 26).

Exceptions

- Applications for pre-settled status should be permitted by individuals who are in prison or in a youth offender institution on or soon before the cut-off date of free movement of persons rights (p 27).

- Primary legislation should give protection concerning exclusion and deportation for pre-cut-off date conduct to all those who benefit from the EU settlement scheme (p 28).

- Schedule 1 to the 2016 Regulations should be excluded when the concepts of public policy and public security are retained, post-Brexit, for conduct prior to the cut-off date (p 28).

- The suitability provisions in Appendix EU should be amended to require consideration of the current risk posed by an individual, and the exercise of discretion in appropriate cases (p 29).

- A requirement of proportionality should be added to the suitability provisions in Appendix EU, to mandate consideration of whether refusal of an application is both necessary and the least restrictive measure to protect a legitimate public interest (p 29).

- An application should not be refused under Appendix EU unless appeal rights concerning deportation or exclusion have been exhausted (p 29).

- The possibility to refuse an application on suitability grounds because of the provision of "false and misleading" information should be limited to cases where it is reasonable to conclude that there was dishonest intent in the making of an application (p 29).

- Appendix EU and associated guidance should be amended to require caseworkers to exercise discretion so that vulnerable persons such as trafficking or domestic violence victims are not unfairly refused status (p 30).

- The fact of a removal decision should not be grounds for refusing an application, where it remains possible for that decision to be successfully challenged on appeal (p 30).

1. Introduction

Scope of the report

This report addresses the many legal questions posed by current Government plans to protect EU free movement rights after Brexit. It is particularly concerned with the protection of the right of residence of pre-Brexit residents, and their families over the longer-term. It aims at a comprehensive solution, whereby all EEA+ citizens who were resident in the United Kingdom before Brexit, and family members with pre-Brexit rights of residence through them, are eligible for such long-term protection.

In the report, we address the protection of EU rights on the assumption that the United Kingdom will leave the EU in accordance with the October 2019 Withdrawal Agreement, including its citizens' rights provisions.[1] For the purposes of the report, we assume that the post-Brexit implementation period – and with it the free movement of persons regime - will end on 31 December 2020.

The report covers the nationals of the other 27 EU member states, and also the nationals of the three EEA states (Iceland, Liechtenstein and Norway), and Switzerland, which have free movement of persons agreements with EU. United Kingdom immigration law currently treats the nationals of these four states equally with EU27 nationals, and the EU settlement scheme applies equally to them. The citizens' rights provisions of the Withdrawal Agreement will also extend to these four states under parallel agreements.[2] As far as possible, the nationals of all 31 states are treated together in this report, and the term 'EEA+ nationals' is used to refer to them.

The report also considers the position of the family members of EEA+ nationals, and of family members of British citizens when they are protected by EU free movement law.

The citizens' rights provisions of the Withdrawal Agreement

The citizens' rights provisions of the Withdrawal Agreement will guarantee a minimum level of protection for EU citizens and their family members in the United Kingdom. In broad terms, EU27 nationals and family members who qualify for a right of residence under EU free movement law at the end of the planned transitional period (31 December 2020) will be entitled to continue residence after that date.

The Agreement provides for a right of permanent residence, largely on the same terms as in the current Citizens Directive.[3] A right of permanent residence will normally be acquired after

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[1] The text of the Agreement may be found at [2019] OJ C 384/ 1 or https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration. The citizens' rights provisions are in Part Two of the Agreement.

[2] An agreement with Iceland, Liechtenstein and Norway, and a separate agreement with Switzerland, were announced by the Government on 20 December 2018. A further agreement providing for a no-deal scenario was concluded with Iceland, Liechtenstein and Norway on 8 February 2019. The terms of the December 2018 agreement with Switzerland permit it to apply in a no-deal scenario as well.

[3] Article 15(1) of the Withdrawal Agreement and 16 of the Citizens Directive.

five years' qualifying residence which meets the requirements of the Citizens Directive as a worker, self-employed person, self-sufficient person, student, or family member.[4] It will be acquired sooner by a person who had ceased economic activity in another member state, and/or their family members.[5]

For this purpose, the period of residence will be determined in accordance with the Directive. The Agreement states that continuity of residence is not affected by "temporary absences not exceeding a total of six months a year'" or by compulsory military service, or by one absence of up to 12 consecutive months for an important reason.[6]

A key difference between the Agreement and the Citizens Directive is that the right of permanent residence will be retained during an absence of up to five years, rather than two years.[7] The logic of this change is that, after Brexit, EU citizens and their family members will lose the right they currently possess to resume 'ordinary' residence after a prolonged period of absence from the United Kingdom. A person with five years' qualifying residence in the past will also benefit from this change, even if they had previously lost the right of permanent residence under EU law under the two-year rule.[8]

An EU citizen with less than five years' qualifying residence will be eligible to 'continue' to reside in the United Kingdom with an ordinary right of residence.[9] It is expressly stated in the Agreement that such individuals may go on to acquire the right of permanent residence once they have five years' qualifying residence.[10] The rules on continuity of residence referred to above will apply to the retention of the right of ordinary residence.

The Agreement protects qualifying family members who resided under EU free movement law before the cut-off date, and who continue to reside in the United Kingdom.[11] It permits the *future* sponsorship of partners and dependent adult relatives, provided the relationship existed before the end of the transitional period. The children of an EU citizen and/or their partner may also be sponsored in the future.[12] The Agreement does not however protect the family members of British citizens under the *Zambrano* or *Surinder Singh* principles (see further section 4 below).

The EU settlement scheme

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[4] See Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035

[5] Article 17 of the Citizens Directive. Note that this includes the family members of workers and self-employed persons who have died.

[6] Article 15(2) of the Withdrawal Agreement and Article 16(3) of the Citizens Directive.

[7] Article 15(3) of the Withdrawal Agreement.

[8] Article 11 of the Withdrawal Agreement states that a right of permanent residence acquired before the end of the transition period is not to be treated as lost through absence for the period (specified in Article 15 (i.e. five years).

[9] Articles 10(1)(a), 13(1) and 13(2) of the Withdrawal Agreement.

[10] Article 16 of the Withdrawal Agreement.

[11] Articles 10(1)(e), 13(2) and 13(3) of the Withdrawal Agreement.

[12] It will be possible to sponsor children of an EU citizen whose other parent is not their partner only if the other parent were a British citizen, or the EU citizen had sole or joint custody: see Article 10(1)(e)(iii) of the Withdrawal Agreement.

In the United Kingdom, rights of residence linked to EU free movement law are to be protected after the cut-off date by the grant of status under the EU settlement scheme, which became fully operation on 30 March 2019. In line with the agreements which have been reached, the scheme applies equally to nationals of all EEA+ states, and their family members.

A key feature of the scheme is that acquisition of settled and pre-settled status is based on periods of continuous residence alone. For most EEA+ nationals and their eligible family members, it is therefore unnecessary to meet, or to have met, the substantive qualifying conditions required in EU free movement law, the Immigration (European Economic Area) Regulations 2016 and the Withdrawal Agreement.[13] In other respects, the rules as to the meaning of continuous residence, and concerning absences, are as set out in the Withdrawal Agreement.

Appendix EU also goes further than the Withdrawal Agreement by protecting family members with *Zambrano* or *Surinder Singh* rights through a connection with a British citizen. Moreover, the dependence of relatives in the ascending line is assumed - rather than needing to be proven - where the EEA+ sponsor is an adult.

A form of indefinite leave known as 'settled status' is granted to those eligible for permanent stay. In most cases, settled status is granted after a minimum of five years' continuous residence. In line with the Withdrawal Agreement, it may be acquired with less than five years' residence by a person who has ceased economic activity in the United Kingdom and/or their family members. In line with the Withdrawal Agreement, settled status is stronger than the version of indefinite leave granted under other parts of the Immigration Rules, in that it is lapses after five years' absence from the United Kingdom, rather than two years.[14]

A form of limited leave known as 'pre-settled status' is granted to eligible individuals with shorter periods of residence. Pre-settled status is valid for five years. A person with pre-settled status is eligible to obtain settled status after five years' continuous residence, including periods before and after pre-settled status was granted. Pre-settled status lapses automatically upon a person's being outside the United Kingdom for two years.[15]

The EU settlement scheme reflects the opportunity given by the Withdrawal Agreement to require EU citizens and family members to apply for a new residence status. From a domestic law perspective, however, the scheme is based solely upon domestic immigration law, having been set out in Appendix EU to the Immigration Rules, and adopted under the Immigration Act 1971.[16] The EU settlement scheme is therefore legally separate from the Agreement, and not contingent upon its ratification.

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[13] The 2016 Regulations are relevant to the position of individuals claiming 'derivative' and *Surinder Singh* rights, or through dual British/ EEA+ nationals: see sections 4 and 6, below.

[14] Immigration (Leave to Enter and Remain) Order 2000 (SI 2000 No. 11610), art 13(4)(za), as amended by Immigration (Leave to Enter and Remain) (Amendment) Order 2019 (SI 2019 No. 298). In line with the citizens' rights agreement with Switzerland, the permitted period of absence for Swiss nationals and their family members is four years.

[15] This is the general rule in Immigration (Leave to Enter and Remain) Order 2000 (SI 2000 No. 11610), art 13(4)(a), as amended by the Immigration (Leave to Enter and Remain) (Amendment) Order 2019 (SI 2019 No. 298).

[16] See *Statement of Changes in Immigration Rules* published on 20 July 2018 (*Cm* 9675), 11 October 2018 (HC 1534), 20 December 2018 (HC 1849), 7 March 2019 (HC 1919), 1 April 2019 (HC 2099), 9

2. Legal protection of residence rights

Our position is that the rights of resident EEA+ nationals and their family members should be protected comprehensively in primary legislation. In this section, we set out what that would entail: a legislative guarantee of rights of residence, a declaratory approach to proof of residence, full rights of appeal and full recognition of the case-law of the Court of Justice.

The case for a legislative guarantee

We support calls for the continuing residence status of EEA+ nationals and their family members to be guaranteed in primary legislation.[17]

A principled argument for such a guarantee is that the nationals of EU member states who have resided in the United Kingdom have exercised rights of 'citizenship'. For that reason, they are entitled to continuity of status when the legal regime changes, and to certainty that their rights will not be reduced or removed at a later date as a result of changes in United Kingdom policy. Within the United Kingdom system, only a guarantee in primary legislation would provide the requisite continuity and certainty. For coherence with EU free movement law, the guarantee should be extended to all EEA+ nationals, and to family members.

A second argument for a legislative guarantee is that it would protect the legal position of individuals who are eligible to register under the EU settlement scheme, but who have not done so. As the law stands, there is uncertainty as to the precise legal status of such persons. That is because section 7 of the Immigration Act 1988 exempts persons eligible under EU free movement law, or protected by the Immigration (European Economic Area) Regulations 2016, from an obligation to obtain leave to enter the United Kingdom. Nevertheless, there is a risk that prior resident who are unregistered could face administrative removal, and difficulties in accessing benefits, health care, driving licences, employment, rented housing and bank accounts. They could also be considered to have been in the United Kingdom in breach of the immigration laws if they later sought to register or naturalise as a British citizen.[18] A legislative guarantee would remove or reduce these difficulties for unregistered persons.

Thirdly, a legislative guarantee would give certainty to those who *have* been granted settled status or pre-settled status that that status would not be questioned at a later date. Successful applicants may for example be concerned that the evidence for their continuous residence was relatively weak. Or, they may fear a future change of policy in relation to permitted absences.

A final point is that a legislative guarantee would permit the re-documentation of EEA+ nationals and family members who were previously registered – or who believe that they

September 2019 (HC 2631) and 24 October 2019 (HC 170). Appendix EU (Family Permit) provides for travel to the United Kingdom by non-EEA+ family members who have status under the settlement scheme, or whose family relationship is with an EEA+ national who has such a status. That Appendix is not considered separately here.

[17] See for example Home Affairs Select Committee, *EU Settlement Scheme: Fifteenth Report of Session 2017–19* (30 May 2019), para 70.

[18] British Nationality Act 1981, section 50A.

were so – but who were unable to prove that that was the case. This protection appears especially relevant in the case of those who are minors at the time of Brexit.

A narrow approach to the scope of the guarantee would focus on individuals protected by the Withdrawal Agreement, and the parallel agreements for the other EEA+ states. A slightly wider approach would protect those covered by section 7 of the 1988 Act at the cut-off date, i.e. with directly effective rights *or* covered by the 2016 Regulations. In our view, however, a better solution would be to link the guarantee to the EU settlement scheme. In particular, this would ensure protection for persons covered by the scheme, but not the Agreement - those persons whose residence was non-qualifying, and persons with *Zambrano* or *Surinder Singh* rights through a family relationship with a British citizen.

We recommend that the legislative guarantee protect all persons eligible for settled or pre-settled status at the cut-off date, or who become eligible later. These individuals should retain an indefinite right to register, subject to compliance with the rules relating to absences.

We also recommend extending the guarantee to all individuals actually awarded settled status or pre-settled status, provided they did not engage in fraud or deliberate misrepresentation in their application.

We recommend that the legislative guarantee be binding upon public bodies carrying out state functions. This would include all elements of the immigration control system, including in-country decision-making by UK Visas and Immigration, decisions by immigration officers at ports of entry, and entry clearance decision-making abroad. Other state bodies which would be bound by the guarantee include the Department of Work and Pensions, local authorities and the Driver and Vehicle Licensing Agency.

A declaratory approach to registration

At present, individuals exercising EU rights of residence do not require leave to enter or remain under section 7 of the 1998 Act, and are not required to register in the United Kingdom. This reflects the position under EU law, which grants rights of entry and initial residence automatically without an application being required.[19] In contrast, when setting up the EU settlement scheme, the Government decided on a 'constitutive' approach, so that permission to be in the United Kingdom is to be dependent upon a grant of leave under the EU settlement scheme.

That approach is permitted by Article 18 of the Withdrawal Agreement. The Government's plan is to set a standard deadline of six months (30 June 2021), which is the shortest period allowed.[20]

We recognise that registration of the large majority of eligible individuals will be crucial to the practical operation of the post-Brexit immigration system. It will enable state officials and third parties to distinguish between EEA+ nationals who were resident before the cut-off

[19] Articles 5-6 Citizens Directive.
[20] The six-month period was set out for example in Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), para 1.19.

date, and those who come later, as the latter will in principle be subject to the same immigration rules as nationals from non-EU states.

However, there is a significant risk that substantial numbers of eligible individuals will not register by any deadline. We have particular concerns in relation to children in care, elderly people, and other persons without access to smartphones or computers. The risk is that individuals who do not register will have no immigration status after the deadline, with only the Home Office's discretion on late applications to fall back on (see section 3, below). They may face difficulties in accessing employment, benefits, rented properties, driving licences and bank accounts. The Government has moreover confirmed there will be no protected status for such individuals.[21]

We therefore support calls for a declaratory model of registration, so that individuals' right of continuing residence would not be conditional upon registration.[22]

We recognise that specific arrangements would be needed for third parties, including employers (in both public and private sectors), landlords, and financial service providers. The main benefit of such a model is that those individuals who fail to register after the time at which they are required to prove their status would not run the risk of being subject to hostile environment measures related to illegal working, illegal renting and so on. A legislative guarantee would ensure that it was not *unlawful* for a third party to carry, to employ, to rent to, or to provide a financial service to, an eligible person who had not registered. These third parties may however require reassurance as to their legal position. For that reason, **we recommend that official guidance for employers and landlords should permit them to accept specified types of evidence from unregistered persons, and to give individuals who claim to be eligible the opportunity to register**.

Challenging refusals of status

At present, under the EU settlement scheme, there is no right of appeal against refusal decisions, and challenges are initially possible only by way of administrative review.[23] Administrative review in other immigration categories is generally a much less effective remedy than an appeal, as its essence is an internal review of the case file within the Home Office with no independent oversight.[24] Statistics indicate, however, that administrative reviews under the EU settlement scheme are significantly more effective.[25] This is most likely because reviewers can consider new evidence. If a decision is maintained after administrative

[21] Matthew Weaver and Amelia Gentleman, 'EU nationals lacking settled status could be deported, minister says', *Guardian*, 10 October 2019.
[22] See for example Joint Council for the Welfare of Immigrants, *Guaranteeing Settled Status for EEA Nationals* (February 2019).
[23] Immigration Rules, Appendix AR (EU).
[24] It has been reported that, in in-country cases, the success rate for challenges on appeal was 60% in 2015, whereas the success rate for administrative reviews was 8% in 2015-2016 and 3% in 2015-2016: Robert Thomas and Joe Tomlinson, 'A different tale of judicial power: administrative review as a problematic response to the judicialisation of tribunals' [2019] *Public Law* 537, at 555.
[25] Joe Tomlinson, 'Administrative review under the EU Settlement Scheme: what does the 90% success rate mean?', *Free Movement*, 4 December 2019.

review, the only way then to challenge it is by judicial review, which is a technically complex, lengthy and expensive remedy. The lack of an appeal right also means that, when a negative decision is notified, there is no *statutory* requirement to give reasons.[26]

The Withdrawal Agreement provides for a right of appeal in the event of a decision not to grant residence status. According to it, an unsuccessful applicant should have access *inter alia* to judicial redress procedures which "allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based."[27] That provision is reflected in the current European Union (Withdrawal Agreement) Bill.[28] which sets out a right of appeal on all "citizens' rights immigration decisions", including those concerning deportation and exclusion.[29]

One question which therefore arises is whether the current administrative review regime will remain in place in addition to the new appeal structure. We recommend clarification by the Government on this point but we believe that there are good reasons to retain the administrative review regime alongside appeals. This is because administrative reviews are quick and easier than appeals for applicants. They can resolve straightforward decision-making errors in a more efficient way than appeals. Individuals should have the choice of appealing or seeking administrative review, but the option of an appeal should remain open after an administrative review has concluded.

We also recommend clarification that appeal rights extend to cases where pre-settled status is offered or granted, even though the applicant was arguably entitled to settled status. **We recommend that legislation expressly provide that there is a right of appeal both against outright refusals of status under Appendix EU and against grants of pre-settled status by persons seeking settled status.**

The status of Court of Justice rulings after Brexit

As EU free movement law will continue to be relevant in the United Kingdom after Brexit, we consider that the rulings of the Court of Justice interpreting EU free movement law should have the highest status possible.

EU free movement law will firstly have ongoing relevance in the United Kingdom because of the binding character of the Withdrawal Agreement.[30] The Agreement is to have "the same legal effects" in the United Kingdom as in the EU and its Member States, which implies respect for the principle of supremacy. The Agreement also provides that natural persons may rely "directly" on the provisions of the Agreement "which meet the conditions for direct effect under Union law". To give effect to these guarantees, the United Kingdom is to ensure

[26] Immigration (Notices) Regulations 2003, SI 2003 No. 658, Regs 4 and 5. There is a separate duty in Immigration Act 1971, section 4(1) to give notice in writing as to *the outcome* of an application to grant or to vary leave.
[27] Article 18(1)(r) of the Withdrawal Agreement.
[28] In this report , references to the European Union (Withdrawal Agreement) Bill are to HC Bill 1 of 2019-2020, introduced on 19 December 2019.
[29] European Union (Withdrawal Agreement) Bill 2019, clause 11.
[30] Article 4 of the Withdrawal Agreement.

through primary legislation that "its judicial and administrative authorities" have "the required powers … to disapply inconsistent or incompatible domestic provisions".

The continuing role for free movement law, and for its concepts, is reinforced by two institutional provisions of the Agreement which relate specifically to citizens' rights. United Kingdom courts will have the power to make references to the CJEU in any proceedings which commenced at first instance in the eight years after the end of the transitional period.[31] Provision is also made for an independent authority to monitor the implementation and application of citizens' rights, which will be entitled to receive complaints, and will have the power to take legal action before a United Kingdom court or tribunal.[32]

Furthermore, the guarantees which apply where "the provisions of this Agreement [refer] to Union law or to concepts or provisions thereof" are particularly relevant to EU free movement law.[33] Concepts and provisions of that kind are to be interpreted in conformity with CJEU case law handed down *before* the end of the transition period. It is also stated that, in the interpretation and application of the Agreement, the United Kingdom's judicial and administrative authorities are to have "due regard" to CJEU case law handed down *after* the end of the transition period.

Because of these provisions, we consider it essential that all courts and tribunals in the United Kingdom interpret the Agreement in a manner which is both correct, and consistent with its interpretation in EU27 states. **We therefore recommend that all case law of the CJEU concerning concepts of free movement law should be binding in the United Kingdom, irrespective of when the judgments in question were handed down.** That principle implies a departure from the position set out in section 6 of the European Union (Withdrawal) Act 2018, according to which the Supreme Court is not be bound by pre-Brexit case law of the CJEU, provided that, in any decision to depart from CJEU case law, it applies the same test as would apply to a decision to depart from its own case law.[34] It also implies rejection of the proposal in the European Union (Withdrawal Agreement) Bill to amend section 6 by conferring a power on the Government to enable lower courts to depart from pre-2021 case law of the CJEU.[35]

3. Registration

This section is concerned with the details of the system of registration for post-Brexit status. This will be an especially important topic if a 'constitutive' approach to rights of residence is adopted, as the registration framework would then directly affect the legal status of individuals. It is also important under a declaratory model, however, as most persons with rights would still find it desirable to register in order to prove their entitlement to reside in the United Kingdom.

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31 Article 158 of the Withdrawal Agreement.

32 Article 159 of the Withdrawal Agreement.

33 Art 4(4).

34 The original version of Section 6 of the 2018 Act refers to case law prior to Brexit day. That is to be changed to the implementation period "completion day" by clause 26(1)(a) of the European Union (Withdrawal Agreement) Bill.

35 See the new section 6(5A) of the 2018 Act proposed in clause 26(1)(d) of the European Union (Withdrawal Agreement) Bill.

The deadlines

Because of the risks of non-registration by significant groups referred to above (section 2), **we recommend that the Home Office remove the deadline for applications to register**. Under a 'constitutive model' a permanent option to apply would mean there was a route available to regularise the status of those who have not previously applied. Equally, if a declaratory system were adopted, there removal of a deadline would ensure that individuals who needed documentation (or re-documentation) could obtain it.

Alternatively, we recommend a much longer initial deadline, linked to the period for which the scheme will remain open for specific categories of applicant. Registration for settled status will remain open for a minimum of five years after the cut-off date (the end of the transition period) for individuals 'upgrading' from pre-settled status (31 December 2025). Registration by pre-cut-off date family members who resided outside the United Kingdom, and for children born after the cut-off date will also be possible after the initial deadline for the lifetime of the persons concerned. As registration will remain available for these applications, it would be logical to keep registration open for *all* applicants for a similar period.

If deadlines are maintained, Article 18 of the Withdrawal Agreement requires national authorities to allow an application to be submitted 'within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline'. The Government has not, however, indicated what will constitute 'reasonable grounds'. **We recommend that the Home Office set out as soon as possible the range of circumstances in which its discretion to waive the deadline will be exercised**.

Automated checks: settled or pre-settled status?

The application process under the EU settlement scheme treats settled and pre-settled status together. The starting-point is that checks are carried out by the Home Office, relying upon information provided by the HMRC and DWP, for the previous seven tax years.[36] If these data checks do not identify a five-year period of residence, by default the system states that an applicant may be granted pre-settled status. An applicant who is offered pre-settled status then has two options: they may accept that status without doing anything further, or they may reject pre-settled status, and seek to prove that they are entitled to settled status.

In our view, a check of only the previous seven years is insufficient. An applicant is entitled to rely upon much older qualifying periods of five years to establish their *prima facie* eligibility for settled status (assuming they have not subsequently been absent from the United Kingdom for five years). Because of this legal position, **we recommend that the timeframe of the automated checks of past residence be widened, either to a ten-year period, or as far back as possible.**

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[36] Home Office, 'EU Settlement Scheme: UK tax and benefits records automated check' (29 March 2019).

We are also concerned the automated checks process is leading applicants to mistakenly accept pre-settled status. The application system is subject to change and recently has been amended to add a question at one point in the process as to whether the applicant has been resident in the UK for 5 years or less. **However, it is important that, in any iteration of the system, when offering pre-settled status, the online system should always indicate that settled status is a stronger status, that the core eligibility rule is five years' continuous residence at any time, and that the automated checks are not the only way to demonstrate the requisite five-year period of residence.**

Declarations of eligibility

When making an application under the settlement scheme, an individual is not required to provide a list of their periods of presence in and absence from the United Kingdom. Moreover, a very broad approach is taken to evidence of residence. For example, Home Office guidance states that, if HMRC find evidence of a monthly or a weekly pay slip, that is evidence that the person was resident for a whole month, while a self-assessment tax return which shows income from self-employment counts for the whole tax year.[37] The guidance on additional evidence of residence states that the following may count for a whole year: an annual bank statement or account summary, showing payments received or made in the United Kingdom in at least six months; a council tax bill; and, a residential mortgage statement or tenancy agreement, if there is proof that the mortgage or rent has been paid.[38]

There is a risk of over-inclusiveness within this approach, in that individuals may be taken to have been resident or present in the United Kingdom when in fact they were not. This risk is potentially mitigated through the requirement in the online application process for applicants to confirm *inter alia* that they are "eligible". This declaration is, however, made before the applicant is told the result of the automated check. Moreover, if the result leads to an offer of settled status, the applicant does not receive any further information about the period of residence indicated by the checks. It is easy to see how someone might inadvertently accept settled status when they were not entitled to it.

Acceptance in error may store up problems for the future. For example, a person may apply for naturalisation, and provide a list of absences which indicated that they were not entitled to settled status. Or, the Home Office might decide to check grants of settled status against its own exit and entry records. There is a risk that the Home Office might then take steps to revoke the settled status, on the grounds that the person obtained their status by deception.

It is unreasonable to expect applicants to grasp complicated requirements as to eligibility, or to accept the results of automated checks which are not fully revealed to them. The declarations in other Home Office application forms do not include an equivalent wording, for good reason. **We recommend that the reference in the online declaration to eligibility and residence in the United Kingdom be removed. Alternatively,**

[37] See the document 'How the automated check calculates the period of residence', available as a link from https://www.gov.uk/guidance/eu-settlement-scheme-uk-tax-and-benefits-records-automated-check.

[38] Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' (29 March 2019), Annex A.

applicants ought first to know the period for which the online system assumes they have been resident.

A physical document

We are concerned about how individuals will prove that they have registered and have settled or pre-settled status. The Home Office position is that this will be possible only by connecting to an online system, using the identity document and the email address or phone number provided by the applicant.

The lack of a paper document may however be problematic for a variety of reasons. For example, a person who was registered as a child may not have the relevant contact information to prove that, having lost access to the email address used to submit the application. A person may have registered, but subsequently lack capacity, leaving other people unable to access their information. The entitlement to British citizenship of the British-born children of individuals with settled status is also significant: they may require proof of the status of parents who are now absent from the United Kingdom, or who are deceased. Third parties such as employers or landlords may be unwilling or unable to confirm an online status.

The possession of a physical document would make it far simpler for the status of the relevant person to be established in many situations. **We therefore recommend that those who register under the EU settlement scheme should have the possibility to obtain a physical document**.[39]

4. Special cases

This section concerns several categories of person who do not fit fully into the Withdrawal Agreement and/ or Appendix EU. Frontier workers benefit from the Agreement, but are to be protected in the United Kingdom outside Appendix EU. In addition, persons with 'derivative' rights, mainly as carers, and the family of returning British citizens, are not protected by the Agreement, but have been included within Appendix EU.

Frontier workers

In EU free movement law, a 'frontier worker' is an EEA+ national who is employed, or engaged in self-employed activity, in a Member State other than the one in which they reside. Under the Withdrawal Agreement, continuity of status will be guaranteed for EU citizens who were frontier workers in the United Kingdom before the end of the transitional period. Employed frontier workers will be able to continue as such, including by taking new employment, and self-employed frontier workers will continue to have the right to take up and to pursue activities as self-employed persons.[40] Member States will though be permitted for the first

[39] See House of Commons Home Affairs Committee, *EU Settlement Scheme: Fifteenth Report of Session 2017–19* (30 May 2019), para 72.
[40] Articles 24 and 25 of the Withdrawal Agreement.

time to require frontier workers to hold a document certifying that status.[41] The European Union (Withdrawal Agreement) Bill contains a power to adopt Regulations concerning frontier workers.[42]

Frontier workers may be eligible for pre-settled status or settled status under the EU settlement scheme. Beyond those cases, the Government has failed so far to specify in full the provision it will make for frontier workers. Some information was provided in guidance published by the Home Office on 19 June 2019.[43] According to it, EEA+ frontier workers will be able to continue as such in United Kingdom, if they began that frontier work before 31 December 2020. A frontier worker document to prove their right to enter and work in the United Kingdom will eventually be required, with the details to be "set out in due course."

Key details which are lacking, are as follows:

- The documentation to be issued to frontier workers for periods after the cut-off date.
- The requirements for frontier worker status. For example, how far back will it be possible to go?
- The conditions to be attached to frontier worker status. For example, how regularly will a frontier worker have to come back to the United Kingdom to maintain their status?
- Whether frontier workers will be free to switch to take up residence for employment in the United Kingdom. If so, will they be permitted to sponsor family members to reside with them?
- How the EU settlement scheme will interact with the new frontier worker status. What will happen to frontier workers who were granted pre-settled status but who do not become eligible for settled status later?

We recommend that full details are published as to the immigration arrangements which will be made for frontier workers after the free movement of persons rules come to an end.

Carers and those related to them

Under EU free movement law, as implemented in the United Kingdom, there are three sets of 'derivative' rights specifically for carers and their family members, outside the Citizens Directive.[44] These are:

- *Chen* rights of residence for the primary carer of a self-sufficient minor EEA+ national who is self-sufficient in the United Kingdom, based on the right of EU citizens to reside throughout the EU territory in Article 21 TFEU.[45]

[41] Article 26 of the Withdrawal Agreement.
[42] European Union (Withdrawal Agreement) Bill, clause 8.
[43] Home Office, *Rights and status of frontier workers in the UK after Brexit* (19 June 2019).
[44] See Immigration (European Economic Area) Regulations 2016, Regulation 16.
[45] *Chen*, Case C-200/02 [2004] ECR I–9951.

- *Ibrahim/ Teixeira* rights of residence for (a) children of a former EEA+ national worker, while they are in full-time education, and (b) their primary carer. These are based on the right to education for workers' children set out in Article 10 of Regulation No. 492/2011.[46]

- *Zambrano* rights of residence for family members, where their stay in a Member State is necessary to ensure that an EEA+ national can remain within the EEA+ as a whole.[47] These rights are based on the right of EU citizenship set out in Article 20 TFEU. In practice, in the United Kingdom, they are of relevance almost exclusively to the family members of British citizens.

These rights apply irrespective of the nationality of the person with the relevant connection to an EEA+ national, but are of particular relevance to third-country nationals. In all three cases, the 2016 Regulations provide that other children under 18 may benefit, if they have the same primary carer, and that person would otherwise be unable to reside in the United Kingdom.

The Withdrawal Agreement covers *Chen* and *Ibrahim/ Teixeria* rights, as it protects rights of residence under Article 21 TFEU and Regulation 492/211.[48] The Agreement will not though protect *Zambrano* rights, as it does not mention Article 20 TFEU, and anyway does not cover individuals with a connection to British citizens in the United Kingdom.[49]

We therefore welcome the commitment to protect all three groups - including *Zambrano* rights-holders - domestically through the EU settlement scheme.[50] Within Appendix EU, the 'other rights' categories distinguish between individuals with a "derivative right to reside" (*Chen* and *Ibrahim/ Teixeira* cases) and individuals with a "*Zambrano* right to reside".[51] Applications on the basis of *Chen* and *Ibrahim/ Teixeira* rights have been possible since 30 March 2019, and those in the *Zambrano* category since 1 May 2019.

One difficulty in the achievement of these rights is the lack of support for applications. Home Office policy is that these cases require the submission of a paper form, which applicants must request from the Home Office, and which is provided on a case-by-case basis.[52] Our information is that Home Office caseworkers frequently act as 'gatekeepers', to deny access

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[46] *Teixeira* (Case C-480/08) [2010] ECR I-01107 and *Ibrahim* (Case C-310/08) [2010] ECR I-0196.
[47] *Ruiz Zambrano*, Case C-34/09 [2011] ECR I-0117; *Dereci*, Case C-256/11 [2011] ECR I-11315.
[48] Articles 13 and 24(1). The scope of *Ibrahim/ Teixeria* rights will be somewhat broadened, as the Agreement includes all direct descendants (not only children) and covers the descendants of self-employed persons (in addition to workers).
[49] For the omission of Article 20 TFEU, see Article 13 of the Agreement. The exclusion of British citizens and their family members in relation to the United Kingdom follows from Article 10 of the Agreement.
[50] Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), para 6.12 and 'EU Settlement Scheme: Written statement', *House of Commons Debates* HCWS1387, 7 March 2019 (Caroline Nokes)
[51] See the definitions in Annex 1 to Appendix EU. Provision for indefinite leave is made in paragraph EU11 for *Chen*, *Ibrahim/ Teixeira* and *Zambrano* rights, and for limited leave in paragraph EU14 for all three groups.
[52] 'Apply to the EU Settlement Scheme (settled and pre-settled status)' https://www.gov.uk/settled-status-eu-citizens-families/not-EU-EEA-Swiss-citizen (as of November 2019).

to these forms. **We recommend that online applications should be permitted for derivative rights categories. If online applications are not permitted, a paper application form should be provided to anyone who requests one.**

A second issue specifically concerns *Zambrano* applications. Under a new policy published on 2 May 2019, *Zambrano* applications made under *the EEA Regulations* will be refused if the person is eligible to apply under Appendix FM of the Immigration Rules.[53] In practice, this means that a person with a British citizen child should first make a human rights application on the basis that "taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK". It will also be necessary to pay a fee of £1,033, unless a fee waiver is obtained. This policy may well be unlawful as a matter of EU law.

Under *Appendix EU*, the definition of a "person with a Zambrano right to reside" includes a requirement that the applicant be "without leave to enter or remain in the UK granted under another part of these Rules." Home Office guidance goes further, however, to deny eligibility where "there is (or was) a realistic prospect that an application by them for leave to enter or remain under Appendix FM to the Immigration Rules, or otherwise relying on ECHR Article 8 … would succeed (or would have succeeded)."[54] This appears to us inconsistent with the provisions of Appendix EU. More generally, **we recommend that individuals who are eligible in the *Zambrano* category be granted status under Appendix EU, irrespective of actual or potential grants of leave under other parts of the Immigration Rules.**

Family of returning British citizens

So-called '*Surinder Singh* rights' permit residence by the family members of a British citizen who has moved to the United Kingdom after a period of qualifying residence in another EEA+ state, provided the family member resided there with them.[55] These rights derive from the EU citizen's right to reside in the EU territory, set out in Article 21 TFEU. They are extended to all EEA+ nationals in the United Kingdom's implementation.[56]

Surinder Singh rights are not protected under the Withdrawal Agreement, as it does not cover individuals with a connection to British citizens in the United Kingdom.[57] Here too, we welcome the Government's commitment to protect *Surinder Singh* rights domestically.[58] Within Appendix EU, *Surinder Singh* cases are protected through the concept of a "family member of a qualifying British citizen".[59] Applications under this heading have been possible since 30 March 2019.

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[53] *Free movement rights: Derivative rights of residence* (2 May 2019), pp 52-53.
[54] Home Office, *EU Settlement Scheme: person with a Zambrano right to reside* (1 August 2019), p. 18.
[55] *Surinder Singh*, Case C-370/90 [1992] ECR 4265 and O *and* B, Case C-456/12, [2014] 3 CMLR 17.
[56] Immigration (European Economic Area) Regulations 2016, Regulation 9.
[57] See Article 10 of the Withdrawal Agreement.
[58] See references in note 50, above.
[59] Provision for indefinite leave is to be found in paragraph EU12, and for limited leave in paragraph EU14.

One issue with *Surinder Singh* cases is that Appendix EU defines "qualifying British citizen" by reference to the equivalent provision in Regulation 9 of the Immigration (European Economic Area) Regulations 2016. It is however far from certain that Regulation 9 is compatible with the rights of returning nationals in EU law. In *O and B* in 2014, the CJEU treated "genuine" residence by an EU citizen and family members in the other state as the central requirement, and implied that *any* period of qualifying residence under Article 7 was sufficient for that to be established.[60] In contrast, the 2016 Regulations treat qualifying residence and whether residence is "genuine" as separate requirements. They also list various other factors as relevant to the genuineness of residence: whether the British citizen's "centre of life" was transferred to the other state, the length of the parties' joint residence in the other state, "the nature and quality" of their accommodation in the other state, whether it was the British citizen's principal residence, the degree of the parties' "integration" in the other state, and whether the other state was the family member's first place of lawful residence in the EU. None of these other factors has a clear foundation in the *O and B*, or elsewhere in the jurisprudence of the CJEU. Moreover, the approach taken in Regulation 9 on this point was recently found to be incompatible with EU law by the Upper Tribunal.[61]

Even though *Surinder Singh* rights are not covered by the Withdrawal Agreement, if the United Kingdom elects to protect individuals with those rights, we consider that that ought to be done on the terms that EU law requires. **We therefore recommend that the provisions concerning the *Surinder Singh* category in Appendix EU be amended, to require "genuine" residence in the other EEA+ state by the British citizens and family members concerned, but without reference to other factors.**

A second concern with the *Surinder Singh* category is that - as with derivative rights (above) - the Home Office requires the submission of a paper form, rather than an online application.[62] **We recommend that online applications should be permitted in the *Surinder Singh* category. If online applications are not permitted, a paper application form should be provided to anyone who requests one.**

5. Retention of rights of residence

This section is concerned with the retention of rights of residence under Appendix EU, once acquired. Three issues are considered: loss of status through absence, a failure to progress from pre-settled status to settled status, and the implications of not updating personal details with the Home Office.

Losing status through absence

The loss of status through absence is likely to prove a challenging issue in the future, as that will be the main way that settled and pre-settled status come to an end. Legally, leave will lapse after a person has been outside the United Kingdom for the requisite period. The question though is *how* status will be treated as lost in those circumstances. There are dangers

[60] Judgment in *O and* B, para 56.
[61] *ZA Afghanistan* [2019] UKUT 281 (IAC).
[62] 'Apply to the EU Settlement Scheme (settled and pre-settled status)' https://www.gov.uk/settled-status-eu-citizens-families/not-EU-EEA-Swiss-citizen (accessed 2 August 2019).

with automatic withdrawal of status, because of the potential for errors or gaps in the administration of border control, as well as the possibility of unrecorded entry from the Republic of Ireland. **We therefore recommend that a specific decision be required to confirm the lapsing of settled or pre-settled status after a period of absence from the United Kingdom. The individual concerned should be notified, and should have the opportunity to provide evidence of their presence in the United Kingdom in the period in question.**

We are also concerned at the potential conflict between settled status and the provision for returning residents in the Immigration Rules. Under paragraph 18 of the Rules, in order to be admitted as a returning resident, a person with indefinite leave to enter or remain who has been away for two years or less must seek admission "for the purpose of settlement". Related to that, under paragraph 19, a person who has been away for more than two years may need to apply for entry clearance. **We recommend that the provisions of the Immigration Rules concerning returning residents be amended, to reflect the five-year period of absence allowed to individuals with settled status, and to remove the requirement in their case that admission be sought for the purpose of settlement.**

Persons with pre-settled status who do not obtain settled status

For those who are initially granted pre-settled status, the expectation is that they will go on to obtain settled status once they have five years' continuous residence. What though is to be the position where they do *not* do so?

One case is where a person is eligible for settled status, but simply does *not apply*. The danger is that they may become, or be treated as, an overstayer, once the period of their pre-settled status comes to an end. A pragmatic argument may be made that, where a person maintains continuity of residence, but fails to apply for settled status, they should not be left without status. We would also question whether such an outcome be compatible with Article 13 of the Withdrawal Agreement, which provides for a continuing right to residence by individuals who are eligible. While states may require registration, no provision is made for a *second* registration by the same person.

We recommend that the Government set out protective arrangements for individuals who obtain pre-settled status but who, despite being eligible through continuous residence, do not go on to apply for settled status. That could be achieved by converting pre-settled status to settled status automatically.

A second case is where a person with pre-settled status is *ineligible* for settled status through excess absences. Pre-settled status itself is retained until it expires, or for up two years' absence from the United Kingdom. However, a person who is absent from the United Kingdom for more than six months out of twelve generally breaks their continuity of residence for the purposes of acquisition of settled status. As a result, many individuals with substantial periods of residence in the United Kingdom will not be able acquire settled status at the end of their period of pre-settled status.

We are concerned that persons with pre-settled status, and who are resident in the United Kingdom, but who are frequently absent from it, will come to lose their right of residence after Brexit. To avoid that outcome, **we recommend that it should be possible for**

persons with pre-settled status to extend that status, as long as they continue to be resident in the United Kingdom.

We are also concerned that this legal position is not widely understood by individuals with pre-settled status. While the information given to applicants does refer to this rule, it is not highlighted with sufficient prominence. **We therefore recommend that the letter given to those granted pre-settled status, rather than information sheet, state clearly that, if the person spends more than six months in a year outside the United Kingdom, they will not qualify for settled status.**

Updating personal information

Finally, what are the implications of an individual's failure to update the personal information provided at the time of registration? The letter received by successful applicants contains the following two statements:

> "To maintain access to your online status and *keep your status up to date*, you will need to tell us if you change your email address or mobile phone number."
>
> "If you renew or replace the identity document you used in your application, or you change your name after making your application, you will need to tell us *so that your immigration status is up to date*."

These statements imply that settled and pre-settled status could be lost or withdrawn if the applicant's contact details are out of date, or a new identity document has not been recorded. Loss of status in these circumstances is not provided for in Appendix EU, however, and would introduce instability into the post-Brexit arrangements. **We therefore recommend that Home Office information make clear that a failure to update contact or identity document details will not cause pre-settled status or settled status to be lost or withdrawn.**

6. Dual nationals and their family members

Individuals who are simultaneously British citizens and nationals of an EEA+ state, and their family members, are generally excluded from the EU settlement scheme. This section addresses a number of problems posed by that exclusion. It is discriminatory because of the sharp differences between family sponsorship entitlements under the EU settlement scheme and the Immigration Rules which would otherwise be applicable. It may act as a barrier to naturalisation or registration as a British citizen by an EEA+ national. It is potentially problematic in cases where British citizenship is overlooked in the first instance. It also raises particular issues in the Northern Irish context, as it is in tension with the recognition in the Good Friday Agreement of a right to identify as Irish alone.

The position of dual British/EEA+ nationals

From 1973 to 2012, the United Kingdom treated dual British/EEA+ nationals in the same way as other EEA+ nationals, without apparent difficulty. The position changed after the CJEU held

in *McCarthy* that dual nationals who had not exercised free movement rights did not benefit from the Citizens Directive.[63] That prompted the United Kingdom to amend the Immigration (European Economic) Area Regulations, to remove protection from EEA+ nationals who were also British citizens. This reform came with a transitional provision, which protected the right of residence of family members of dual British/EEA+ nationals who were eligible on 16 July 2012, and who had obtained residence documents by 16 October 2012 (when the reform took effect).[64]

Subsequently, in *Lounes*, the CJEU held that EU citizens who exercised free movement rights, and then obtained the nationality of a state of residence, should continue to benefit from those rights.[65] That led to a further amendment, so that the definition of 'EEA national' in the 2016 Regulations now excludes British citizens, unless (a) prior to their acquisition of British citizenship they exercised an EU right of ordinary residence, and subsequently continued to do so, or (b) prior to their acquisition of British citizenship they had a right of permanent residence.[66]

The approach to dual British/EEA+ nationals in the 2016 Regulations has been followed in the definition of 'EEA citizen' in Appendix EU.[67] The one exception is that, in line with the *Lounes* judgment, the family of what are termed 'relevant naturalised British citizens' may make applications under the scheme.[68] The overall effect is to deny protection to dual British/EEA+ nationals who acquired both citizenships at birth, and therefore to their family members who are not EEA+ nationals.

We consider it wrong in principle that dual British/EEA+ nationals who are resident in the United Kingdom are discriminated against, by comparison with residents who hold only the nationality of another EEA+ state. It is of course possible for such a dual national to renounce their British citizenship. This option is not especially attractive, however: the fee for renunciation is £372; to be effective, renunciation would have to occur before the cut-off date; and, renunciation would initially give access only to pre-settled status, as the period of continuous residence would start only when British citizenship was given up. It also seems unfair that a person who wishes to retain their British citizenship should have to give it up in order to gain access to the scheme.

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[63] *McCarthy v. SSHD*, Case C-434/09, [2011] ECR I-03375 and definition of 'EEA national' in Immigration (European Economic Area) Regulations 2006 (SI 2006 No. 1003), Reg 2, as amended by SI 2012 No. 1547.

[64] See now Immigration (European Economic Area) Regulations 2016, Schedule 6, para 9, inserted by Immigration (European Economic Area) (Amendment) Regulations 2017 (SI 2017 No. 1).

[65] *Lounes v SSHD*, Case C-165/16, CJEU judgment of 14 November 2017.

[66] See Reg 2 and Reg 9A of the 2016 Regulations, as provided for by the Immigration (European Economic Area) (Amendment) Regulations 2018 (SI 2018 No. 1801), with effect from 24 July 2018.

[67] Appendix EU, Appendix 1, defines 'EEA citizen' as "a person who is a national of: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden or Switzerland, and who (unless they are a relevant naturalised British citizen) is not also a British citizen."

[68] Appendix EU, Appendix I, definition of 'relevant naturalised British citizens'. Despite the terminology used, the families of persons who *registered* as British citizens while exercising free movement rights are also covered by the exception. There is no requirement of continuing qualifying residence by the sponsor.

In order to address this discrimination, **we recommend that Appendix EU be amended so that family members of dual British/EEA+ nationals may apply under the EU settlement scheme as if the sponsor were eligible.**

We also recommend making provision for pre-*McCarthy* residents. **The protection for family members who acquired residence documents prior to the exclusion of dual British/ EEA+ nationals on 16 October 2012 should be maintained, by introducing transitional provisions into Appendix EU.**

Changes of nationality

Situations may arise where changes in nationality potentially affect the operation of the EU settlement scheme. One is where an EEA+ national has obtained settled status, naturalises or registers as a British citizen, and then loses their other EEA+ nationality. As things stand, it appears that any of their family members who has not already applied for settled status under the settlement scheme by that point then ceases to be eligible for it. That may act as a disincentive to naturalisation or registration as a British citizen. **We therefore recommend that, where an EEA+ national naturalises or registers as a British citizen, after acquiring settled status, the position of their family members under the EU settlement scheme should not be affected.** This should include the case where a resident EEA+ national who becomes a British citizen loses their EEA nationality under the law of the other state.[69]

A second case is where a person renounces British citizenship. In that situation, the individual will come within the definition of "EEA national" under the settlement scheme, but the period prior to renunciation will not count towards the qualifying period, either for them or for their family members. **We recommend that, under the EU settlement scheme, residence in the United Kingdom by former dual British/ EEA+ nationals who have renounced their British citizenship be treated equally with that by other EEA+ nationals.**

Dual nationality overlooked in the first instance

Lastly, what will be the position where a person considered themselves to be solely the national of an EEA+ state (or of more than one) when they applied under the EU settlement scheme, but it later turned out that they were also a British citizen at that time? The most likely scenario is that a person acquired British citizenship automatically through birth in the United Kingdom to EEA+ parents, one or both of whom was 'settled'. If no steps were taken to acquire a British passport for them, then they may be unaware of their British citizenship.

If a person is mistakenly treated as if they were an EEA+ national alone, that is unlikely to pose a legal problem for them, as they will anyway 'gain' the right of abode in the United Kingdom. It will though potentially affect the position of family members, whose initial grant

[69] At least eleven EEA+ states have had legal provisions of this kind in the recent past: Austria, Czech Republic, Denmark, Estonia, Germany, Ireland, Latvia, Lithuania, Netherlands, Norway and Spain. See Gerard-René de Groot and Maarten Vink, *Loss of Citizenship. Trends and Regulations in Europe* (EUDO, 2010), pp. 7-8, available at http://eudo-citizenship.eu/docs/Loss.pdf

of status under the scheme may be called into question, and who will be prevented from new applications. **We recommend that, where an application was mistakenly made under the EU settlement scheme by a dual national, grants of status to family members should not be called into question, and new grants to family members should continue to be possible**.

Northern Ireland

There is a further, specific issue in respect of dual British/Irish citizens from Northern Ireland. Their exclusion from the EU settlement scheme appears to conflict with Article 1(vi) of the Good Friday/ Belfast Agreement which "recognise[s] the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments."[70] The British and Irish Governments declared at the time of the Good Friday/ Belfast Agreement that, for this purpose, the "people of Northern Ireland" referred to "all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence."[71]

The "birthright" clause of the Good Friday/ Belfast Agreement does not as such confer a right to *choose* nationality. Nevertheless, it appears to us inconsistent with the principle of identification as Irish that persons from Northern Ireland should be unable to rely upon the EU settlement scheme in relation to their family members. **We therefore recommend that the family members of dual British/ Irish nationals from Northern Ireland be permitted to benefit from the EU settlement scheme.**

7. Exceptions to rights of residence

This section addresses four issues concerning exceptions to rights of residence after Brexit: periods of imprisonment, the deportation and exclusion of individuals for public policy reasons, suitability requirements linked to deportation and exclusion, and suitability requirements linked to previous immigration applications.

Periods of imprisonment

In EU free movement law, individuals who are in prison, though physically on a member state's territory, are not considered 'resident' there. The CJEU has held that, for the purposes of acquisition of a right of permanent residence, periods in prison break continuity of residence: such periods do not count as residence, and neither is it possible to aggregate periods before and after the time spent in prison.[72] The 2016 Regulations and Appendix EU also provide that

[70] British-Irish Agreement 1998, Article 1(vi).
[71] British-Irish Agreement 1998, Annex 2.
[72] Case C-378/12 *Onuekwere v Secretary of State for the Home Department* [2014] 1 WLR 2420.

continuity of residence is broken when a person "serves a sentence of imprisonment".[73] At the same time, under EU law, the 2016 Regulations and Appendix EU, a right of permanent residence which already existed *prior* to a period of imprisonment is preserved during it, and imprisonment itself is not a ground for loss of status.[74]

We are concerned at the position of individuals *without* a right of permanent residence who are in prison or in a youth offender institution on the cut-off date for the free movement of persons regime?[75] Because there is no continuity of residence, such persons would be definitively excluded from the EU settlement scheme. Indeed, that would be the case even if they were released soon afterwards, so that they still had time to register by the relevant deadline (i.e., 30 June 2021 or 31 December 2020, as the case might be). This position appears arbitrary, as it applies to everyone in prison or a youth offender institution on the relevant date, irrespective of the length of their sentence, and many such persons would not subsequently be deported on public policy grounds. **We recommend that applications for pre-settled status be permitted by individuals who are in prison or in a youth offender institution on or soon before the cut-off date of free movement of persons rights.**

Deportation and exclusion on public policy grounds

The Citizens Directive provides a comparatively high standard of protection against the deportation and exclusion of those with immigration rights under EU free movement law.[76] While Member States may restrict freedom of movement for public policy or public security reasons, such measures should comply with the principle of proportionality, and should be based "exclusively on the personal conduct of the individual", which must "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." It is expressly provided that criminal convictions "shall not in themselves constitute grounds" for taking such measures. Those with a right of permanent residence may not be expelled other than on "serious grounds of public policy or public security", while EU citizens who have resided in the state for the previous ten years, or who are minors, may be expelled only on "imperative grounds of public security".

Under the Withdrawal Agreement, these principles will be maintained in force for conduct which occurred before the cut-off date (31 December 2020).[77] For conduct after that date, the Agreement provides that "national legislation" may apply. In the case of the United Kingdom, that means applying the standard that the person's presence in the United Kingdom is "not conducive to the public good." The provision for automatic deportation in the UK Borders Act 2007 would also apply to a person sentenced to a period of imprisonment of a

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[73] Immigration (European Economic Area) Regulations 2016, Reg 3(3) and Appendix EU, Annex I, definition of 'continuous qualifying period'.
[74] That conclusion is also clear in the guidance document *EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members* (29 March 2019), p. 60.
[75] The judgment in *Secretary of State for the Home Department* v *Viscu* [2019] EWCA Civ 1052 implies that EU free movement rights are limited in the same way by periods in young offender institutions as periods of imprisonment. The Home Office takes the same view in relation to applications under Appendix EU: see Immigration Minister, Brandon Lewis, 'Young Offenders: EU Nationals', written answer, *House of Commons*, 6 September 2019.
[76] Directive 2004/ 38, Articles 27 and 28.
[77] Withdrawal Agreement, Article 20(1).

year or more, or if the offence is otherwise classed as serious, subject to the Article 8 ECHR limits to deportations.

One gap in these arrangements is that, when EU free movement rights are 'switched off' in the United Kingdom, provision will be necessary to ensure that the EU rules on exclusion and deportation continue to apply to pre-cut-off date conduct. One option could be to maintain the relevant parts of the 2016 Regulations in force. That would however limit protection to individuals with rights under EU free movement law, and not the wider category of those eligible under Appendix EU. **For that reason, we recommend that primary legislation, give protection concerning exclusion and deportation for pre-cut-off date conduct to all those who benefit from the EU settlement scheme.**

A further issue concerns the formulation of the EU standard at the domestic level. At present, Schedule I to the 2016 Regulations contains a list of "considerations" of public policy and of the fundamental interests of society, to which a court of tribunal considering a decision to deport or to exclude "must …have regard".[78] The difficulty is that this list introduces interpretations of these concepts which are questionable as a matter of EU law. Examples are the statement that "having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom"; that a person's persistent offending or numerous convictions increase the likelihood that their presence "represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society"; and, that "maintaining the integrity and effectiveness of the immigration control system", "preventing the evasion of taxes and duties" and "protecting public services" are all "fundamental interests" of society.[79]

We consider it undesirable that parts of the 2016 Regulations which are suspect as a matter of EU law should continue into post-Brexit law. For that reason, **we recommend that Schedule I to the 2016 Regulations be excluded when the concepts of public policy and public security are retained, post-Brexit, for conduct prior to the cut-off date.**

Mandatory exclusion on suitability grounds

Paragraph EU15 provides that an application for settled or pre-settled status "will be refused" where the applicant is, at the time of the decision, subject to a deportation order or a decision to make a deportation order, or is subject to an exclusion order or an exclusion decision. We are concerned that, as currently framed, Appendix EU does not respect the terms of Article 20 of the Withdrawal Agreement.

One issue here is that EU free movement law permits exclusion or deportation of an individual only where they pose a *current* threat to public policy or public security which is sufficiently serious to justify such a measure. By contrast, as drafted, paragraph EU15 excludes all those subject to a current removal or exclusion decision, regardless of whether they pose a current threat. It may be however that the circumstances which led to the making of the deportation

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[78] 2016 Regulations, Regulation 27(8).
[79] For a detailed critique of Schedule 1, see ILPA, *The Immigration (European Economic Area) Regulations 2016: A Commentary* (12 February 2017), pp 26-28, available at http://www.ilpa.org.uk/data/resources/32969/17-02-12-European-Econonmic-Area-Regulations-2016-final.pdf.

decision or order no longer pertain – for example, where an applicant has not been removed from the United Kingdom, and has successfully addressed the risk factors which led to their offending.

We recommend the amendment of the suitability provisions in Appendix EU to require consideration of the current risk posed by an individual, and the exercise of discretion in appropriate cases

A second issue is that there is no requirement within paragraph EU15 to respect the principle of proportionality found in EU law. The principle of proportionality in Article 27(2) of the Citizens Directive and the Withdrawal Agreement ought however to govern decisions to exclude or remove a person from the United Kingdom in relation to pre-cut-off conduct. The principle is moreover recognised in paragraph EU16 concerning previous immigration applications (discussed below).

We recommend that a requirement of proportionality be added to Appendix EU, to mandate consideration of whether refusal of the application is both necessary and the least restrictive measure to protect a legitimate public interest.

A third issue is that, as currently framed, paragraph EU15 requires that an application be refused simply because a deportation or exclusion decision has been taken, even if that decision could subsequently set aside on appeal. We are concerned that the fact of a deportation/exclusion decision having been made should not in itself act as a mandatory bar to a grant of status. Some applicants will go on to succeed in an appeal, and will then be permitted to obtain settled or pre-settled status, but will have been unable to make an application for settled or pre-settled status at the time that they wished. **We recommend that an application should not be refused under paragraph EU15 unless appeal rights concerning deportation or exclusion have been exhausted.**

Immigration-related refusals

We also have concerns regarding the two 'discretionary' immigration-related grounds for refusal contained in paragraph EU16.

Firstly, under sub-paragraph EU16(a), an application may be refused where "false or misleading information, representations or documents have been submitted" which were material to the decision to be taken. The wording of paragraph EU16(a) is consistent with the test for all applications for leave to remain in paragraph 322 of the Rules. It does not however reflect established domestic case law concerning paragraph 322, which requires dishonest intent on the part of the applicant.[80] Instead, as currently framed, it appears to permit the refusal of an application on the basis of innocent mistake, or where the falsehood is unknown to the applicant. **We recommend that the possibility to refuse an application on suitability grounds because of the provision of "false and misleading" information should be limited to cases where it is reasonable to conclude that there was dishonest intent in the making of an application.**

[80] *Adedoyin v SSHD* [2010] EWCA Civ 773.

A further issue with the framing of paragraph EU16(a) is that the power to refuse an application on "false or misleading" grounds is likely to disproportionately affect vulnerable individuals, such as victims of trafficking or domestic violence, who do not have control over statements made or documents submitted on their behalf. Individuals in controlling and coercive relationships should not be held responsible for, nor prejudiced by, false or misleading information, representations or documents which they submit in an application, where that is linked to the situation of abuse. **In our view, Appendix EU and associated guidance should be amended to require caseworkers to exercise discretion so that vulnerable persons such as trafficking or domestic violence victims are not unfairly refused.**

We also have concerns about paragraph EU16(b), which permits an application to be refused where the individual is subject to a removal decision on the grounds of their non-exercise or misuse of rights under the Citizens Directive. As in relation to paragraph EU15, **we recommend that the fact of a removal decision should not be grounds for refusing an application, where it remains possible for that decision to be successfully challenged on appeal**.

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This report was drafted by an expert group on EU residence rights established by ILPA. The contributors to the report, in alphabetical order, were as follows:

Gabriella Bettiga (MGBe Legal)
Charles Bishop (Immigration Law Practitioners' Association)
Tom Brett Young (VWV solicitors)
Simon Cox (Open Society Justice Initiative)
Chris Desira (Seraphus solicitors)
Eva Doerr (Lamb Building chambers)
Paul Erdunast (Temple Garden Chambers)
Elspeth Guild (Kingsley Napley and Queen Mary University of London)
Leonie Hirst (Barrister at law)
Alison Hunter (Wesley Gryk solicitors)
Jonathan Kingham (LexisPSL Immigration)
Rowena Moffatt (Doughty Street chambers)
Bernard Ryan (University of Leicester)
Kim Vowden (Kingsley Napley)

Bernard Ryan acted as chair of the group, and lead author.

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