Reforming the EU Settlement Scheme:

The Way Forward for the EUSS

A Report by JUSTICE

Chair of the Committee
Paul Bowen KC

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The recommendations set out in this report are those of JUSTICE, having been informed by the views of members of the Working Group. It does not reflect the views or policy aims of the organisations or institutions to which the Working Group members belong.

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FOREWORD

The legal consequences of Brexit are profound. Those most acutely affected are: European Union ("**EU**"), European Free Trade Association ("**EFTA**"), and Swiss nationals and their family members who exercised their EU citizenship and free movement rights to live and work in the United Kingdom; and UK nationals living in the EU member states, the EFTA countries and Switzerland prior to the expiry of the Brexit transition period on 31 December 2020. Since then, UK law has applied the same immigration rules to newly arrived nationals of EU member states, EFTA countries and Switzerland as it applies to citizens of other countries. Likewise, EU immigration rules now treat British citizens (who were not already living in the EU) the same as other non-EU citizens. No precise figures are available for the numbers affected. Prior to Brexit, an estimated 3-4 million EU/EFTA/Swiss nationals and their family members were living in the UK with about 1 million UK citizens living in EU/EFTA/Switzerland. Ensuring that these individuals were not prejudiced was a key objective of the EU and UK Withdrawal Agreement ("**WA**"), which guarantees reciprocal rights intended to reproduce many of those enjoyed pre-Brexit. The European Economic Area ("**EEA**"), EFTA Separation Agreement and the Swiss Citizens' Rights Agreement largely mirror the WA. Those agreements are given legal and practical effect in the UK through the EU Settlement Scheme ("**EUSS**"). The EUSS creates two protected categories: those with 'settled status' (who had lived in the UK for five years prior to 31 December 2020) and those with 'pre-settled status' (who had lived in the UK for fewer than five years). Those making a successful application under the EUSS remain entitled to live and work in the UK.

In many respects the EUSS can be considered a success. Administered through an online system, a remarkable number of applications have been processed through the scheme. As of 30th September 2023, the EUSS had processed 7.45 million applications from an estimated 6.2 million people. Status has been granted to an estimated 5.7 million people with around 3.7 million people now holding settled status and 2 million holding pre-settled status. The numbers are unprecedented. By way of comparison, approximately 300,000 visa applications have been received from Ukrainians moving to the UK under the Ukraine Family Scheme and Ukraine

Sponsorship Scheme and about 24,000 individuals have arrived in the UK under the Afghan Resettlement Programme. The numbers processed through the EUSS far exceed earlier estimates. The published EUSS Impact Assessment stated that the Home Office internal analysis estimated (though acknowledging that the estimations were inherently uncertain) that the total number of EEA citizens and their family members was likely to be between 3.5 and 4.1 million.

The success of the EUSS is qualified, however. Many of those affected have yet to apply as they remain unaware of the need to regularise their immigration status, with potentially dire consequences for their employment, housing and access to health and welfare benefits. A steady volume, between 15,000 and 20,000 a month, of late applications continue to be made. When applications are made, they are now beset by backlogs and delays. Decision-making lacks clarity and consistency. Applications are often wrongly refused that could have been made correctly with little additional effort by the Home Office. Injustices can be hard or impossible to remedy. The administrative review scheme has been abolished. Certain rejection decisions are not appealable. Where appeals to the Immigration Tribunal are available, they are complicated and expensive, with public funding often unavailable and few lawyers with the necessary skills to bring them. Even once status has been granted there remain challenges for the unwary. The people most likely to be adversely affected by these shortcomings are excluded, marginalised or otherwise vulnerable members of society: older people, victims of trafficking, victims of domestic violence, homeless people, children in care, those who lack literacy, language or digital skills, and people with criminal records. In some cases, vulnerability is created due to persistent problems in demonstrating status.

The legal architecture of the EUSS is highly complex and teasing out its effects requires unusual levels of legal expertise: in public law, human rights law, EU law, immigration law, housing, welfare, healthcare, discrimination and employment law. JUSTICE has pulled together a powerful team of legal experts and representatives of advocacy groups with vast collective experience of helping those affected by the changes wrought by Brexit. It has been my great privilege to Chair this Working

Group and my thanks go to all of its members who have contributed so many hours of their time for free to produce this report. The report could have been twice as long and made several times as many recommendations.

We hope the few changes it prescribes will be carefully considered and adopted.

Paul Bowen KC (Chair of the Working Group)
Brick Court Chambers

EXECUTIVE SUMMARY

JUSTICE began the EUSS Working Group to assess key operational issues within the scheme. The Working Group identified a number of areas for improvement, and makes 16 recommendations, under four key themes: Eligibility, Suitability and Validity; Review and Appeals; Communication; and Post Application Digital Status.

The UK's adherence to the rule of law means that it must operate *any* administrative scheme in a way that is intelligible, clear, predictable, and accessible. Since its inception, the Government has made significant efforts to operate the EUSS, one of those administrative schemes, consistently with its obligations under the WA, and the rule of law. For the most part, these efforts have been largely successful. Given the significant numbers of applicants that have been processed under the EUSS, the Home Office ought to be commended. It nevertheless remains the case that the EUSS suffers from a number of issues, which the recommendations made in this report seek to resolve.

Eligibility, Suitability, and Validity

I. A central issue identified by the Working Group under this section, and relevant throughout this report, is the UK Government's obligation to honour in good faith the rights of the EU, EFTA, and Swiss nationals under the WA. In its departure from the EU, Britain agreed to maintain the rights of EEA nationals living in the UK and their family members under the Withdrawal Agreement. This obligation is met by ensuring that any implementation mechanism recognising EEA national status is accessible, transparent, and clear. Furthermore, that any derivative rights are properly recognised, to ensure they may be effectively exercised.

II. The Working Group considers the Government is falling below this implementation standard by failing to recognise and facilitate effective exercise of rights by all eligible EEA nationals. The EUSS is not intended to be a gatekeeping scheme for residence in the UK, but to facilitate rights entitlement for EEA nationals as provided by the WA. In the Working

Group's discussion, they reviewed establishing eligibility; absences from the UK; automated checks; the provision of evidence; dependents; and durable partners. The Home Office's approach to these different topics was considered to be unclear, or rigid, for example in the context of relationships between unmarried partners.

III. The effective implementation of the EUSS is further undermined by the use of "suitability" provisions found within Appendix EU. These powers were considered by the Working Group to have been employed in many instances stall and delay applicants, and in the context of criminal records, deny applicants entirely.

Administrative Review and Appeal

IV. During the course of the Working Group's discussions, the Home Office stopped conducting administrative reviews of EUSS decisions.[1] The Working Group recommends that this route of review be reinstated. Administrative review provided an important, early and inexpensive opportunity for applicants to have their cases reconsidered. These reconsiderations were often to rectify minor issues, arguably unsuitable for the appeals process. The Working Group acknowledge that issues existed with administrative review, in particular delays, however, they consider it preferable to improve the process rather than dispose of it entirely.

V. In respect of appeals, the Working Group noted that there appears to be a Home Office practice of defending refusals at the immigration tribunal, even when they are highly likely to be overturned. This likely stems from a lack of proper review prior to a substantive hearing before a judge and is undoubtedly exacerbated by the cessation of administrative review.

[1] 5 October 2023.

VI. Appellants face severe difficulties accessing much needed advice and representation due to a lack of funding as well as capacity within the immigration sector. Representations at appeals are often done through Exceptional Case Funding ("**ECF**"), or *pro bono* representation, because work related to the EUSS is not in scope for legal aid. The Working Group recommends increasing funding provisions either by the Home Office expanding their current provision of funding for EUSS immigration advice to cover appeals work, or through the Ministry of Justice expanding the legal aid scheme to include appeals to the tribunal in EUSS cases.

Communication

VII. The Working Group identified a lack of communication between government departments relevant to the administration of the EUSS: the Driving and Vehicle Licence Authority ("**DVLA**"); Department for Work and Pensions ("**DWP**"); His Majesty's Revenue and Customs ("**HMRC**"); and the Home Office. This failure to communicate effectively results in EEA nationals not being able to prove their status. For example, sub-departments within the Passport Office being unaware that EUSS status holders have a digital-only status.

VIII. The Working Group was strongly of the view that the UK's obligations to recognise the rights of EEA nationals under the EUSS includes having an effective communication strategy, one which ensures that potential and current applicants, and status holders are aware of the scheme, and any relevant changes. Whilst initially the Government conducted a widespread communication strategy, this is no longer the case. However, now more than ever it is vital that the Government continues to communicate the scheme as those who are still eligible, but have not yet applied, are likely to be in more vulnerable circumstances.

IX. The Working Group also identified issues with individual communication. Applicants often receive template responses regarding their status, or other

key aspects of the process, which lack detail relevant to individual applicants. This is a source of confusion and anxiety for many applicants.

Post Application and Post Grant of Status Rights (Including Digital Status)

X. Since the main EUSS deadline (and end of the 'grace period') of 30 June 2021, EEA nationals have been required to prove their status to access services and benefits in the UK. For EEA nationals, the only means of proving this status is by generating a share code online, which requires an internet connection, a device to access the appropriate Government website and a phone/device on which to receive a security code via email or text message. This form of status has been subject to widespread criticism and as being unreliable. The Working Group therefore recommends the creation of an offline, 'hardcopy' proof of EUSS status.

XI. The Working Group is also concerned by the sharing of EEA nationals' data by the Home Office with other government departments. The Working Group therefore recommends the Government disclose any agreements that the Home Office has with other departments in regard to the sharing of personal data of individuals.

XII. A consistent lack of understanding of the rights of status holders exists amongst different government departments, service providers, border control and potential employers. This makes access to key public services such as housing, welfare benefits, employment and healthcare extremely difficult for some status holders.

Individuals in particularly vulnerable circumstances

XIII. Throughout the report there is reference to vulnerable groups or individuals. The Working Group identified the people in the following circumstances as at particular risk of encountering issues when seeking to secure status under the EUSS:

- Elderly, disabled people and those with serious health conditions (e.g. physical or mental impairment, digitally or socially excluded);
- Victims of modern slavery and/or trafficking;
- Victims of domestic violence or exploitation;
- Those with no fixed abode (Gypsy, Roma and Traveller communities, rough sleepers);
- Children in need and children who are in care or those who have left care; and
- People with limited language skills or literacy, and who lack digital skills; and
- Seasonal workers, and other circular migrants

METHODOLOGY

Our method of working

The Working Group first sat in May 2023,[2] and met four times over the course of 8 months, in addition to several sub-group meetings. During these meetings, members of the Working Group identified key issues across the administration of the EUSS scheme and possible solutions to them. This was an iterative process, and the Working Group discussed ideas and shared professional knowledge and experience throughout. The Working Group comprised a range of professions and all had considerable knowledge, experience, and in some instances lived experience of the EU Settlement Scheme.

Purpose

The Working Group's purpose was to produce recommendations aimed at improving the process for EEA, EFTA, and Swiss nationals and family members seeking to acquire residence rights in the UK under the EUSS.

Aims

The overall aim of this report was to ensure that individuals seeking to acquire residence rights in the UK under the EUSS have their applications considered fairly, accurately and expeditiously. Furthermore, that these groups are able to exercise their rights once status has been granted.

In their review of the EUSS, the Working Group considered the following:

- The quality, procedural fairness, accuracy and efficiency of decision making at each stage of the current application process;
- The fairness and accessibility of challenges to decisions made under the scheme, including by administrative review (before the cessation of administrative reviews), and appeals;

[2] First Working Group Meeting, 4 May 2023.

- The extent to which applicants, and potential applicants are, and continue to be made aware of the scheme, and understand the application process, including available guidance and support, in particular for those who are vulnerable or digitally excluded.
- The accessibility and effective recognition of EEA nationals' rights under the EUSS, including to healthcare, education, housing and data privacy post grant of pre-settled and settled status.

Audience

The intended audience of this report is the Home Office, Department of Work and Pensions, His Majesty's Revenue and Customs, the European Affairs Committee, the Home Affairs Committee, the Legal Aid Agency and other EUSS policy makers and stakeholders.

I. INTRODUCTION

1.1 In November 2021, JUSTICE published its report '*Reforming the Windrush Compensation Scheme*, which made 27 recommendations to improve the Home Office's delivery of compensation for individuals unable to demonstrate lawful immigration status due to Home Office maladministration.[3] Based on its work, JUSTICE recognised that some of the administrative issues identified in the Windrush Compensation Scheme were applicable to ad hoc immigration schemes. Subsequently, JUSTICE began a '*Lessons Learning'* project; a comparative review of the Afghan Resettlement Schemes, the EUSS and the Windrush Compensation Scheme.

1.2 In August 2023, JUSTICE published the second of these three reports '*Reforming the Afghanistan Resettlement Schemes*: the way forward for ARAP and ACRS, which made 24 recommendations to assist the Government in improving the process of administration for applicants and referees under the two respective Afghan resettlement schemes.[4] With the completion of the EUSS report, three important reports have been produced, and will subsequently form the basis for a comparative assessment of Government administration in a handful of ad-hoc schemes.

Background to the European Union Settlement Scheme

1.3 In 2017, there were an estimated 3.8 million EU nationals living in the UK.[5] Prior to the UK's departure from the EU, EEA nationals in the UK (and their family members) benefitted from EU free movement rights.[6] EU free movement law operated by way of a 'declaratory residence scheme' under

[3] Reforming the Windrush Compensation Scheme, a report by JUSTICE, 15 November 2021, [https://files.justice.org.uk/wp-content/uploads/2021/11/12142211/JUSTICE-Report-Reforming-the-Windrush-Compensation-Scheme-Press-Copy.pdf].

[4] Reforming the Afghanistan Resettlement Schemes: the way forward for ARAP and ACRS, JUSTICE 15 August 2023 [JUSTICE-Afghan-Report-August-2 but 023-1.pdf].

[5] Office for National Statistics, "Population of the UK by country of birth and nationality: 2017" [2017] available at [https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/2017], (accessed 19 February 2024).

[6] Directive 2004/38/EC, implemented into UK law by the Immigration (European Economic Area) Regulations 2016, governs the rights of EU citizens and their family members to move and reside freely within the European Union.

which residence rights (and other entitlements) arose automatically upon the fulfilment of relevant conditions: citizenship of an EEA nation; or a family member of an EEA national citizen.[7] As such, EEA nationals and their family members, exercising their freedom of movement in the UK were exempt from immigration control, and had rights to work and study, access to welfare benefits (conditional for those who had not yet acquired a permanent right of residence), and access to the National Health Service ("**NHS**").

1.4 Following the UK Government's departure from the EU, the basis of the residence rights now afforded to EEA nationals and their family members[8] derive from the WA. Under Title II of Part II of the WA, 'Citizens Rights Provisions',[9] EU nationals and their family members have a right of residence/permanent residence respectively, provided they meet certain conditions set out in those provisions. The WA also provided that the UK are able to implement a 'constitutive residence scheme' under Article 18(1) of the WA, which requires EEA nationals (and their family members) to *apply* for a residence status.[10] The purpose of the EUSS application procedure is to verify whether an individual is entitled to the rights under Title II of Part II WA.

1.5 The UK exercised the power under Art 18(1) of the WA by implementing the EUSS through the Immigration Rules, Appendix EU. Notably, the UK's institution of a constitutive scheme involving a verification process was a significant departure from the way in which EEA nationals accessed their rights prior to Britain's departure from the EU, when they were not required to obtain documentation to evidence their status.

1.6 To qualify for status under EUSS, applicants must satisfy requirements on:

- "validity" whether an application was validly made;[11]

[7] Free Movement Directive, 2004/38/EC, OJ L158/77.

[8] The WA also applies to British Citizens living the EU/EEA.

[9] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ C384 I/01, Article 13, Article 15.

[10] The WA provides generally that Host States can implement constitutive residence schemes, which includes for British Nationals in EU host states.

[11] Immigration Rules (Home Office, 25 February 2016, updated 22 February 2024), Appendix EU, EU9, EU10.

- "eligibility" whether the substantive requirements for residence are met;[12] and
- "suitability" whether exclusion of an applicant would be justified on grounds of public policy, public security or public health.[13]

1.7 Appendix EU provides two categories of status:

- 'Settled status' or, under ordinary Immigration Rules, 'Indefinite Leave to Remain' ("ILR"). To be granted settled status, a person must have ordinarily resided in the UK for a continuous period of five years (subject to narrow exceptions); and
- 'Pre-settled status' or, under ordinary Immigration Rules, 'Limited Leave to Remain' ("LLR"). A person who is not eligible for settled status only because they have not yet completed the full five-year qualifying period of residence.

[12] Immigration Rules (Home Office, 25 February 2016, updated 22 February 2024), EU11-13.

[13] Immigration Rules (Home Office, 25 February 2016, updated 22 February 2024), EU15-16.

II. EU SETTLEMENT SCHEME

2.1 The domestic legal basis for the EUSS is the Immigration Act 1971.[14] The scheme opened for applications on 30 March 2019 (after two beta trials[15] starting in August 2018), with an intended deadline of 30 June 2021.

2.2 Implementation of Part II of the WA is monitored by the Independent Monitoring Authority ("**IMA**") for the Citizens' Rights Agreements. The IMA is an independent, non-departmental public, statutory body established under the EU (WA) Act 2020.[16] The IMA's functions are to ensure that the rights of EU and EEA EFTA nationals and their family members in the UK and Gibraltar are protected.

Administration of the Scheme

2.3 The EUSS is administered by the Home Office through a number of institutions including:

- EUSS casework team;
- Settlement Resolution Centre;
- EUSS Vulnerability Programme Team;
- EUSS Criminal Casework team; and
- the Special Cases Unit.

2.4 The application deadline for EEA nationals (unless applying as joining family members) and their family members who exercised EU free movement rights by 31 December 2020 was 30 June 2021. However, the scheme remains open indefinitely for late applicants, those who apply to 'upgrade' their pre-settled status to settled status and applications from joining family members**.** EEA nationals eligible under Appendix EU will have their application considered, even if late, provided they can demonstrate 'reasonable grounds' for missing the deadline.

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[14] It is important to note that the EUSS is not contained in any statutory provision, but merely part of the immigration rules.

[15] Home Office, UK Visas and Immigration, EU Settlement Scheme: private beta testing phase 1 report (accessible version) (Updated 5 September 2022) [https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-1]; Home Office, UK Visas and Immigration, EU Settlement Scheme private beta testing phase 2 report (Published 21 January 2019), [https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-2].

[16] European Union (Withdrawal Agreement) Act 2020, UK Public General Acts, 2020.

Digital application process

2.5 Applications under the EUSS are primarily submitted through an online application process.[17] Once applicants have submitted a valid application under the EUSS, a Certificate of Application ("**CoA**")[18] will be issued by the Home Office. The CoA confirms temporary protection of an applicant's rights in the UK, pending the outcome of their application, and any administrative review or appeal.

2.6 Digitally submitted applications are received automatically by Home Office caseworkers in the EUSS casework management system. All applications under the EUSS pass through three distinct consideration stages, in the following order:

a. **Validity assessment**: This consists of an 'Identity Verification' whereby applicants must provide their identity documents, normally in the form of a biometric passport. If applications are submitted late, it also comprises an assessment of the applicant's 'reasonable grounds' for doing so. Review of an applicant's 'reasonable grounds' and identity documents are performed by an administrative office in the EUSS casework team;

b. **Suitability assessment**: A suitability assessment determines whether an applicant has a criminal record. This review is performed by ATLAS, an immigration casework system. The EUSS suitability assessment teams, which are part of the Immigration Checking and Enquiry Service, are responsible for this stage; and

[17] Paper applications are only made available by the EUSS Resolution Centre where individuals have significant difficulty applying through the online application process, which cannot be resolved with support from the assisted digital provider, 'We Are Digital', do not hold a valid passport or national identity card and wish to rely on alternative evidence of their identity and nationality (or of their entitlement to apply from outside the UK), or are applying based on derivative rights of residence.

[18] Home Office Staff Guidance, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members', page 56, Version 22.0 (2024) [https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf], "A certificate of application under the EU Settlement Scheme is issued by the Home Office to confirm that the applicant has submitted a valid application. It does not confirm that the person has immigration status in the UK, but it does confirm the temporary protection of their rights in the UK pending the outcome of their application and any administrative review or appeal. A certificate of application will be issued to the applicant on receipt of a valid application by them under the scheme".

c. **Eligibility assessment**: Applicants who have a National Insurance ("**NI**") number may use it to evidence their UK residence and prove their eligibility for either pre-settled or settled status. The Home Office carries out automated checks against tax and certain benefits records held by HMRC and the DWP using the NI number provided to confirm the applicant's UK residence. Applicants who cannot have an automated eligibility check must supply documents to evidence their residence.

III. AREAS FOR IMPROVEMENT

In this section, the Working Group identified four key areas for improvement which were discussed in four sub-groups, followed by recommendations:

i. Eligibility, Suitability, and Validity
ii. Review and Appeals
iii. Communication
iv. Post settlement (including digital status)

I. ELIGIBILITY, SUITABILITY AND VALIDITY

Eligibility

3.1 The Working Group focused on issues which were considered to affect a larger cohort of individuals or were otherwise central to the administration of the scheme:

i) Home Office duty to establish eligibility;
ii) Move from pre-settled to settled status;
iii) Approach to absences from the UK;
iv) Evidential flexibility and automated checks; and
v) Complexity of rules especially relating to family members

i). Home Office Duty to Establish Eligibility

3.2 The move from a declarative scheme to a constitutive scheme meant that EEA nationals were required to evidence and meet the conditions set out by the UK. In recognition of the difficulties EEA nationals were likely to encounter, the WA contains a number of safeguards in Article 18 which includes a requirement for the Home Office to assist applicants to prove their eligibility and avoid any errors and omissions in their applications.[19]

3.3 The Working Group recognises that the Home Office has made some effort to comply with the duty to assist applicants under Article 18(1)(o). For example, instructing caseworkers to contact applicants prior to refusing their applications in order to obtain further evidence in support of their applications. However, given the high numbers of refused applications, and

[19] Withdrawal Agreement, art 18(1)(o).

the Working Group's observation of poor engagement by the Home Office with applicants, they consider that more could be done.

Recommendation 1:

The Home Office should conduct an internal review of the effectiveness of the mechanisms implemented to comply with its duties under Article 18 (especially with regard to Art. 18(1)(o) and assess what more could be done to comply with these duties, and therefore avoid refusing applications from eligible applicants.

ii. Moving from pre-settled to settled status

3.4 The mechanics of the EUSS required those with pre-settled status to make a further application for settled status once they have satisfied the five-year residence requirement. This was referred to as 'upgrading' pre-settled to settled status. However, in *R (IMA) v Secretary of State for the Home Department*[20] the High Court determined that it would be unlawful for EEA nationals with pre-settled status to lose their rights on the basis of not making a further application to the EUSS before their status expired. The court also found that the right of permanent residence under the WA was acquired automatically, without the need for a further application, once the necessary conditions were met.

3.5 To implement this judgement, the Home Office issued a policy extension of two years for pre-settled status, to avoid EEA nationals losing lawful status for not making further application to the EUSS. Currently, this extension applies automatically, and requires no further action from pre-settled status holders. However, this approach is envisaged to change during 2024, and there is little information available regarding what will happen at the end of the two-year extension. The IMA has issued several updates,[21] raising its concerns.

3.6 The Working Group is of the view that the Home Office's decision to extend pre-settled status by two years does not resolve the underlying issue, which is

[20] *R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin).

[21] Citizens Rights Watchdog, 'Citizens Rights Watchdog Gives Update on Judicial Review' (1 December 2023), [https://ima-citizensrights.org.uk/news_events/citizens-rights-watchdog-gives-update-on-judicial-review/].

that the WA does not permit the Home Office to require re-applications from EEA nationals and their family members, eligible for settled status. Any resolution of this issue requires recognition that those granted pre-settled status should be granted settled status automatically without making another application.

Recommendation 2:

The Home Office must find a way to convert pre-settled status to settled status for those entitled, without requiring them to reapply. In order to determine the most appropriate way of doing this, the Home Office should conduct a consultation amongst stakeholders as soon as possible.

iii. Approach to absences from the UK

3.7 For the purposes of the EUSS, an individual must ordinarily be resident in the UK for a continuous qualifying period of five years.[22] During that period, that individual cannot have been outside the UK for more than 6 months in any 12-month period (with some exceptions for a longer absence for an 'important reason', and some limited exceptions for absences related to COVID).[23]

3.8 The Home Office calculates continuity of residence on a rolling cumulative basis, which considers an applicant's absences within any 12-month period whilst resident in the UK. This means, for example, that a four-month absence at the end of one year, followed by a three-month absence at the start of the following year, is aggregated to seven months. This breaks continuity of residence under Home Office rules. Also note, this period does not start from the beginning of the calendar year or the beginning of the person's residence, but from a point in time and any 12 months before. The EU Free Movement Directive, which also employs continuity of residence requirements counts any absence per year of residence, with each year starting on the anniversary of the date when the person took up residence in the host member state.

[22] Gov.uk, 'What settled and pre-settled status means', [https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means].

[23] Immigration Rules, Appendix EU, 'Eligibility for indefinite leave to remain or enter, EU11'; See also Home Office Staff Guidance, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 22.0 (2024),[https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf].

3.9 In the Working Group's view, the Home Office method of calculating a 12-month period is not immediately clear to applicants. Furthermore, the calculation is difficult to perform, and has led to confusion amongst applicants. This confusion may result in them unknowingly breaking continuity of residence, thus making them ineligible for settled status. Among those people who are aware they can lose pre-settled status altogether after an absence of 2 years, many do not realise the serious consequence of shorter absences, which can prevent applications for permanent residence, and the loss of their ordinary residence.

Recommendation 3:

The Home Office should calculate absences the same way as is done under the EU Free Movement Directive and subsequently update relevant guidance, including Home Office Staff Guidance, and ensure that this is clearly communicated to applicants and decision makers.

iv. Impact of prison sentences on eligibility

3.10 The definition of 'continuous qualifying period' in Annex 1 of Appendix EU has the effect that any period of imprisonment breaks a person's continuity of residence in the UK. As a result, pre-settled status holders (or those who do not yet hold but are eligible for pre-settled status) who have received a prison sentence or have been detained in a young offender's institution are ineligible to upgrade their status to settled status,[24] regardless of the duration of the detention. In cases where the offence is not sufficiently serious to trigger deportation, those with pre-settled status are often unaware that they will not be eligible for settled status, and that their status is liable for curtailment or cancellation. The Working Group expressed serious concerns as to the lawfulness of this provision, which creates an additional suitability requirement disguised by its inclusion in the eligibility requirements of the scheme.

Recommendation 4:

The Home Office should amend the definition of 'continuous qualifying period' in Appendix EU so that prison sentences do not affect a person's eligibility but affects suitability alone.

[24] Or where they do not yet hold status, be granted pre-settled status.

v. Evidential issues and automated checks

3.11 EUSS applicants who provide their NI numbers are subject to automated checks to establish eligibility. The Application Programming Interface ("**API**") checks against HMRC and DWP records to establish applicants' residence status, i.e. the length of time they have been resident in the UK'.[25] Where an automated check does not provide evidence of an applicant's UK residence, or the applicant does not provide an NI number, they are asked to provide documentary evidence of the relevant family relationships.[26] Caseworkers can then identify which form of leave (if any) an applicant can be granted.

3.12 The Working Group observed that an applicant's employment records form a significant aspect of the automated assessment and, in the absence of consistent employment or a clear employment record, applicants are unlikely to receive a positive outcome through automated checks. The Working Group noted that automated checks sometimes missed individual employment records. In such instances, the Working Group recommends that additional support should be available to applicants in the form of greater caseworker support and more flexibility in their consideration of forms of evidence of employment.

3.13 Applicants who are not able to prove their residency through the automated checks are therefore asked by government to prove their residence via other means and face a heavy burden. It appears to the Working Group that Home Office caseworkers require highly formalised evidence of residency such as bank statements or council tax bills. Some of this documentation is not available to everyone. This approach was considered by the Working Group to be inconsistent with the guidance taken holistically which urges evidential flexibility.[27]

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[25] EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, Preferred evidence of residence, page 228 (Version 22.0, Home Office, 16 January 2024) [https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf].

[26] Ibid.

[27] Ibid, page 10.

Recommendation 5:

The Home Office should review its caseworker training with regard to evidential flexibility, ensuring that applicants who do not have access to more formal evidence are provided with greater caseworker support.

vi. Complexity of the Immigration Rules: Appendix EU and Appendix EU (Family Permit)

3.14 Under this heading, the Working Group addresses the content of the eligibility requirements under Appendix EU and Appendix EU (Family Permit), particularly as they relate to family members and derivative rights holders. Appendix EU and Appendix EU (Family Permit) are extremely complex, which contributes to inconsistency of decision making, creating uncertainty amongst applicants and their advisors. In particular, the Working Group noted a stark lack of clarity in guidance and decisions relating to dependent family members and durable partners.

Dependency

3.15 A person can apply for status if they are:

a. a child, grandchild or great-grandchild and aged under 21; or
b. a dependent child, grandchild or great-grandchild aged over 21 of an EEA citizen (or spouse or civil partner of an EEA citizen). [28]

3.16 Dependent is defined in Appendix EU as:

having regard to their financial and social conditions, or health, the applicant cannot, or (as the case may be) for the relevant period could not, meet their essential living needs (in whole or in part) without the financial or other

[28] UK Visas and Immigration and Home Office, 'EU Settlement Scheme: Evidence of Relationship - How to provide evidence that you're a family member of an EEA or Swiss citizen or person of Northern Ireland' (Published: 22 March 2019, Last updated: 20 September 2022) "In some cases, you can apply as a dependent relative of an EU, EEA or Swiss citizen if you're their dependant, a member of their household or in strict need of their personal care on serious health grounds. The EU, EEA or Swiss citizen cannot be your spouse, civil partner, unmarried (durable) partner, child (or grandchild or great-grandchild) or dependent parent (or grandparent or great-grandparent). They can be your brother, sister, aunt, uncle, nephew, niece or cousin (or, in some cases, of your spouse or civil partner)".

material support of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) or of their spouse or civil partner;[29]

3.17 The definition of dependency is therefore not based exclusively on financial dependency. However, the Working Group notes that the guidance only offers examples of financial dependency,[30] and decision makers often fail to consider non-financial factors, such as the social and emotional features of dependency. The Working Group informed us that this approach led to a failure to assess relevant evidence of dependency other than financial or health dependency, such as emotional or social dependency.

Durable Partners

3.18 'Durable Partners' are defined in Appendix EU as:

"a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years"…unless there is other significant evidence of the durable relationship".[31]

3.19 The definition is notably vague. In a recent unreported decision, the Upper Tribunal of the Immigration and Asylum Chamber attempted to clarify the definition of 'durable partner'.[32] The judge considered that the rules and related policy guidance were difficult to understand. This also reflects the experience of the Working Group. Much of the information included in the guidance[33] is difficult to understand, even for legally qualified, seasoned caseworkers. The Working Group raised durable partners and dependents as two examples of this complex guidance unrepresented, or unassisted

[29] Home Office, 'Immigration Rules Appendix EU: EU, other EEA and Swiss citizens and family members' [https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu].

[30] Home Office, 'Immigration Rules Appendix EU: EU, other EEA and Swiss citizens and family members' [https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu], page 125

[31] Immigration Rules, Appendix EU, Eligibility for indefinite leave to enter or remain, [https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu]; See also *Kabir v SSHD* EA/13870/202.

[32] EA/13870/202.

[33] EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members (Version 22.0, Home Office, 16 January 2024).

applicants face significant difficulties in understanding the criteria of a durable partner.

3.20 The definition of durable partner in Home Office Guidance includes couples who have had a long-distance relationship. However, in the experience of the Working Group, this broadened definition is inconsistently applied by caseworkers, with the majority of refusal letters seen by Working Group members continuing to focus on a restrictive view of durable relationships based on cohabitation. The Working Group also considered that the Home Office disproportionately focused on financial dependency as 'other significant evidence' of durable partners within the guidance.[34]

3.21 The Working Group considered there to be multiple examples of durable partners, who despite having significant evidence of a relationship, for example having a child together (evidenced through birth certificates) or having been in long-distance committed relationship for several years (evidence through evidence from family and friends, photos, hotel bookings, and text chats) were nevertheless refused in their EUSS application for lack of evidence of cohabitation.

3.22 In addition, the Home Office does not appear to consider the role of different cultures and traditions when determining whether someone is a durable partner. The Working Group noted that in many cultures couples do not live together until marriage and certainly do not have bank accounts in joint names. Many EU nationals may have nothing more than photographic evidence, and some correspondence, jointly addressed to those in a partnership, none of which appeared to be considered by the Home Office as strong evidence.

Recommendation 6:

The Home Office should undertake a specific review in relation to decision making of applications from dependent family members and durable partners, identify particular systemic patterns that result in incorrect decision making, and provide additional training to caseworkers to ensure that decisions are consistent and in line with published Guidance.

[34]https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf

II. SUITABILITY

i. Disclosure of criminal records

3.23 Under Appendix EU, applications may be refused on the basis of suitability. The Home Office Staff Guidance 2024 states that:

"*the assessment of suitability must be conducted on a case-by-case basis and be based upon the applicant's personal conduct or circumstances in the UK and overseas, including whether they have any relevant prior criminal convictions, and whether they have been open and honest in their application*".[35]

3.24 As part of a suitability assessment, applicants are required, to "provide information about previous criminal convictions"[36], something that the Working Group noted frequently resulted in refusals. On this point, the Working Group expressed concern that there is a distinct lack of clarity in the current guidance on the weight given to prior criminal convictions as part of a suitability assessment, and how this affects applicants' prospects of success under the scheme.

3.25 In addition to the obligation on applicants to provide information about their criminal convictions, the Home Office takes account of 'whether [applicants] have been open and honest in their application'.[37] The Working Group noted their concerns with this requirement, and how it interacts with the criminal records of applicants under a suitability assessment. The Working Group, and other charitable organisations understood that an applicant's failure to disclose their criminal record accurately raised the risk of them being considered to 'have submitted false or misleading information',[38] which alone could lead to refusal if considered material to the decision.

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[35] Home Office Staff Guidance, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, Suitability, Version 22.0 (2024)153 [https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf].

[36] Home Office, UK Visas and Immigration Guidance, EU Settlement Scheme: suitability requirements (accessible), (Updated 16 January 2024)

[37] Ibid, page 9.

[38] Ibid, page 21.

Recommendation 7

The Home Office must clarify the weight placed on criminal records of applicants and set out in guidance the purpose of self-disclosure of criminal records of applicants.

ii. Delays Caused by Pending Criminal Prosecutions

3.26 Under the 'EUSS: Suitability requirements' guidance (Version 8.0) a person with a 'pending prosecution' is someone:

- arrested or summoned in respect of one or more criminal offences and one or more of these offences has not been disposed of either by the police or the courts; and
- is the subject of a live investigation by the police for a suspected criminal offence.[39]

3.27 The guidance further states that where an application would not fall for referral to Immigration Enforcement, even if the pending prosecution present should lead to a conviction, a decision must be made on the application in light of all other available evidence.[40]

3.28 Although this guidance should limit delays, applicants who are accused of multiple offences and/or of serious crimes, and those with minor previous convictions may still face substantial delays in their decision outcomes. Previously, the guidance stated that where a person was facing a pending prosecution their application would be suspended for 6 months. This requirement to suspend the application for 6 months has since been removed,[41] and applications must now be paused until the outcome of the prosecution is known. An application can however be progressed before the outcome of a prosecution is known for applicants who meet the following criteria:

- they are subject to only one pending prosecution;

[39] Home Office, UK Visas and Immigration Guidance, EU Settlement Scheme: suitability requirements (accessible), (Updated 16 January 2024), EUSS applicants are checked against criminal records databases including the Police National Computer (PNC) and the Warnings Index (WI).

[40]Home Office, UK Visas and Immigration, 'EU Settlement Scheme: Suitability Requirements' (Accessible) (Updated 16 January 2024) [https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance/eu-settlement-scheme-suitability-requirements-accessible].

[41] Ibid, page 4.

- the maximum potential sentence upon conviction for the offence is less than 12 months, according to the maximum category 1 sentence in line with the Sentencing Council guidelines for the alleged offence; and
- the applicant has no previous convictions.[42]

3.29 Given the delay in public prosecutions and the courts, pausing EUSS applications until the outcome of a prosecution is known was considered by the Working Group likely to have knock on effects in other areas of entitlement: social assistance; housing employment.[43]

3. Validity

ii. Long-term residents currently outside the UK

3.30 Members of the Working Group noted that individuals who live outside the UK, but are nevertheless eligible for the EUSS, may not be aware that they have a right to apply under the EUSS based on previous periods of residence in the UK. As such, they may also have been unaware of the need to apply before the deadline of June 2021. Although the statistics on this cohort are not kept, the Working Group anticipated this could be a substantial number of people. The Working Group is concerned that such applicants are likely to be excluded by the 'reasonable grounds' test which requires applicants to show that they have reasonable grounds for having failed to meet the deadline applicable to them.

Recommendation 8:

The Home Office should, in addition to its current publicity campaign, communicate to long-term residents currently outside the UK policy changes affecting their applications. This should include that 'reasonable grounds' for failure to make an application may include the fact that residents were unaware that previous periods of residence might entitle them to settled or pre-settled status. The Home Office guidance should be amended to reflect this.

[42] Ibid.

[43] The AIRE Centre – Written evidence (CIT0001) https://committees.parliament.uk/work/1246/citizens-rights/publications/written-evidence/].

II. ADMINISTRATIVE REVIEW AND APPEAL

Administrative Review

i. Process of Administrative Review

3.31 Prior to its cessation on 5 October 2023, Administrative Review ("**AR**") was operated by the Administrative Review Unit ("**ARU**") and staff in the EUSS Settlement Resolution Centre ("**SRC**"). This was a separate team from those who made initial decisions.

Under Appendix AR (EU), the grounds upon which an applicant could challenge a decision to refuse status were:

- the original decision maker failed to apply, or incorrectly applied, Appendix EU;
- the original decision maker failed to apply, or incorrectly applied, the published guidance in relation to the application; and
- there is information or evidence that was not before the original decision maker which shows that the applicant qualifies for a grant, or a different grant, of leave under Appendix EU.[44]

Issues excluded from AR were:

- Refusal on invalidity or suitability grounds
- Decisions made regarding family permits
- Challenges to decisions based on WA grounds[45]

ii. Further information

3.32 Under the EUSS AR system, applicants were permitted to submit new information and further evidence alongside their original application, which was considered all together by a different caseworker in the Home Office.

3.33 In addition, the caseworker conducting the AR may have also requested additional information or evidence from the applicant. There was no specific deadline for applicants to provide additional information or evidence

[44] Home Office, Immigration Rules, Appendix AR (EU), Administrative Review for the EU Settlement Scheme (Published 25 February 2016, Updated 22 February 2024.

[45] Ibid.

requested. Instead, caseworkers were required to give applicants a reasonable timeframe, depending on the circumstances of the case.

iii. Benefits of the Administrative Review

3.34 Where an application for AR was refused, applicants could apply to the Tribunal and make a fresh application at the same time. As became evident during the evidence-gathering meetings, due to the immense delays and the cost of AR for applicants (£80 per review), applicants were more inclined to make fresh applications under the EUSS, which were usually processed by the Home Office more quickly. In response, the Home Office amended their guidance making the approach to repeat applications stricter and introduced a presumption that there would be no reasonable grounds for making a late application where a previous application had been made.[46]

3.35 A significant benefit of AR, identified by the Working Group, was the process for rectifying caseworker errors without needing to go to the immigration tribunal.

3.36 These included:

- miscategorising applicants;
- misunderstanding the basis on which an applicant asserts they are entitled to EUSS;
- the incorrect conclusion that applicants had not submitted evidence; or
- clear misunderstandings of the law or guidance

3.37 It was also significant that AR permitted applicants to submit new evidence with their applications. This allowed applicants to remedy perceived defects with their original applications, and obtain status after the completion of the AR.

3.38 Administrative review was cheaper and simpler than appeal, which made it a more viable option for EUSS applicants, especially vulnerable applicants. This was an important feature of the process. Many EUSS applicants will have lived in the UK for a significant length of time, relying solely on their EU free movement rights. Consequently, applying to the EUSS would likely be their

[46] Home Office Staff Guidance, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 22.0 (2024), page 37 [https://assets.publishing.service.gov.uk/media/65a64d87640602000d3cb6fa/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf].

first engagement with the UK's complex immigration system. The Working Group considers that remedies for challenging decisions ought therefore to take account of this lack of familiarity.

iv. Delays

3.39 The Working Group notes there were significant delays in the AR process. As of 30 June 2023, 2,918 ARs were outstanding for more than 18 months, and 242 of those for more than 2 years.[47] By 7 November 2023, 20,396 ARs had been requested but only 7,254 had been concluded (although some were due to invalid and withdrawn ARs).[48] The Working Group consider these delays had a significant impact on the effectiveness of the scheme.

v. Consequences of removal of Administrative Review

3.40 One of the obvious implications of removing AR is that it will likely increase the numbers of appeals to the immigration tribunals. The Working Group considers there to be a number of disadvantages of a tribunal appeal compared to AR. First, a tribunal fee of £130 is payable. Whilst it is possible to have the fee waived, or reduced, the 'help with fees' form is cumbersome. Many lay EUSS applicants, especially applicants in vulnerable circumstances are unlikely to be engage with this process effectively without legal representation.

3.41 Second, given the complexity of the EUSS rules, applicants appealing would likely need legal advice and representation, which as discussed below is difficult to secure.

3.42 Third, Grant Funded Organisations ("**GFO**'s) are unable to assist with appeals. GFO's are funded by the Home Office to provide advice to EUSS applicants. Critically, many GFO's were funded by the Government for the provision of advice and assistance within the context of EUSS ARs, which meant that there was assistance at this stage.

3.43 However, most GFO's do not have the qualifications necessary to undertake appeals work. It is noteworthy that the Government has not sought to make

[47] Alice Welsh v Home Office (WhatDoTheyKnow, EUSS Administrative Reviews, 30 June 2023) [https://www.whatdotheyknow.com/request/euss_administrative_reviews_30_j#incoming-2463524].

[48] Alice Welsh v Home Office, 7 November 2023 [https://www.whatdotheyknow.com/request/euss_administrative_reviews_30_j/response/2463524/attach/5/FOI%2078406%20Response.pdf]

any specific provision for vulnerable applicants (who received assistance with their initial applications), to be supported in any appeals that may be required, should the applicant wish to challenge the decision on their application.

Recommendation 9

The Home Office must provide for a process of administrative review, with clearly published guidance for caseworkers and applicants. The reinstitution of administrative review must be supported with greater resources. This includes increased staffing and improved training in order to deal with delays.

Appeals

i. Right and grounds of Appeal

3.44 Under the Immigration (Citizens' Rights Appeals) (EU exit) Regulations 2020 (the "**2020 Regulations**"),[49] which came into force on 31 January 2020, applicants who make a valid application under the EUSS have the right to appeal against:

- refusal decisions of their pre-settled or settled status under the EUSS; or
- where an applicant is granted limited leave to enter or remain (pre-settled status under the scheme) but the applicant believes they should have been granted indefinite leave to enter or remain (settled status);

3.45 The 2020 Regulations also provide that EU, EEA and Swiss nationals and their family members have the right to appeal against decisions in relation to EUSS family permits or travel permits. Furthermore, where a person has been granted status under the EUSS, or an EUSS family permit or travel permit, they will have a right of appeal against a decision to:

- vary their leave to enter or remain so that they have no leave (pre-settled status);
- revoke their indefinite leave to enter or remain (settled status);
- cancel their leave to enter or remain (settled or pre-settled status);
- cancel or revoke their EUSS family permit or travel permit;

[49] The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (UK Statutory Instruments 2020 No. 61).

- refuse them leave to enter the UK under Article 7(1) of the Immigration (Leave to Enter and Remain) Order 2000 when they have a valid EUSS family permit or travel permit;
- vary or cancel leave to enter which they have by virtue of having entered the UK with a valid EUSS family permit; and deport them, where they have EUSS leave (settled or pre-settled stats) or are in the UK having arrived with an EUSS family permit.

ii. Process of Appeal

3.46 Appeals are heard in the First-tier Tribunal, with normal rights of appeal to the Upper IAC Tribunal with permission, on a point of law. Exceptions apply in cases where refusals are certified by the Home Office as a national security issue and appeals will be lodged to the Special Immigration Appeals Commission ("**SIAC**").

3.47 The appeals procedure for EUSS-related appeals is the same as the procedure normally followed to challenge a Home Office refusal on an immigration application. Appeals are lodged to the First-tier Tribunal within 14 days of the notice of refusal being sent (if the appeal is being lodged within the UK), and within 28 days of the notice of refusal being received (if the appeal is being lodged outside the UK).[50]

iii. Issues with Appeal

3.48 In the Working Group's view a key issue with appeals is that the Home Office unreasonably defends some appeals, which were inevitably going to be unsuccessful. The Working Group formed this view on the basis of a number of costs orders made against the Home Office by the Tribunal, acknowledging that the Home Office had not conducted the litigation reasonably. The Working Group suggested that this may be due to a lack of review by the Home Office, despite Tribunal directions to do so.

3.49 The Working Group are of the view that, in some cases, if an appeal had been reviewed properly, it would have been obvious that the prospects of the Home Office successfully defending the appeal were low. This is particularly concerning given that the WA places an obligation on the Home Office to

[50] In SIAC appeals, the following time limits apply: Where the person is detained 5 days from when they are served the notice of decision; where the person is in the UK, 10 days from when they are served the notice of decision; and when the person is outside the 28 days from when they are served the notice of decision.

give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions.

3.50 The Working Group identified the following additional issues with EUSS appeals:

I. The Home Office sought to remove appeal rights in circumstances where it determined that applications were late without reasonable grounds, by rejecting them on the basis that they were invalid. On the 17 July 2023, a new Statement of Changes in Immigration Rules HC 1496 was published, which introduced the requirement for applications to be made by 9 August 2023 in order to be considered valid. Where an application was rejected at this initial validity stage an applicant would not be granted a right of appeal. The consequence of this approach meant that on the face of it, judicial review ("**JR**") was the only remedy. However, the Working Group were of the view that JR is not an appropriate remedy for a negative decision under the EUSS. JR is highly specialised procedure which requires the use of lawyers. The First-tier Tribunal is better able to deal with litigants in person. Additionally, IAC First-tier Tribunals are able to re-make decisions of fact, to ensure lawfulness. On a JR, the Administrative Court is generally only concerned with whether the decision was unlawful, not with whether it was factually correct. This is a much higher threshold.

II. Second, the restricted provision of legal aid available for EUSS appeals. The Working Group is concerned this creates a "*real risk that persons will effectively be prevented from having access to justice*".[51] EUSS appeals to the First-tier tribunal are generally outside the scope of legal aid, which creates difficulties for those who cannot afford to pay for private legal advice and representation. Moreover, whilst legal aid providers can make Exceptional Case Funding ("**ECF**") applications on behalf of clients to fund EUSS appeals work, the ECF process itself is cumbersome and time-consuming. Public Law Project produced a note

[51] The Universal Credit Regulations 2013, SI 2013/376, Pt 2, reg 9. [https://www.legislation.gov.uk/uksi/2013/376/regulation/9].

setting out the difficulties with ECF for the EUSS setting out the issues.[52] As such, the Working Group suggested that it may be beneficial for the Legal Aid Agency to issue specific guidance to applicants and caseworkers on how applications for ECF in this context will be approached.

III. One of the conditions for ECF is that a case is sufficiently complex. The Working Group suggested that it would be helpful if guidance acknowledged the complexity of the EUSS rules, and that EUSS-related issues are likely to be complex, a result of which is that litigants are likely to find it difficult to represent themselves. The Working Group did note, however, that even if grants of ECF for EUSS appeals were to increase, there was still an issue with the immigration legal aid sector being significantly underfunded and lacking in capacity.

Recommendation 10:

I. **The Home Office should monitor compliance with the obligations to carry out reviews of cases during the appeals procedures (including as directed by the Tribunals) allowing for deficiencies perceived in the original application (taking into account WA obligations) to be corrected. The Home Office should also monitor the numbers of cases where costs orders are being made against it in EUSS appeals;**

II. **The Home Office must amend the Immigration Rules, and afford late applicants a right to appeal, when their applications are rejected as invalid;**

III. **The Home Office must ensure that access to remedies is not prevented by ensuring there is adequate funding in place, so those who require legal advice and representation to pursue appeals can obtain this. The Working Group considers the best way to achieve this would be either by a) the Ministry of Justice expanding the scope of legal aid to include EUSS appeals to the First-tier Tribunal; or b) the Home Office expanding their grant funding to cover representation in the First-tier Tribunal to**

[52] Supplementary Note: ECF, 'Brexit' and the EU Settlement Scheme. Public Law Project, March 2023 220810 Update note v 175BA1_DR (002) (publiclawproject.org.uk).

organisations that are qualified to provide this representation. This is to ensure there are no financial barriers to appealing;

IV. **The Home Office must simplify the fee waiver process; and**

V. **The Legal Aid Agency must put in place Exceptional Case Funding guidance for applicants and caseworkers that is specific to the EUSS.**

III. COMMUNICATION

3.51 The Working Group looked at internal communication between government departments as well as external communication both in terms of a broad communication strategy directed at those eligible for status and individual applicants (and where relevant their caseworker and/or legal representative).

3.52 Communication, both at a macro and individual level, is extremely important within the context of publicly administered schemes such as the EUSS. On a macro level, it is important that those eligible to apply are aware of this and understand how to embark on the process. It is critical that potential applicants, applicants and status holders have the information they will need and can know how to access assistance to navigate the process. On a micro level, individual communication with applicants is also important. Correspondence must be provided in plain language and must identify and assist individuals with embarking upon the next steps in the process.

i. Internal Communication

3.53 In the experience of the Working Group there appears to be a significant lack of communication between the Home Office and other government departments, such as the DVLA, DWP, and HMRC. The Working Group noted several examples which illustrated the difficulty encountered by applicants. These included:

- a failure by the DWP to update its guidance to include reference to the changes introduced to give effect to the IMA judgement;
- sub-departments within the Passport Office being unaware that EUSS status holders have a digital-only status; and
- delays in communicating an individual's status from the Home Office to another government department, which could affect the rights associated with their status. An example of which is a lack of clarity and awareness of the EUSS at the DVLA for applicants seeking to renew their licences.

3.54 The Working Group also noted that the Home Office could improve its communication with EU embassies in the UK. The Home Office places the onus on applicants to verify their identity, which in some instances requires liaising with their own embassy.

Recommendation 11

The Home Office must take active steps to ensure that caseworkers can official embassy channels and are empowered to use these channels when determining whether an applicant holds a particular nationality.

ii. External Communication

3.55 The Working Group considers there to be a concrete obligation on the State to have an effective communication strategy in respect of those eligible to apply for it. The absence of information about the scheme has resulted in vulnerable applicants being unaware of their eligibility and a general dissemination of misinformation about the process and deadlines of the EUSS, that the Working Group considered not to have been counteracted by government sources.

3.56 This dearth of information is highlighted by, for example, the failure to adequately communicate that EEA documentation was to become invalid after 31 December 2020, including Permanent Residence documents. A further example is the failure to communicate clearly regarding the expiry of all biometric residence cards after 31 December 2024 for non-EEA members.

Recommendation 12:

The Home Office must disseminate information on the EUSS as widely as possible in its external communications, and ensure that it provides clear updates on policy and legal changes. The Home Office must also make efforts to actively counteract misinformation about the scheme as part of its EUSS external communications campaign.

iii. Individual Communications

3.57 The Working Group was also concerned about communications with individual applicants who often receive standardised/template responses. Such responses do not effectively set out the precise reasons for delays, rejections or next steps. This is a particular issue with decision letters as applicants need to understand the basis of their refusal to decide whether to

request an AR, appeal or submit fresh evidence. For example, Working Group members have seen decision letters refusing an application for lack of evidence without an explanation for why evidence that has been submitted was not accepted.

3.58 The Working Group also noted that the Home Office's Resolution Centre, which can assist with how to apply to the EUSS, and technical problems whilst applying online[53] is ill-equipped to provide the support or updates people need regarding their applications and phone line staff do not have direct access to the casework system.

3.59 The Working Group note that the Home Office has duties under Art. 18 (1)(o) to 'help applicants to prove their eligibility and to avoid any errors or omissions in their applications'.[54] In addition, to give applicants the opportunity to provide further evidence or correct errors. Despite this, applicants are often not provided with an opportunity to effectively provide further evidence. In addition, refusal letters regularly suggest that attempts to contact an applicant have been made, yet in the experience of the Working Group, those applicants are frequently unaware of any such attempts having been made.

Case study: Mass mailers to status holders

3.60 There have been instances in which all EUSS status holders were sent an email by the Home Office, without the use of segmented audiences, resulting in confusion. For example, an email was sent regarding the Government's proposal to extend the status of all pre-settled status holders by two years. This email was also sent to those who already held settled status, causing them much confusion. The Working Group suggested that the Government ought

[53] Contact UK Visas and Immigration for help, 'EU Settlement Scheme, Frontier Worker permit or Service Provider from Switzerland visa applications', [https://www.gov.uk/contact-ukvi-inside-outside-uk/y/inside-the-uk/applying-to-continue-living-in-the-uk-including-settled-and-pre-settled-status/using-the-eu-exit-id-document-check-app].

[54] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Part Two, Title II, Chapter 1, Article 18(1)(o), [https://www.legislation.gov.uk/eut/withdrawal-agreement/article/18/adopted].

to have consulted those working in the EUSS immigration sector regarding the contents of these mailshots, including grant-funded organisations providing specialist EUSS advice.

Recommendation 13

The Home Office should provide greater clarity and detail in communications with applicants whilst their applications are pending. In addition, the Home Office should provide greater clarity and detail in decision letters to applicants, which set out the grounds on which the Home Office has refused applications. These must enable applicants to understand the full basis of the decisions and fully consider whether to appeal.

In addition, the Home Office must:

a. **Keep a record of attempted contact dates in good faith;**
b. **Use the preferred method selected by applicants as a means of communication; and**
c. **clearly assess evidence previously provided by applicants and provide clear reasons if that is not accepted as sufficient.**

IV. POST APPLICATION AND POST GRANT OF STATUS RIGHTS (INCLUDING DIGITAL STATUS)

This sub-group considered issues arising in respect of:

I. Applicants and status holders' access to digital status;
II. Data Rights; and
III. Post-grant of status rights, and access to services

Accessing Digital Status

3.61 EEA nationals were the first group of citizens to receive a digital-only immigration status under the EUSS. This is part of a wider drive by the Home Office to digitalise all UK immigration statuses. The aim is to complete this switch by 2024, at which point (although it remains unclear precisely when) all physical immigration documents will have expired. Consequently, all status holders will need to create a UK Visas and Immigration (UKVI) account in order to obtain an eVisa - an online record of their immigration status.[55] The issues described in this section on digital status therefore already apply, or will soon apply, to all people with a UK immigration status.

Summary of the Online Digital Status Process

3.62 In order to access services, including welfare benefits, the NHS, housing and employment, EEA nationals, like all non-UK citizens, must be able to show that they have leave to remain in the UK. Yet, the online system through which EEA nationals have to access their settled/pre-settled status poses numerous difficulties. We set out below a summary of the steps an individual must go through to access their online proof of status to give an idea of the complexity.

[55] UK Visas and Immigration, Guidance on Online Immigration Status (eVisa) (Published 30 October 2023).

STAGE 1:

The 'View and Prove' Service: accessing online digital status

Step 1: Navigate to the 'View & Prove website'

Step 2: When a status holder arrives at the View & Prove website, before gaining access to the online status page, they need the following information:

- The identity document used when they applied, such as passport, national identity card ("**NIC**"), or biometric residence card (or the most recent identity document they linked to their UKVI account);

- Their date of birth; and

- Access to the mobile number or email they used when they applied - to which a security code will be sent allowing them to log in to their online status page.

Step 3: The applicant must then select and input their identity document number (for example, the long number in their passport), date of birth, and select where they want their security code to be sent.

Step 4: Once the security code has been sent, it needs to be inputted and then applicants are taken to their View & Prove status page.

Step 5: Once a status holder selects 'Prove your status to someone', they are taken to another page, 'What do you need the share code for'.

Step 6: Once a status holder selects an option, they will be taken to a third page, where they will see a preview of the information that will be seen by the third party checking their status. The status holder will be able to generate a share code, which is in essence a tether, allowing third parties to access an applicant's online status.

STAGE TWO:

Once a status holder has accessed, and provided their share code to a third party, such as an employer or landlord, their status can then be checked.

Employer Checking Service and Landlord Checking Service

3.63 If an individual cannot provide a share code, employers or landlords are able to check an individual's right to work or rent on the Government's Employer Checking Service ("**ECS**") or Landlord Checking Service ("**LCS**"). However, neither of these services are straightforward for the employer / landlord to access, as they have:

- multiple drop-down options, some of which lead to a dead end;
- complex wording;
- a great deal of information on different landing pages, and;
- delays before the Home Office issues a 'positive verification notice' which means the user of the service can proceed to offer an applicant a job or a house rental.

3.64 Within the NHS, oversight for checking EEA national residency status is designated to NHS Overseas Visitors Managers' ("**OVM's**"),[56] who have access to:

- The Message Exchange for Social Care and Health ("**MESH**") and NHS SPINE; and
- The Digital Status Checker ("**DSC**").[57]

Issues with accessing Digital Status

3.65 The Working Group observed issues with accessing online digital status at every one of the steps identified above. Access is often sought by status holders at time-critical moments, where they were likely trying to access a service, employment, housing or welfare benefits, or board a plane back to the UK. In addition, local authorities, employers, landlords, and travel carriers, are under legal obligations to immigration status checks. These organisations and individuals are subject to penalties if they fail to meet these obligations. This means that where online digital status cannot be accessed, services are denied to status holders. Therefore, any issue with accessing the digital status, however 'minor' it may appear to decision makers, has a significant impact on the ability of status holders to access services.

Issues with the digital system

3.66 Many status holders encounter difficulty at Step 1, if they:

- lack an appropriate device such as a smartphone, tablet or computer;

[56] For the purposes of determining a patients' chargeable status, see NHS, 'NHS Cost Recovery - Overseas Visitors: Guidance for NHS Service Providers on Charging Overseas Visitors in England' (Published 19 February 2024), paragraph 107.

[57] The DSC allows staff who have completed the relevant e-learning to access immigration status information from the Home Office on a patients Summary Care Records, 6 years prior.

- lack access to the internet (no data signal, no WIFI or no data allowance); or
- cannot find the correct website (through not knowing the best search terms to put into a browser for example).

3.67 At step 2, members of the Working Group noted that the View and Prove system can fail to recognise the combination of date of birth and passport, NIC, or biometric residence card number. Whilst instances of non-recognition could result from human error, the Working Group were aware of instances where the system simply did not recognise the details. The result of an unaccepted date of birth/identity document combination is to simply render the entire View and Prove service, and therefore the share code, inaccessible.

3.68 At step 3, even if the applicant's information has been accepted, and they have been sent a security code, for some individuals, the security code does not work. As set out above, one needs the security code to access the online digital status landing page, and then access the share code. If the security code does not work, then as with previous steps, the applicant cannot move on, and the View and Prove service is inaccessible.

3.69 If steps 1-3 have been successful, then an applicant will be able to see their status. However, the Working Group explained that for some individuals their online digital status displays the wrong form of leave. For example, they may have been given pre-settled status, which they will know from the written correspondence they received, but their status will only show a CoA.

3.70 A second way in which a person's status may appear incorrect on the View and Prove page, is where it displays another person's information, as opposed to their own, or a mixture of their own and another status holder's information (for example their own photograph but someone else's name and status expiry date).[58]

3.71 At step 4, many status holders receive an error when they select 'Prove your status to someone', for example by being told that the service is unavailable. At step 5, the preview information may appear incorrect even if the person's status showed correctly in step 3. For example, there have been cases where the preview shows a different photograph, or different status information/expiry date to the details shown on the status page.

[58] Members of the Working Group reported instances wherein this had happened to their clients.

3.72 Even if a share code is successfully produced by the status holder, further errors can occur at Stage 2, where an employer or landlord for example uses the EUSS status checker and inputs the share code.

3.73 Whilst the Home Office does not provide data on the technical errors encountered by users, there is nevertheless strong anecdotal evidence from Working Group members to support the issues identified above as encountered by status holders.

3.74 The Working Group concluded that even if everything works at Stages 1 and 2 the first time, an individual's status 'may break' at any point, thereafter, rendering an individual unable to access their online digital status. This understandably leads anxiety about one's status, and a genuine fear of being unable to evidence status.

The View and Prove Digital Framework

3.75 The Working Group considered that there were two critical failings in the Home Office's approach to the EUSS View and Prove digital framework. First, the 'mirror, or mock-up' database, and second, the entirely online digital status.

3.76 Members of the Working Group understand that the current EUSS online digital status framework does not give applicants access to the Home Office database directly, but instead provides a mirror, or mock-up version. In essence, EUSS applicants are able to access a much narrower version of the Home Office database, one that is generated dynamically from different data sources. Therefore, when View & Prove is accessed, it is fragile and inconsistent over time.

3.77 These issues also mean that there are discrepancies between the different government departments and third parties accessing information about applicants. Although JUSTICE makes no recommendations about the precise way in which the system should work, it is suggested that the mirror system which individuals can access, which is intended to reflect the necessary information held by the Home Office about an applicant, must be better maintained and made more accessible to individual applicants.

Digital Status

3.78 The second pressing issue of concern to the Working Group is the online-only digital status, and the difficulties this format causes for applicants and those with pre-settled and settled status.

3.79 There is a substantive difference between *online-only* digital status, and digital status in general. The former requires an individual to have an internet connection, and a computer, or phone with a browser that can run the status page. In its current form, the EUSS online digital status gives no option to download either the status, such as in a PDF format, or through a phone application, akin to the Covid Pass, which holds a person's status directly on whatever piece of hardware one may be using. This approach by the Home Office means that any issue with online status, such as those set out under Stage 1 and 2 above, renders an individual unable to prove their status.

3.80 On this point, the Working Group emphasised that even if, for example, an individual takes a screenshot of their share code, if their status breaks, a third party using their share code will still be unable to access the individual's profile or verify their status. This problem presents particular difficulties when status holders are travelling with an ID card to the UK. Travellers may be asked to show their immigration status to border police and/or airline staff, or risk being denied travel. The Working Group emphasised that some EU border officers challenge passengers because they are not aware that EEA nationals with EUSS status may travel on an ID card rather than a passport.

3.81 'Digital Status', akin to the Covid Pass, was felt by the Working Group to be more reliable. In essence, a Covid style pass could provide a secure hard copy version of an individual's immigration status, which could be carried on one's phone, or a downloadable (and printable) PDF. This approach would mean that when an applicant had been assigned pre-settled or settled status, they could access this status quickly, including at the points in which it was most needed, without risk of the Home Office system failing to generate a share code.

3.82 Furthermore, if landlords and employers had access to the same system – via scanning the secure QR codes provided by the application or printed on the PDF or other hard copy – it may mean that fewer errors occur when providing access, because individuals are sharing a hard, offline version. The Working Group noted that they considered this suggestion to be feasible given that a share code is valid for three months – and so some form of 'temporary status' is created. This was considered a clear indication that a more permanent 'link' could be created.

Issues with accessing Online Digital Status: NHS, Employers and Domestic Violence

3.83 The NHS, and employment are two key examples of difficulties accessing services, as a result of digital status issues, set out below.

NHS

3.84 EU and EFTA citizens, living in the UK on or before 31 December 2020, require EUSS status or CoA in order to access NHS services free of charge,[59] and where they have EUSS status, evidence of being ordinarily resident in the UK. In the Working Group's experience, evidence is required in the form of an EEA national's name, passport number, or a code assigned to their online digital status. The Working Group notes, however, that the requirement for a passport number or code presumes that EEA nationals have a passport number or code actually assigned to their status. Additionally, it assumes that if they do, they will have the necessary digital literacy to update their online status with any changes to their passport number.

3.85 The Working Group also identified that status holders encountered delays with the NHS online status checking systems. Whilst MESH and the DSC were not considered as error prone as the ECS and LCS, delays encountered by EEA nationals between submitting an application, and obtaining a CoA often resulted in charges for use of the NHS. The Working Group also noted that the way in which the charging policy is applied across different NHS Trusts' is inconsistent, in part attributable to the discretion exercised by OVM's. This was considered to result in differences between the treatment of EEA Nationals, dependent upon the NHS trust in which an individual happens to be seeking treatment.

3.86 Given all the issues outlined under 'Digital Status' above, in addition to the potential for computer illiteracy and difficulties obtaining the necessary code, the requirement to prove residency for accessing the NHS undoubtedly raises difficulties.

[59] NHS cost recovery – overseas visitors, Guidance for NHS service providers on charging overseas visitors in England, Published 19 February 2024 [https://assets.publishing.service.gov.uk/media/65d33bdf0f4eb1f5bba98141/nhs-cost-recovery-overseas-visitors-february2024.pd] 67, 101

Employment

3.87 EEA nationals awaiting a decision, or with pre-settled or settled status, have the right to work in the UK. However, as with the provision of services, before they can access employment, EEA nationals must demonstrate they have such a right. This can be demonstrated through a share code, a CoA, issued post 1 July 2021, or a Positive Verification Notice, which is confirmation from the Home Office that an applicant has the right to work, obtained through the Employer Checking Service.

3.88 However, the Working Group noted that the alternative means through which an employer might verify an applicant's status, such as the Employer Checker Service, are complex and time-consuming. Therefore, employers can often be discouraged, in the absence of a share code, from verifying the employment status of EEA nationals despite obligations on them not to discriminate.

3.89 Second, employers considering individuals with pre-settled status expect that status to expire and are either reluctant to renew contracts or, when they do so, for a much shorter period. This is in part because the View and Prove system routinely displays an expiry date, despite the Government's commitment to implementing the *IMA* case, effectively by extending pre-settled status by two years ahead of its expiry.

Domestic Violence

3.90 Members of the Working Group noted that EEA nationals who had been subject to domestic violence faced particular difficulty in accessing their status. This can happen through the domestic abuser keeping control of the email and or phone to which the View & Prove access security code is sent, thereby separating the status holder from their status. In one case, a victim of domestic abuse who had moved into a safe house updated the log-in details for her child and informed the Home Office of her change of address but later found that her abusive partner had been granted access to these details.[60]

Digital Literacy and Support

3.91 An underlying issue running throughout section IV is the Home Office's assumption that individuals seeking to use and access the system are digitally literate. In the experience of the Working Group, this is not the case. Many

[60] Working Group Members.

applicants have encountered difficulty using the EUSS system. As set out above, there are several issues encountered with using digital EUSS status.

3.92 In addition, members of the Working Group who assist individuals in navigating the EUSS system noted that there are often changes made to the system, which do not improve user experience, but appear superficial, and thus unnecessarily confusing. As an example, a long asked for change was recently made to display all identity documents that are linked to someone's UKVI account. However, for many applicants, their status displays a message that no identity documents are linked at all. If they then try to link their identity document, they receive an error that informs them that the document is already known to the system so cannot be added.[61]

3.93 A public administrative system must be accessible and transparent, and where a digital system sits between members of the public, and a service, there is a very real risk of excluding, or otherwise obstructing access. It is important that the Home Office ensure that the systems available, such as the EUSS, are simple to understand, use and are digitally supported.

Home Office Digital Support

3.94 As with other online immigration schemes, the Home Office provides digital support to assist with issues that emerge when navigating the system. For the purposes of the EUSS, these services are provided by:

- We Are Group[62]
- The EUSS Settlement Resolution Centre ("**SRC**")
- The UKVI Contact Centre

3.95 However, whilst these services do provide some assistance, they were considered by the Working Group to be inadequate. Delays occur with more technical enquiries, because IT support appears to be available only where an issue raised is escalated by the staff of the SRC or UKVI contact centre. In addition, even when matters are escalated, no indication is provided for when the issue might be fixed. This unpredictable delay is highly disruptive to the lives of status holders and their families, who need their status to prove their

[61] Letter to the Home Office about New Functionality Showing All Identity Documents Linked to a UKVI Account (Published 10 January 2024, Correspondence), [https://the3million.org.uk/publication/2024011001].

[62] A service that provides assistance to applicants, not status holders post-rights.

right to access basic services. This places individuals in precarious situations which can result in homelessness, rough sleeping, lost job/rental opportunities, bank accounts being closed and travel obstructions, such as being prohibited from boarding flights.

Charitable Digital Support

3.96 The Working Group outlined that a great deal of digital support for applicants was provided by the charitable sector and GFO's. However, it should be noted that funding for services provided by some GFOs has steadily declined, attributable to the incorrect assumption of a reduced need to assist EUSS applications.

3.97 Furthermore, charitable organisations and GFO's are often not equipped, nor is funding provided on the basis that they would provide IT support. Often, GFO caseworkers whose main role is to assist with the making of EUSS applications, are also required to assist with digital accessibility issues. This service is provided in the absence of adequate alternatives to equip status holders. The Working Group highlighted the issue with advisers being 'in charge' of a status (in the sense of holding the telephone number/email address to receive the security code with which to 'unlock' the View & Prove process), often contrary to an organisation's own policies.

3.98 Whilst this is admirable work, it is unacceptable for the Government to depend upon the charitable sector to fill the gap of IT administrative support for the EUSS. It should also be noted that charities whose remit covers Immigration, or EU issues are bound like applicants to the 'front end' of the online digital status pages. Therefore, GFO's are highly restricted in what assistance they might provide. As the Working Group observed, if an individual's digital status is broken, they are unable to fix it.

Recommendation 14

I. The Home Office must provide a means whereby individuals can access and hold their digital status offline in a secure and stable form, independent of the fragile online status retrieval process. This may be through, for example, a device such as a mobile phone, a printout of a PDF document, or a card supplied to those who do not have access to technology.

II. **The Home Office must provide a tight service level agreement on the resolution of technical problems and transparent publishing of how many statuses are broken.**

III. **The Home Office must set out in current guidance how it approaches situations of Domestic Violence, to enable survivors and support workers to understand the steps they can take to update login details.**

Recommendation 15:

The Home Office must commit to providing a 24-hour service, free phone also accessible from abroad and accessible to status holders themselves, that will confirm status when required in urgent situations, such as access to housing and benefits, boarding flights, and proving the right to work / rent.

Data Sharing

Collecting Data

3.99 The Working Group was conscious that EEA nationals, with pre- settled status or otherwise awaiting a decision, are exposed to broad sharing of their personal data. This included information about:

- Health (through the NHS);
- Residence (through the Local Authority and Home Office);
- Financial data, and bank accounts (retained by the DWP and HMRC) and;
- Driving status, (through the DVLA).

3.100 On account of the fact that EEA nationals must access and provide their digital status to access any services or employment, their digital footprint is effectively updated and expanded in real time. The Working Group understands that the information listed above can be shared between any number of central and local government agencies, without consent, or even knowledge by individuals to whom the information relates. This consistent and thorough dissemination of one's personal information is arguably in conflict with general principles of data sharing - lawfulness, fairness and transparency. As a starting point, any processing of an individual's personal data, whether EEA or British national, must have a clear, and coherent legal basis.

Memorandums of Understanding

3.101 Two Memorandums of Understanding ("**MoU's**) are currently in force between the Home Office and DWP; and the Home Office and HMRC, for the purposes of data sharing.[63] They set out the powers to share personal data between the departments and the lawful bases relied upon for the processing of data as well as what data will be shared.

3.102 It is beyond the remit of this report to comment upon the substantive lawfulness of any data sharing arrangements between government departments; the Working Group nevertheless expressed concern about the clarity of data sharing arrangements currently in force between the Home Office and other departments. In addition, members of the Working Group expressed concern with a perceived lack of transparency in the Government's data sharing arrangements, and with the difficulty in obtaining documents, which set out such arrangements.

3.103 The Working Group also noted that whilst the Home Office has made publicly available MoU's relevant to data sharing between the HMRC and DWP, it has not published similar documents relating to the sharing of information between the Home Office and NHS for example, nor between the Home Office and Local Authorities, for the purposes of housing allocation assessments.

Recommendation 16

The Home Office must clarify and clearly set out the precise legal basis for data sharing on EEA nationals with the DWP, HMRC and any other department with which it shares data.

Rights to services pre and post settlement

3.104 Whilst the aim of this project was to examine issues with the administration of the EUSS scheme itself, the EUSS Working Group considered it remiss not to also highlight the difficulties encountered by applicants and status

[63] Process Level Memorandum of Understanding (PMoU) between the Home Office and Department for Work and Pensions [https://assets.publishing.service.gov.uk/media/5c9cfddbe5274a527b865b7f/Home_Office_DWP_API_EUExit_MoU.PDF].

holders, particularly those with pre-settled status, in accessing rights and services. JUSTICE also notes, as part of the Lessons Learning Project, that the difficulties faced by EEA nationals in the context of rights access sadly mirror those faced by the Windrush victims, who were also unable to access benefits, housing, and employment.

Lack of understanding and inconsistent decision-making

3.105 The key issues, consistent throughout the areas of concern identified by the Working Group: social welfare; housing; healthcare; and employment; were poor understanding of EEA nationals' rights entitlements and inconsistent decision making across central and local government. The Working Group attributed these issues to a lack of guidance, a failure to follow recent case law, and insufficient training on complex issues.

Housing and social assistance benefits

3.106 Within the context of social welfare, in general pre-settled status holders are excluded from social assistance benefits, including Universal Credit, and housing support from local authorities unless they pass a Habitual Residence Test. This requires applicants to have a qualifying right to reside ("RTR"). Holding pre-settled status does not count as a RTR. Instead, applicants must be exercising a separate EU Treaty right, e.g. working or having stopped work owing to being temporarily unable to work, or be the family member of an EEA citizen exercising such a right. This operates as a form of 'hidden' no recourse to public funds condition which prevents pre-settled status holders accessing vital support.[64] However, unlike other forms of limited leave to remain, there is no formal No Recourse to Public Funds ("NPRF") and thus pre-settled status holders cannot apply to lift it, if they are destitute or facing destitution.

3.107 The recent cases of *CG*[65] and *AT*[66] have improved the situation for EU citizens and their family members with respect to social welfare law. In summary, these cases require benefits (in *AT* Universal Credit) to be granted

[64] See 3million's policy work on this issue here: https://the3million.org.uk/sites/default/files/documents/t3m-briefing-ParliamentaryEvent-HiddenNRPF-21Jun2023.pdf

[65] *CG v the Department for Communities in Northern Ireland* (Case C-709/20) [2021] WLR 5919.

[66] *SSWP v AT (AIRE Centre and Independent Monitoring Authority for the Citizens' Rights Agreements intervening)* [2023] EWCA Civ 1307.

to holders of pre-settled status who are not exercising a RTR where a refusal of support would result in them being at an actual and current risk of a breach of their rights under the EU Charter on Fundamental Rights. Whilst *CG* and *AT* allow for some EEA nationals with pre-settled status to access benefits, the Working Group's view is that reliance on *AT* by EEA nationals and their family members remains tentative. Indeed, there remains a lack of clarity in decision making across public bodies about the contexts in which, and people to whom, these cases apply. This includes public bodies disputing whether the judgment in *AT* and the protection of the EU Charter applies to all pre-settled status holders and whether non-EEA national family members can also benefit from it. This has resulted in a continued bar for EEA nationals and their family members with pre-settled status accessing vital benefits and housing.

3.108 With respect to housing support in particular, the Working Group expressed concern that the local authorities' lack of understanding of EEA nationals' right to residency and eligibility for housing support resulted in the inconsistent administration of housing by local authorities. These issues were attributed to, in part:

- Multiple Local Authorities with varying levels of knowledge and capacity;
- Devolved local authority powers; and
- The complexity in the housing system itself, combined with the complexity in the eligibility rules.

3.109 In the Working Groups' experience, a serious consequence of the issues identified above is that applications for housing by EEA nationals, and non-EEA national family members, with pre-settled status can be rejected and render individuals homeless. The risk of homelessness is particularly acute for very vulnerable groups, such as families and children, those fleeing domestic violence, victims of trafficking and modern slavery, and people with care needs.

3.1 In addition, local authorities and benefits decision makers often breach their duty to assist applicants to establish their eligibility for social assistance, for example by checking any records available to the decision maker but not the applicant. This duty was recognised by the House of Lords in the case of *Kerr*

v Department for Social Development[67], and is recognised by the DWP in its own guidance.[68] A failure to comply with this duty causes prejudice to vulnerable family members, estranged from, or unable to contact the EEA national on whose right to reside they rely. For example, the Working Group is aware of victims of domestic violence being refused housing and/or benefits because they are unable to provide records of their husband working, even though evidence of this would be available to HMRC and/or DWP.

[67] *Kerr (AP) (Respondent) v Department for Social Development (Appellants) (Northern Ireland)* [2004] UKHL 23, on appeal from: [2002] NI 347 (House of Lords, Session 2003-04).

[68] Department for Work and Pensions, Advice For Decision Makers, Chapter A1 (Principles of Decision making and evidence) (first published 22 March 2013, last updated 14 December 2023), para A1405, available at: [https://assets.publishing.service.gov.uk/media/6582c50ffc07f3000d8d4560/adma1.pdf]

CONCLUSION

4.1. The focus of the Working Group has remained consistent with JUSTICE's aims, to strengthen the justice system, and focus on fair, accessible, efficient legal processes, and the rule of law. For those reasons, whilst we undoubtedly recognised the range and depth of the topics which could have been addressed under the EUSS, we sought to engage with the most pressing and apparent issues consistent with our aims. This task was made all the more difficult by because policy and legal changes emerged whilst the report was being produced and we have no doubt the EUSS process will likely continue to change after the report is published. One of the most significant changes which occurred during the project was the end of the administrative review process for the EUSS. This change was the basis of one of the reports headline recommendations, to reinstate the process of administrative review, with clearly published guidance, greater resources, increased staffing, and improved training.

4.2. The other headline recommendation made by the Working Group, which forms the basis of a great deal of the difficulties faced by status holders in their day-to-day lives, was the online-only digital status. At its inception, this form of identification was likely to have been anticipated as being of assistance, rather than hindrance, to status holders. Accessing one's status on any system with the internet and being able to use a share code to independently verify one's status are all on their face, entirely sensible ideas. However, it is now clear that this form of identification is unreliable. The Working Group, conscious of these issues, concluded that the online-only digital status should be reformed to provide individuals with an offline status.

4.3. In addition to the overarching observations and recommendations made by the Working Group, several important and granular issues were raised, which materially affect the ability of EUSS applicants and status holders to access and engage with the scheme. Confusing eligibility and suitability criteria such as high costs on appeal and poor communication were all cited as areas in which the Home Office and Government could improve. It was also noted by many Working Group members that there appears to be a general sense in government that the EUSS is towards the end of its function, having already processed a significant number of EEA nationals. This consideration was widely cautioned against, and the general view of the Working Group is that is a large number of people either already in the system with a pending application or eligible to apply.

4.4. The overarching aim of the *Lessons Learning* project, of which the EUSS report and Working Group are the second part, is to ensure that future schemes, either for compensation, resettlement, or otherwise are constructed and implemented fairly, expeditiously and with clarity.[69] Implicit in the aim of the project therefore, and across JUSTICE's work, is the goal of ensuring that the Government creates properly functioning administrative systems, which share core features: clarity; transparency; expeditious processing; and fairness.

4.5. The recommendations in this report have a dual purpose. First and foremost, to improve the EUSS. Second, to form part of a broader lessons learning project to assist the Government in operating fair and effective administrative schemes. This is vital to prevent a recurrence of the difficulties faced by some EEA nationals and their family members in the UK, by other migrant groups.

[69] Ibid.

RECOMMENDATION LIST

Recommendation 1:

The Home Office should conduct an internal review of the effectiveness of the mechanisms implemented to comply with its duties under Article 18 (especially with regard to Art. 18(1)(o)) and assess what more could be done to comply with these duties, and therefore avoid refusing applications from eligible applicants.

Recommendation 2:

The Home Office must find a way to convert pre-settled status to settled status for those entitled, without requiring them to reapply. In order to determine the most appropriate way of doing this the Home Office should conduct a consultation amongst stakeholders as soon as possible.

Recommendation 3:

The Home Office should calculate absences the same way as is done under the EU Free Movement Directive and subsequently update relevant guidance, including Home Office Staff Guidance, and ensure that this is clearly communicated to applicants and decision makers.

Recommendation 4:

The Home Office should amend the definition of 'continuous qualifying period' in Appendix EU so that prison sentences do not affect a person's eligibility but affects suitability alone.

Recommendation 5:

The Home Office should review its caseworker training with regard to evidential flexibility, ensuring that applicants who do not have access to more formal evidence are provided with greater caseworker support.

Recommendation 6:

The Home Office should undertake a specific review in relation to decision making of applications from dependent family members and durable partners, identify particular systemic patterns that result in incorrect decision making, and provide additional training to caseworkers to ensure that decisions are consistent and in line with published Guidance.

Recommendation 7

The Home Office must clarify the weight placed on criminal records of applicants and set out in guidance the purpose of self-disclosure of criminal records of applicants.

Recommendation 8:

The Home Office should, in addition to its current publicity campaign, communicate to long-term residents currently outside the UK policy changes affecting their applications. This should include that 'reasonable grounds' for failure to make an application may include the fact that residents were unaware that previous periods of residence might entitle them to settled or pre-settled status. The Home Office guidance should be amended to reflect this.

Recommendation 9

The Home Office must provide for a process of administrative review, with clearly published guidance for caseworkers and applicants. The reinstitution of administrative review must be supported with greater resources. This includes increased staffing and improved training in order to deal with delays.

Recommendation 10

I. **The Home Office should monitor compliance with the obligations to carry out reviews of cases during the appeals procedures (including as directed by the Tribunals) allowing for deficiencies perceived in the original application (taking into account WA obligations) to be corrected. The Home Office should also monitor the numbers of cases where costs orders are being made against it in EUSS appeals;**

II. **The Home Office must amend the Immigration Rules, and afford late applicants a right to appeal, when their applications are rejected as invalid;**

III. **The Home Office must ensure that access to remedies is not prevented by ensuring there is adequate funding in place, so those who require legal advice and representation to pursue appeals can obtain this. The Working Group considers the best way to achieve this would be either by a) the Ministry of Justice expanding the scope**

of legal aid to include EUSS appeals to the First-tier Tribunal; or b) the Home Office expanding their grant funding to cover representation in the First-tier Tribunal to organisations that are qualified to provide this representation. This is to ensure there are no financial barriers to appealing;

IV. **The Home Office must simplify the fee waiver process; and**

V. **The Home Office must put in place Exceptional Case Funding guidance for caseworkers that is specific to the EUSS.**

Recommendation 11:

The Home Office must take active steps to ensure that caseworkers can official embassy channels and are empowered to use these channels when determining whether an applicant holds a particular nationality.

Recommendation 12:

The Home Office must disseminate information on the EUSS as widely as possible in its external communications and ensure that it provides clear updates on policy and legal changes. The Home Office must also make efforts to actively counteract misinformation about the scheme as part of its EUSS external communications campaign.

Recommendation 13:

The Home Office should provide greater clarity and detail in communications with applicants whilst their applications are pending. In addition, the Home Office should provide greater clarity and detail in decision letters to applicant, which set out the grounds on which the Home Office has refused applications. These must enable applicants to understand the full basis of the decisions and fully consider whether to appeal.

In addition, the Home Office must:

a. **Keep a record of attempted contact dates, in good faith;**
b. **Use the preferred method selected by applicants as a means of communication; and**
c. **clearly assess evidence previously provided by applicants and provide clear reasons if that is not accepted as sufficient.**

Recommendation 14:

I. **The Home Office must provide a means whereby individuals can access and hold their digital status offline in a secure and stable form, independent of the fragile online status retrieval process. This may be through, for example, a device such as a mobile phone, a printout of a PDF document, or a card supplied to those who do not have access to technology.**

II. **The Home Office must provide a tight service level agreement on the resolution of technical problems, and transparent publishing of how many statuses are broken.**

III. **The Home Office must set out in current guidance how it approaches situations of Domestic Violence, to enable survivors and support workers to understand the steps they can take to update login details.**

Recommendation 15:

The Home Office must commit to providing a 24-hour service, free phone also accessible from abroad and accessible to status holders themselves, that will confirm status when required in urgent situations, such as access to housing and benefits, boarding flights, and proving the right to work / rent.

Recommendation 16:

The Home Office must clarify and clearly set out the precise legal basis for data sharing on EEA nationals with the DWP, HMRC and any other department with which it shares data.

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