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*City Law School Research Paper 2019/03*

## **Brexit's Effect on Citizens, Human Rights & Immigration**

Report of a roundtable held at City, University of London  
on 11 June 2019

(compiled by Maja Zarkovic)

Michaela Benson, Mihai Calin Bica, Christopher Desira, Paul Erdunast, Nicole Masri, Ollie Persey, Madeleine Sumption, Hannah Wilkins, Adrienne Yong, Sheona York, Katarzyna Zagrodniczek, Maja Zarkovic

The City Law School

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## Abstract

This report records the roundtable on “Brexit’s Effect on Citizens, Human Rights and Immigration” organised by Dr Adrienne Yong on 11 June 2019 at City, University of London funded by the Higher Education Innovation Fund (HEIF) 2018/19.

Speakers included:

- Hannah Wilkins (House of Commons Library)
- Blanca Grey (Home Office)<sup>1</sup>
- Paul Erdunast (Immigration Law Practitioner’s Association - ILPA)
- Christopher Desira (Seraphus Solicitors)
- Nicole Masri (Rights of Women)
- Ollie Persey (Public Law Project)
- Katarzyna Zagrodniczek (East European Resource Centre)
- Mihai Calin Bica (Roma Support Group)
- Dr Adrienne Yong (City, University of London)
- Dr Michaela Benson (Goldsmiths, University of London)
- Madeleine Sumption (Migration Observatory)
- Sheona York (Kent Law Clinic)

A host of unique legal questions were raised in the aftermath of the UK’s referendum result where the electorate voted in favour of leaving the EU on the 23 June 2016. Opinion has been split as to whether the UK and EU have indeed struck a fair deal for citizens, with arguments that citizens have been used as bargaining chips throughout the process to achieve a deal. As negotiations progressed towards the original mandated date of withdrawal, 29 March 2019, various schemes emerged to handle post-Brexit immigration of EU citizens in the UK and reciprocal arrangements for British citizens in the EU. This is now reflected in the EU Settlement Scheme, the Immigration and Social Security Co-ordination Bill, and the reciprocity agreed with EU Member States as to British citizens in the EU. These issues and more were discussed at the roundtable.

**Keywords:** Brexit, human rights, settled status, EU Settlement Scheme, immigration.

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<sup>1</sup> The Home Office was the only participant that declined the invitation to be included in this report.

## Introduction

On 30 March 2019, the EU Settlement Scheme was opened by the Home Office to all in-country applications. The Government announced that all EEA and Swiss citizens, and their family members, resident in the UK, will need to apply to secure their rights through an online system which would give them status in UK law which will remain valid after Brexit.

This roundtable analysed the state-of-play of immigration in Brexit Britain as it faces the challenges of governing almost 4 million individuals who have previously not needed governing. It gathered views from policy and legal practice to explain the state of immigration in the UK post-referendum on 11 June 2019. It also presented views from the ground of experiences of applicants to the EU Settlement Scheme through organisations representing citizens applying for settled status and then evaluated the academic viewpoint of the Brexit effect on citizens' rights.

By bringing such a network together, the intention was to inform the debate on citizens' rights, and exchange different forms of knowledge during a crucial time of change for all those affected. This report is split into three sections mirroring the programme of the day:

- Part A will consider the new governance of immigration to the UK in the context of Brexit;
- Part B will consider how immigration is experienced by civil society and NGOs;
- Part C will present the effect on citizens' rights across borders in the EU and the UK.

## A. NEW GOVERNANCE OF IMMIGRATION TO THE UK IN THE CONTEXT OF BREXIT

### **1) *The Immigration Bill, settled status, and an end to free movement***

Hannah Wilkins, Senior Library Clerk, Home Affairs, House of Commons Library

#### *Introduction*

The Commons Library provides impartial and independent research so the focus of Wilkins' briefing was to outline the law and policy framework for the EU Settlement Scheme. This information intended to lay the groundwork for further discussions on the Scheme itself during the roundtable. Wilkins set out the legislative framework as it currently exists and how it will change, or needs to change, to end free movement and implement the Scheme. To accomplish this, she presented a basic overview of how the UK implements EU free movement law, what the Immigration and Social Security EU Coordination Bill planned to do,<sup>2</sup> what Parliament proposes to do to end free movement in the UK, and what this means for the settled status scheme.

#### *The immigration framework for free movement in the UK*

It is helpful to provide context when considering how the Immigration Bill would work.<sup>3</sup> The majority of EU free movement law has been implemented in the UK through statutory instruments made under section 2(2) of the European Communities Act 1972.<sup>4</sup> It is under this provision that the Immigration (European Economic Area) Regulations 2016, were made. These EEA Regulations set out the bulk of EU free movement rights and transpose into national law the Citizens' Rights Directive 2004/38.<sup>5</sup> Under Section 7 of the Immigration Act 1988 those entering the UK by exercise of enforceable EU law rights or any provisions made under section 2(2) of the European Communities Act 1972 are exempt from the requirement to obtain immigration leave to enter or remain.

The Immigration Bill was awaiting report and third reading stage in the Commons at the time of writing. The Bill was reported to the House by a Public Bill Committee without amendments

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<sup>2</sup> It is important to note that since the conference, the Immigration Bill fell when Parliament was prorogued in September 2019.

<sup>3</sup> The Immigration and Social Security EU Coordination Bill 2017-19. The Bill from now.

<sup>4</sup> Section 2(2) of the ECA provides power to make orders, rules, regulations or schemes which implement the UK's EU obligations.

<sup>5</sup> Council Directive on 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC 93/96/EEC [2004] OJ L158/77.

in March 2019. In summary, Part 1 of the Bill (clauses 1-4 and Schedule 1) would make provision to end the free movement of EU citizens to the UK. EU citizens would be brought under UK immigration law and require immigration permission to enter and remain in the UK. Part 1 would also confirm the status of Irish citizens in the UK. Part 2 of the Bill (Clause 5 and Schedules 2 and 3) sets out the provisions on social security co-ordination.<sup>6</sup> Part 3 of the Bill (Clauses 6 and 7) sets out the general provisions on interpretation and commencement.

As the purpose of the Bill is to repeal free movement and bring EU citizens under the control of domestic immigration law, the Bill would be implemented if the Withdrawal Agreement is ratified or in the event of a no-deal. If the Withdrawal Agreement or another deal which implements a similar transition period is ratified, the Bill would be implemented at the end of the transition period to coincide with the introduction of the UK's future, uniform immigration system from January 2021. Clause 1 and Schedule 1 are the most substantive when considering the end of free movement in the UK. Schedule 1 identifies the practical steps which need to be taken to repeal free movement. It sets out the various provisions or pieces of primary and secondary legislation which need amending including in EU derived domestic legislation, retained direct EU legislation, and EU derived rights.

#### *What does the Bill do?*

The main source of UK law implementing free movement is the Immigration EEA Regulations. These will be repealed in full. They should be replaced by a range of measures depending on the circumstances of the relevant individual such as the immigration rules for settled status and the future immigration system.

Section 7 of the Immigration Act 1988 places EU citizens and their eligible family members outside of UK immigration control which is necessary to facilitate free movement. This section will be omitted from the 1988 Act to bring EU citizens and their family members within the scope of the Immigration Act 1971, meaning they will require immigration permission to enter and remain in the UK. The most practical significance to this change is that bringing EU citizens within the scope of the Immigration Act 1971 means that the Home Secretary will have the power to make administrative rules or regulations about EU citizens under section 3 of the Act being the immigration rules.

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<sup>6</sup> Further information on the social security provisions social security provisions can be found Commons Library briefing paper prepared for 2nd reading which analyses Part 2 in detail: see <https://researchbriefings.parliament.uk/?ContentType=Commons+Briefing+papers&Topic=European+Union&SubTopic=EU+law+and+treaties&Year=2019&SortByAscending=false>



Schedule 1 performs a range of other modification and repeal functions to remove other references to free movement across the statute book. There are also catch-all provisions in Part 3 of Schedule 1 to effectively mop-up any directly effective EU law rights that may relate to free movement and which have been retained in the UK by virtue of the EU Withdrawal Act. For example, the Bill's explanatory memorandum explains this would include rights set out in the Treaty of the European Union and the Treaty on the Functioning of the European Union.

Clause 2 of the Bill would insert a new section into the Immigration Act 1971 which provides that Irish citizens do not require leave to enter or remain in the UK. This provides an exception to the general rule under section 3 of the 1971 Act which requires immigration permission to enter or remain in the UK for non-British citizens. It also confirms the rights of Irish citizens to reside in the UK under the Common Travel Area. However, Irish citizens subject to a deportation order, exclusion order or and international travel ban will require an exemption to this new section, meaning that they are not entitled to enter without leave. The Bill ensures that Irish citizens who enter the UK from any country would be covered by the Common Travel Area to close this gap.

In regards to implementation, the main policy provisions of the Bill would come into effect on a day appointed by the Regulations. If the Withdrawal Agreement is ratified free movement would continue during the implementation period until the end of 2020. In this scenario, the Government would not need the Bill to come into effect until the end of the implementation period. If there is a no-deal Brexit there will be no implementation period.<sup>7</sup>

One of the more controversial aspects of the Bill has been the consequential provisions of Clause 4. Clause 4 allows the Government to amend primary and secondary legislation by statutory instrument. Delegated powers that enable ministers to amend primary legislation via secondary legislation are referred to as "Henry VIII powers" and have sometimes (but not always) proved controversial – particularly if the powers are very wide-ranging.<sup>8</sup> They are seen by their critics as transferring legislative power from Parliament to Government.

*What does this mean for settled status?*

The Bill is silent on settled status. Settled status has been implemented in the immigration

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<sup>7</sup> Following the change in government on 24 July 2019, a plan to end free movement immediately without a transition period has been announced. See 'No deal immigration arrangements for EU citizens moving to the UK after Brexit' (5 September 2019) <<https://www.gov.uk/government/publications/no-deal-immigration-arrangements-for-eu-citizens-moving-to-the-uk-after-brex-it>> accessed 13 September 2019.

<sup>8</sup> For more information, see <https://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.

rules and all the substantive law on settled status and the future immigration system is or will be laid out under the rules. However, the Bill facilitates the change from EU law to UK domestic law, repealing UK law which implements free movement in order to bring EU citizens under domestic immigration law, and require them to have leave to enter or remain in the UK.

#### *Concluding remarks*

The Bills numerous functions also raises some interesting questions in the context of settled status and a no-deal Brexit. The Government has extended the settled status scheme in the event of a no-deal Brexit but without the Withdrawal Agreement there would be no underpinning international law obligations to implement the scheme. The settled status scheme would remain only in the immigration rules and subject to changes, although the Government has stated that it is not their intention to do so.

## **2) *The automated residency checks in the EU Settlement Scheme***

Paul Erdunast, Legal and Parliamentary Officer, Immigration Law Practitioners' Association

### *Introduction*

Erdunast pointed out that the automated residency checks have a crucial effect as to whether vulnerable groups are able to maintain settled status during the transition period. Erdunast gave a detailed explanation as to how the checks work while also pointing out how these required checks may have a differential impact on vulnerable citizens.

### *Automated checks*

The first step of the automated checks requires that the applicant gives the Home Office;

- Forename
- Surname
- Date of birth
- Any previously held or other names
- National Insurance number<sup>9</sup>

During the second part of the process, the Home Office collects the information listed above on the applicant and sends it to Her Majesty's Revenue and Customs (HMRC) which then builds a 'footprint' of residence based on employment, Pay As You Earn (PAYE), and self-assessment details held by HMRC only. Then, only if PAYE records or self-assessment return can be found for that tax year, the applicant is marked as resident for that year. In other words, the Home Office puts this information from the HMRC into a residency footprint algorithm which gives an automatic calculation for how many months and years the applicant has been in the UK.

Significantly, it is the HMRC, not the Department for Work and Pensions (DWP), which holds the records for child benefits, child tax credits and working tax credits. In other words, it is the HMRC, not the DWP information residency footprint algorithm which feeds into these residency checks which in turn feeds into and decide the applicant's status. Therefore, this allows the Home Office to prevent benefits such as child benefits or other welfare benefits held by the DWP to feed into the residency checks. This creates a differential impact on for example, women who receive child support.

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<sup>9</sup> Optional but required for the residency check. Without a National Insurance number there can be no residency check.

However, and as Erdunast pointed out, there is no principled reason why benefit records held by DWP but not HRMC should form an automatic picture of an applicant's residence in the UK. In ILPA's view, this brings disparity to how benefits are treated compared to work earnings including pensions. The sooner that the Home Office can add DWP information to what the HRMC send to the Home Office, the sooner this can help vulnerable citizens.

For now, the DWP information works differently than the HRMC with the algorithm and does not allow accurate information to be transmitted to the residency algorithm which provides the residency result. Therefore, people who have been living in the UK might receive and inaccurate outcome stating that they have less than five years of residency. In addition to this, the third step of the application process requires that if the HRMC checks do not show five-year residency, a footprint is sent to the DWP. The disparity between treatment of HRMC and DWP records give cause for concern about differential impact on women and those with other protected characteristics who depend on benefits to survive in the UK.

The fourth step requires that this DWP footprint is added to the HMRC footprint and sent to the Home Office where it is seen by one of their caseworkers in the form of a table, not the applicant. The applicant will only receive the outcome not any reasons as to why. The caseworker sees a table such as the one below:

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2018	-	✓	-	✓	✓	✓	✓	✓	ARD	-	-	
2017	✓	-	-	✓	✓	✓	-	✓	✓	✓	✓	✓
2016	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-	-
2015	✓	✓	-	-	-	-	-	-	-	-	-	-
2014	-	-	-	-	-	-	-	-	-	-	-	-
2013	-	-	-	-	-	-	-	-	-	-	-	-
2012	-	-	-	-	-	-	-	-	-	-	-	-

The problem with this system is that an applicant who has been born in the United Kingdom could have an outcome which simply claims that Home Office records show that they have been continuously resident in the UK for less than five years and that they will only be considered for pre-settled status. Only *if* they challenge the result of the check choosing to send in additional evidence of residence is the applicant given the option to provide evidence of residence for each year they claimed to live in the UK. ILPA has concluded that due to this

application system, there is disparity to how benefits are treated compared to work. If the Home Office is looking to protect vulnerable people, they need to address this disparity.

*Concluding remarks and proposals for change*

ILPA, therefore, concludes the following:

1. ILPA has previously asked for meaningful public information on the automated residency checks and the Home Office provided some of the information asked for.<sup>10</sup>
2. The Home Office should provide applicants with the table that the Home Office caseworkers see, at the first opportunity, so that they can understand why they may have failed the check and whether there are inaccuracies in the results due to the information held.
3. The Home Office should give reasons why the applicant did not pass the checks to allow applicants the best chance of obtaining settled status and have the opportunity to collect evidence for a more accurate check.
4. The Home Office should make it easy and quick for applicants to request HMRC and DWP records so that incorrect information about the applicants can quickly be rectified before they apply. For example, the Government gives a list of reasons for possible data matching errors, all of which could be out of the applicant's control, particularly women who are more likely to be dependence on benefit claims such as a Housing Benefit or Universal Credit claim.
5. Finally, ILPA proposes that the Home Office do a 6-monthly audit into the operation of the check which would enable the Home Office to make improvements to the systems accuracy, so that it succeeds for more applicants. This will prove more and more effective, and needed the closer to the end of the application window we reach.

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<sup>10</sup> See <https://www.gov.uk/guidance/eu-settlement-scheme-uk-tax-and-benefits-records-automated-check#how-the-automated-check-calculates-the-period-of-residence>.

### **3) EU Settlement Scheme: practical and emotional challenges**

Christopher Desira, Director, Seraphus Solicitors

Desira is the solicitor and director of Seraphus, a firm specialising in legal and policy advice relating to UK immigration, asylum and EU law. He works for the European Representation office in London and has work with and EEA and EU Swiss embassies.

#### *The EU Settlement Scheme – not so simple*

The Home Office intended for the EU Settlement Scheme to be as simple as possible stating that they are looking to grant applications and not to refuse them. However, the actual process and the required evidence need to be further analysed. As Erdunast also pointed out, the EU Settlement Scheme still requires applicants to prove eligibility and that the applicant has been in the UK for the time that they state they have been. It is clear how these requirements may be more than just simple obstacles for some. In other words, the process is much more complex than the three-step plan which the Home Office proposes.<sup>11</sup> In fact, applying for the EU Settlement Scheme is a very complex process and those challenges are best illustrated when engaging with the millions of individual backgrounds that need to fit into a one-fits-all scheme.

#### *Obstacles to the scheme and groups affected*

Some examples of groups who have problems with the application and who have been left out of the communication campaigns led by the Home Office include those with dual EU & third country nationality citizens, for example, those with dual Dutch and Somali nationality. These are individuals who have acquired EU citizenship somewhere along the paths of their lives and have a European passport but are unaware that they have to prove their status in the United Kingdom. They know they can live in the United Kingdom based on their passport but do not link Brexit with the ending of those rights.

Other groups include vulnerable citizens, such as the East Timor community in Europe, many of who have Portuguese nationality which provided them with access, but do not know enough about domestic law to know that they need or are eligible to apply. These are communities which are usually patriarchal and which have created conflicts within family units, spoken to some worried that the head of the family who hold their passports will not apply or will forget to apply. Desira also briefly summarised his work with other vulnerable groups. He found that

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<sup>11</sup> See <https://www.gov.uk/government/news/home-office-publishes-details-of-settlement-scheme-for-eu-citizens>.

certain groups of people have problems with proving residence and identity due to their lifestyle. This has caused for some communities to become even more withdrawn from society.

Other groups of vulnerable citizens who will have problems with the application process are those who lack the capacity to understand the process, notwithstanding their inability to engage with the application procedure. In addition, individuals and institutions caring for these individuals including family members, carers, local authorities, social workers and mental health institutions may or may not have the legal ability to act on their behalf to aid them with the application. It may not be able to be much help. Desira found during his work that social workers are not well equipped to aid incapacitated individuals on their behalf as their knowledge of the scheme is still lacking. Most social workers who have not received training or assistance to aid people with the application process and have rarely to have obtained evidence of the nationality of the child.

However, Desira also found that it's not just those with offences or alternative lifestyles that may be deterred from applying to the scheme. Applying to the Scheme has also been a challenge for long-term residents. Desira found that there is reluctance or even a refusal from long-term/older residents to engage with the scheme. Here, again, communication efforts made by the Home Office have failed to explain the necessity of the scheme. Communication is mainly framed around explaining to individuals how to prove their rights to work or to rent. However, these are no longer concerns for many long-term residents. Even those who have the necessary documents, through no fault of their own will find themselves being locked out of the Scheme. Another key group who have severe obstacles with the application is third country citizens who are whose status depends on their partners who may not want to help them, who are abusive, or who have abandoned them. For example, a third country national spouse of an EU citizen, which relies on the cooperation of that person but is no longer with that EU citizen due to relationship breakdown.

Based on the aforementioned scenarios one can see how women and children as well as minority groups are going to be the hardest hit in this scheme, especially women who are victims of domestic violence. However, Desira pointed out that these categories fail to touch on the full extent of the work that ahead for him to get everyone who is protected under this scheme actually protected. Additional minority groups that Desira found to be the most at risk include the following non-exhaustive list: digitally illiterate, those with dependency needs, citizens living in isolation, those working in the informal economy, those vulnerable to exploitation by employers or rogue lawyers/trafficked persons, those at risk of exploitation or domestic violence from family members, those incorrectly believing they are British and not

required to apply, prisoners and those released from prison (particularly after the deadline), those detained under immigration powers, those who face higher instances of discrimination, particularly Eastern Europeans, those taking up residence in the UK close to the deadline, those living in informal living arrangements, those living in sheltered or religious communities, homeless persons, those living outside the UK, including family members.

While the Home Office claims that those who do not apply within the deadline are allowed to apply late but only with good reason, one already starts thinking about the issues that this will cause for the aforementioned groups and whether their reasons for possibly applying late will be accepted by the Government. These include problems faced by members of Roma communities that may have been deterred from or reluctant to apply, dual EU third country nationals who may not have been aware they have to apply, or vulnerable women and children dependant on others who did not have applied at all, or long-term residents who have not opened up a new bank account on time. There are actually no definite protections once an applicant applies late and the excuse will only be accepted in extreme situations.

Desira also hypothesises that new groups who have not applied to the Scheme but should have will be revealed. Desira also pointed out that no other registration scheme has achieved 100% take up in the past. From previous registration systems, the most common reasons for applicants late submission was due to a major life change, at a point when a child was reaching higher education, a person who was in the process of applying for a pension, someone requiring non-emergency treatment, and a person who was applying for a new job or buying a new home.

#### *The new immigration system and the EU Settlement Scheme*

The new immigration system will lock out any EU citizens without pre-existing leave. It will give those EU citizens that have current status in the country pre-settled status and those with at least five years of residence settled status. Upon refusal, an applicant has the right to appeal the decision. However, from his experience as an immigration solicitor, Desira explains that many of these applications will not be accepted by the courts or the Home Office, and the appellant would usually be facing years of appeals.

Even those who acquire pre-settled or settled status may also have problems. This means that the support that the Home Office claims to be offering towards the application and the required support for vulnerable EU citizens which have been discussed at this roundtable will be needed for years to come and is not a short term issue.



*Concluding remarks*

As mentioned above, the application process for the EU Settlement Scheme is not as simple or as easy as the Home Office has tried to make it seem. Through his experience in trying to aid and inform individuals in the UK about the EU Settlement Scheme, Desira found that the largest general issues were lack of awareness, emotional consequences/distress, fear, not understanding why they need to apply and dependency. Communication campaigns led so far by the government have left out big categories of both vulnerable and non-vulnerable individuals. This is why it is very important at this stage to inform people about the scheme and provide them with adequate support to apply while acknowledging the difficulties that vulnerable groups face. We need to work on notifying people of the process immediately.

## **B. EXPERIENCING IMMIGRATION IN THE UK – VIEWS FROM THE GROUND**

### ***1) The impact of the EU Settlement Scheme on women: policy and practice***

Nicole Masri, Legal Officer, Rights of Women

Rights of Women is a women's voluntary organisation committed to securing equality, justice and safety in the law for women. They offer free confidential legal advice to women on their advice lines. Rights of women covers three main areas of law - family law, criminal law, and immigration and asylum law. In addition to their advice services, they provide training to professionals and provide guidance to policy makers. A high proportion of the women who access the services of Rights of Women are victims of gender-based abuse.

#### *Introduction*

Through their work engaging with the government on issues affecting migrant women, Rights of Women were invited to join the Home Office's safeguarding user group which was set up over a year ago to address the needs of vulnerable people in the context of the EU Settlement Scheme. Since that time, they have been analysing the law, policy and implementation of the EU Settlement scheme. In their analysis, there have been various categories of women identified that are at risk of failing to secure any status under the scheme or are at risk of failing to secure full settled status.

#### *Women who are unaware of the need to apply*

There are numerous reasons why people will not be aware of the need to apply to the scheme. In Masri's experience so far, very few of the women who use their advice services know about the EU Settlement Scheme or that the UK's exit from the EU would affect their immigration status. The more common presenting need relates to accessing benefits or wanting to understand the impact of relationship breakdown on their immigration status and entitlement to benefits. They have observed little difference since the Government's mass communications campaign launched this year.

A lack of awareness of the Scheme will affect some vulnerable women in particular. Perpetrators of abuse commonly use immigration status to control their victims. They often see victims of domestic abuse kept in the dark about the need to make immigration applications, victims prevented from making immigration application or deceived by perpetrators into thinking applications have been made on their behalf. These types of cases will emerge after the deadline for application. These cases are most likely to come to light in circumstances where a woman has contact with an arm of the State, for example, in an

application for benefits, or with a private body undertaking immigration checks, for example, an employer.

Under the Withdrawal Agreement, there will be, if implemented, a power to accept out of time applications for good reason. Masri notes that she is not aware of the same commitment being made explicit in the context of a no-deal scenario. While there is still some time from the deadline for applications, the organisations concerns have not been assuaged by government's attitude to preparing for out of time applicants. In their stakeholder meetings, the Home Office has informed Rights of Women that it has no intention on consulting with representative groups on its approach to out of time applications.

The organisation have pressed government for policy guidance ensuring that vulnerabilities, such as being a victim of domestic abuse or modern slavery, are properly identified as forming reasonable grounds for missing the deadline. They also want to see legislation to protect out of time applicants from losing lawful residence in the UK in the period between the deadline for applications and an out of time application.

#### *Women who have difficulty applying to the EU settlement scheme*

An application-based system that places the burden of proof entirely on applicants leaves many vulnerable women facing serious barriers to successfully securing status.

##### a) Lack evidence of own identity & nationality and that of their children:

The two most common situations Rights of Women comes across are women who have had identity documents removed from their control by perpetrators of abuse; and women who cannot obtain identity documents for their children where an abusive or uncooperative father's consent is required by the issuing nation.

Rights of Women was one of seven community organisations that participated in the second private beta testing phase in November and December 2018. During PB2, they supported 12 women to apply to the EU settlement scheme. Amongst the 12 women, they had eight children who needed to make an application to the EU Settlement Scheme. They were only able to assist half of those children to apply with their mothers because the other half did not have a valid passport. Of the four children who couldn't apply because they didn't have a valid passport, in three cases it was because their fathers' consent was required to obtain a new passport. The children's mothers were unable to document them because they were estranged from the children's fathers because of domestic abuse.

Unlike now, during PB2, it was a mandatory requirement to have a valid passport. Now the children could seek to rely on the Home Office's power to accept alternative evidence of their identity and nationality. The Home Office's approach to the exercise of this power will require close scrutiny.

At present, due to their experience in applying for the scheme the Rights of Women remain concerned that the exercise of the power to accept alternative evidence of identity and nationality lacks transparency and accountability. Applicants who do not have a valid identity document cannot apply online. They need to request a paper form to apply and can only do so by persuading the Settlement Resolution Centre staff that they qualify for the exercise of discretion. If the Settlement Resolution Centre refuses to issue a paper application form there is no written decision explaining why.

b) Lack evidence of own residence:

As was mentioned by Erdunast, for women, the fact the HMRC checks do not include tax credits or child benefit as well as the limited evidential value attached to most DWP benefits undermines the utility of the checks. The effect is that women face a disproportionate burden of proving their residence.

Government's report of the second private beta testing phase, published on 21 January 2019 confirmed that of all the decisions made by that time in the private beta two cohort of applicants,<sup>12</sup> 84% did not need to provide any additional evidence of UK residence because the decision was made on the basis of the automated data checks or because the applicant already had a valid permanent residence document or indefinite leave to remain.

Rights of Women's experience during PB2 was markedly different. Of the 12 women supported to make applications, 10 needed to provide additional evidence of their residence – 83% of applicants in the client group did need to provide additional evidence of residence.

The clients' circumstances from the Rights of Women varied. They included women with periods of self-employment, informal cash in hand work, periods of unemployment due to child care, periods of unemployment due to abuse and destitution or homelessness, periods of

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<sup>12</sup> Home Office, 'EU Settlement Scheme private beta testing phase 2 report' (21 January 2019) <<https://www.gov.uk/government/publications/eu-settlement-scheme-private-beta-2/eu-settlement-scheme-private-beta-testing-phase-2-report>> accessed 27 August 2019.

unemployment due to ill health, periods receiving benefits that were not included in the automated data checks e.g. tax credits and child benefit and periods receiving benefits that would have been identified on the automated data checks but limited evidential value would have been ascribed to them e.g. housing benefit, income support.

Of the 12 women Rights of Women supported to make an application, two women did not have to provide additional evidence because they were both in work at the time of the application and eligible for pre-settled status only. The evidential burden on them was lower for pre-settled status because they only needed to prove they were resident in the UK in the last six months. In both cases, the fact they were in work and on the payroll in the last six months meant the automated data checks were effective for them. Masri states that from her experience and from the experience of the organisation of monitoring the effectiveness of the automated data checks demonstrates the importance of disaggregating data by type of status.

Of the 12 women the organisation supported to make applications during private beta two, eight had resided in the UK for a continuous period of five years and were eligible for settled status. Each and every one of these eight women had to provide additional evidence of their residence in the UK because the automated data checks did not confirm their eligibility for settled status.

In the context of the disproportionate burden on women to provide evidence of their residence, the Home Office's approach to evidence is critical. The Home Office has gone on record repeatedly that they will be cooperative and apply discretion. However, Rights of Women have in turn repeatedly raised their concern that when government's user facing and caseworker guidance is all but silent on how discretion would be exercised there is a considerable risk that it is exercised unfairly and inconsistently.

There were early signs of positive practical experiences during private beta two for the organisations clients who had the benefit of legal representation in a controlled pilot. From the PB2 casework there were examples of Home Office decision-makers checking Home Office records for evidence of past applications. There were also cases where there were gaps in evidence provided that did not prevent a grant. While this was from the practical experience of the Rights of women, Masri notes that there is no evidence that this is a formal approach adopted by the Home Office because it has not yet agreed to include the approach in its published guidance. This leads to uncertainty and inconsistency when some applicants will receive the benefit of this assistance and others will not.

Masri, on behalf of Rights of Women, argues that one of the most important safeguards to preventing vulnerable people from failing to secure status under the EU Settlement Scheme, is for the Home Secretary to accept a duty to make reasonable enquiries on behalf of an applicant to satisfy himself, where it is necessary to do so, if the applicant's own identity and nationality and continuity of residence (and where necessary, on behalf of a non-EU citizen, the identity, national and residence of an EU citizen family member).

c) Non-EU nationals who lack evidence relating to a family member:

Non-EU national family members are a category at high risk of failing to secure status under the scheme because of a lack of evidence. The evidential burden on non-EU citizens is much greater than that on EU citizens because their eligibility is dependent on an EU citizen. The Home Office has created a system that is geared primarily towards family members applying together. The system is more difficult to navigate for non-EU national family members who may be estranged from their EU citizen family member and need to apply separately. If a woman is separated from an abusive partner, she may have no way, without the assistance of the State, of proving his identity and nationality and residence. This will also be true of women still trapped in abusive relationships.

The safeguard Rights of Women proposes as a duty on the Home Office to make reasonable enquiries is critical for non-EU nationals estranged from their EU citizen family members. However, the user facing and caseworker guidance is silent on what, if any support, the Home Office will offer family members who cannot access documents from EU citizens. For example, it could, but doesn't, offer to check its own Home Office records, HMRC or DWP records.

Even if the Home Office agreed to undertake enquiries on behalf of non-EU family members, checks may come back negative. For example, an EU citizen may not have applied to the scheme or the EU family member may be Irish and have no need to ever apply to the scheme. In instances such as this, it would be expected that the Home Office to give appropriate consideration to its powers to grant leave outside the rules taking into account the best interests of any children involved. Unsurprisingly, we have seen no evidence of the Home Office's willingness to address any alternative grounds in applications made under the EU settlement scheme.

d) Women who cannot meet the eligibility criteria because of relationship breakdown:

Aside from those who are refused on grounds of serious or persistent criminality, EU citizens

are in principle able to meet the eligibility criteria independently. As we know, this is because as a matter of domestic policy, the UK government has introduced more favourable eligibility criteria than those agreed in the draft Withdrawal Agreement. EU citizens need to demonstrate they have lived in the UK for six months in any year of their residence to qualify.

Each EU citizen woman who used to rely on a partner for her right to reside, can now qualify under the scheme in her own right. Rights of Women welcome this policy decision because, from an immigration status perspective, it severs the tie of dependency some women had to their partners.

The same does not apply to non-EU citizens. They can fall outside the scope of the EU settlement scheme because their eligibility depends on maintaining a family relationship with an EU citizen in the UK. This has caused a concern that this will disproportionately disadvantage non-EU national women and put victims of domestic violence at risk. Victims of domestic abuse need safe and secure routes to exit abusive relationships rather than a scheme that compels them to stay in abusive relationships or face removal from the UK.

There are three categories of non-EU national women that Rights of Women is particularly concerned about from their experience:

- a) Non-EU national spouse who separates from an abusive EU citizen husband before residing in the UK for 5 years:
  - Not eligible under the EU Settlement Scheme
  - If the EU citizen perpetrator husband leaves the UK or loses his EU nationality by naturalisation before divorce proceedings are commenced.
  
- b) Non-EU national unmarried 'durable' partner who separates from an abusive EU citizen partner before residing in the UK for five years:
  - Not eligible under the EU Settlement Scheme
  
- c) Non-EU national child who is estranged from (and not dependent on) an abusive EU citizen parent or step-parent:
  - Not eligible under the EU Settlement Scheme
  - If she turns 21 before residing in the UK for five years

Masri points out that the organisation consistently advocated for protection to be given to these

groups of vulnerable women to ensure they can regularise their status independently from the perpetrator of abuse.



## 2) *Administrative justice and the EU Settlement Scheme*

Ollie Persey, Pupil Barrister, Public Law Project

### *Introduction*

Working as a Pupil Barrister at the Public Law Project, Persey has worked on statutory instrument filtering and tracking (making secondary legislation to effectively rewrite constitutional laws). Persey states that that the government seems to view the EU Settlement Scheme as a model for the future. In fact, the government stated the EU Settlement Scheme “sets the tone for the design and values of the new immigration system that we will implement from 2021.”<sup>13</sup>

### *The legislative and policy design for the EU Settlement Scheme (i.e. the form of the rules)*

The legislative and policy design for the scheme is made up of Draft Withdrawal Agreement March 2018 and the immigration rules as covered by Wilkins. The substance of the legislative design is made up of both the pre-settled and settled status and the interplay between the two.

The temporal limitations for the EU Settlement Scheme involve mainly the time limits for the application. The consequences for out of time applications are still unclear and under what circumstances they will be accepted has not yet been decided. Persey also notes that registration and decision making on status is determined by an online “streamlined” application.

During the initial decision-making stages of the application, Persey found that applicants submit a highly variable quality of evidence. The automated application uses an algorithm to check DWP and HMRC databases after it requests that the applicant provide their name, date of birth, and national insurance number. The technological challenges associated with providing such information in this way has been previously discussed.<sup>14</sup>

### *Redress – administrative review, tribunal appeals and judicial review for the EU Settlement Scheme*

The types of redress available within the United Kingdom is the tribunal right of appeal, administrative review and judicial review. However, there does not seem to be an existing intention from the government to secure the right of appeal for individuals applying to the EU Settlement Scheme. Persey states that there needs to be an appeal right for all people

<sup>13</sup> HM Government, The UK’s Future Skills-Based Immigration System (Cm 9722, December 2018) [9.19].

<sup>14</sup> See Erdunast’s contribution above.

required to apply to the EU Settlement Scheme and those who are granted pre-settled and settled status. On a more positive note, in the event of a deal the primary redress which will most likely be available is administrative review. However, as Persey put forward, administrative review is only the Home Office “marking its own homework” and is not and adequate form of redress alone. In addition, administrative review is not available for all types of government decisions made, only challenging eligibility *NOT* suitability. In addition, for now, it is not clear whether this form of redress will even be available in the event of the United Kingdom leaving the EU. While the tribunal right of appeal is more robust and independent and is a more satisfactory form of redress, this may never be available for those exposed to the scheme. While over three million citizens asking for right of appeal, the government has consistently responded with if “no deal, no appeal.” In fact, that is the generally considered acceptable within the current political sphere.

#### *Concluding remarks and questions for the future*

The main way of securing the right of appeal in the United Kingdom is through a Bill which has yet to be passed and go through both Houses of Parliament. While there is an amendment being pushed forward for the new Immigration Bill, the bill is not going to be passed any time soon. Furthermore, as stated before the government has not expressed a clear intention for implementing appeal rights at all while stating that appeal rights existing in more than one place for the scheme would be confusing and that, for that reason, tribunal rights will most likely be inaccessible. This again, is problematic when one considers the aforementioned limitations of the administrative appeal system and considers the narrow legality grounds within which Judicial Review can be available. Two of the key questions for the Home Office are firstly, how should a right of appeal be introduced in the mean time? And secondly, is there any intention on behalf of the government to implement appeal rights at all?

While the government has repeatedly stated that there is a right to reapply for the scheme and so an extensive appeal system is not needed, Persey’s experience with the application so far is that the system is not currently functioning in a way which will allow individuals to reapply. The second question for concern then is whether the government will ensure that the reapplication process is available for those applicants who have been refused.

### **3) *Brexit and vulnerable EU citizens***

Katarzyna Zagrodniczek, Immigration Programme Manager for the East European Resource Centre (EERC)

The EERC is a charity that provides information, advice and support to the most vulnerable people from Central and Eastern European from the 2004 and 2007 EU accession countries: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. The EERC is one of the 57 organisations in the UK who have been awarded funding from the Home Office to support vulnerable EU citizens to apply for settled status. This funding has been put towards; advice and support lines which help individuals with their application, workshops for Eastern European citizens to inform them about their rights, and extensive outreach.

#### *Introduction*

While the Home Office claims that the EU Settlement Scheme application process is simple and user friendly, the EERC has noticed that the claim is not true when it comes to vulnerable EU citizens. Generally, the organisation has noticed that many clients are not able to access mainstream services and complete the application process successfully. After the Brexit referendum the EERC noticed a raise in hate crime, EU nationals being asked about permanent residency during interviews, landlords refusing to rent properties to EU nationals, challenges related to settled status. At the same time, the Government has required EU nationals to apply for settled status in order to be able to stay in the country after Brexit.

#### *Key problems with EU Settlement Scheme*

In fact, the key issues seem to be language, awareness, accessibility, problems with application, problems with eligibility, proving identity with valid documents, and residence. Out of this list awareness and accessibility seem to be the greatest obstacles for vulnerable EEA citizens.

#### *Awareness*

There is lack of awareness of what even Brexit is among many vulnerable Eastern European citizens. There is also limited understanding of what settled status is among vulnerable Eastern Europeans and why they even need to apply. In fact, many EU nationals who believe they are excluded from the application process when they are not such as children, long term residents, permanent residents, people with properties in the UK, people with a British spouse or children who are already British nationals.

The main problem with this lack of awareness stems from the fact that there has been no obligation to apply for any status until now. The Government's message after the Brexit referendum was that "you do not need to do anything now." Another key problem is that there are data sharing fears among vulnerable citizens. Those that are dependent on social care, benefits, those with criminal convictions but also and victims of modern slavery are worried about the application process and so are too scared to apply. In addition, individuals are very scared about the nature of a digital status. It is confusing that there is no document, actual code or number, just a web page.

### *Accessibility*

There are also key barriers to accessing the scheme which have been discovered by the EERC. Key barriers for this group of vulnerable people from even accessing information about the scheme is language barriers, disabilities, and illiteracy including IT illiteracy.

### *Problems with the application*

Issues with the application itself have prevented many from following through with the application process for the EU settlement scheme correctly or at all. Reasons for this include digital exclusion, no access to mobile phones, no personal email, no access to internet, problems with using Identity Verification App (especially reading the chip), scanning faces, taking a picture, problems with uploading documents/evidence. Only 10 documents are allowed for this section, asking difficult for some to provide full evidentiary support.

The description of evidence about which period of time the document is confirming is very difficult for clients with limited English as they may not understand documents that they are submitting. As outlined by Erdunast, due to the inaccuracy of HRMC records, people have become too scared to apply due to other people's negative experiences. For example, for self-employed individuals who haven't submitted their latest tax return before applying. HRMC cannot find data for the last six months, which is inaccurate. This creates fear and distrust in people when it comes to the system. Furthermore, majority of clients have noticed that emails from the Home Office all go to spam or junk folder and do not get seen. In case of any other IT issues the Settlement Resolution Centre often advises you to use a different laptop or phone or to reinstall the app.

### *Problems with eligibility*

Those without an ID or sufficient documentation to prove their residence at the time of the application also tend to see inaccurate results or get discouraged from applying at all. However, not having an ID or lacking sufficient documentation does not automatically exclude

someone from having five year residency in the UK.

Furthermore, it is the more vulnerable EU citizen that is more likely to lack official documentation despite actually having five-year residency. For example, the type of applicants found to not have evidence of their residence are victims of marital abuse and domestic violence, victims of labour exploitation, casual workers paid cash in hand, individuals with no bank account, people without proof of address, homeless people and people in precarious housing, family members providing unpaid care to people with long-term ill health or disabilities; grandparents caring for their children, people not in education, employment or training, not claiming any benefits living with their family members. This is not an exhaustive list.

### *Conclusion*

While the Home Office has taken steps to aid vulnerable Eastern European citizens, there are still serious obstacles for these citizens when it comes to the EU Settlement Scheme. The application process seems to set unrealistic expectations for those who are vulnerable and at-risk. These people may not even realise or understand that they will lose their status in the country if the application is not completed.

#### **4) Roma and Brexit Campaigning and Policy Project<sup>15</sup>**

Mihai Calin Bica, Campaigning and Advocacy Project Worker, Roma Support Group

##### *Introduction*

Roma Support Group (RSG) is the first and largest charity working with and for the Roma community in the UK since 1998. Following the Brexit referendum in 2016, RSG has engaged community members in debates and information sessions regarding Brexit and rights of EU citizens' rights in the UK after Brexit, meeting hundreds of Roma community members and also being one of the main actors of an event organised in July 2018 in Parliament regarding Brexit and issues concerning the Roma community.<sup>16</sup>

##### *RSG and PB2 testing of the EU Settlement Scheme application*

As part of the EU Settlement Scheme development process, in early October 2018, RSG was invited to take part in the PB2 testing of the EU Settlement Scheme application, which consists of identity checks through a smartphone app, and the completion of an online application form.

The testing period lasted from 15 November to 21 December 2018. While the organisations initial aim was to support 20 applicants through the process, they ultimately recruited 69 service users for participation in the testing, submitting 64 applications. One application could not be submitted due to numerous technical errors. Another approximately 40 potential applicants were turned away as RSG was at full capacity in terms of the numbers of people it could handle at the time.

RSG applied broad criteria in recruiting participants; having:

- A valid passport,
- A valid email address,
- The ability to pay the (then) £65 application fee.<sup>17</sup>

Participants' profiles encompassed a wide range of backgrounds, ranging from people with regular full-time employment to those who had only worked temporary cash-in-hand jobs, or were on benefits. It is important to remember that many of these most vulnerable service users would have been unable to access the testing phase due to lack of appropriate identification

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<sup>15</sup> The text of this contribution is also based on a report produced by Mihai Calin Bica, Sarah Zawacki & Andy Shallice for the Roma Support Group in January 2019.

<sup>16</sup> Philip Brown, Andy Shallice, Gill Brown, Arthur Ivatts, 'Roma and Brexit Report' (July 2018) <<https://www.gypsy-traveller.org/wp-content/uploads/2018/09/APPG-Brexit-and-Roma-Report-1.pdf>>

<sup>17</sup> This fee has since been scrapped, see <https://www.bbc.com/news/uk-politics-46950719>.

documents and inability to pay the application fee.

As such, RSG was unable to include rough sleeping Roma in PB2 testing. Rough sleepers will largely need to be approached through street outreach, yet the current organisational capacity does not allow for extensive outreach work. Furthermore, many rough sleepers will lack the necessary documentation for completing their settled status applications, thus requiring much more intensive support than RSG were able to provide.

Bica notes that as an organisation, RSG was overwhelmed by demand from their service users for support in completing the application. Even after the beta testing period ended, they still received requests for help in completing the application.

RSG staff asked all applicants at the outset to attempt to complete applications as independently as possible. Out of the total of 64 applications submitted, only two applicants were able to complete the application without any assistance, and four were able to complete parts of the application (e.g. they were able to enter their phone numbers, their email addresses or take photos of themselves). The remaining 58 applicants required assistance with all stages of the application process. These issues were both broadly attributable to language barriers and digital-related barriers. Identifying, scanning and uploading additional supporting documentation created some significant barriers to completion of the application. Applicants did not know which documents were relevant for inclusion or what period of time was covered by each document, nor did they have the IT skills to scan and upload documents to the application form.

55 applicants intended to obtain settled status, with the remaining nine applying for pre-settled status. 23 applications faced technical errors with regard to DWP and HMRC checks. Out of these, six revealed no records in HMRC or DWP data and the 17 remaining applicants revealed less records than expected by the applicants. This required people to upload additional evidence to prove their residence in the UK. Apart from this, 13 applicants met technical errors with regards to the application itself, like smartphone application not reading the passport chip, inability to scan applicant's face, or issues regarding the online application such as errors when uploading documents.

From the total applicants, 48 were able to submit their application during their first appointment, including applicants who were required to provide further evidence of their residence. The average application time took around 50 minutes - ranging from 30 minutes to 90 minutes. The other 16 applicants required, in total, 21 further appointments in order

identify, scan and upload further evidence or re-submit their application following technical errors. Each of these appointments took on average 60 minutes, ranging from 45 minutes to two hours. Also, RSG staff recorded a number of 29 calls made to the Settlement Resolution Centre, mainly relating to technical errors.

By the last day of the testing trials, 41 applicants (out of 64 applications) had received their final decision. On average, it took three days for an applicant to receive a decision, with a spread ranging from five hours to 11 days. One applicant who received a wrong decision was informed about the ways to discuss or appeal it but not why they were not granted the status they applied for. RSG will be able to fully assess this situation once they have contact with all applicants. The organisation's concern is that many of them might not be aware if they have received a decision or not as they do not regularly check their email accounts, and they rely on relatives, friends or others to do that for them.

From the total of 69 applicants initially booked to be supported by RSG only 64 had their application submitted; one applicant was not able to submit his application due to several technical errors, two applicants discovered their documentation had expired during the appointment and two applicants cancel the appointments as they could not pay the fees.

#### *Concluding remarks*

RSG recommends that more support should be made available for a fair access of all EU Citizens in the UK, especially those from vulnerable groups, including the Roma, to go through the system as there are many more vulnerable people than initially believed.

RSG recommends support designed specifically for deaf, mute or blind EU citizens living in the UK should be made available. They are unable to access the Settlement Resolution Centre. RSG also recommends that the deadline for applying for Settled Status applicants should extend by at least another year to 30 June 2022. From their experience, many EU citizens and majority of Roma community members still do not know about the Settlement Scheme. As more than a third of all their applicants were required to submit further evidence and further support, there are concerns of ability of the Home Office to consider and assess such a high volume of work in such a short period.



## C. THE BREXIT EFFECT ON CITIZENS' RIGHTS ACROSS BORDERS IN THE EU AND THE UK

### 1) *Retaining rights to protection from expulsion as a fundamental right in Brexit Britain*

Dr Adrienne Yong, Lecturer in Law, City, University of London

#### *Introduction*

Yong's research has focused on human rights protection post-Brexit, more specifically focused on EU citizens who were denied a vote in the EU referendum, but who are now likely to be most affected by withdrawal because of the effects on their private and family lives. Yong considered theories surrounding expulsion, particularly for vulnerable groups. One of the key questions that she tried to answer is if protection from expulsion is a fundamental right how can it be protect post-Brexit.

Yong notes that one of the largest problems with Brexit is that protection from expulsion is being undermined at the expense of a perceived need of regaining state sovereignty. Expulsion itself is mainly about exercising control, being able to decide who stays within borders and who does not, and, so, is yet another way of reinstating sovereignty. The problem here is that when immigration and expulsion are extensively controlled and increasingly so, these restrictions could lead to illegality and clear breaches of human rights. She notes that the EU Settlement Scheme is part of this ongoing plan to retake control and to gain back the sovereignty perceived to be lost and states that it is a continuation of the hostile environment policy. Yong notes that with the loss of the protection that the EU law has offered against deportation after Brexit, UK law will not be offering an equal alternative and the protection offered within national law against expulsion will, most likely, not be adequate.

#### *Right to protection from expulsion*

Brexit will allow for the UK to no longer to be bound by the Charter of Fundamental Rights, only by the European Convention on Human Rights (ECHR),<sup>18</sup> removing the right to free movement and allowing for greater control and exercise of sovereignty. The right to protection from expulsion is a subset of the right to private and family life protected by the Charter in Article 7 and through the ECHR in Article 8, hence it's challenge to sovereignty. This refers not to protection of individuals with an illegal status, but to legal individuals being asked or

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<sup>18</sup> Charter of Fundamental Rights of the European Union 83/02 [2010] OJ C-83/389, Article 7 and Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Article 8 (hereafter, the ECHR).

forced to leave. While the right to be protected from expulsion is protected both within EU law in the Charter and the European Convention on Human Rights before Brexit, it is clear that without the protection of EU Treaty provisions, the protection offered will not be as adequate.

What was originally an opportunity to liberalise immigration policies for EU citizens has now proven to be an opportunity to demonstrate true exercise of sovereignty. Protection from expulsion has both a social and legal element to it. While there is the legal element to it as exemplified by the legal status one may or may not receive, for example, from the EU Settlement Scheme, it is also a way to exercise control within the state by deciding who to keep in and who to keep out. As representatives of the UK government have stated, Brexit was about “taking back control”.

Yong notes that policies on expulsion demonstrate the level of control and sovereignty of a nation and is an exemplification of liberal democracy.<sup>19</sup> However, at the same time, Yong reminds us of the boundary paradox: there is no liberally democratic way of determining what the boundaries of a polity are. Yet, policies on expulsion distinguishes the outside from the outside and helps define what differentiates between the two. The problem is that these socially constructed boundaries have serious social and legal implications which may need to be challenged. Through her work, Yong concludes that since control and sovereignty are expressed through the governance of expulsion, the challenge to sovereignty must come from a human rights protection instead.

### *EU versus UK Approaches*

Yong uses a case study on deportation in her research in order to show how the adequate protection against deportation, a form of expulsion, which exists in the EU framework, is absent from the UK's.<sup>20</sup> When it comes to deportation there is a stark difference between the UK and EU positions. This is in turn revealing for how human rights are perceived in each system's constitutional framework, in terms of their importance.

This is particularly significant because while the UK will still mostly likely be bound by the ECHR post-Brexit, and so bound within the boundaries of Article 8 ECHR, it will still lose protection from Article 7 of the Charter. This again, is crucial because the protection currently offered by the EU against expulsion is much higher than domestically. The EU focuses on

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<sup>19</sup> Mae Ngai, *Impossible Subjects* (Princeton University Press, 2004).

<sup>20</sup> Orders for deportation are different from administrative removal, under Immigration and Asylum Act 1999, s10. Deportation is often for more serious cases, and administrative removal does not disallow re-entry unlike deportation.

protection *against* deportation, whilst the UK has a rebuttable presumption *in favour* of deportation.<sup>21</sup> Deportation itself and orders allowing this are also a very interesting phenomenon theoretically in terms of the implications for sovereignty and what it means to deport individuals and why.<sup>22</sup>

In contrast, post-Brexit the domestic law will not be offering similarly wide protections against expulsion. The Immigration and Social Security Co-ordination Bill seeks to get rid of the right to free movement and right to all EU treaty provisions. At the same time, Appendix EU to Immigration Rules refuses settled status for anyone subject to expulsion order. Under the Home Office suitability criteria, an individual who is subject to a deportation, exclusion or removal decision would be refused settled status. This could mean that those subject to a deportation order under appeal could be refused settled status simply because of the mere existence of their being subject to a deportation order. Given the high propensity for these deportation orders to be against a number of legal provisions, not least those related to human rights, it would be an even further miscarriage of justice, not to mentioned breach of human rights in the context of rights protection if this was then the reason why an individual did not get settled status.

### *The challenge of Brexit*

While Brexit will bring the denial of several human rights available within the EU Treaty provisions it will also provide new policies, laws and requirements which focus on who will be allowed in the UK borders after Brexit and who will not. One of these of course is the EU Settlement Scheme which ultimate focus is on those who cannot get settled status before official withdrawal. Yong has concluded that while vulnerable parties are most at risk for failing to apply successfully, there are relaxed conditions for others. Yong also notes that the requirements and evidence that the EU Settlement Scheme calls for demonstrates a hierarchical valuation of EU citizens by the Home Office, allowing for the “sifting through” of those considered desirable and those that are not. In other words, the EU settlement scheme is yet another tool within the new immigration control regime used to regaining a socially perceived loss of control and sovereignty. It is part of the hostile environment policy giving the UK government an escalated level of control over which EU citizens which will remain within its borders and which do not.

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<sup>21</sup> Adrienne Yong, ‘Human rights protection as justice in post-Brexit Britain: a case study of deportation’ in Tawhida Ahmed and Fahey (eds), *On Brexit: Law, Justice, and Injustices* (Edward Elgar, 2019 forthcoming).

<sup>22</sup> William Walters, ‘Deportation, expulsion, and the international police of aliens’ (2002) 6 *Citizenship studies* 265, 277.

*Concluding remarks*

There is a need for the UK to seriously consider its protection against expulsion after Brexit if an adequate level of human rights is to be maintained in the UK. Merely from a human rights standpoint, the decision not to protect such rights after Brexit is a risky one. However, it is also not a positive sign that there has not been the requisite attempts to protect against deportation pre-Brexit, suggesting that the likelihood of it being protected after Brexit is even less. There are grave human rights injustices if this is not something that is properly considered by the UK. There is a remaining political commitment to the rights under Article 8 ECHR that are meant to be considered before issuing an order for deportation. However, they are not often relied upon because the presumption in favouring of deporting rather than protecting against it within the UK and the fact that there is very little political will to prevent against expulsions does not help.

## 2) *Brexit and the British in the EU-27 beyond the illusion of free movement*

Dr Michaela Benson, Reader in Sociology, Goldsmiths, University of London

### *Introduction*

Benson presented the lesser-known story of citizens' rights. She runs Brexit Brits Abroad which is an innovative research project funded by the UK in a Changing Europe<sup>23</sup> initiative. It examines what Brexit, as it unfolds, entails for British citizens living and working in the EU-27, exploring in particular questions of citizenship, identity and belonging from a sociological perspective. Working with British citizens abroad since 2002, the goal of Benson's work in this particular research project is to question what is exposed once the structural privileges of EU citizenship are removed and to draw out the uneven experience of Brexit in the lives of British citizenship. In this way, the project intends to highlight the instabilities of privilege.<sup>24</sup>

Presenting the significance of the project, Benson explained how British immigration is very high and stands as the top 5 nationalities to immigrate to European countries. The problem is that UK citizens who live abroad and believe they have exercised their treaty rights are now facing removal from EU countries where they currently work, study, reside and live. Official statistics will tell you that approximately 900,000 British citizens were living in EU.<sup>25</sup>

Benson predicted that the fallout from Brexit will outline exactly what the limitation for knowledge was for these citizens. This includes bringing to light how law on paper will translate into law and practice post Brexit and affect British citizens abroad; the uneven exceptions and treatment in terms of Brexit across different types of British citizens living abroad; how freedom of movement legislation will actually affect these citizens who were not subject to scrutiny until Brexit and how that may depart from how they may have thought it would be applied. In other words, Benson's project examines how British citizen's rights have changed post-referendum—including through the enforcement of existing legislation relating to Freedom of Movement, how they are navigating the effect of Brexit in other countries and how varies from country to country.

### *The research*

<sup>23</sup> For further information, see <http://ukandeu.ac.uk/>

<sup>24</sup> For further information, see <https://brexitbritsabroad.com>

<sup>25</sup> 'What information is there on British migrants living in Europe?' (Office for National Statistics, January 2017)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatinformationisthereonbritishmigrantslivingineurope/jan2017#number-of-british-citizens-living-in-europe-in-2011-by-age>> accessed 13 September 2019.

Benson's research project examines whether and in what ways this time of social and political transformation in Britain is experienced by Britons resident in Europe, across a range of national and local settings. It questions in what ways them: re-evaluate their lives and citizenship; re-negotiate their identities; (re)position themselves in relation to shifting political realities of Europe; and navigate and manage the changing structural conditions that shape the possibilities for their continued residence and/or repatriations.

In particular, she focussed her talk on the elements of the project looked at British people living in France. This entailed ethnographic fieldwork which lasted for 4 months from June 2017–October 2018. The interviews focused on how people understood Brexit in the context of their lives and migrations and was designed to collect life and migrant histories. The interviews included questions about citizenship, identity and belonging.

There were two important aspects about France which made it useful to Benson's project. Firstly, it hosts the largest British population in EU-27 since 2007. Secondly, it offered a good example about how British individuals might fall between the gaps because, unlike other EU countries, there is not a registration process for EU citizens in France, and there is no requirement for EU nationals to register for a residence card. French law, however, rules that they can apply for a residence document if they wish and EU law gives them the right to obtain one after they have lived in France for five years or more. However, many French prefectures often seem to be unwilling to issue residence documents to EU nationals, even to those who have lawfully lived in France for more than five years. This has been a concern for approximately three to four years and has worsened since the Brexit vote, with UK nationals particularly being affected.<sup>26</sup>

The study looked at both what Brexit means *for* British citizens already living in the EU-27 in terms of how a change of legal status may lead to a loss of EU citizenship; how the withdrawal agreement has affected and will affect British citizens rights in Europe including right to residence, social entitlements and employment. However, the study also looked at what Brexit means *to* British citizens living in the EU-27. In other words, the study also mainly aims to explore how the continued right to reside interplays with individual circumstances and how the protracted uncertainty has had significant impacts on the lives of these migrants.

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<sup>26</sup> 'UK and EU Citizens Still Struggle to Obtain Residence Documents in France' (European Citizen Action Service, 14 June 2018) <<https://ecas.org/uk-and-eu-citizens-still-struggle-to-obtain-residence-documents-in-france>> accessed 15 July 2019.

Therefore, the project, loosely framed, examines what the legal transformation of Brexit means to British citizens and how they are differently positioned post-Brexit. The general reaction from the British citizen community after Brexit seems to be that they have questioned their sense of identity and connection to Britain (something Benson would like to look at in more detail) while at the same time there has not been a good level of understanding among the British population and what it means for their rights. The findings in France also brought to light the examination of structural privilege built on Britain's position in the world and its position as a colonial power. Benson's study revealed the instabilities of such a privilege by recognising that just as for any population, the British who live in Europe include those who are undoubtedly precariously positioned: those with chronic health conditions, those on very limited incomes, who are often not registered in the places that they live, and those who, for a variety of reasons, have highly limited access to social entitlements and services. Brexit as a process has the potential to heighten and amplify these conditions of precarity at the same time, lessening temporarily or permanently, the advantages of structural privilege.

The study has so far highlighted the impacts of Brexit on and preceding the legal transformation of the rights and entitlements of British citizens. It looks at how Brexit shatters the illusion of freedom of movement as a level playing field revealing how Brexit as a process is unevenly felt and experienced. Finally, the study provides insights into how the privilege of British citizens living in Europe is re-constituted, enacted and embodied to reveal the instabilities of privilege at the level of the individual.

### *Concluding remarks*

Benson's work focuses on the lesser known story of Brexit and its implications for British citizens living in Europe. It moves beyond Brexit as a legal process—the terms on which such Britons are currently able to live in other European member states. It examines how the British sense of legal identity and citizenship may be transformed as their European citizenship is removed, tracing what is exposed once the illusion of free movement is shattered. In legal terms, Brexit marks a moment when these Britons are reclassified as migrants in the places they live and work and the structural privileges that they previously held as British (European) citizens are reframed. The project is based on findings during qualitative research with British citizens living in the EU-27. As Benson argues, to make sense of how Brexit is experienced by those who have moved under the mantle of freedom of movement and with what effects this has on their everyday lives, requires a relational perspective that takes seriously the hierarchies of belonging beyond nationality that shape migrant experience.

### **3) Unsettled Status? Who is at risk in the Settlement Scheme?**

Madeleine Sumption, Director, Migration Observatory at the University of Oxford.

#### *Introduction*

Sumption's research focused on cataloguing which groups of people are at risk of not securing settled status might be and collecting data on the size of these groups. An important caveat is that the size of vulnerable groups is likely to be underestimated in available data sources.

#### *Evidence*

Sumption concluded that in order to secure settled or pre-settled status, EU citizens wishing to maintain status in the country would need to know or want to apply, be eligible to apply and have the specific evidence required by the Home Office. When it comes to the evidence required for the EU settlement scheme application, the Scheme allowed for flexible options for most groups, and many people would not have to submit evidence at all because the government already holds data on them. However, there are some smaller groups of people who could face problems with evidence.

Firstly, while the majority of people have bank accounts, there are those who do not. In fact, 3.5% of adults do not have bank accounts, across all nationalities which is equivalent to approximately 90,000 European citizens. Secondly, many European citizens do not have proof of work or residence because they have informal arrangements that do not produce documentation. Some lack ID documentation. While the provision of identity documents is a key part of the required evidence for the scheme, the 2011 census found that up to 100k EU born residents had no passport.

#### *Pre-settled status/settled status*

There is a concern that some people who are eligible for settled status will receive pre-settled status instead, because they cannot or do not provide evidence of at least 5 years' residence. This is problematic for several reasons. Pre-settled status does not secure permanent status, so people with pre-settled status will need to apply again for settled status later. If a person with pre-settled status has a child, that child is not automatically a British citizen (they would be automatically a citizen if the parent had settled status). In addition, other particularly vulnerable groups such as victims of exploitation, victims of abuse, those with mental health problems, Roma citizens, those with disabilities may have problems securing settled status and thus will be given a more precarious immigration status.

#### *Data outliers*



Some EU citizens may not be considered vulnerable but may nonetheless fail to apply to the scheme at all. The size of this group is difficult to predict at the moment. However, it could include long term residents who feel that they should not need to apply for a status they have had for most of their lives; EU citizens planning to return to the UK post Brexit; those who are planning to return to their country of origin eventually and do not feel that they need to apply; people who do not think that things will change; the elderly; existing permanent residence holders; those who perceive themselves to be ineligible due to previous rejections or criminality, for example.

Sumption expects that the largest number of people at risk will be those who are not aware of the Scheme. The fate of these groups depends mostly on the approach that the Government chooses to take after the deadline. The government has said it will take a 'proportionate approach' to people who did not apply where there is a 'good reason'. However, some people will not have a good reason. Furthermore, the question of how individuals who do not have the required evidence in addition to having missed the deadline will be treated is still unclear. However, Sumption does point out that if the numbers of people in this group are big enough, the Government may consider extending the deadline or making the scheme declaratory.

#### *Will we know how many?*

Unless data collection improves, it may not be possible to accurately measure how many people have failed to apply for settled status. This is because current data sources come with substantial margins of error, and we know that they exclude some people, such as residents in communal establishments such as hostels, and certain EU/non-EU dual citizens.

If the number of EU citizens who fail to apply for settled status is very large, it will probably be clear from the data. If it is less than a few hundred thousand, it will be more challenging. There are some solutions to this problem if the government wants to develop the data to understand what share of people have obtained settled status. For example, Sumption notes that other options for data collection include linking Home Office records to HMRC and DWP statistics.

#### **4) Privatisation, 'mission creep' and lack of Home Office legal conscientiousness in the Home Office application process**

Sheona York, Clinic Solicitor, Kent Law Clinic, University of Kent

York is a clinic solicitor working for the Kent Law Clinic since September 2012. Her research focuses on issues arising from recent and current UK immigration policies such as the aim to reduce net migration, to discourage unlawful migrants through the 'hostile environment,' and to deport foreign criminals.

##### *Introduction*

York explained that the hostile environment is characterised by UK immigration policy and practice which has increasingly operated on an "illegal unless proved legal" basis. The legal underpinning of the Home Office's culture of disbelief is that the burden of proof is entirely on the applicant. However, for EU nationals and their families, the EU Settlement Scheme represents a major political change in UK immigration control where the legal intention is to grant status, not to refuse and where there is a shared burden of proof. However, the remaining problem is that those individuals who are not successful with the EU Settlement Scheme will still be exposed to the still present hostile environment together with all other non-EU Applicants.

##### *Main features of UK immigration control*

Firstly, since the Thatcher government came to power, the government has multiplied the circumstances in which people have to prove their immigration status, and has increasingly required that this be done by producing specified documents rather than permitting holistic, common sense-based decisions. Therefore, the burden of proof on an applicant (not just for their immigration status but for any other public or private good or service) has in practice to be satisfied to the legal standard of "beyond all reasonable doubt." This applies not just to unlawfully-present migrants (the ostensible target) but to those lawfully present. Secondly, the outsourcing of immigration enforcement to other public bodies, private entities and private individuals has *legally distanced* migrants from decisions made about them. For example, the Home Office may inform an employer or landlord about someone's status (maybe erroneously) without the migrant herself being a party to that process<sup>27</sup> and thus having no remedy if a

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<sup>27</sup> From April 2018 the Home Office has provided access to this 'service' for migrants themselves, but only if they already hold a biometric residence permit or EU settled status. For example, York's client, granted indefinite leave to remain (ILR) in 2010 without receiving any papers, has since then had the right to work, in law, but has been treated as an unlawfully-present migrant since 2005.

mistake has been made.<sup>28</sup> Thirdly, the imposition of stricter requirements and significantly higher application fees, the lengthening waiting time for applications and appeals, the prevalence of Home Office case working and record-keeping errors, lack of caseworker discretion and common sense, and the lack of legal aid, (as well as the UK Supreme Court's definition of "precariousness"<sup>29</sup>) have combined with those other trends to prevent many unlawfully-present migrants from successfully making meritorious applications to remain (thus perpetuating illegality), and making it difficult for many lawful migrants to renew their leave, thus creating illegality.<sup>30</sup>

For the over 3 million visa applications and 130,000 citizenship applications made every year to UK Visas and Immigration (therefore, all other applications other than the EU Settlement Scheme), the privatisation of visa application centres (from 2005) and the rapid move to online application forms for applications from within the UK (from mid-2018) have been carried out with no published "statement of intent", no trialling and only imperfect post-hoc lines of communication from applicant groups to those in the Home Office designing the process.<sup>31</sup> This too has intensified the two processes of legal distancing and creating and perpetuating illegality. This is important for today's discussion because once EU nationals and any non-EU family members cease to be protected by their separate Scheme they too will be subject to the hostile legal forms and content of UK immigration control.

### *The EU Settlement Scheme – a major political change?*

The contrast with the treatment of EU nationals under the Settlement Scheme could not be clearer. At a practical level, uniquely in the history of migrants' applications to the Home Office, the Settlement Scheme was subject to two separate trials for specific groups of EU nationals before being opened to all applicants, the results of which were formally considered and acted on. For EU nationals, the legal intention is to grant status, (effectively adopting a shared burden and lower standard of proof, even below the balance of probabilities) as well as explicitly renouncing some of the controversial requirements of the EEA Regulations;<sup>32</sup> and the political intention, backed up by significant resources, is to ensure that no one gets left

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<sup>28</sup> The Home Office is threatened with judicial review, but this cannot injunct the employer to employ the person or not dismiss them.

<sup>29</sup> *Rhuppiah* [2018] UKSC 58; Richard Warren "Private life in the balance: constructing the precarious migrant" (2016) *Journal of Immigration, Asylum and Nationality Law* 124, 130.

<sup>30</sup> From York's submissions to the Windrush Lessons Learned Review, drawing on her paper 'The 'hostile environment' - how Home Office immigration policies and practices create and perpetuate illegality' (2018) 32(4) *Journal of Immigration, Asylum and Nationality Law* 363.

<sup>31</sup> This lack of forward planning and lack of involvement of applicants' stakeholders is completely standard – see part 4 of the paper.

<sup>32</sup> Immigration (European Economic Area) Regulations 2016, in particular regarding the need for comprehensive sickness insurance and the treatment of gaps in enjoyment of Treaty rights.

behind, for fear of another Windrush debacle. This refers to the fact that since Windrush, staff resources and time have been provided for careful, cooperative decision-making; controversial requirements have been abandoned; and the experience of applicants has been sought and improvements made to the process.

*The EU Settlement Scheme – two telling cultural and political changes – (1) ‘looking to grant, not for reasons to refuse’, (2) a conscious effort to ensure no one who is eligible is left out of the EU scheme?*

The EU Settlement Scheme Statement of Intent, as quoted in the Independent Chief Inspector of Borders and Immigration report,<sup>33</sup> stated that the Home Office wished to take the opportunity to develop a fresh culture in this new business area, one that reflected the aim of ‘looking to grant, not for reasons to refuse.’ Both that inspection report and the recent Home Affairs Committee (HAC) report<sup>34</sup> noted that part of the success of the first two trials of the new scheme, and of the functioning of the full scheme so far, must be due in large part to there being relatively good levels of staff resources, with high morale. ‘Everyone said that they were committed to providing a world class customer service’ and were clear that the aim was to ensure that the decision the applicant received was ‘right first time’.<sup>35</sup> The Home Office clearly recognise that to achieve such a culture requires significant additional resources as well as a change in attitude. For example, for those applicants for whom the standard HMRC and DWP checks did not show five years’ residence, Home Office caseworkers were permitted (i.e. afforded the time) to exercise discretion in favour of the applicant and would not refuse an application for lack of documentation before attempting to contact the applicant to assist them find additional information.<sup>36</sup> In relation to vulnerable applicants, again the Home Office recognised that these would need extra resources, and has agreed to provide funding ‘of up to £9m’ for voluntary organisations to assist such applicants.<sup>37</sup> However, even the level of resources and planning so far provided has not resolved all issues, and the Home Office has been urged to make further funding available to assist with vulnerable groups, as well as paying for travel to document scanning locations, help with fees, etc.

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<sup>33</sup> David Bolt, ‘An inspection of the EU Settlement Scheme November 2018-January 2019’ (Independent Chief Inspector of Borders and Immigration (ICIBI), May 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/799439/An\\_inspection\\_of\\_the\\_EU\\_Settlement\\_Scheme\\_May\\_WEB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799439/An_inspection_of_the_EU_Settlement_Scheme_May_WEB.PDF)> accessed 3 September 2019.

<sup>34</sup> Home Affairs Committee, ‘EU Settlement Scheme Fifteenth Report of Session 2017–19’ (House of Commons, 14 May 2019) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/1945.pdf>> accessed 3 September 2019, 17.

<sup>35</sup> Bolt (n32) para 6.13.

<sup>36</sup> Bolt (n32) para 6.39, 6.45-48.

<sup>37</sup> Bolt (n32) para 6.51.

But underlying all this trialling, concern and preparation is a clear political aim to ensure that all eligible EU nationals and their family members do make a successful application under the scheme, so as not to be left without status – explicitly attempting to avoid a new Windrush scandal. In other words, the Home Office appears to be adopting a shared responsibility for the stability and security of status of EU nationals and their families, into the future.

However, as York points out, the key remaining issue (and why it is so troubling that the Home Secretary, in his responses to the HAC,<sup>38</sup> did not seem truly to appreciate the difficulties caused by the hostile environment) is that many both lawful and unlawful individuals within the UK will still be exposed to the hostile environment, including those who are unsuccessful with the scheme: this has not been addressed. In other words, the government's approach to the EU Settlement Scheme is completely different to the various currently existing regimes governing applications for entry visas and or leave to remain. The high-level position of the Home Office towards non-EU migrants is that while they might choose to enter or remain in the UK their motives are always suspect and must accept that their presence in the UK is fundamentally temporary and must be strictly policed.

*What are the effects of UK immigration control on those lawfully present?*

A recent ICIBI inspection into Home Office approach to illegal working refers to a Home Office 2014 estimate that 500,000 people might be in the UK lawfully but do not have a biometric residence permit (obligatory for non-EU and non-UK citizens since 2008), of whom only 90,000 have since applied for one. This means that the remaining lawful residents who do not have this residence permit are all subject to the 'hostile environment.' Further, the barriers to asserting their legal rights have increased because of privatisation and Home Office 'mission creep' in the application process.

*What are the effects of the presence of UK immigration control for illegal migrants?*

The Home Office does not know how many illegal migrants there are in the UK. The most recent estimates are from 2009, of between 450,000 and 900,000. These are the ostensible targets of the hostile environment. These may technically be failed asylum-seekers, illegal entrants, overstayers, those with leave curtailed or revoked, or who have had a deportation order made, but who have not left. Many of these have arguable rights and entitlements under the Immigration Rules, case law or Home Office policies, but for whom the barriers to making arguable applications have increased because of privatisation and Home Office 'mission

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<sup>38</sup> Home Affairs Committee (n33) 17.

creep.’

### *Privatisation and ‘legal distancing’*

York notes many charities and non-governmental organisations have all pointed out how technological issues (such as crashes and browser compatibility issues) and misinformation about where to send evidence distances the applicant from the legal rules. In addition to this there is no route of redress, which further perpetuates legal distancing. As York points out, from the moment of submission via Sopra Steria (a French private company) until the Home Office refusal, there is no Home Office contact point or formal way of intervening.<sup>39</sup> Thus, an application may be refused, or rejected, or even not successfully made, on the basis of decisions made by the outsourced entity. Applicants do not have access to their algorithms or other Sopra Steria case-working procedures, and thus, even if a judicial review of the Home Office is theoretically available, they cannot obtain the necessary information. In her concluding statements, York points out the malign transformation of ‘applicants’ into ‘customers’ in the minds and public vocabulary of governments and managers of public bodies. However, regardless of whether any particular migrant has a ‘choice’ whether or not to come to or remain in the UK, in relation to the application process they have no choice. This is why Amber Rudd’s comment about setting up an LK Bennett account<sup>40</sup> was so wide of the mark. If LK Bennett’s online shopping portal was as bad as the Home Office, no one would shop there, whereas a person applying for a public right or entitlement must apply to the Home Office – and is in no way a “customer” but always and only an applicant. Finally, under public administrative law, an applicant must have access to the law, and to a fair and transparent procedure.

### *Concluding remarks*

During the period of the Legacy,<sup>41</sup> hundreds of thousands of asylum-seekers waited years for decisions, and, in despair, shopped around from one lawyer to another in the hope of finding someone who could resolve their case. Precisely because of the capricious nature of the process, the difference between good and bad advisers began to blur. There is a danger that

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<sup>39</sup> The new online system was launched rapidly in November 2018 along with a £91 million contract to a French company, Sopra Steria, to run a number of locations where applicants would, by appointment, attend to enrol their biometrics and bring their supporting documents to be scanned.

<sup>40</sup> ‘Rudd says online EU registration will be ‘as easy as shopping at LK Bennett’ (*The Guardian*, 23 April 2018) <<https://www.theguardian.com/politics/2018/apr/23/amber-rudd-online-eu-registration-system-lk-bennett>> accessed 3 September 2019.

<sup>41</sup> Following the 2006 discovery of 450,000 unresolved asylum applications, the Case Resolution Directorate was set up to deal with all of them by July 2011. Cases were drawn out of the archive at random and ‘worked on to a conclusion’, with no way of prioritising urgent cases, or, e.g. dealing with all those from a specific country after a new country guidance case. Solicitors spent years telling clients ‘there was nothing we can do’ to resolve their cases.

the essentially capricious nature of application procedures both from outside the UK and inside will have a similar effect. The opaque process is leaving solicitors and advisers ignorant of the procedures and any new 'requirements', so clients cannot be advised confidently, leading applicants to shop around, pay stupid money, make unmeritorious application, and fall into or remain in the hostile environment. If these problems are not solved *for all immigration applications*, eventually EU nationals and family members may face the same issues in future.<sup>42</sup>

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<sup>42</sup> See also Jonathan Thomas, 'Back to the future – what history tells us about the challenges of post-Brexit UK immigration policy' (Social Market Foundation, May 2019).

## Concluding remarks

It is important to emphasise that this conference, held on 11 June 2019, set out the state-of-play of immigration in the UK (primarily for EU citizens, but also concerning UK citizens in the EU and other non-EU individuals) at the time. It intended broadly to be a brief and early evaluation of the progress of the EU Settlement Scheme two and a half months on from its official roll-out to the public after 29 March 2019. It is relevant to note that this was also the original date of withdrawal for the UK from the EU, whose subsequent extension did not affect the EU Settlement Scheme's operation.

The intention of the conference and its different parts were to consider views from a broad spectrum of interested and influential parties. It is important to note at this juncture that arguably the most interested and influential party, the UK Home Office, accepted the invitation to participate in the conference but did not consent to being part of the conference proceedings outlined above in this report. Their presentation was entitled 'EU Settlement Scheme – protecting the rights of European citizens in the UK'. However, the rest of the conference report is a reflection of views from policy and practice in Part A, from representatives of individuals participant to the Scheme in Part B and from academia in Part C.

The conference discussed several areas where immigration policy concerning immigration post-Brexit needed some further reflection. As such, it was the intention of the conference and this report to bring awareness and attention to these very important issues. In particular, there was a focus on certain parties that were at a disproportionate disadvantage in applying successfully for settlement (Erdunast, Desira) this due to the policies in place concerning how the UK intended to govern these individuals (set out by Wilkins at the beginning in her overview of UK government's (then) position on immigration). In particular, the idea was to raise awareness of both the individuals who by their nature could arguably be said to be vulnerable such as the poorer and less educated Roma and Eastern European communities (Zagrodniczek, Bica), and less obvious scenarios such as certain groups of abused women (Masri). Focus in particular was on why and how individuals may be disadvantaged in a more legal sense (Persey, Sumption, Yong) and how these issues were translated to experience of British expatriates living abroad in the EU (Benson).

It is difficult to come to any concrete conclusions at a time of such flux, change and unprecedentedness in the political environment surrounding the UK's withdrawal from the EU. However, it is hoped that this conference report sheds some much needed light on the crucial



issues facing individual rights protection in light of immigration and Brexit. As the UK government wades its way through the murky waters of Brexit, the hope is that some of the issues highlighted and addressed at this conference will be addressed in due course. There are serious legal and practical implications of the issues highlighted, and it would be prudent legally and practically for the concerns raised to be dealt with, and hopefully resolved before there are serious implications on individuals' lives. After all, what is at stake here could have a profound effect on millions of individuals' livelihoods, private lives and family lives, and if there is one thing bringing together all the conference participants' contributions is that the individual is at the centre of each consideration, and there are some reasons why this must be the case in light of Brexit.

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