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Adrienne Yong

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Adrienne Yong
The City Law School

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A Gendered EU Settlement Scheme: Intersectional Oppression of Immigrant Women in a Post-Brexit Britain*

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Adrienne Yong

Abstract

The EU Settlement Scheme (EUSS) is a transitory immigration regime rolled out by the Home Office as part of the measures for the UK withdrawing from the EU. More can be said about whether the EUSS can truly be hailed an overall "success", as per official Government messaging, several years after its initial introduction. This paper evaluates this by considering two case studies of vulnerable immigrant women required to apply to the Scheme to successfully remain in the UK after the transition period: those at risk of or facing violence against women and girls (VAWG), and non-EU family members (NEFMs) of EU citizens. Using the theories of intersectionality and vulnerability, the paper outlines how gender and immigration status intersect to make women more vulnerable by virtue of the legal framework of the EUSS and its criteria, arguing that it entrenches intersectional oppression faced uniquely by these women.

Keywords: Brexit, EU Settlement Scheme, violence against women and girls, non-EU family members, intersectionality, vulnerability

* This paper aims to state the law as of 1 July 2022. All errors are the author's own.

Introduction

The UK's withdrawal from the EU was a long drawn-out process for many reasons, with the unfortunate consequence of adding to significant uncertainty around the effect of Brexit on the lives and livelihoods of EU citizens in the UK and their families after withdrawal.[1] A majority of this group of EU citizens could not vote in the crucial referendum that ultimately decided their fate upon the end of free movement on 1 January 2021. Much early attention was dedicated to their plight via campaigns and subsequent governmental policies aimed at protecting EU citizens and eligible family members from losing rights as a result of Brexit, most notably through the EU Settlement Scheme (EUSS; the Scheme). Attention on this matter continues well beyond the EUSS's application deadline of 30 June 2021. With this context in mind, this paper seeks to more closely examine a specific group of individuals, argued to have been put at higher risk of greater vulnerability in post-Brexit Britain[2] because of the EUSS's constitutive immigration framework: immigrant women. Adopting an intersectional lens to analyse the vulnerability of two groups of immigrant women – victims and survivors of violence against women and girls (VAWG) and non-EU family members (NEFMs) of EU citizens – the paper argues that the application of the EUSS legal framework and criteria, set out in Appendix EU of the UK's Immigration Rules, is perpetuating the oppression of these women at the intersection of their gender and immigration status.

It is acknowledged that there were great strides made to try to secure the rights of EU citizens in the UK after the referendum result was announced. The quick roll out of the EUSS to the public on 30 March 2019 as a fully digital system was a significant task (Home Affairs Committee, 2019), with Kevin Foster, Minister for Future Borders and Immigration describing it as ‘hugely successful’ (Home Office, 2020a). There has been an overwhelming uptake in the number of applications to the Scheme lasting well beyond its official deadline, approaching 7 million at last count, with 92% of these being successful applications.[3] However, what has had less attention are the remaining 8% of unsuccessful applications (Home Office, 2022a), whose proportion increases as the numbers of applications submitted also increase (Benn, 2020). This paper shed lights on what appears to be a relatively small percentage, noting that it actually constitutes several hundreds of thousands of individuals, and argues that when broken down, it is women who are disproportionately represented in this group. This is because of the precarity Brexit risks imposing on immigrant victims and survivors of VAWG, and the gendered nature of the category of NEFMs from EU law.

Whilst there is some data available on EUSS applications, this paper is not a thorough empirical analysis of the data. Publicly available Home Office data (2022a, 2022b) is limited

due to the publication of only certain disaggregated categories of application received and concluded since the Scheme was rolled out. What data may otherwise concretely prove that there are less favourable outcomes for certain groups of immigrant women is not easily or freely available, apart from a notable freedom of information request made in June 2021 by Barnard and Costello (2021). This paper's intention, therefore, is rather to fill an urgent gap in the research agenda pertaining to vulnerable immigrant women, who have fallen within the cracks of new EUSS system. The paper's originality is in applying an intersectional lens in this context, which allows for a holistic review of the existing situation, related literature and doctrine. By extrapolating from what data does exist, the claim can be made that immigrant women without a secure immigration status are comparatively more disadvantaged than the general population by the new post-Brexit immigration regime. Turning a blind eye to their vulnerabilities and outcomes under the EUSS significantly undermines the Government's claim that the EUSS is 'operating effectively' (Home Office, 2020b: 3). Considering intersectionality explains why Brexit has made women at the intersection of their gender and immigration status more vulnerable within the context of satisfying the legal criteria of the EUSS.

This paper is structured as follows. It begins by considering the EU Settlement Scheme in the context of the legal framework of Appendix EU of the Immigration Rules, and how the interpretation of the law into its requisite criteria has played out in the experiences of vulnerable applicants to the Scheme, especially concerning their ability to apply successfully through the online application route. Noting that obstacles exist for applicants who are deemed to be outside the mainstream, it then introduces the theoretical framework that will apply to the latter half of the paper to explain why these obstacles exist for immigrant women in particular. They are Kimberlé Crenshaw's theory on intersectionality (1989) and Martha Fineman's vulnerability theory (2008). Third, zooming in from the wider context of the Scheme itself and applying the aforementioned theories, two groups of vulnerable immigrant women each become a case study – victims and survivors of violence against women and girls, and non-EU family members of EU nationals. These two groups are analysed in detail to demonstrate how being at the intersection of gender and immigrant status is oppressive under the EUSS's application process, specifically when attempting to satisfy the criteria. Finally, the paper concludes, noting the importance of highlighting the plight of these often-forgotten vulnerable immigrant women, which is largely exacerbated by the UK's decision to withdraw from the EU.

The EU Settlement Scheme in Context

The UK's withdrawal from the EU presented a unique situation of what was criticised as "limbo"

for many EU citizens in the UK and their families who sought to remain legally in a post-Brexit Britain, gender notwithstanding (Remigi et al., 2017). In order to mitigate the effects of this, the Government repeatedly promised to protect the rights of EU citizens and their families, previously enjoyed under EU citizenship in Article 20 TFEU (May, 2017). As one of the negotiating priorities of the EU, it was crucial that the Government fulfil its promise with haste, hence the roll out of the EUSS to the public on 30 March 2019. It offered two legal statuses: pre-settled status, for those who had not yet resided in the UK for five years (the qualifying period for permanent residency), and settled status, to replace the status of permanent residency deriving from EU law (Article 16, Directive 2004/38/EC). In order to obtain one of the two statuses, three criteria have to be satisfied – proof of identity, eligibility and suitability (Appendix EU9, Immigration Rules). Identity requires proof of ID and biometrics, eligibility speaks to one's residency in the UK as an EU citizen (or their family member) and suitability ensures applicants are of good character. The Home Office branded these criteria as 'three simple stages' from the outset (Home Office, 2018: 2) and the application process for the EUSS was designed to be entirely online, save for some exceptional situations. It is these exceptional situations that are the primary focus of this paper.

Appendix EU of the Immigration Rules was intended to apply to all individuals previously eligible under EU law, who were in the UK before the end of the transition period on 31 December 2020. Appendix EU forms the legal basis of the constitutive system of the EUSS, which as mentioned, was designed as a fully online application system. There was much emphasis on the online application process from the start as it was supposedly meant to be 'as easy to use as setting up an online account at LK Bennett' (Home Affairs Committee, 2019: 33). Nonetheless, three exceptions exist that allow for a paper application. They are: (1) for those unable to access the online application, (2) for those who do not have ID, (3) and for derivative rights holders, also known as NEFMs. One of the primary underlying reasons for this paper arguing that the EUSS is having a disproportionate effect on women is that many of the most vulnerable applicants who cannot apply online are making up most of the numbers of unsuccessful outcomes. The overarching argument in this paper is that these are more likely to be women. This is the situation regardless of the fact that early on, the Home Office officially sought to address concerns that some may not find the application process as simple as officials themselves claimed it should be.

A "vulnerability cohort" was identified to take part in private beta testing stage 2 (PB2) for the EUSS several months before the Scheme opened to the public, at the end of 2018. This cohort, identified by the Home Office, included vulnerable immigrant women subject to domestic violence, amongst others. There were originally 57 organisations across the UK

granted £9 million in funding to provide support for EUSS applications (Home Office, 2019a). The objective of PB2 was to hear from representatives of the vulnerability cohort about their cohort's experiences of the EUSS, with a view to identifying areas for improvement to the Scheme before it went live to the public (Home Office, 2019b). At the end of the pilot, concerns were expressed by the participants of PB2 and the Independent Chief Inspector of Borders and Immigration about how the process was complicated and arduous for many individuals with 'non-straightforward' applications, or those 'who have any form of vulnerability'. Most scathingly, though, it was noted that the Home Office was seemingly unable to fully appreciate the difficulties faced by these vulnerable groups, firstly, when attempting to satisfy the application criteria, and secondly, when seeking to apply via the digital system (Bolt, 2019: 5; Home Affairs Committee, 2019: 29).

Several years later, and following the official deadline passing for applications to the Scheme, these concerns have been vindicated by the statistics. There is a lower success rate for the exceptional paper-based route compared to the online one, though now this information is only available through Barnard & Costello's aforementioned freedom of information request (2021). Paper-based applications were only included as part of the published statistics on the EUSS in June 2020, over a year after the Scheme opened publicly. Interestingly, whilst data has consistently been made available on numbers of applications and outcomes under the paper-based route's third exception for derivative rights holders, no disaggregated data is currently available on the other paper-based application categories. It appears that the Home Office has subsumed any disaggregated data on paper-based applications and their outcomes into their main set of statistics (Home Office, 2020c). This has the effect of masking how the outcomes overall for the paper-based applications differ from the online ones. Given who was being asked to apply through the paper-based route and their much higher risk of an unsuccessful outcome, though, this choice becomes more unsurprising.

It would be accurate to say that the lower success rate of paper-based applications appears to be a direct consequence of funnelling the "non-straightforward" applications from vulnerable individuals – such as victims and survivors of VAWG and NEFMs – into those routes, given they already have a higher risk of getting an unsuccessful outcome because of their "non-straightforward" natures. It can thus be argued that the provisions under Appendix EU as the legal basis for the EUSS's criteria unwittingly operate to disadvantage women at the intersection of their gender and immigration status, given that having a general legal entitlement to rights as set out in the law does not always translate to substantive protection. Being vulnerable by virtue of one's intersectional characteristics translates into a different experience than that envisaged by the Home Office for individuals applying under the legal

framework of the EUSS. Within this context, this paper makes its wider argument about how rules set out in Appendix EU of the Immigration Rules impact immigrant women particularly, due to them sitting at the intersection of gender and immigration status.

Intersectionality and Vulnerability Theory

Given how much attention was dedicated to attempting to streamline the EUSS process as outlined above (Yong, 2018), the barriers both groups of immigrant women still faced after the consultation in PB2 serves to demonstrate how the legal framework of Appendix EU interpreted by the constitutive system of the EUSS and its criteria has let these women down. Victims and survivors of VAWG are a group consisting exclusively of women, who in the context of a post-Brexit Britain, are also at the mercy of their intersecting immigration status. NEFMs, or derivative rights holders, are a group consisting exclusively of immigrants, and who in the same context of a post-Brexit Britain, are now also at the mercy of their intersecting gender. In both situations, the claim is that their intersecting identities exacerbate their overall vulnerability in a post-Brexit Britain. Applying Crenshaw's theory of intersectionality (1989) and Fineman's theory of vulnerability (2008) allows for a detailed explanation of how and why.

Intersectionality

Intersectionality, pioneered by Crenshaw (1989), is the theory used here to identify and exemplify how the law operates to undermine immigrant women's experiences as a specific category of its own in a post-Brexit Britain. Intersectional discrimination is different from racism, xenophobia or sexism – all which could be argued to be relevant to an immigrant woman's experience in the UK given the loss of the EU framework of rights. Instead, intersectionality articulates the specific interaction and experience of those at the intersection of multiple group identities. In this case, it is the experience of being an immigrant intersecting with one's gender in the context of a post-Brexit Britain under the framework of the EUSS and its relevant criteria that is of interest

Intersectionality is not simply the addition of multiple layers of vulnerability. Here, it is rather the specific overall experience of an immigrant woman applying to the EUSS, whose oppression and discrimination faced can be attributed to their ‘intersecting subordinate identities’ (Carbado, 2013). In essence, this means that whilst, for example, gender on its own may be a contributing factor, attention must also be given to the problems raised by women who have been made precarious due to the new post-Brexit immigration regime. Otherwise, there is a risk of ignoring a part of the population that is already marginalised due to their gender (Crenshaw, 1989: 152), and now also for their immigration status due to Brexit. Furthermore, in this context for NEFMs, these individuals are already marginalised due to their immigration status (all being immigrants), and now due to the way the legal categories of

NEFMs are defined under EU law, are also marginalised for their gender since more women fall within the scope of the definition of NEFMs.

It is also important to note that outwardly, the intention behind the EUSS was not specifically to subordinate eligible individuals at the intersection of their gender and immigration status. After all, the Scheme itself is an attempt to achieve formal legal equality by allowing a perceived equal opportunity for all EU citizens and their qualifying families, including non-EU citizens, to apply to remain after Brexit. The argument is instead that these laws in practice fail to achieve substantive equality because it is not an equal experience or outcome for all under the EUSS, despite the supposed equal opportunity to apply. Crenshaw (1991: 1249) clarifies that '[i]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment.' However, the EUSS can be argued to be exclusionary by firstly, looking to its form and substance as a constitutive system requiring the satisfaction of certain criteria, and secondly, considering the reality of unsuccessful outcomes for many vulnerable immigrant women.

As mentioned, this paper does not solely consider empirical data to prove its arguments, because of the data gap in paper-based outcomes. However, because many of the unsuccessful applications are likely to be those of immigrant women, what is also playing out is what Purdie-Vaughns & Eibach call (2008) 'intersectional invisibility'. This occurs when those with multiple group identities fail to fit into mainstream single identity groups and thereby become invisible through 'distortion of the intersectional persons' characteristics in order to fit them into frameworks defined by prototypes of constituent identity groups.' (Purdie-Vaughns and Eibach, 2008: 381) Whilst the theory argues that invisibility occurs through a lack of intersectional representation within existing single identity groups, in this case, even the single identity group of women is absent from the data. Quarterly statistics published by the Home Office provide a breakdown of applications by UK country, age, nationality and even applications by local authority, but not by gender (Home Office, 2022b). Purdie-Vaughns and Eibach's (2008: 377) proposed solution to counter such intersectional invisibility centres around the recognition of the existence of distinctive forms of oppression faced by those with multiple subordinates. This underpins much of the analysis in this paper, which seeks to shine a light on the somewhat "invisible" experiences of immigrant women applying to the Scheme, and their various inherent vulnerabilities.

Vulnerability

Fineman's vulnerability theory argues that human vulnerability should be considered an

inherent and constant universal trait (2008: 8). In this context, it is by recognising the human vulnerability of the two groups of women that exposes the disproportionate effects that the process of regularising one's status in a post-Brexit Britain has on certain immigrant women applying to the Scheme. Fineman calls for us to interrogate the structures of governance – namely, the law – that fall short of achieving equality. This is the underpinning reasoning for the EUSS being front and centre of the analysis here. In this way, it can be argued that the State's governance of immigration post-Brexit is the source of immigrant women's vulnerability. Fineman further argues that the State should be responsible for addressing disparities arising between individuals and their varying vulnerabilities. For this reason, its position is interrogated here, given that the EUSS seems to be doing exactly the opposite of what Fineman argues should be done to address inequalities. It itself appears to be creating, rather than eliminating, greater discrimination and vulnerability for immigrant women in a post-Brexit Britain.

Certain immigrant women under the EUSS seeking to regularise their immigration statuses do not appear to have their inherent vulnerabilities accounted for, demonstrated by their negative experiences and outcomes under the new regime. Their risk of being unsuccessful when attempting to satisfy the EUSS's criteria is high, in contrast with the guarantees of protection afforded previously when under the EU framework under Union citizenship status. Indeed, this is the opposite of the guarantees of protection for vulnerabilities from the State that Fineman calls for. The specific situations facing the two groups of immigrant women outlined later in detail can thus be argued to be evidence of what McGoey (2019) would call the law's (and hence, the state's) apparent wilful ignorance of such inherent vulnerabilities. The effect is of a disproportionate impact on individuals who fail to conform to the prevailing mainstream identity, which differs depending on the context. They are more likely to be systematically ignored (McGoey, 2019: 59). In this context, the prevailing identity is informed by claims that the EUSS should be a simple online process, a claim which appears to be true given the high success rates of these online applications. Subsequently, those who are not in the majority group of those applying online (successfully) are being wilfully ignored by the State, and furthermore, have become somewhat invisible due to disadvantages caused by their specific intersecting identities.

Further evidence of what constitutes the prevailing identity in this context is Kofman's (1999) argument that men are generally more likely to have more secure immigration statuses than women because they often have more financial resources, due to them carrying out traditional forms of paid work. This is known as the male labour bias. This is present within the EU framework as well (Raj and Silverman, 2022; Shutes and Walker, 2018). It provides an

explanation for why so many immigrant women made vulnerable by the Brexit and the EUSS, especially those who carry out unpaid work or have caring responsibilities, and perhaps why so many face “non-straightforward” situations that carry a higher risk of failure when seeking to satisfy the EUSS's eligibility criteria. It becomes yet another example of how the State proves itself to be the source of greater vulnerability for these women. Within the context Brexit, it is the case that formally making certain individuals eligible under a constitutive system through the satisfaction of certain criteria obfuscates the reality that some of these individuals are more vulnerable. Being granted eligibility is not the same as being guaranteed protection in a post-Brexit Britain. The problem to be highlighted later is that the impact of the EUSS's criteria falls heavier on vulnerable immigrant women.

It is therefore through Fineman's vulnerability theory that this disproportionate yet understudied impact on vulnerable immigrant women can be brought to attention. It is especially important given Dauvergne's argument (2007: 495) that ‘[c]itizenship law perfects the exclusionary mechanism of migration law by cloaking it in a discourse of inclusion.’ The EUSS regime itself is the closest equivalent in this case to (EU) citizenship, as its “replacement” in a post-Brexit Britain. Some have highlighted the serious consequences of certain vulnerable groups falling outside the EUSS's scope leading up to and even beyond the deadline for the EUSS, which passed at the end of June 2021. This is by either failing to apply for a multitude of reasons (O’Brien and Welsh, 2021), or applying unsuccessfully having failed to satisfy the criteria. A cliff edge was created by the deadline, and though the consequences associated with the cliff-edge deadline are outside the scope of this paper (O’Brien, 2021), immigrant women are in a more serious position of risk of falling off such a cliff-edge. This situation has specifically arisen out of the Brexit context and is unique to immigrant women here because of their intersecting identities.

By consistently arguing that the Scheme is working well because of its less than 10% unsuccessful applications (Home Office, 2022a), official mainstream channels are undermining the reality of potential precarity for many vulnerable immigrant women. This is extremely pertinent to the situation of victims and survivors of VAWG as well as NEFMs in light of the messaging around the EUSS that promoted it initially as an easy, straightforward online process. Indeed, it is the assumed ease of individuals applying successfully that shows how the experience of those with vulnerabilities at the intersection of gender and immigration status were, in fact, wilfully ignored ahead of the Scheme opening to the public. This is despite asking for input from the vulnerability cohorts in PB2. The blindness to the consequences for these immigrant women when evaluating the overall effectiveness of the EUSS regime further deepens inequalities experienced by those at the intersection of gender and immigration

status, and embeds inherent vulnerabilities into the law's framework (Fineman, 2010).

It is thus the process of interpreting the law through the EUSS's application process and its requisite criteria that is aggravating vulnerability and deepening inequalities when the application's outcome is not successful. In turn, it demonstrates how much value is placed on, and thought is given to, some of the most marginalised in society like immigrant women, and their inherent vulnerabilities. In order to remedy this situation, details of what intersectional oppression is faced by immigrant women under the EUSS's application process must be outlined, to highlight exactly how these vulnerable women are being uniquely affected by the law. The next sections consider victims and survivors of VAWG and NEFMs respectively in greater detail. They draw out how the intersecting characteristics of gender and immigration status have prejudiced these two groups of vulnerable women in particular when seeking to satisfy the criteria of the EUSS.

Victims and Survivors of Violence Against Woman and Girls (VAWG)

The issues faced by victims and survivors of VAWG are a well-documented global issue that has attracted significant scholarly attention over the years (Burman eta l., 2004; Crenshaw, 1991; Kasturirangan et al., 2004; Menjívar and Salcido, 2002; Raj and Silverman, 2002; Sokoloff and Dupont, 2005). Burman and Chantler (2005: 64) in particular had noted long before EU withdrawal that specific concerns of minoritized women had not been addressed adequately by domestic VAWG policy in the UK. This in itself did not set a great precedent for the EUSS later also accommodating this vulnerability. Prior to the EUSS's establishment, it was clear that the Government had not considered the effects that an insecure immigration status would have on one's risk of being subject to domestic violence, despite scholarship identifying and highlighting that specific intersecting identities can lead to heightened vulnerabilities (Anitha, 2011). Within this context, the argument is that the EUSS is yet another immigration regime that exacerbates, rather than alleviates, such vulnerabilities for victims and survivors of VAWG. This section will clarify more specifically how the EUSS framework operates to make these victims and survivors of VAWG more vulnerable, through the consideration of the criteria of proof of ID and eligibility.

As mentioned above, Crenshaw spoke to the intersectional vulnerability of immigrant victims and survivors of VAWG in her seminal article focused on the US jurisdiction, where the theory of intersectionality was born (1991: 1246ff). She highlights that it makes a significant difference for a victim or survivor of VAWG to have citizenship rather than a precarious immigration status in terms of this removing a layer of vulnerability that was imposed by the law. It can be said that this claim is based on the notion that citizenship is a privilege (Marshall, 1950; Miller,

2000), which is especially evident even when compared to what is deemed as more “secure” immigration statuses, such as formal leave to remain. This has become especially true for the immigration regime applicable in a post-Brexit Britain. The framing of domestic immigration laws that treat it as a privilege to obtain leave to remain in a country without risk of deportation ultimately affects the development of subsequent domestic laws like the EUSS. This has consequences for victims and survivors of VAWG who are also immigrants.

Subsequent to Crenshaw's establishment of the theory of intersectionality in the early 90s, there was a burgeoning portfolio of literature in the mid-2000s that sought to address the glaring lacuna in the area of domestic violence studies and intersectionality (Burman et al., 2004; Menjivar and Salcido, 2002; Sokoloff and Dupont, 2005). Before this, the regulation of domestic violence largely appeared to fail to consider the unique experiences of VAWG for women of colour. Most of the arguments around intersectionality centred around race and class intersecting with gender to deepen inequality. They also focused on the law failing to recognise a Black woman's intersecting identity as distinct from her just being Black, or just being a woman (Crenshaw, 1991). The law itself has long played a significant contributing factor in exacerbating the negative experiences of these women because of its inadequate response to tackling VAWG for women of colour and immigrants, which has indeed been the case in the UK too (Graca, 2017).

It was Voolma (2018) who explained why this was (and arguably, remains) such an issue, by emphasising what is so unique about the experience of VAWG for immigrant women. She argues that it is the framework of immigration law which shapes much of the lived experiences of those subject to VAWG. Problematically, as she pointedly states, the precarity created by the law exacerbates what is already a harrowing experience for some of the most vulnerable of society:

> ‘the uncertainty inherent in a temporary status…is conceptually important here—a woman not knowing whether she can stay long-term provides perpetrators of violence with a further tool of abuse: exploiting women's fears of deportation.’ (Voolma, 2018: 1832)

These women are clearly already extremely vulnerable because of the gendered violence they are subjected to. Now, also being subjected to a new immigration regime is the distinction that intersectionality brings to their experiences in a post-Brexit Britain under the EUSS.

In this vein, the specific issues facing victims and survivors of VAWG under the EUSS can be classified by considering two of its three “simple” criteria for a successful application – proof of ID, and eligibility. A failure to satisfy these criteria on the face of it is the primary reason that

victims and survivors of VAWG are required to apply by the paper-based route instead, as an alternative. Firstly, proof of ID (Appendix EU9, Immigration Rules), which is a more difficult criteria for a victim or survivor of VAWG to satisfy should they be under control or estranged from an abusive partner and do not have easy access to their ID (Home Affairs Committee, 2019). Difficulties like these have been well documented since even before the Scheme opened, in PB2. This criterion also demonstrates how divergent the experience of a non-vulnerable individual versus a vulnerable one is, where something as seemingly straightforward as proving ID may cause precarity. By definition, those unable to satisfy the mainstream processes are considered precarious in terms of their immigration status. For anyone who is also a victim or survivor of VAWG, this precarity is problematically alongside vulnerability around being subject to gendered violence.

Secondly, eligibility (Appendix EU11ff, Immigration Rules), which was actually formally extended to any individual whose relationship with an abusive (EU citizen) partner has permanently broken down. This right to remain as a family member of an EU citizen, overlapping with the NEFM category, was included a year and a half after the Scheme officially opened to the public, in June 2020. This is significantly later than most of the mainstream application categories (Home Office, 2020d: 8). Since the deadline for the EUSS passed at the end of June 2021, the Government website has also been changed to reflect “reasonable grounds” for missing the deadline, which includes those in abusive or controlling relationships (Home Office, 2021). This acknowledgment of victims and survivors of VAWG in the policy, however, is a prime example of how formal equality does not always amount to substantive equality.

The reason that formally being eligible is not translating to substantive successful outcomes under the EUSS is because this strand of eligibility for victims and survivors of VAWG is an exceptional one. The mainstream position is that any family members of EU citizens are eligible on the basis of lasting durable relationships (Appendix EU11, condition 7; Appendix EU12, condition 4, Immigration Rules). As such, the law appears to favour rewarding those in such types of relationships, which undermines the formal inclusion of eligibility for victims and survivors of VAWG in the EUSS's criteria. This is especially as fewer women are succeeding through the “non-straightforward” exceptional routes under the EUSS. It has the added consequence of indirectly pressuring immigrants subject to VAWG to stay with abusive partners for fear of losing their links to a secure individual, as the risk otherwise of deportation is perceived to be too high. The argument is that the specific experiences of these women need to be better recognised within the applicable legal framework, in terms of more than just on the face of it within the eligibility criteria. It needs to go beyond even just being asked to

apply via the alternative non-mainstream route, whose outcomes now show these applications are less likely to be successful.

It is therefore the structure of the law itself, interpreted through the EUSS's criteria, that is adding to the disparity and inequality between certain eligible vulnerable women applying to the Scheme. The situation that the EUSS presents is summarised by noting the problem that societies have – in particular, patriarchal ones – that may not explicitly condone VAWG, yet cultural expectations of those societies might actually be fostering an environment that leads to more domestic violence (Kasturirangan et al., 2004: 321). Similarly, the EUSS provisions do not seek to support domestic violence, in fact, quite the opposite. The Government explicitly outlined an exception for victims and survivors of VAWG to the mainstream eligibility criteria. However, the reality of the legal framework as it applies – considering the procedure from application to a successful status – actually oppresses immigrant women, given it can be difficult to apply successfully by virtue of one's own independent status. This is rather than remaining with an abusive partner, fearing being subject to stricter immigration rules now that the EUSS deadline has passed, and risking deportation (Yong, 2019b).

Overall, it is not disputed that victims and survivors of VAWG are in extremely vulnerable positions. More recent feminist literature of the mid-2000s and beyond has highlighted how the law itself failed to consider that intersectional factors make the experiences of women of colour unique and thus more difficult and complicated in terms of resolution (Burman et al., 2004; Erez et al., 2009; Menjivar and Salcido, 2002; Sokoloff and Dupont, 2005). Oftentimes it is the way the law applies, demonstrating how it fails to account for their intersectional qualities like gender and immigration status, as this analysis highlights. However, as alluded to, there are also cases of non-EU family members of EU nationals, or derivative rights holders, who may also be victims and survivors of VAWG. Notwithstanding any overlap, however, individuals who are in this legal category as defined under EU law also face obstacles to obtaining a legal status under the EUSS.

Non-EU Family Members (NEFMs) of EU Nationals

Before delving into the issues facing NEFMs for those who are women and immigrants in a post-Brexit Britain, it is important to acknowledge that non-EU family members of EU nationals, also known as derivative rights holders, would not normally fall within the scope of the protection guaranteed under the EU Treaties. EU law does not automatically confer rights to individuals who do not hold EU citizenship status as a national of an EU Member State, who are otherwise known as third country nationals (C-165/16 *Lounes*; C-82/16 *KA and Others*; C-836/18 *RH*). However, it is the case that in certain situations of dependency, some non-EU

nationals do derive rights to remain based on their dependency to eligible rights-bearing EU citizen family members. These individuals, known as NEFMs, derive rights and are protected by virtue of an extension of the scope of EU citizenship status under Article 21 TFEU and through various case law that will be outlined below. Similar to victims and survivors of VAWG, this category of individuals is precarious as their rights depend entirely on their EU family member(s), and additionally in this particular context, by not being EU citizens themselves. This section outlines the issues faced by NEFMs, focusing on their satisfaction of the EUSS's eligibility criteria. It argues that the most vulnerable NEFMs are most likely to be women due the gendered nature of how these categories are defined and legally interpreted.

There is a great deal more data specifically on NEFMs than even on applications made by women generally to the EUSS, making them a good case study. However, NEFMs, like victims and survivors of VAWG, were also an afterthought in terms of being granted official eligibility to the EUSS a month after the Scheme opened to the public officially (Home Office, 2022c: 8). This is despite having rights under EU law for some time from five groups of established Court of Justice of the EU (CJEU) case law precedents: (1) *Lounes* (C-165/16) for naturalised family members of British citizens, (2) *Surinder Singh* (C-370/90) for family members of returning British citizens, (3) *Chen* (C-200/02) for primary carers of EU national children, (4) *Teixeira & Ibrahim* (C-480/08 & C-310/08) for primary carers of EU national children in education (Regulation 16(3) and 16(4), Immigration (EEA) Regulations 2016), and 5) *Ruiz Zambrano* (C-34/09) for primary carers of British dependents (Regulation 16(5) Immigration (EEA) Regulations 2016).[4] NEFMs, unlike victims and survivors of VAWG, are not always women and are also not all necessarily classified as “vulnerable” in the same way that victims and survivors of VAWG may be (unless, of course, they are in the overlapping category of falling in both groups). They are, however, all vulnerable by way of their immigration status. Of the five categories of NEFMs from EU law, this paper focuses on eligibility of the latter three – *Chen, Teixeira/Ibrahim* and *Zambrano* – as these are the categories mostly made up of carers of EU children and dependents. These are also most likely to be women.

The reason for arguing that more vulnerable women are likely to have sought protection under the NEFM category than men is because derivative rights are mainly reserved to non-EU nationals who provide care as family members who move to live with qualifying British citizens. Carers are more often women, both formally in the labour market and informally in the family home, and the male labour bias means that it is men who are the qualifying EU or British citizens that NEFMs rely on when seeking to secure their rights (Kofman, 1999). The high prevalence of single motherhood (versus single fatherhood) and victims and survivors of VAWG – both gender specific vulnerabilities – would also be a reason why the NEFM category

would have more women. The legal bases of the three aforementioned cases – *Chen*, *Teixeira*/*Ibrahim* and *Zambrano* – are entirely grounded either in proving some form of economic activity, having sufficient resources or being entirely reliant on the status of another individual. It is also for this reason that it is argued that the more difficult NEFM derivative rights categories will include more vulnerable women than the other routes by design.

The legal background of the rights deriving from EU law to non-EU family members of EU nationals in *Chen, Teixeira*/*Ibrahim* and *Zambrano* require further analysis to explain how the various legal bases for rights under EU law, transposed into domestic UK immigration law, disproportionately affect those at the intersection of their gender and immigration status. First, in *Chen*, a Chinese national travelled to Northern Ireland to give birth. Her daughter became an Irish citizen by virtue of *jus soli* citizenship rules on the island of Ireland, which confers Irish citizenship to all born on the territory. Mother and child returned to Britain where the child's father, a Chinese national, worked and resided. The mother sought residency under EU law, and the CJEU held that the non-EU mother could derive rights from her EU national child in order to remain to care for her. This allowed the baby to remain on EU territory and established the category of *Chen* derivative rights holders. The child needed to be 'exercising Treaty rights' for this to be effective, meaning that they had to have moved between Member States, and at least one parent had to have sufficient resources and comprehensive health insurance to avoid becoming a burden on the national Member State's welfare system, as per Art 7(2) of Directive 2004/38 and the *Bambaust* case (C-413/99). Therefore, though this category benefits non-working mothers who are an EU child's primary carer and whose fathers can support them financially, it primarily rewards those with sufficient resources. As such, it suggests that a single mother supporting a family on her own is not likely to be eligible under the *Chen* carer category.

Second, the conditions from the CJEU cases of *Teixeira* and *Ibrahim* are slightly more generous than *Chen*, requiring that a child be in education in the host Member State and their parent to be or have been a worker in order for the NEFM in question to be eligible to derive rights. In both cases, single mothers of EU national children sought housing assistance upon a right of residence in the UK. The CJEU held that the claimants derived rights to remain from their children to allow the children to continue in education in the host State. There is less reliance on economic activity than for *Chen* carers by not asking for proof of sufficient resources, but rather asking that at least one parent have been a worker. In theory, this category should empower vulnerable women in a way that *Chen* does not. However, whilst perhaps single mothers would not have to rely on former partners, the *Teixeira*/*Ibrahim* route still requires there to be some proof of worker status from either parent (whether primary carer

or not). This harks back to the requirement of some sort of economic activity. The most vulnerable non-working single mother would thus also find this condition less than straightforward to satisfy.

However, the most difficult category of NEFMs and where the data is starkest in terms of vulnerability under the EUSS is *Zambrano* carers, whose situation was also subject to great interest under EU law because of the wide-ranging effects of this case for the scope of EU citizenship status (Nic Shuibhne, 2011; Van Eijken and De Vries, 2011; Yong, 2019a: 112ff). Unlike in *Chen* and *Teixeira/Ibrahim*, there is no reference to required economic activity. A Colombian couple sought rights to remain in Belgium with their young Belgian children after their father ceased working. The CJEU held that they could derive rights to remain from their children because without this, the EU national children would be deprived of the genuine enjoyment of their rights under EU law, namely being forced to leave the EU with their parents if their parents were not able to stay legally. The CJEU appeared to facilitate family reunification in this case. In the context of Brexit, it is the *Zambrano* carer category that would therefore include the most precarious of individuals applying to the Scheme, including many women. It has the widest scope given it is the least restrictive and has the least economically driven conditions for eligibility, especially as compared to *Chen* and *Teixeira/Ibrahim*. It is within this context that the specific issues faced by NEFM women under the *Chen*, *Teixeira/Ibrahim* but mostly the *Zambrano* routes become the focus.

The reason for focusing on *Zambrano* carers within the context of NEFMs is because the statistics show a shocking 85% of refused applications under the NEFM route where applications were made under the *Zambrano* line of case law (Home Office, 2022b). Though there are no published statistics on EUSS applications by gender, these numbers still illuminate the inequality faced by NEFMs, who are more likely to be immigrant women. It supports the argument that the EUSS has failed to consider intersectional issues faced by vulnerable immigrant women seeking to regularise their statuses in a post-Brexit Britain. Anecdotal evidence already suggests that *Zambrano* carers are mainly non-EU national victims and survivors of VAWG with EU national children, who seek to flee their abusive British or EU partners (McKinney, 2020). This has been recognised as a potential overlap in the two groups. The reason for such a high refusal rate for *Zambrano* carers is argued to be the way that this particular NEFM category is legally defined, which has led to more immigrant women firstly, falling within the scope of this category, and then subsequently, more likely to fall outside the scope of the EUSS's protection. Looking more closely at the very poor rate of success for NEFM's paper-based applications – and even worse for *Zambrano* carers – helps to uncover the exact nuances in the EUSS's process operating to their detriment. Delving

deeper into the *Zambrano* derivative rights route also provides a potential explanation for the high refusal rates.

There were various routes that *Zambrano* carers could take in order to guarantee their rights to remain in the UK, before the end of the transition period on 31 December 2020, but after the EUSS was established. This is because this group mainly consists of non-EU nationals who could have had rights protected under either UK domestic law, (pre-Brexit) applicable EU law, or now, post-Brexit domestic transpositions of EU law. More specifically, one route is solely based on UK immigration law (Appendix FM, Immigration Rules) and open to those with family members of any nationality who are in the UK. Another route was based on rights guaranteed by the now repealed Immigration (European Economic Area) Regulations 2016 (hereafter, EEA Regulations 2016) under Regulation 16(5) and only available to family members of EU citizens. The final route is through the EUSS and also only for family members of EU citizens. Brexit necessitated that any individual with rights based on the EEA Regulations 2016 (rather than UK immigration law) would be required to apply under the EUSS successfully to be able to remain in a post-Brexit Britain. This is because the EEA Regulations 2016 would be repealed after 31 December 2020. Importantly, the domestic UK immigration route based on Appendix FM of the Immigration Rules has remained valid throughout, though it has its benefits and drawbacks.

Appendix FM has always allowed any nationality of family member the right to seek leave to remain in the UK, as long as they have family members (of any nationality) in the UK. However, applications under Appendix FM costs upwards of £1033, which is the standard fee under the broad "Leave to remain – other" category (Home Office, 2020e). Appendix FM is also only a limited right to remain and is leave that must be renewed, but allows for recourse to public funds. In contrast, having a right to remain based in EU law under the EEA Regulations 2016 was a guarantee, as long as the Regulations remained binding. It required no application process or fees. Its replacement, the EUSS, also requires no fees, though does require an application and offers an easier route to permanency, if successful. It does not, however, allow recourse to public funds. Nonetheless, those holding Appendix FM rights may prefer status under the EUSS given it is not solely a temporary status, and is free. Many Appendix FM rights holders would have the opportunity to apply under the EUSS to make their legal statuses permanent, alongside all those who were required to apply anyway under the EUSS because they previously had rights under the repealed EEA Regulations 2016. The difficult choice that *Zambrano* carers eligible under both Appendices FM and EU would have to make when establishing their right to remain in the UK post-Brexit, though, is what has caused significant confusion and controversy. It is around what the exact definition is of "a person with a

Zambrano right to reside".

The way the Home Office chose to interpret who is a *Zambrano* carer is where the difficulties for this group lies, and why there is such a high refusal rate for this category affecting mainly immigrant women. Under 'Annex 1 – Definitions' of Appendix EU, the Home Office's interpretation of a "person who had a derivative or *Zambrano* right to reside" was effectively read so that applications from anyone who had already been granted other leave to remain, namely, under Appendix FM, or indeed, *could have* applied but had not done so, would be refused. Bishop described this condition (2022) as a '*de facto* requirement for applicants for *Zambrano* status to have made an application under Appendix FM first'. The latter condition of being entitled to apply but not doing so has severely limited the ability of many NEFMs seeking rights as *Zambrano* carers to apply successfully under the EUSS. This reading effectively excluded anyone for which the EUSS was not their *only* available option to regularising their legal immigration status in the UK. Given the difficult choice to be made by applicants between applying for leave under Appendix FM, which allows for recourse to public funds, or seeking status under the EUSS, which is more permanent, it is likely that this is why there are 85% refused applications under the *Zambrano* route. It suggests that many took a chance under the EUSS, but sadly, it was to their detriment. As mentioned, this would have been disproportionately affecting mostly vulnerable immigrant women.

In light of this punitive narrow reading of Annex 1, the case of *R (Akinsanya) v SSHD* [2021] EWHC 1535 (Admin) was taken to the High Court in mid-2021 to challenge the Home Office's interpretation of a *Zambrano* right to reside that rejected rights for those who previously had leave to remain, under both EU law and domestic law. There was some brief hope for justice when the High Court ruled that the Home Office's interpretation of both EU law and domestic law was unlawful. It held that a successful outcome under the EUSS application process should not be precluded simply by virtue of already having leave to remain under anything except Appendix EU of the Immigration Rules. This would have opened the door for Appendix FM holders to make their legal statuses permanent if successful under the EUSS. It could have relieved some of the intersectional oppression that Brexit had brought upon many immigrant women. Mostyn J in *Akinsanya* even noted the correlation between the high refusal rates and this reading by the Home Office (*R (Akinsanya) v SSHD* [2021] EWHC 1535 (Admin), paragraph 71). However, when the Court of Appeal handed down its appeal decision in *SSHD v Akinsanya* [2022] EWCA Civ 37 at the start of 2022, it held that under domestic law, the definition under Annex 1 was incorrectly interpreted, but the Home Office had not erred in its interpretation of EU law. This was not a complete endorsement of the High Court's decision against the Home Office.

The legal changes arising out of this case only materialised six months later in mid-June 2022, when the Home Office changed its Guidance to read that it was still lawful to refuse status under the EUSS if you already held another limited leave to remain, such as that under Appendix FM (Home Office, 2022d). It did, however, accept it was unlawful to deny rights to those who only had *entitlement* to apply. Ultimately, this interpretation of the court case by the Home Office in its Guidance fails to account for and address the vulnerabilities of those who may have already or additionally sought the right to remain under Appendix FM, which for reasons stated earlier, is likely to be many immigrant women in precarious situations. Therefore, despite the Government's claims that it wanted to protect the rights of EU citizens seeking legal residency in the UK after the transition period, the situation remains precarious and uncertain for many of the most vulnerable immigrant women. Greater uncertainty has been created since the *Akinsanya* court cases dragged out the timeline for anyone waiting for a decision under the *Zambrano* route far beyond the EUSS's deadline at the end of June 2021. Yet, sadly, it has still only resulted in a narrowing of the scope of one of the most precarious routes to a successful status under the EUSS, which, as argued above, is likely to affect women more. It is now pending further appeal.

It is clear from the above legal analysis of the cases under EU law, their interpretations through Appendix EU by the Home Office and the recent domestic jurisprudence, that many of the most vulnerable NEFM women are likely to be disproportionately disadvantaged under the EUSS's criteria. Only by outlining the full details of the process of application as a *Zambrano* derivative rights holder could it be clarified exactly how the EUSS eligibility criteria operates to the exclusion of vulnerable women under the NEFM route seeking to remain in the UK in a post-Brexit Britain. The design and interpretation of the criteria underpinning a successful outcome from the EUSS has resulted in significant difficulties for these immigrant women. It is a perfect storm of issues arising from the EUSS eligibility criteria that are a function of NEFM vulnerable immigrant women's intersection of their gender and immigrant status, demonstrating how Brexit has brought upon them a heightened level vulnerability. There are clear consequences of the wilful ignorance of these women facing intersectional oppression, which the Government has failed to address.

Conclusion

This paper outlined how and why the transitory regime of protection for EU citizens and their eligible family members of the EU Settlement Scheme entrenches the oppression of vulnerable women at the intersection of gender and immigration status under the law, and how this undermines the mainstream messaging about the Scheme being a success as has been

claimed by the Government in its official messaging. Adopting a framework underpinned by the intersectionality and vulnerability theories, it considered two case studies of vulnerable women within the context of the EUSS – victims and survivors of violence against women and girls, who are exclusively women, and here also immigrants, and non-EU family members of EU citizens, who are exclusively immigrants, and of whom the most vulnerable are most likely to be women. In this way, it was possible to highlight specific examples where by the applicable criteria and application process under Appendix EU of the Immigration Rules disproportionately discriminated against certain vulnerable immigrant women in a post-Brexit Britain. From an intersectional perspective, being in a vulnerable position because of one's gender is made worse when having to additionally be aware of one's immigrant status, and having to apply to and satisfy the criteria for the new constitutive system of the EUSS. This situation of disparity due to one's intersectional identity and vulnerability has been created by the State, and has not been addressed by it.

Intersectional and vulnerability elements highlight how being a both woman and immigrant subject to Appendix EU of the Immigration Rules is more oppressive for immigrant women because of how the legal process specifically affects them in terms of satisfying the criteria. Firstly, victims and survivors of VAWG, by their very definition, are vulnerable, and formal extension of eligibility to these women has not translated to their protection, but indirectly could act to entrench them in an abusive situation. Secondly, an NEFM is in a more complicated situation as a non-EU national that has to apply to the EUSS based on a very narrow interpretation of the eligibility criteria. This category affects more women because of the way it is legally defined from EU law, especially when considering *Zambrano* carers of EU dependents, who are sometimes even victims and survivors of VAWG as well. In both cases, both groups of immigrant women are put firmly outside the mainstream. In analysing the specific experiences of the two groups of vulnerable immigrant women, it was highlighted how both may experience the EUSS's application process especially when seeking to satisfy the criteria, thereby bringing to attention how the process itself is aggravating vulnerability, rather than eliminating it. Whilst a majority of applications are successful, it is those who are unsuccessful who are the most vulnerable of society, often immigrant women. Without sufficient attention, greater marginalisation and discrimination is perpetuated of these women, who already sit in a vulnerable position at the intersection of their gender and immigration status.

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Hart Publishing.

The City Law School

City, University of London

Northampton Square
London EC1V 0HB

T:+44(0)20 7040 3309
E: law@city.ac.uk

Email enquiries:
law@city.ac.uk

Telephone enquiries
+44 (0) 44 02 7040 5787

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