the3million submission to Independent Monitoring Authority February 2021

Who is the3million?

the3million is the leading grassroots organisation representing EU citizens in the UK, formed in 2016 after the Brexit referendum. Our work ranges from monitoring the implementation of the Withdrawal Agreement implementation, advocating for the integration of EU citizens through a pathway to citizenship, informing people of their rights, and giving EU citizens a voice in British society to change the narrative on migration.

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1 Introduction

Brexit and Citizens' Rights

At 11:00 pm on 31 December 2020 the transition period came to an end and the Withdrawal Agreement activated. The rights protected in that agreement, and how millions of EU citizens and their family members acquire and enforce them, will become the subject of great scrutiny and analysis for the months and years ahead. It will define the success or failure of Brexit.

To ensure that those rights are protected and respected by public bodies, the Independent Monitoring Authority ('IMA') was established. To assist the IMA with its function, we have put together an initial report reflecting on the issues we believe are currently pertinent to the respect and protection of citizens' rights focusing on Part Two Title II (the Citizens' Rights part) of the Withdrawal Agreement.

This document is not exhaustive and is the beginning of an ongoing inquiry and analysis function of the3million. We are a small organisation with finite resources and the issues identified are those, based on analysis conducted by the team, that we believe warrant further investigation and action. Further, careful analysis is needed of other areas not focused on here, in particular Title III of Part Two of the Withdrawal Agreement (the social security coordination elements of the agreement).

This report will pay particular attention to the UK's application process to register millions of EU citizens under article 18(1) of the Withdrawal Agreement - the EU Settlement Scheme, and the means provided for EU citizens to demonstrate their rights under that Scheme. It will also focus on the consequences of decision making by the government when it comes to accessing and enforcing rights in other areas such as housing, social welfare and the NHS.

Report structure

We set out below, from our perspective, the key issues facing EU citizens (throughout this document we use EU citizens as shorthand to include all EEA and Swiss citizens, and their family members) who have made their home in the UK - arriving before 31 December 2020. Please note, we have focused predominantly on the issue within England, Wales and Scotland. Any issues on the island of Ireland and Northern Island, in particular, frontier working, we have not had the capacity to consider and reflect here. This also applies to Gibraltar. We look forward to hearing from and working with colleagues with expertise in this area to bring their concerns to the IMA's attention.

The document divides these issues into three sections, to cover the following groups of citizens:

1) Those who have not applied to the EU Settlement Scheme
2) Those who have applied but are awaiting grant of status
3) Those who have been granted either pre-settled or settled status.

Within the first two of these sections we further subdivide into issues arising during the grace period (up to 30 June 2021), and issues following the EU Settlement Scheme deadline (from 1 July 2021), since the legal landscape, and consequences for citizens in their day-to-day life, changes considerably at that point.

Within the last of these sections, we look at issues common to those with either status, but also at those specific to either pre-settled or settled status.

Much of this document is based on principle - examination of the legal implementation of the Withdrawal Agreement - but we supplement with anonymised accounts of issues that have been reported to us.

A brief note on methodology

Our analysis and feedback in this report are based on a number of sources as well as our own expertise. The core team has included academics specialising in EU law as well as practitioners in the relevant field of free movement and immigration. They have been closely involved with the negotiations and development of the Withdrawal Agreement and its implementation. Crucially, the team has developed a unique perspective by being directly affected by the UK's decision to leave the EU - most of us are EU citizens living in the UK.

This report is not intended as an academic piece - it is not conclusive. We have attempted to map trends and identify pitfalls within the UK's current implementation, in particular legal shortcomings. The key sources of information are:

1. Feedback from the public via questions, requests for information, reporting tools, surveys, and various social media forums - including the3million's closed forum which has 44,5k members;
2. Intelligence from various civil society organisations and advice services working with EU citizens;
3. Intelligence from experts and representatives of industry / business across multiple sectors;
4. Research based on papers in the public domain and polling.

The report's fundamental purpose is to begin to bring together the concerns and shortcomings of the UK's implementation of the Withdrawal Agreement. We hope other organisations will find its contents helpful in their own work and we welcome feedback and contributions from others. This is the beginning of a very important discussion.

Most importantly, we hope that the IMA will use these insights and recommendations to inform their own research and recommendations to the Government.

2 The Withdrawal Agreement and the Independent Monitoring Authority - A Brief History

Freedom of movement is a cornerstone and fundamental principle of the European Union. Whilst the UK was a member, millions of EU citizens moved to the UK to live, work or study. The protection of these citizens was a central commitment of the UK government and the EU from the outset of the negotiations. The Withdrawal Agreement negotiated and agreed between the UK and EU guarantees most rights for these citizens and their family members.[1]

The Withdrawal Agreement protects those EU citizens lawfully residing in the UK at the end of the transition period. The transition period ended at 11pm on 31 December 2020. It also protects the family members of those EU citizens as defined by EU law. This includes spouses, (grand) children, and (grand)parents. Those in scope have their rights to residence, equal treatment, non-discrimination and various other rights protected. Like a lot of EU law, citizens can rely on their rights in the agreement directly. Meaning that the agreement itself has supremacy over the laws that implement it where there are inconsistencies.

Rights of those in scope of the agreement are guaranteed by one of two processes: either a declaratory framework (article 18(4)) or a constitutive one (article 18(1)). The UK has chosen to adopt the latter. The constitutive model agreed between the UK and EU essentially requires those people in scope to apply for a new status with the UK authorities to be able to exercise their rights. Articles 18(1), (2) and (3) set out various procedural safeguards to protect those who are applying. Those EU citizens in scope of the EUSS have until the end of June 2021 to apply to the scheme.[2]

The UK's application process is implemented by means of the EU Settlement Scheme ('EUSS')[3]. EU citizens and their family members complete an application with the scheme and, should their application be successful, they will receive an immigration status, either settled status (conferring permanent residence rights) or pre-settled status (a time-limited residence status for 5 years). The differences between these statuses and the serious consequences of failing to apply to the scheme are expanded on below. Proof of this status is accessed via a UK Government website and is digital-only for EU citizens. Non-EU family members are currently able to obtain a biometric residence card as a physical proof of their EUSS status.

The implementation of the citizens' rights part of the Withdrawal Agreement is overseen by the IMA. The body is born from article 159 of the Withdrawal Agreement giving it powers equivalent to that of the European Commission along with the right to bring legal proceedings. Schedule 2 of the European Union (Withdrawal

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2019%3A384I%3ATOC see also guidance note issued by the European Commission https://ec.europa.eu/info/publications/guidance-note-citizens-rights_en

[2] There are exceptions including certain family members and those with reasonable grounds to applying late.

[3] an overview can be found here: https://www.gov.uk/settled-status-eu-citizens-families. The Immigration Rules within Appendix EU and Appendix EU (Family Permit) set out how a person acquires their status here: https://www.gov.uk/guidance/immigration-rules and are accompanied by various guidance: https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance

Agreement) Act 2020 sets out the scope of its powers and other necessities. At the time of preparing this report the IMA had yet to produce its guidance[4] on how it will exercise its functions. We look forward to its publication.

EU citizens can continue to rely on their rights in UK courts. Where appropriate UK courts can ask preliminary questions to the Court of Justice of the EU for a period of eight years starting on 31 December 2020. For questions related to the application for status via the EUSS, that eight-year period started from 30 March 2019.

The IMA and the European Commission inform each other annually through the Joint Committee established by the Withdrawal Agreement of the measures taken to implement and enforce rights under the agreement. The Joint Committee, which we understand intends to meet bi-monthly, is a space in which parties can attempt to resolve differences and where appropriate make necessary changes.

The significance of the IMA cannot be understated in the context of protecting citizens' rights. It is therefore important to assist it in identifying and pursuing issues of Withdrawal Agreement incompatibility and breaches of rights.

[4] as mandated by paragraph 32 of schedule 2 of the EU(WA)Act 2020

3 Those who have not applied to the EU Settlement Scheme

3.1 Introduction

The target is unknown

A crucial point about EU citizens living in the UK is that they were never required to perform any registration formalities when coming to the UK, therefore as stated in a Migration Observatory report "essentially this means that the total number of people expected to apply to EUSS is not known."[5] Original estimates of the number of EU citizens in the UK were just over three million. By the end of November 2020, over four and a quarter million grants of status[6] under the EU Settlement Scheme had been made.

It will therefore not be possible to know, on 30 June 2021 or indeed at any other deadline, whether everyone who is eligible for status, has applied for that status. What ***is*** known however, is that no scheme worldwide has ever reached 100% of its intended audience by its first deadline. Even the most successful scheme in the UK, the transition from analogue to digital TV, had 97% take-up[7] by the deadline. This is an exceptionally high success rate, and was of course partly due to the fact that there was an in-built way of reaching the target audience of TV viewers - by using TV ads. ***Even if*** the EU Settlement Scheme is as successful as this, this would mean that well over 100,000 individuals who have made the UK their home and are eligible to status under the scheme, would be left without lawful status in the UK from July this year.

Consequences for those who are missed

The consequences for those without status under the EU Settlement Scheme are already being felt. Although the Government websites for right to work and right to rent specify that employers and landlords should not require proof of status until after July 2021, in practice this is not happening. We have seen many job advertisements requiring (pre-)settled status in order to be eligible for applying. There is much confusion over eligibility for services during the grace period. We have seen increased reports of EU citizens being denied access to loans/mortgages and other services / opportunities for not having pre or settled status. It appears that as part of any risk assessment by private actors, a person's legal status in the UK is a determining factor in what they can and cannot have access to.

NHS charging regulations[8] were introduced last December which do not protect a large cohort of those who are eligible for (pre-) settled status but have not yet been granted that status, namely those who were not exercising treaty rights on 31 December 2020. (Note, this could include people who have been resident in the UK for many years but were unaware they needed a private health insurance to comply with the EEA regulations, despite never needing that insurance to access the NHS). We have already been informed of an EU

[5] Migration Observatory report 'Unsettled Status - 2020: Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit' https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-2020/

[6] https://www.gov.uk/government/collections/eu-settlement-scheme-statistics

[7] Page 9, https://www.thinknpc.org/wp-content/uploads/2019/03/What-level-of-coverage-should-we-expect-A-review-of-similar-schemes.pdf

[8] https://www.legislation.gov.uk/uksi/2020/1423/made

citizen facing charges for NHS secondary treatment due to not having (pre-) settled status. The act of applying for status during the grace period will not protect this cohort, see Sections 4.1, 4.2 and Appendix A.2.

The consequences for those without status after 1 July 2021 will be serious. People will be faced with the full force of the Government's hostile environment policy, including potential loss of employment, loss of their homes, loss of entitlement to NHS treatment and far more.

Equally, the risks facing particularly marginalised groups of EU citizens will see a risk to detention and removal from the UK if they do not have the required immigration status to remain in the UK beyond 1 July 2021. Whilst the Government have levelled assurances that this will not be the case, the legal infrastructure is unchanged and there are no clear legal or policy frameworks to ensure that eligible citizens for the EU Settlement Scheme are identified and supported towards status.

Given the risks to those who do not apply and the potential significant numbers of those in this situation, it is key to understanding these groups in the context of the UK's commitments under the Withdrawal Agreement.

Those who have not applied to the EU Settlement Scheme can be divided into different groups:

- those who do not know they need to apply
- those who know they need to apply but are struggling to do so
- those who want to apply but are not allowed to

Each group is considered in turn below.

3.2 Those who do not know they need to apply

The Government's information campaigns so far have included online, adverts on bus-stops and other media. Although we have asked in meetings with ministers and the user groups we attend, we do not have any information on the strategy underlying future communication campaigns. An FOI request[9] on the outreach strategy was refused.

As a report by Migration Observatory[10], some of those who may not know they need to apply include:

- Children of EU citizens
- Very long term residents
- People with permanent residence status
- People who are expecting to return home
- People who think they are not eligible or fear being rejected

Some of our concerns are highlighted below, followed by our recommendations.

[9] https://www.whatdotheyknow.com/request/615722

[10] https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/

- **Grant-funded organisations**
  Grant-funded organisations[11] ('GFO') to help vulnerable groups in applying to the EU Settlement Scheme have struggled during the COVID-19 pandemic to reach as many people as they may otherwise have been able to, due to lack of face-to-face events and meetings. Their current funding covers the period up to 31 March 2021, and it is not known whether this will be extended.

  Ironically, because of the construction of the grace period (during which time employers and landlords are directed not to check for (pre-)settled status), it is highly likely that large numbers of citizens may only find out that they need to apply for a new status once it is potentially too late - after the expiry of the 30 June 2021 deadline.

  At this point the need for GFOs to help vulnerable citizens will be greater than ever, not only to help with applications to the EU Settlement Scheme but also to navigate the extra hurdle of proving 'reasonable grounds' for a late application and the various hostile environment infrastructure they encounter whilst they await a decision.

- **Reasonable grounds for late applications**
  The Home Office has promised guidance as to a non-exhaustive list of what constitutes 'reasonable grounds' in early 2021. We are particularly concerned for persons whose grounds for not applying are simply 'I did not know I needed to'.

  As such, much more needs to be done to ensure all eligible citizens know of their need to apply.

- **More and better outreach needed**
  The Government has sought to increase media and awareness of issues via television and online media but it has also written to every household previously in relation to significant events - COVID 19 and Brexit. Given the seriousness of consequences facing those EU citizens who do not apply, the Government should write a letter to every single household in the UK (since there is no way of reaching the targeted audience of only EU citizens). This letter should be addressed not only to EU citizens, but also to family, friends, neighbours and colleagues - to ask them to look out for their EU citizen contacts and make sure that they know they need to apply to be able to stay and keep their rights in the UK. It should also explain to people who are landlords or employers that during the first six months of 2021 they do not need to check for people to have settled or pre-settled status, and that having an EU passport or national identity card is enough to be allowed to rent or work.

  As an example that this can be done very cost-effectively, Brighton and Hove sent a postcard[12] to every single household in their area, in combination with an engagement programme with community groups and local businesses.

  But this should not be the end of the outreach work required. The Government needs to actively research and target groups it has concerns about and provide funding and support where appropriate. It

[11] https://www.gov.uk/government/publications/eu-settlement-scheme-community-support-for-vulnerable-citizens

[12] https://twitter.com/brightonhovecc/status/1323958281044430848?s=21

has recently researched the numbers of children in care that need to apply[13]. The survey found less than 50% have applied. As such, this has encouraged the Government to drive support and focus on these groups.

However, we have concerns about this research. Fundamental to this exercise's success is identifying the children who need to apply. A clear method of who is eligible and how they are identified is central. Recent correspondence between the Home Office and the Home Affairs Select Committee (HASC) queried[14] how Local Authorities identified looked-after children eligible for the EUSS. The Government says that they had received no complaints from Local Authorities in identifying these children. However, it is not clear how the Government established whether Local Authorities were correctly identifying eligible children. It is possible Local Authorities are not undertaking their assessment correctly and missing out groups of eligible children.

Whilst it appears training on the EUSS has been provided to Local Authorities, there is no indication on what analysis was undertaken on the methodology adopted in identifying eligible children. The questionnaires sent to Local Authorities included in the correspondence to HASC do not include any questions about how they undertook an assessment of which children were eligible to apply to the EUSS.

This is a significant shortcoming. It is vital that any opportunity to identify with some precision those who must apply to the EUSS is done correctly. We would recommend the Government quickly work with Local Authorities to establish their methodology of identifying those eligible to the scheme.

This project and approach, once improved, needs to be expanded to other areas of concern quickly. By working in partnership with local authorities and regional groups, we can form a better picture of who is still to apply and engage with them.

- **More time is needed**
  COVID-19 has had a huge negative impact on communications and the ability to advise and support communities . We should therefore consider whether the grace period should be extended. GFOs need more time to restart their programmes when the COVID-19 restrictions are reduced. Similarly, there is a need for further analysis and research on the numbers and groups to be identified further.

  To highlight just two examples of areas where more time is needed:

  - Migrants Organise have brought a legal challenge[15] against the Home Office over their concern for EEA citizens with mental health issues who may not have the capacity to engage with the EU Settlement Scheme without assistance, and indeed may not even know they need to apply to the Scheme in order to keep their rights to continue living in the UK.

[13] https://www.gov.uk/government/publications/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020

[14] https://committees.parliament.uk/publications/4264/documents/43356/default/

[15] https://www.migrantsorganise.org/?p=29968

- JCWI have launched legal action[16] against the Home Office on behalf of vulnerable groups with protected characteristics. They argue that the Scheme's Policy Equality Statement[17] (finally published in late November 2020 after extreme delays) does not consider that for example older people, people with certain disabilities like mental capacity issues, or Roma people are less likely to know about the Scheme, and does not propose any measures to address this fact.

- **Voluntary Return Scheme**

  We are also concerned about vulnerable people being fully informed of their rights in the context of the government's Voluntary Return Scheme (VRS)[18]. As a consequence of the end of the transition period, EU citizens have now been added to this scheme[19], where financial support is offered as an encouragement to people who are in the UK illegally to return to their country of origin.

  This is particularly problematic in the context of a cohort of people who are considered by the Government to be in the UK illegally (those not strictly exercising treaty rights on 31 December 2020), yet **are eligible** to apply for status under the EU Settlement Scheme thereby 'regularising' their status.

  This cohort includes on the one hand students and self-sufficient people who did not know about the little-known 'Comprehensive Sickness Insurance' requirement[20], and on the other hand vulnerable citizens who are not economically active. The VRS we understand contains no guidance to thoroughly check whether the citizens it deals with are entitled to obtain lawful status in the UK, and its mindset is rooted in trying to achieve and incentivise self-deportation of these citizens. We are therefore extremely concerned that the VRS will be mis-used to persuade EU citizens to leave the UK without making them aware of their rights under the EUSS.

[16] https://www.jcwi.org.uk/stop-the-home-office-criminalising-eu-citizens-after-brexit
[17] https://www.gov.uk/government/publications/eu-settlement-scheme-policy-equality-statement
[18] https://www.gov.uk/return-home-voluntarily
[19] https://www.theguardian.com/politics/2021/jan/26/eu-citizens-offered-financial-incentives-to-leave-uk
[20] See Appendix B in this document

Those who do not know they need to apply - recommendations:

- The Government should be required to publish the guidance on 'reasonable grounds' as soon as possible
- Funding to organisations helping vulnerable groups apply to the EU Settlement Scheme should be extended to well beyond the 30 June 2021 deadline
- The communication efforts to those who need to apply to the scheme need to be ramped up considerably. Alongside other strategies of active research and targeting, the Government should be required to write a letter to every single household in the UK
- Given that GFOs and various other organisations assisting people with applications are unable to perform to full capacity, the lack of guidance in key areas, the continuing delay in understanding the numbers / types of groups who are still to apply, and the reasons highlighted in this chapter, the grace period should be extended to accommodate
- Ensure the Voluntary Return Scheme and other Border Force / Enforcement Home Office framework includes stringent safeguards to check that citizens are fully informed of their potential rights to apply to the EU Settlement Scheme

3.3 Those who know they need to apply but are struggling to do so

There are many who are struggling to navigate the process of applying. This is as a result of many factors coming together – not least COVID-19 and its implications on identity documents.

- **Identity scanning locations**
  People who do not have the ability or technology to use the scanning 'EU Exit: ID Document Check' app, need to go to an identity scanning location instead. Many identity scanning locations[21] are closed, are only offering scanning on appointment, or have restricted opening hours. People who are isolating may not be in a position to go to a scanning location, or are putting it off until lockdown restrictions are eased – at an unknown date.
- **Problems renewing identity documents**
  People who never travel and have expired passports or identity cards, are struggling to get appointments at their embassies to renew those documents. The higher demand for these renewals coupled with COVID-19 restrictions, in addition to the arguments raised in the previous point, mean that many may not receive an up-to-date identity document in time. It is possible to apply to the scheme with expired identity documentation, by means of a paper application, but vulnerable citizens will struggle to do so without help. It is not possible to simply download a paper application from the government website. Instead, people have to ring the EU Settlement Resolution Centre (frequently very

[21] https://www.gov.uk/government/publications/eu-settlement-scheme-id-document-scanner-locations/locations-offering-chip-checker-services

difficult to get through; we have been contacted by several charity workers to report a up to 90 minutes waiting time to get through a case worker) and ask for permission to submit a paper application. We have heard of inconsistencies between case workers agreeing to do so.

- **Complexity of immigration rules**
  In addition to the barriers set out above, there is one causing considerable concern amongst practitioners and those who work with EU citizens. The **immigration rules** governing how EU citizens and their family members qualify for status via the EUSS are **overly complex**. Indeed, we have had repeated reports to us from those leading in this area that they are impossible to navigate owing to their complexity and incoherence. To see an example of this complexity, consider the definition of '*relevant EEA citizen (where the date of application under this Appendix is on or after 1 July 2021)*' under Appendix EU (Family Permit)[22]. This will apply to anyone wishing to join their family member (already resident in the UK) after 1 July - impossible to understand for a lay citizen, and extremely challenging even for experienced immigration advisers / lawyers.

  Given these challenges, even for experts in UK immigration law, it raises doubts as to how the scheme is compliant with article 18(1)(e) which requires:

  "*the host State shall ensure that any administrative procedures for applications are smooth, transparent and **simple**, and that any unnecessary administrative burdens are avoided"*

  We ask that the IMA consider carefully the UK immigration rules and whether they are sufficiently coherent to discharge the commitments under 18(1)(e) of the Withdrawal Agreement.

- **Absence calculations**
  The method to calculate absences is very complex. Whereas the EU recommends simply taking each year from the first day of continuous residence in the host country, and checking total absences within each year, the UK uses a method of 'rolling absences'. So if someone's five year period of continuous residence starts from say 10 August 2015, then with the EU's method one looks at the years 10 August 2015 - 9 August 2016, 10 August 2016 - 9 August 2017 and so on, and checks that absences in each of those years did not exceed 180 days. However, with the UK's method one must examine the year 10 August 2015 - 9 August 2016, 11 August 2015 - 10 August 2016, 12 August 2015 - 11 August 2016 and so on. This is so complex that one requires calculation tools provided by experts to work out.

  The EU Settlement Scheme requires people to self-declare that their absence did not exceed the allowable limits. It is therefore highly likely that applicants may mistakenly say that their absences did not exceed the limit when in fact they did (consider for example a 3 month absence Aug-Oct in one year, and a 4 month absence Apr-July the following year). Legally these applicants will have inadvertently breached suitability requirements: "***whether or not to the applicant's knowledge**, false or misleading information, representations or documents have been submitted*". A false declaration can be used to deny or remove someone's status.

- **Organisations and COVID-restrictions**
  Equally, as set out above, organisations are unable to fully assist applicants owing to the COVID-19

[22] https://www.gov.uk/guidance/immigration-rules/appendix-eu-family-permit

restrictions. Whilst some organisations have attempted to provide services via telephone, practitioners tell us this is ineffective, particularly for those most vulnerable and marginalised. Some applications are being delayed inevitably because the applicants are unable to access the level of assistance they require.

It is worth noting that the Government retendered GFO contracts last year with the purpose of funding organisations to target and assist vulnerable EU citizens. Whilst those we have spoken with are doing what they can in these difficult times, there are limits and they need more time to expand their services that have been restricted by the pandemic.

Those who know they need to apply but are struggling to do so - recommendations:

- extend the 30 June 2021 deadline for at least six to twelve months to allow for COVID-19 restrictions to lessen and GFO/advice agencies to restart their vital services assisting people with applications
- it should be easier to obtain paper applications where people cannot get a renewed passport or identity card in time (paper applications should be freely available rather than only on agreement from an EU Settlement Resolution Centre caseworker), and it should be easier for voluntary organisations to help people complete paper applications (currently OISC EUSS Level 1 advisors are not able to do so where there is no valid identity document)[23]
- Promote the simplification of Appendix EU and Appendix EU(FM) by the 'Simplification of the Immigration Rules Review Committee'[24].
- Both the rolling absence calculation and the suitability requirements should be updated to reduce complexity of the absence calculation and the risk of individuals being penalised for unknowingly doing something wrong.

3.4 Those who want to apply but are not allowed to

Since UK immigration law does not allow the combination of legal status, there are several groups who face a problem of not being able to apply to the EU Settlement Scheme.

- **Discretionary leave to remain**
  EU citizens with 'discretionary leave to remain' (DLTR), such as victims of human trafficking. They are dependent on DLTR to be eligible for benefits and housing support; if they apply for pre-settled status they will have no recourse to public funds. On the other hand, DLTR is a much more difficult route to settlement. These citizens are entitled to rights under the EU Settlement Scheme, but are effectively prevented from applying since to do so would render them destitute without access to benefits through their DLTR status.

[23] https://www.gov.uk/government/publications/guidance-for-euss-advisers
[24] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914010/24-03-2020_-_Response_to_Law_Commission_for_publication.pdf

This issue would fall away if pre-settled status constituted a 'right to reside' for benefits purposes. The Court of Appeal recently ruled[25] that this should be so under EU free movement legislation, but legislation has not yet been changed due to the possibility that the Government will appeal the judgement at the Supreme Court.

Article 23 of the Withdrawal Agreement states that all those granted rights under the Withdrawal Agreement are entitled to equal treatment.

- **Lounes dual nationals**
  Certain EU citizens who are also British (who have exercised their free movement rights in their host state, referred to as Lounes dual nationals) have rights under the Withdrawal Agreement, but are not able to apply to the EU Settlement Scheme.

  Article 18 of the Withdrawal Agreement (WA) allows the UK and each EU Member State to choose whether to implement a constitutive (an application is needed for WA rights to be conferred) or a declaratory (people have rights by meeting the conditions, no application is necessary).

  The EU Commission have confirmed to us[26] that "*host states with a constitutive scheme should allow dual EU/UK nationals, who fall within the personal scope of the Withdrawal Agreement, to apply for a new residence status under Article 18(1) of the Withdrawal Agreement*", and "*while such dual EU/UK nationals will not need to rely on the Withdrawal Agreement for their residence rights in the host State, they are entitled to do so. In countries with constitutive schemes, they would need to apply by the end of the grace period to acquire their new residence status under the Withdrawal Agreement.*"

  It is important to realise that an Article 18(1) document confers rights under Title II of Part Two of the WA, and that these rights go beyond residence rights. Other rights that are necessary for dual nationals include family reunification rights, and rights under Title III of Part Two of the WA.

  Lounes dual nationals should therefore be able to apply to the EU Settlement Scheme both in order to be assured of WA rights, and to have a simple way of evidencing those rights. (Currently, a family member of a Lounes dual national needs to go through a far more complex paper application to the EU Settlement Scheme than a family member of an EU national). We cannot see how the UK's current approach preventing those entitled to having their rights conferred is compatible with its obligations under the Withdrawal Agreement.

- **Joining family members**
  There is a cohort of people wishing to exercise their family reunion rights under the Withdrawal Agreement who are prevented from doing so due to the way Appendix EU(FM) of the Immigration Rules is constructed.

[25] Fratila and Tanase v SSWP & AIRE Centre (2020) https://cpag.org.uk/welfare-rights/legal-test-cases/current-test-cases/eu-pre-settled-status

[26] In a reply to our comments on the Guidance Note: http://www.t3m.org.uk/t3m_BiE_WAGuidanceNote_Observations

Someone who is a family member (e.g. spouse, (grand)child, (grand)parent) of an EEA citizen in scope of the Withdrawal Agreement is entitled to join their family member at any time after the end of the transition period, 31 December 2020. For those applying to do so after 1 July 2021 however, the rules say[27] that the sponsoring EEA citizen **must have already been granted** pre-settled or settled status.

Therefore, family reunion is not possible for a person who applies after 1 July 2021 and is a family member of someone:

a. who has a pending application for pre-settled or settled status (as Section 4.1 will make clear, there are many people who wait for months or more for their application to be decided); or

b. who has not yet submitted an application under the EU Settlement Scheme, but may turn out to have 'reasonable grounds' for submitting a late application

Part a) would be, in our view, a breach of Article 18(3) of the Withdrawal Agreement, which states "*Pending a final decision [...] all rights provided for [...] shall be deemed to apply to the applicant"*, as the sponsoring EEA citizen is being denied their right to be joined by their family member while waiting for status to be granted.

Both parts a) and b) also appear to contravene Article 18(1)(m), which covers those joining their family members after the end of the transition period. The Article explains that the only supporting documents which may be required from the applicant (in addition to identity documents) are evidence of the relationship, and **any** proof of residence of the sponsoring EEA citizen. It cannot therefore be a requirement that the sponsoring citizen has submitted an application or indeed been granted status - only that the sponsoring citizen can demonstrate that they would be eligible for such status.

Children born after 1 July to someone with pending applications, or someone who has not yet applied, cannot submit valid applications under the existing rules.

- **Family permit required before applying for EU Settlement Scheme status**
  Additionally, any family member wishing to join their sponsor in the UK after 1 January 2021 must apply for an EUSS Family Permit **before** travelling to the UK. Once in the UK they can then apply for pre-settled status. If they make the mistake of travelling to the UK without an EUSS Family Permit, they will automatically enter the UK under a Visitor Visa. If they consequently apply for pre-settled status, their application will be rejected and they will be told to leave the UK, apply for the EUSS Family Permit, wait for a decision and then re-enter the UK.

  This is unduly onerous, and we predict that a great many people will make this mistake completely innocently.

[27] https://www.gov.uk/guidance/immigration-rules/appendix-eu-family-permit - definition of 'relevant EEA citizen (where the date of application under this Appendix is on or after 1 July 2021')

- **Prevented from entering the UK before 31 December 2020**
  Finally, there is a cohort who were intending to apply but are now ineligible because they were unable to enter the UK before 31 December 2020 due to COVID-19 restrictions, or were not made aware of the implications of not doing so. This is most dramatically seen in the case of EU students who enrolled at UK institutions in the autumn of 2020. They will have done so in the clear expectation of travelling to the UK for the start of their course. However, since education providers have responded to the pandemic by moving teaching online, many students have opted for remote learning instead, due to COVID-19 restrictions in the country of residence and/or the UK. As the situation steadily worsened towards the end of 2020, anyone who was not informed of the far-reaching consequences of nevertheless making at least one trip to the UK before 31 December, would sensibly have decided to wait until the spring to travel.

  The difference in their outcome based on that decision is profound: when they finally come to the UK they will need to apply for a visa instead costing £348 plus £470 a year in health charges to be able to use the NHS. They are restricted regarding the type of work they can do whilst studying and their future employment prospects are drastically reduced if they wish to continue living in the UK owing to the new immigration regime.

  We consider this unfair considering that these students are participating every bit as much as their co-students who are in the UK - they are attending the same lectures, handing in the same assignments, participating in the same groups - in short as if they would physically be in the UK were it not for COVID-19. Some have paid fees expecting to study in the UK relying on their freedom of movement rights. It has to be considered whether they have a legitimate expectation to study in the UK and to qualify for pre-settled status?

Those who want to apply but are not allowed to - recommendations:

- Change legislation such that pre-settled status constitutes a right to reside for benefits purposes
- Ensure every citizen who is within personal scope of the Withdrawal Agreement can obtain proof of their rights, include those with right of abode (British citizens) or those holding other immigration status (e.g. DLTR).
- Ensure Appendix EU(FM) Immigration Rules are changed such that after 1 July 2021, family members are able to apply for a Family Permit, join their family member in the UK and apply to the EU Settlement Scheme even if their sponsoring EEA citizen has not yet been granted (or has not submitted an application for) status under the EU Settlement Scheme.
- Consider whether it is possible to change the rules such that an in-country switch from visitor visa to pre-settled status is allowable, as Article 18(1)(e) states "*the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided*".
- Create an exemption for EU students who started a course in, but did not travel to, the UK before 31 December 2020 where they can evidence that they would have taken up residence in the UK but for COVID-19.

Note about the Withdrawal Agreement and extending the EU Settlement Scheme deadline

Whilst Article 18(1)(c) allows for extension of the application deadline for the UK and EU member states that have chosen a constitutive approach in the case of technical problems, the Withdrawal Agreement was created before Covid-19 overwhelmed the world. Out of the 13 member states who, like the UK, have elected a constitutive implementation of Article 18, the majority[28] have already announced an extension to the June 2021 deadline. Whilst it is true that in some member states this is at least partly due to a later implementation start, Covid-19 has been cited as contributing to the decision to extend. In any case, the numbers of British citizens required to apply in each of these member states is *substantially* lower than the number of EU citizens in the UK, but also in most cases they are known already due to an existing requirement to register one's residence.

[28] https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/overview_ms_residence_rights.pdf

4 Those who have applied but are awaiting grant of status

4.1 Long waiting times, together with choice of legislation, leaves many without legal protection

EUSS waiting times

The website for estimated processing times[29] for EU Settlement Scheme applications has not been updated since May 2020, at which time it was stated "*It usually takes around 5 working days for complete applications to be processed if no further information is required, but it can take up to a month.*" However, an FOI request[30] (submitted on 11 May 2020 and finally responded to on 23 October 2020 showed that, as at 31 March 2020:

- 710 applications had been waiting longer than a year
- 32,815 applications had been waiting between six months and a year
- 69,830 applications had been waiting between three and six months
- 142,280 applications had been waiting between one and three months

We have requested, but not been granted, updates on this data. The latest statistics[31] show that there is currently a backlog of over 390,000 applications.

Saving legislation to cover those eligible for, but not yet granted, EUSS

From the 1 January 2021, both during the so-called 'grace period' to 30 June 2021 and beyond, EU citizens who do not have pre-settled or settled status live in a complex legal landscape. On the one hand, the 'Immigration Act 2020'[32] has ended free movement from 1 January 2021. On the other hand, the Withdrawal Agreement insists that the UK (and all EU Member States) must allow a grace period of at least six months for EU (and British) citizens to apply for their new status. Therefore parts of UK law, the 'EEA Regulations', have been 'saved'[33] to apply beyond 1 January 2021 to protect those who are eligible to apply to the EU Settlement Scheme but have not yet done so or are still waiting to receive their status.

People excluded from this saving legislation - 'unlawfully resident'

The saved regulations do not quite protect ***everyone*** who is eligible for (but has not yet been granted) status under the EU Settlement Scheme. This is because it only protects those who have strictly exercised treaty rights,

[29] https://www.gov.uk/government/publications/eu-settlement-scheme-application-processing-times/eu-settlement-scheme-pilot-current-expected-processing-times-for-applications

[30] https://www.whatdotheyknow.com/request/eu_settlement_scheme_delays

[31] https://www.gov.uk/government/collections/eu-settlement-scheme-statistics as updated 21 January 2021

[32] The Immigration and Social Security Coordination (EU Withdrawal) Act 2020

[33] Restrictions of Rights of Entry and Residence regulations https://www.legislation.gov.uk/uksi/2020/1210/contents/made
Saving regulations https://www.legislation.gov.uk/uksi/2020/1309/contents/made
Grace period regulations https://www.legislation.gov.uk/uksi/2020/1209/contents/made

which leaves out a large cohort of people who are not economically active (they were either studying or self-sufficient) and did not know that they needed Comprehensive Sickness Insurance [CSI][34].

The Government **considers this cohort as not living in the UK lawfully,** and has stated so explicitly in correspondence to the3million[35]. However, since CSI is not a requirement for the EU Settlement Scheme, this cohort ***is*** able to submit an application to the Scheme.

The problem arises because this cohort is not protected by legislation from the moment they put in an application, they are only protected once they are granted their status - which can be many months later. This lack of protection can have various serious consequences, most notably when it comes to accessing healthcare. It has been confirmed to us that although GP and Accident & Emergency visits are available to this cohort without cost, non-emergency hospital treatment is not.

People were not treated as being 'unlawfully resident' before

The Government claims that this is merely continuing the current situation, but that is not accurate. In the past, the NHS did not check if EU citizens were exercising treaty rights, however recent policies have now changed this. The Overseas NHS Visitors Charging Regulations[36] make clear that EU citizens who are here lawfully are ordinarily resident, and are exempt from NHS charges. The guidance refers to "Ways in which people can be lawfully resident in the UK"[37] which makes explicit reference to exercising treaty rights on 31 December 2020:

> "*Applicants for EUSS status before the end of the grace period (30 June 2021) must also demonstrate they were exercising those rights on or before 31 December 2020 and that those rights would continue to exist after that date in order to be able to access 'relevant services' without charge, providing they remain ordinarily resident in the UK.*"

However, previous versions of this guidance as recently as 27 October 2020[38] stated:

> *"However, **it is very important to note that an EEA national who is not exercising Treaty rights and does not otherwise have a right of residence under the Directive will not automatically be considered to be in the UK unlawfully**. Therefore an EEA national who is not residing in accordance with the Directive may still be considered to be ordinarily resident, provided that they meet the other requirements of that test. The relevant question to consider is if they are properly settled in the UK for the time being, and not are they exercising Treaty rights, or do they have a right to reside or a permanent right to reside."*

The assertion by the Home Office that this cohort is not living in the UK lawfully is therefore clearly and directly contradicted by the archived guidance "Ways in which people can be lawfully resident in the UK".

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[34] See Appendix B in this document

[35] https://249e1c0f-a385-4490-bfe6-875269a8d3d5.filesusr.com/ugd/0d3854_7bc0b734a1a04a26a654ef7d56886785.pdf

[36] https://www.gov.uk/government/publications/overseas-nhs-visitors-implementing-the-charging-regulations - sections 3.11 and 3.12

[37] https://www.gov.uk/government/publications/ways-in-which-people-can-be-lawfully-resident-in-the-uk/ways-in-which-people-can-be-lawfully-resident-in-the-uk

[38] https://webarchive.nationalarchives.gov.uk/20201027221501/https://www.gov.uk/government/publications/ways-in-which-people-can-be-lawfully-resident-in-the-uk - paragraph 25

Legal protection for those awaiting grant of status - recommendations:

- Simplify the 'saving' regulations such that they cover everyone who is eligible for status under the EU Settlement Scheme.
- Extend the 30 June 2021 deadline for at least six to twelve months in order to reduce the application backlog (which currently stands at 390,000)

4.2 Breach of Article 18(3) of the Withdrawal Agreement

Article 18(3) of the Withdrawal Agreement states (our emphasis):

> *"Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities,* ***all rights provided for in this Part shall be deemed to apply to the applicant****, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4)."*

The various sets of regulations governing rights of EU citizens who have not yet been successfully granted (pre-) settled status contravene Article 18(3) of the Withdrawal Agreement as follows:

- The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 regulations[39] (also called 'grace period SI') do not grant rights to someone who has **submitted an application before 30 July 2021 and is awaiting grant of status**, if they were not exercising treaty rights on 31 December 2020.
- The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020[40] do not grant rights of residence to **anyone who submits an application after 1 July 2021** (assuming they are considered to have 'reasonable grounds' to be able to do so) **and is awaiting grant of status**.
- The National Health Service (Charges to Overseas Visitors) (Amendment) (EU Exit) Regulations 2020[41] do grant access to **secondary healthcare without charge** from the point of application for those who apply after 1 July 2021. However, they do not grant this access to those who have **submitted an application before 30 June 2021 and are awaiting grant of status**, if they were not exercising treaty rights on 31 December 2020.

[39] Citizens' Rights (Application Deadline and Temporary Protection) regulations, aka "grace period regulations" https://www.legislation.gov.uk/uksi/2020/1209/made

[40] Immigration Act (Consequential, Saving, Transitional and Transitory Provisions) regulations https://www.legislation.gov.uk/uksi/2020/1309/made

[41] NHS (Charges to Overseas Visitors) regulations https://www.legislation.gov.uk/uksi/2020/1423/made

We cannot see how this framework is compatible with the Withdrawal Agreement 18(3). We have summarised the position in the images in Appendix A.

There is therefore a fundamental mismatch between the EU Settlement Scheme eligibility criteria (which essentially checks for residence in the UK), and the regulations that save EEA Regulations

Breach of Article 18(3) of the Withdrawal Agreement - recommendation:

- Pressure the Government to change its legislation to ensure that every citizen who has applied for status under the EU Settlement Scheme, whether an in-time or late application, is fully protected by the Withdrawal Agreement from the moment the application is submitted, as required by Article 18(3) of the Withdrawal Agreement.

4.3 The Hostile Environment and those awaiting grant of status

Certificates of Application - online vs paper applications

Article 18(1)(b) of the Withdrawal Agreement clearly states that on submitting an application for residence status, a "*certificate of application for the residence status shall be issued* ***immediately***". This should then ensure that "*all rights provided for in this Part shall be deemed to apply to the applicant*" as per Article 18(3).

In the UK, when someone submits an online application to the EU Settlement Scheme, they are sent a confirmation email immediately, with a 'UAN number' (Unique Application Number). It has a PDF attachment which clearly states it is a Certificate of Application (CoA).

However, when someone submits a paper application, they are not sent a CoA immediately. Instead, the applicant must first have completed their biometrics process. To obtain a biometrics appointment can take weeks or months, exacerbated by Covid-19, because it is very difficult to get appointments at UKVCAS centres. This process can be prolonged and prevent citizens from having the security they require until a decision is made. We would argue it is in breach of the Withdrawal Agreement not to issue a CoA immediately.

Rights when in possession of a Certificate of Application

However, even when a citizen is in possession of such a CoA, they will face difficulties in practice, due to the government policy in place.

Policy has only been created so that employers, landlords etc can check the right to work, rent etc of EU citizens who have been **granted** status under the EU Settlement Scheme. There is no guidance on CoAs.

It is clear that those who were exercising treaty rights on 31 December 2020, and who have an **outstanding in-time application** to the EU Settlement Scheme are fully within scope of all three sets of regulations described in Section 4.2 (see also Appendix A.1).

The problem comes as a result of the policy behind the regulations described in Section 4.2. If those regulations stand, not protecting ***all*** citizens with a certificate of application, it will not be possible to instruct employers, landlords etc to accept a certificate of application as proof of right to work, rent etc. Instead these delegated border controllers would need to be checking whether that certificate of application was from an in-time or a late application to the EU Settlement Scheme, and if the person was exercising treaty rights on 31 December 2020 or not. Such complexity is guaranteed to lead to widespread confusion and discrimination.

As it stands, a certificate of application will not help people navigate the UK's hostile environment. This, particularly in combination with the size of the EU Settlement Scheme backlog and the extremely long wait to grant of status for many, is unacceptable and, in our opinion, very much against the spirit of the Withdrawal Agreement.

the3million has received multiple reports of people who have been waiting for over a year for their status – despite repeated telephone calls and emails to the EU Settlement Resolution Centre they are still left in the dark and in limbo. They are anxious, stressed and fearful of consequences for their daily lives going forward. A certificate of application is not enough across the multitude of places where proof of status is required – whether to open a bank account, prove entitlement to NHS treatment, or access financial support for education under home fees.

Even while we are in the grace period, we are receiving reports from distressed EU citizens who are waiting for their grant of status, and are being denied jobs for not having status.

The Hostile Environment and those awaiting grant of status - recommendation:

- Ensure that the Government changes its guidance, and incorporates into its communication as soon as possible that a Certificate of Application is fully recognised as proof of entitlement to work, rent, access healthcare etc. without requiring any checks on date of application or examination of historical exercise of treaty rights

4.4 Late applications (after 1 July 2021)

The Home Office has confirmed in writing[42] that for someone who makes a late application (i.e. after 1 July 2021 – but excluding those who are applying under family reunion rights), the following applies:

1. between 1 July 2021 and date of submission of application, the person will not have had lawful status in the UK - even if their status is eventually granted
2. between date of submission and date of status being granted, the person will not have had lawful status in the UK (*we submit this is a straightforward breach of Article 18(3) of the Withdrawal Agreement*)
3. from date of status being granted, the person will obviously have lawful status in the UK

[42] http://www.t3m.org.uk/HO_letter_StuartMcDonald_Dec20

Considering the practical consequences of these statements, it is worth considering three examples:

a) an application for employment or rental in time periods 1 and 2 above

b) a bill for NHS treatment in time periods 1 and 2 above

c) whether the person is left with a criminal record

a) application for employment or rental

The letter states: "*Those who have not applied to the scheme by the deadline of 30 June 2021 will not have lawful status in the UK after that date. This means, for example, they will not be able to evidence their right to work or rent if they seek new employment or a new tenancy agreement in the private rented sector during the period in which they have no lawful status. They will also not be entitled to benefits and services while they do not have lawful status. In line with the withdrawal agreements1, late applications will be accepted where there are reasonable grounds for missing the deadline. The Home Office will publish non-exhaustive guidance on what constitutes reasonable grounds early in 2021. Those who are subsequently granted status under the scheme will be able to access benefits and services as now from the point it is granted, provided they meet the relevant eligibility criteria.*"

In other words, people will not be able to work or rent during periods 1 or 2.

The lack of retrospectively deeming status to have been lawful during period 1 (so that someone can be reinstated into a job, find housing, and receive benefits) is creating the precise conditions for individuals to be vulnerable to destitution and deportation pressures - exactly as happened with the victims of the Windrush scandal.

As we mention above, the lack of lawful status during period 2 is, in our view, a breach of Article 18(3) of the WA which states that "Pending a final decision [...] all rights provided for [in the WA] shall be deemed to apply to the applicant".

b) incurred charges for NHS treatment

The letter goes on to state: "*The National Health Service (Charges to Overseas Visitors) (Amendment) (EU Exit) Regulations 2020 provide an exemption from charging for those who make a late application under the scheme. The exemption will apply from the date the late application is made, until it is finally determined. The costs of any relevant treatment undertaken after the grace period and before a late application is made, and when the individual does not have lawful immigration status,* ***would be recoverable, and would not be refundable*** *when the application is made. In addition, if someone's late application was refused, any treatment costs for the period between making a late application and the date of refusal, during which they were exempt, would be recoverable.*"

In other words - NHS treatment during period 1 will always need to be paid regardless of whether the person is eventually granted status.

This will cause identical problems to those experienced by the Windrush victim Sylvester Marshall[43].

However, during period 2, thanks to the healthcare regulations, the applicant should not be charged for treatment (unless the application is ultimately refused, in which case the NHS would seek to recover the costs from the applicant. These Regulations are therefore implementing Article 18(3) of the Withdrawal Agreement correctly.

c) Criminal Record

It is clear from the above that, even if a late applicant is considered to have reasonable grounds to apply late, and is successful in being granted that late status, they will have had a period of unlawful residence in the UK. This criminalisation can be used against them for deportation purposes, and will undoubtedly hinder any potential application for citizenship. Furthermore, it is potentially a criminal offence under the Immigration Act 1971.

Treatment of late applications is unreasonable

In our view, none of this is in the spirit of the Withdrawal Agreement - in particular Article 18(1)(d) and the Good Faith principles set out in Article 5. It seems absurd to create policy that will have such dire consequences for someone who is ultimately recognised as having reasonable grounds for a late application.

Kevin Foster MP has frequently used the example of a child in care, for example in Committee debate[44], where he said:

"*I regularly cite the relevant example of a child in the care of a local authority that has the duty to make the application on their behalf. If the local authority fails to do that, and the person becomes an adult and realises that the application was not made for them, that would be seen as an eminently reasonable ground, because they were entitled to believe that the local authority would have done its duty and made the application on their behalf.*

Moreover, there is no set time period for reasonable grounds. For example, in the case of a looked-after child, the Home Office accepts that it could be some time before they run into the problem. For the sake of argument, an eight-year-old child will become an adult in 10 years' time and might discover when they go for their first job that the local council had not made the application 10 years ago. That would still be seen as a reasonable ground for a late application, because the child would not have known about it."

We need to look at the policies in the light of such an example, and indeed Mr Foster himself says in another debate[45]:

"*In my understanding [...] if someone has been found to have a reasonable ground for a late application, it would be hard to then hold against them a penalty in the form of not getting access to treatment or being deemed an overstayer. That would seem a bizarre outcome that I cannot imagine any court would uphold. I would expect*

[43] https://www.theguardian.com/uk-news/2018/apr/27/windrush-cancer-victim-has-uk-residency-status-confirmed
[44] Draft Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 - column 5
[45] https://committees.parliament.uk/oralevidence/1135/html/ reply to Q71

that if, for example, they had been doing activities in the UK, it would be covered by the fact that they had made a reasonable late application.

It is a fair point that is raised and I appreciate that people would wish to see that clarified as to the impact of it, not just in this instance but in more general terms. They are not going to be considered an overstayer. If they then go on to apply for citizenship, we are not going to consider that a period of unlawful residence for naturalisation purposes. There are a few other elements that, rightly, people would want to see clarified."

The existing policies simply do not reflect his desire not to penalise someone who has grounds for a late application.

A far cleaner legal policy would be, to cover both the period 1 and period 2 problems, to deem someone to have had lawful status **from 1 July 2021, as soon as they submit a valid late application**, i.e. from the point of being issued a Certificate of Application [CoA]. This CoA must be issued immediately on a late application being submitted, even before it is considered whether the applicant has reasonable grounds to submit this late application. If that is not the case, the reasonable grounds test can and will become a further tool with which to cause harm. Such a policy would also incentivise swift resolution of applications.

Late applications - recommendations:

- Ensure that the Government changes its process, so that a Certificate of Application is issued immediately on receipt of a paper application, rather than requiring the applicant to have first completed biometrics
- Ensure that policy is changed such that for late applications, the applicant is deemed to have had lawful status **from 1 July 2021**, as soon as the Certificate of Application is issued

5 Those who have been granted (pre-) settled status

5.1 Introduction

First and second class status

There is a fundamental assumption at the heart of the Government's implementation of the Withdrawal Agreement[46], namely that there are two 'classes' of pre-settled and settled status under the EU Settlement Scheme (EUSS):

- 'First class' pre-settled and settled status for those who fall within scope of the Withdrawal Agreement - meaning they are exercising treaty rights, or have EU Permanent Residence rights, on 31 December 2020
- 'Second class' pre-settled and settled status for those who do not fall within its scope but who may nevertheless be granted leave to enter or remain in the UK by virtue of the residence scheme immigration rules (in other words the EUSS) - this cohort mainly includes those who did not have private health insurance[47] when studying or self-sufficient.

EU Settlement Scheme eligibility tests for residence only

This distinction stems from the fact that the UK Government has chosen not to test applicants to the EUSS for strict exercising of treaty rights under EU law. It has chosen to dispense with tests for CSI[48], and instead is testing only for residence (alongside identity and criminality).

The UK is thereby being more generous than the Withdrawal Agreement allows - which is an option open to the UK (and to EU member states for the rights of British citizens in the EU) - and indeed anticipated by Article 13(4) which states

> "*There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.*"

Article 38 (More favourable provisions) also states

> "*This Part shall not affect any laws, regulations or administrative provisions applicable in a host State or a State of work which would be more favourable to the persons concerned. This paragraph shall not apply to Title III.*"

EU Settlement Scheme is implementation of Withdrawal Agreement Article 18(1)

As explained earlier, the Withdrawal Agreement allows for a choice of constitutive (Article 18(1-3)) or declaratory (Article 18(4)) approach, and the UK has opted for a constitutive scheme, via the EUSS.

[46] See Paragraph 7(2) of the European Union (Withdrawal Agreement) Act 2020 - https://www.legislation.gov.uk/ukpga/2020/1/section/7/enacted
[47] See Appendix B in this document
[48] See Appendix B in this document

Article 18(1) makes clear that citizens may "*apply for a new residence status which confers the right under this Title and a document evidencing such status which may be in a digital form.*"

Two phrases deserve closer inspection.

> "*which confers the right under this Title*": It is therefore clear that an application granted under the EUSS **confers** the rights under the Withdrawal Agreement. Regardless of whether one is a 'first class' or a 'second class' applicant, once granted status, they have all rights under (Part Two Title II of) the Withdrawal Agreement conferred on them.
>
> "*a document evidencing such status*": All those granted status under the EUSS are given digital status (and for non-EU citizens the option of a biometric residence card) which carries the wording "Issued under the EU Exit Separation Agreements". No distinction is made between 'first class' and 'second class' grants of status.

Philosophical difference of interpretation of the Withdrawal Agreement

the3million therefore submits that all those granted status under the EUSS have conferred on them all the rights of the Withdrawal Agreement. We posed this question to the EU Commission in March 2020[49], and their reply to us in April 2020[50] was clear:

> "*All EU citizens who are granted (pre-)settled status by the United Kingdom in implementation of Article 18(1) of the Withdrawal Agreement are beneficiaries of the citizens' rights part of the WIthdrawal Agreement and can thus rely on the rights provided for in Part Two of the Withdrawal Agreement. We therefore understand that this should include EU citizens who have been affiliated to the NHS without having private comprehensive sickness insurance."*

This profound philosophical difference in interpretation lies at the heart of many of the problems described below, particularly for those who have been granted pre-settled status, and for those who go on to naturalise as British.

People's problems are therefore not over once granted status under the EU Settlement Scheme. Some issues are specific to those with pre-settled status, some to those with settled status, and some problems arise regardless of which status has been granted. They will be examined in turn below.

5.2 Those who have been granted pre-settled status

Under the EU Settlement Scheme rules, if an eligible applicant has been in the UK for less than five years, they are granted 'pre-settled status'. This expires five years after the date it is granted. In order to be able to stay in the UK beyond the expiry of their pre-settled status, they can apply for the full 'settled status' as soon as they become eligible for it (i.e. they have clocked up five years of 'continuous residence'), however they must do so before their status expires.

Pre-settled status is a precarious status, for many reasons.

[49] http://www.t3m.org.uk/t3m_letter_EC_WAPersonalScope
[50] http://www.t3m.org.uk/EC_reply_t3m_WAPersonalScope

- **Automatic loss of pre-settled status**
  For someone with pre-settled status who continues to live in the UK, doesn't break their continuity of residence or any other eligibility criterion, but simply **forgets to apply for settled status** before their pre-settled status expires, the consequences are hard to overstate.

  They lose their lawful basis to be in the UK, they face the full policies of the hostile environment namely potential loss of job, rental accommodation, driving licence, access to healthcare. All for forgetting an administrative procedure.

  the3million consider that this loss of status is not compliant with the Withdrawal Agreement. Whereas e.g. levying financial penalties for not applying in time would be allowed, Article 20 of the Withdrawal Agreement does not cover loss of status for lack of an administrative action.

  We have heard indications that holders of expired pre-settled status could be considered to have 'reasonable grounds' for making a late application for settled status. However, this does not address the loss of rights and entitlements until the settled status is eventually granted. An NHS bill related to treatment during the interim stage, a job lost, a rental eviction can quickly lead to destitution and ruined lives in the same way as those caught up in the Windrush scandal.

- **A dead-end pre-settled status**
  A related, and equally serious issue occurs when people do **break their continuity of residence**, for example by leaving the UK for 14 months.

  Even though their pre-settled status may still be valid and within its expiry date, it then becomes impossible to apply for a new status under the EU Settlement Scheme.

  This is because a key eligibility requirement is to have continuous residence which began before 31 December 2020. This is a requirement that they can no longer fulfil, since they broke their continuous residence, and therefore they will have no choice but to attempt to apply for a status under the new Immigration Rules instead, or leave the UK.

  This is not stated clearly enough in plain English in the email sent by the Home Office to those granted pre-settled status. The standard letter says "*If you are absent from the UK for a continuous period of more than two years, your pre-settled status will lapse… However, qualifying for settled status generally requires five years continuous residence in the UK with only absences of up to six months (or one absence of up to 12 months for a good reason) permitted.*"

  Note it does ***not*** say that this five years continuous residence must start before 31 December 2020. We have received many reports of people with pre-settled status who believed (from the wording of their email) that they would be able to for example:

  - take up a study abroad as long as they were not out of the UK for more than two years
  - come back to the UK, intending to settle for the long term
  - renew their pre-settled status when it expires
  - apply for settled status when they finally accumulate five years of continuous residence

Arguably this should be allowed under the Withdrawal Agreement in any case, as such loss of status is not allowed under Article 20. The EU Settlement Scheme specifies that five years' continuous residence must have commenced before 31 December 2020 (notwithstanding family reunion applications). However, articles 15 and 16 of the Withdrawal Agreement do not specify that the five years continuous residence must have commenced before 31 December 2020.

- **Pre-settled status is not a 'right to reside' for the purposes of benefits**.
  When people apply for Universal Credit and other means-based benefits and services such as homelessness support, they have to demonstrate a 'right to reside' to access it. British citizens satisfy this automatically, as do EU citizens with full settled status.[51] However, EU citizens with pre-settled status cannot use their pre-settled status to demonstrate their 'right to reside'. Instead, they have to show that they are, in short, workers or have retained worker rights. When the EU Settlement was first launched in December 2018, pre-settled status ***was*** a right to reside, however in July 2019 the Government changed its mind by introducing regulations[52] which specifically excluded pre-settled status from the list of rights to reside.

  This means EU citizens with pre-settled status are not benefiting from 'equal treatment' rights as promised in the Withdrawal Agreement Article 23 nor their rights to non-discrimination under Article 12. This has caused a lot of hardship especially during the COVID-19 pandemic, as many people have lost their jobs and face destitution without access to Universal Credit and other help from the Government.

  Status under the EU Settlement Scheme is supposed to be a proof of rights under the Withdrawal Agreement, and as such should be sufficient to receive equal treatment to British citizens including when it comes to receiving social assistance.

  As referred to earlier in this document, the Court of Appeal recently ruled[53] that pre-settled status should indeed be a 'right to reside' for benefits purposes, under EU free movement legislation. The same principle should be extended under the Withdrawal Agreement for exactly the same legal arguments as Article 12 includes reference to Article 18 of the TFEU and Article 23 of the Withdrawal Agreement is framed with reference to Article 24 of Directive 2004/38/EC.

- **Grants of pre-settled status to those entitled to full settled status**

  The precarious nature of pre-settled status is not clearly communicated to those who the Home Office offer it to. It is important to reflect on the way the EUSS application process works. Regardless of how long someone has been resident in the UK, i.e. whether they are eligible for pre-settled or settled status, that person applies using the same application process.. Where there is insufficient evidence via the automated system to establish a person's entitlement to settled status, an offer of pre-settled status is

[51] We acknowledge here that the habitual resident requirement does require an intention to settle in the UK on those who are recently returned to the UK.
[52] https://www.legislation.gov.uk/uksi/2013/376/regulation/9 - Subparagraph 9(3)(c)
[53] Fratila and Tanase v SSWP & AIRE Centre (2020) https://cpag.org.uk/welfare-rights/legal-test-cases/current-test-cases/eu-pre-settled-status

made in its place (assuming evidence of residence of less than 5 years is available). We have had repeated reports of people inadvertently accepting pre-settled status when, instead, they are entitled to settled status. It is simply the case that the automated system was unable to establish their complete five-year residence. Although the system asks them if they wish instead to supply more evidence manually to prove longer residence, many are simply relieved to have been granted any status at all and do not understand the instructions or the legal implications of accepting the pre-settled status.

This concern has been raised repeatedly in different forums and continues to be an issue amongst those in need of assistance and ill equipped to navigate the process.

Those who have been granted pre-settled status - recommendations:

- Ensure the government changes legislation so that expiry of pre-settled status cannot result in loss of rights for any reasons other than those specified in Article 20 of the Withdrawal Agreement. An administrative penalty should be the only allowable consequence
- Ensure the government changes legislation so that EU citizens, who were in the UK before 31 December 2020 and therefore within scope of the Withdrawal Agreement, are allowed to apply for settled status even if their five years of continuous residence start after 1 January 2021. This is to comply with Articles 15, 16 and 20 of the Withdrawal Agreement
- In the absence of changing this legislation, at a minimum improve the clarity of information sent to those granted pre-settled status, to clearly indicate the consequences of leaving the UK for more than six months
- Ensure the government changes legislation to give pre-settled status holders equal treatment with British citizens as conferred by an Withdrawal Agreement Article 18(1) document
- Strengthen the EUSS process o make sure that applicants who are entitled to settled status do not accept pre-settled status

5.3 Those who have been granted settled status

Many think that Comprehensive Sickness Insurance (CSI)[54] is no longer a problem because the EU Settlement Scheme does not ask for evidence of CSI. However, the issue re-appears in many forms buried deep within the complex immigration rules and secondary legislation:

- **Applications for British citizenship**
  People with settled status who want to go on to naturalise as British citizens find that their last 10 years are examined to see if they had CSI when not economically active. They must establish that they were lawfully resident for the purposes of becoming British. It is important to note that the conclusion is that

[54] See Appendix B in this document

those who did not have CSI where required were unlawfully resident in the UK. As noted above in Section 4.1, the Department of Health's guidance "Ways in which people can be lawfully resident in the UK"[55] said as recently as November 2020 that *" **it is very important to note that an EEA national who is not exercising Treaty rights and does not otherwise have a right of residence under the Directive will not automatically be considered to be in the UK unlawfully**."* The naturalisation guidance states there is 'discretion' to ignore such periods without CSI but who would gamble £1,500 citizenship fees on an opaque discretion?

- **Losing family reunion rights**
  Anyone who does nevertheless go on to naturalise, and becomes a dual EU-British citizen will then find that they have now lost their rights to future family reunion. If it was previously a requirement for them to have CSI to be lawfully resident in the UK they would need to demonstrate this at the time they naturalised and thereafter.
- **Children of long residents denied British citizenship at birth**
  For children born in the UK to an EU parent who has lived in the UK for more than five years and believed they had permanent residence rights, the situation is even more complex. Deciding whether or not the baby is born British and is entitled to a British passport involves looking at whether the parent had CSI when not economically active at any time during the previous five years. Given that by far the most common reason for people not having CSI is that they simply did not know they needed it (since only the Home Office requires it), this can lead to very upsetting outcomes. Even more distressing are those cases where the baby is given a British passport, but five years later at the renewal of that passport the Home Office decides that the child is not British after all.

Those who have been granted settled status - recommendation:

- The UK should accept that access to the NHS - bearing in mind this is funded by general taxation, including e.g. VAT and not just income tax - satisfies the Comprehensive Sickness Insurance requirement

5.4 Applying for National Insurance numbers (NINo)

Since March 2020, EU citizens have been unable to receive a National Insurance number due to the pandemic. The official explanation[56] is that EU citizens have not been through an identity check interview, therefore they would need a face-to-face interview to obtain a NINo, which is not possible during the pandemic. On 7 December 2020, DWP resumed NINo allocations for EU citizens with settled or pre-settled status. The process involves telephoning, being mailed a form with a link to an application (this takes up to 7 days), then processing

[55] https://webarchive.nationalarchives.gov.uk/20201027221501/https://www.gov.uk/government/publications/ways-in-which-people-can-be-lawfully-resident-in-the-uk
[56] https://questions-statements.parliament.uk/written-questions/detail/2020-07-20/76859

the application (which takes another 6 weeks).

In November 2020, a Parliamentary Question (PQ)[57] promised an online solution by the second Quarter in 2021. However, in January 2021, a PQ[58] moved this to 'early next year'.

The latter PQ also confirmed that the temporary non-face-to-face service is not available to those without pre-settled or settled status. We have received reports that the telephone line used to register for this application leaves people waiting indefinitely, and that many have had to simply give up.

Although strictly speaking it is possible to work without a NINo (employers should get round it by using an emergency 'tax code') we are seeing the following problems:

- The emergency tax code results in tax and national insurance contributions being paid at maximum levels. These are refunded eventually but this is causing serious cash flow issues for many.
- Many employers are not aware of the emergency tax code solution, so are refusing to employ EU citizens without a NINo. It is pushing many EU citizens, desperate for work, into the black market, causing a race to the bottom on employment rights.
- Even for those who are working, there are instances where not having a NINo is causing considerable problems in practice, even if in theory they might be surmountable. We have seen evidence of the following:
    - Refused funded childcare to which they are entitled
    - Refused Government maternity allowance to which they are entitled
    - Unable to set up a private pension
    - Unable to apply for Universal Credit
    - Employers unable to claim furlough
    - Unable to register as self-employed for the purposes of licences

The situation is unacceptable and is causing considerable harm to people's everyday lives.

Applying for National Insurance numbers - recommendation:

- To obtain National Insurance Numbers, citizens should be able to use something like the online service[59] to verify identity (which has been in place since April 2020). It was created for universal credit applications, and should be used for National Insurance Number applications. Alternatively - a regular zoom call between the DWP and the NINo applicant should be sufficient.

[57] https://questions-statements.parliament.uk/written-questions/detail/2020-10-30/109436

[58] https://questions-statements.parliament.uk/written-questions/detail/2020-12-15/130119

[59] https://dwpdigital.blog.gov.uk/2020/10/15/confirm-your-identity-a-new-way-to-verify-online

5.5 Lack of physical proof of EU Settlement Scheme status

Whereas non-EU family members with status under the EU Settlement Scheme are entitled (for now) to receive a biometric residence card to prove their status, EU citizens are not. Their status is held by the Home Office, and people need to go online to access it, involving access codes sent to their email or mobile telephones. Banks, employers, landlords, the NHS, border control and countless other private and public organisations will need to use digital systems to check whether an EU citizen has rights to their services, via the generation and use of a time-limited 'share code'.

This digital system can work well for many, and in many different circumstances. However it will not work for all, and it will not always work. The government's own impact assessment has acknowledged this. We are concerned for vulnerable and elderly citizens, and those who lack digital skills. We foresee a lot of discrimination especially when it comes to applying for jobs and renting accommodation - where employers and landlords face very tough sanctions for employing or letting to anyone without permission to be in the UK. Many will struggle with the digital system and will likely find it easier to choose the candidate with physical proof.

We argue that the transition to a purely digital system cannot be done overnight, using one group of citizens as guinea pigs. Australia is the only country in the world to have achieved a (near) fully digital immigration system, and it allowed people to have a physical backup for over a decade while the entire society became accustomed to digital status.

the3million has campaigned on this issue extensively[60]. Most recently, an amendment to the Immigration Bill, to require the Government to give physical proof of status to any EU citizen who requested it, was passed by the House of Lords by a large majority[61]. However it was defeated in the House of Commons.

Problems with current implementation of digital status

Over our campaign, we have received many reports about the difficulty surrounding proof of status:

- **BAME EU citizens and discrimination**
  There are many BAME EU citizens who fear an additional layer of discrimination on top of the discrimination they already experience in the employment and rental sector.
- **Lack of knowledge of 'share code'**
  Applicants for Universal Credit are asked for a **'share code'**, without an explanation of where to find such a code. Many have no idea what this 'share code' is, as this phrase is never mentioned in the decision letter. The decision letter merely mentions using the link view-and-prove-your-rights.homeoffice.gov.uk, and using it to "***show*** *your right to work to an employer by letting them* ***view*** *your status online."* We have heard reports from interpreters on universal credit appointments who say that in virtually every call, EU citizens are asked for a 'share code', and in almost none of the calls do the EU citizens know what this is. Some try to give their UAN number, which is the application reference number referred to on the decision email and attached decision letter.

[60] See our detailed Parliamentary briefing http://www.t3m.org.uk/t3m_PhysicalProof
[61] https://www.theyworkforyou.com/lords/?id=2020-10-05d.446.1

- **Problems around maintaining or updating digital status**
  The status, being digital, needs to be maintained and updated which many people will struggle to do. If the identity document used to obtain the status is renewed, then the user must use the old document to access their records, to then update it with their new document. This will be problematic for people who don't have both documents to hand, e.g. if their original identity document had been lost or stolen. It then takes a considerable while before the EUSS status is updated – so during this time people don't know whether to use their old or new when proving their status, including when using e-gates for example. The process is also confusing because many have inadvertently started a new application (with their new identity document) rather than updating their existing status, resulting in a problematic situation. The advice is to withdraw the new application, but subsequently the correct update procedure fails because the system already knows about the new identity document.

  Similarly, when someone's telephone number, email address or postal address changes, they need to update this online, and we have had various reports of this resulting in errors, for example:

  > "*I simply cannot update my UK address using the online, digital service. I have settled status, obtained over a year ago, and recently did two things, renewed my passport and changed my address. I was able to update my passport without any issues but when I try to update my address to the new one, I simply get an error telling me that they cannot update my address*"
  >
  > *"I received a confirmation email about my address and passport. But I tried to update my address as I moved to Scotland and the website gave me an error. I call the resolution centre and they told me that their side hasn't been updated. They will send me emails about the process. I never received any email, so I called back and asked about the process, they could not see anything, they took my details and again passed to an IT professional. At the moment I am in the same situation, which make me very worried if in January I will be able to cross the borders as my settled status should be linked to my passport. They've told me there is others way to check but no explanation or email where I can show that at the borders."*

- **Proof of EU Settlement Status inaccessible**
  We have had multiple reports of users attempting to use the 'View your status' website, and being told that their identity document is not recognised.

  > "*I completed my settled status on August 2019. I checked my status online without issues back then. I tried to view my status again today and it is not working. I attached the error page to this form. They offer you a phone to contact them if you have issues. This number has a cost of 50p per minute. It is embarrassing how they are treating us."* (attached form shows *"We cannot find your current status in this service."*)
  >
  > "*The Gov.uk website says it does not recognise my detail but the details I input are absolutely correct.*"

"I updated my identity document by sending it to the relevant address. Got it back four weeks later with a note that I don't need to go anything else. However, I haven't been able to view my online status ever since, neither with my old nor my current ID."

"On https://www.gov.uk/view-prove-immigration-status I have entered my details numerous times in order to view my status as I will need to prove it soon but the system says that the details entered 'don't match our records'."

"My status was successful but when trying to access the proof it does not recognize my passport or ID."

This is extremely concerning, especially as the Government's rationale for refusing to give EU citizens a physical proof is that the Home Office consistently claim that digital status "cannot be lost, stolen or tampered with". The recent news story that around 400,000 police records were lost[62] by "human error" according to the Home Secretary has done nothing whatsoever to reduce EU citizens' anxiety about not being in control of their own status in their own wallet.

- **Home Office website for checking status is unavailable**
  Less frightening for the individual but still extremely worrying is the frequency with which the status checking website is unavailable:

  "Sorry, there is a problem with the service. Try again later. This is the message that I get in the last 3 months."

  "When trying to have the 30-day link that proves my status sent to me, the Home Office website says "There's a problem with this service" (after I entered the one-time code sent to me by e-mail)."

  "The website was down, could not prove my status."

  "It just didn't work for hours"

- **Lack of awareness of digital nature of EUSS from those needing to check status**
  We are receiving reports of a lack of knowledge about the digital nature of the EU Settlement Scheme. This includes for example UK and foreign banks, foreign check-in staff, employers, landlords and others. There will doubtless be many unexpected organisations wishing to check status which have not been factored into the Home Office's planning for the digital status.

- **International travel back to the UK – boarding abroad**
  We have had multiple reports of people struggling to convince foreign check-in staff to let them board an aeroplane. Even though the Government has told us in a letter[63] that foreign carriers should not be

[62] https://www.bbc.co.uk/news/uk-55691710

[63] https://249e1c0f-a385-4490-bfe6-875269a8d3d5.filesusr.com/ugd/0d3854_90289c07eca4422aa98c3a3da6c17ac2.pdf

completing any additional checks for EU citizens, and that they "*will work closely with carriers and border officials globally through our overseas liaison network to ensure the messages are understood",* we are seeing many problems in practice:

> "*Travelling to the UK on an EEA passport has started being a problem. Even though I have no issues with the UK authorities, the problem is actually ALL around the world. In Doha, Banjul, Manila, Beijing, Bogota, Addis Ababa, everywhere I've travelled on work on official UK government business, I have been asked whether I have a visa or not. I have applied for and received a PR card in 2020, too, especially for immigration officers globally who do not know what settled status is and that I do not need it.*"
>
> "*I want to come back to UK from Pakistan and I have been asked to proof my immigration status which I can't proof to the authorities, same situation when flying back after holidays in Africa, Poland etc they need to see physical evidence to proof if I am resident of UK.*"
>
> "*In early January, 2021, I was set to travel on American Airlines from the US (where my family resides) to the UK (where I currently live with my partner). As a dual EU/American citizen, I have never had any trouble entering the UK, and I always fly in on my EU passport. On this trip, I had extra paperwork ready to comply with Covid-19 restrictions, including a Covid negative test and a passenger locator form. I first gave the American Airlines associate my EU passport and then the additional paperwork. She asked what my status was in the US, and so I handed her my US passport as proof of citizenship. She then asked why I don't fly to the UK on the US passport, and I responded that as an EU citizen, I have received pre-settled status in the UK, which grants me residency. She flipped through both passports and asked me if I had proof of UK residency, and I explained that it's a digital status. She said that she had no information in her system about how EU citizens could enter the UK. She then proceeded to ask me if I have a return flight and how long I am planning on staying in London. And I said again that I live there. She seemed very confused, and had no information at all about the EU Settlement Scheme. Ultimately, she let me through on my US passport.*"
>
> "*I was asked for a residence card when I was doing the check in with Iberia to fly back into UK. I was flying from a third country (Argentina) and the check-in officer insisted for me to have a physical paper to demonstrate that I was living in UK. This lead into a discussion on how to prove that I was allowed to fly back to UK without a return ticket. They did not understand how it was possible for me not to have a paper or a letter that shows that I was living in the UK. The situation was resolved because luckily I had with me the NINo letter.*"

- **International travel back to the UK – entering at UK border control**

  COVID-19 has shone a spotlight on the problems with digital status. The intention was not to check for EU Settlement Status during the grace period, however due to COVID-19 citizens have been asked to

prove their residence in certain circumstances. As reported by Politico on 2nd February 2021[64], the digital border scheme is not ready for digital status:

> "*delays in implementing a key digital border scheme meant officers at the front-desk would not currently know whether an EU national has U.K. resident status under the EU Settlement Scheme without performing further checks in the back office.*
>
> *The Digital Services at the Border Programme (DSBP), launched in 2013, was expected to be in place by March 2019, but its delivery has been delayed to March 2022, the National Audit Office said in a report last month, which said delays had "increased costs by £173 million and means it continues to rely on legacy technology." It is meant to replace the 26-year-old system currently in place.*"

- **Digitally excluded citizens**
  Many people are digitally excluded, which will cause severe problems. People with learning disabilities, people without access to technology (smartphone, computers or access to the internet), people without the skills to use the internet, people whose access to their status (in the form of email address or telephone number) is held by someone else – all will be seriously disadvantaged in a society which is simply not ready for such a big-bang switch to a digital-only status.

  The Government's EUSS Policy equality statement[65] entirely corroborates this:

  > "*This may put at a particular disadvantage certain protected groups (as considered below) who may find it harder to use digital services because they are not regular internet users. The Office for National Statistics (ONS) survey of 'Internet users, UK: 2019' found that 47% of adults aged over 75 were recent internet users, compared with 83% of those aged 65 to 74, 99% of those aged 16 to 44 and 93.2% of those aged 55-64. Older applicants may be disadvantaged because they are less familiar with using online services and may find it harder to access or demonstrate their status as a result.*
  >
  > *Digital evidence of status may place at a particular disadvantage people from the Roma community, estimated at around 200,000 people in 2012, as highlighted in some recent reports, which point to a lack of IT skills and access to technology as two important barriers to Roma people accessing the EUSS and using their digital status.*
  >
  > *In addition, online-only evidence of immigration status may place women at a particular disadvantage, as they have been identified as being overrepresented in many of the groups identified as vulnerable; and are overrepresented amongst non-internet users. It may also place at a particular disadvantage some disabled people with accessibility needs: the ONS survey of 'Internet users, UK: 2019' found that 18% of disabled adults had never used the internet."*

- **Non-EU citizens are entitled to a physical document in the form of a biometric residence card**.
  However it is important to realise that they do not automatically get this card on being granted (pre-)

[64] https://www.politico.eu/article/uk-border-customs-officers-no-documents-for-eu-citizens-britain/
[65] https://www.gov.uk/government/publications/eu-settlement-scheme-policy-equality-statement

settled status, rather they have to make a separate application for it. This itself frequently takes several months, with serious implications on proving rights, especially again, for travel. This is exactly what happened to the NHS worker stuck in Kenya reported in January[66] – it took her three months just to get an appointment to apply for her card, which she still had not received by the time she needed to travel to Kenya for her father's funeral.

Furthermore, many non-EU citizens apply for EUSS status using their EEA biometric residence card, or an existing biometric residence permit under the Immigration Rules. Once granted (pre-) settled status, this status is linked to that residence card/permit, which obviously does not state that it is '**Issued under the EU Exit Separation Agreement**'. In order to swap their residence permit or EEA residence card, they need to do so via a website[67] that is very difficult to find (and is not cross-referenced from the webpages[68] which declare that EEA residence cards will no longer be valid after 30 June 2021).

Even if they do find the correct website, and apply for an EUSS biometric residence replacement card, they need to send in their existing residence permit or EEA residence card, and be without physical proof of their status in the interim. As mentioned earlier, this process can take many months, and denies the right of travel in the meantime - as foreign airlines would not allow them to board a flight back to the UK without proof of residence.

We are aware that non-EU citizens are also in the process of being moved to a digital-only status, as the are being issued with biometric cards expiring in 2024 even if they have indefinite leave to remain, or their leave expires later. This is causing anxiety for many.

Better implementations of a digital system are available

Article 18(1) of the Withdrawal Agreement, application for a new residence status, allows for "*a document evidencing such status which may be in a digital form*". There are many ways of implementing digital documents, and it is clear that the current digital status of the EU Settlement Scheme is set to cause much anxiety, discrimination, and interference with the ability of EU citizens to simply "live their lives as they did before". The UK is not ready for a complex two-party, two-factor authenticated system to dictate everyday transactions such as renting, applying for a job, or opening a bank account. Fundamentally, this is not a document that is in the citizen's control – rather the citizen is permanently dependent on the Home Office for proof of status at every turn.

The Home Office should engage with EU citizens' clearly and strongly expressed wish for a physical proof of their status, and provide such proof. Even if the Home Office insists on resisting this, there are other, far better ways of delivering digital documents[69] which leave the citizen in possession of the document yet still address all the security concerns that the Home Office may have. These should be seriously examined and reported on.

[66] https://www.theguardian.com/uk-news/2021/jan/16/nhs-worker-stuck-in-kenya-as-settled-status-documents-are-rejected

[67] https://visas-immigration.service.gov.uk/product/biometric-residence-permit-replacement-service

[68] https://www.gov.uk/uk-residence-card

[69] As an example – see secure QR Code solutions such as https://www.qryptal.com/industries/immigration/

Lack of physical proof of EU Settlement Scheme status - recommendations:

- The Government should communicate much more widely and clearly what a 'share code' is.
- The Home Office should urgently engage with the3million and other stakeholders on examining alternatives to the current digital status implementation of the EU Settlement Scheme.

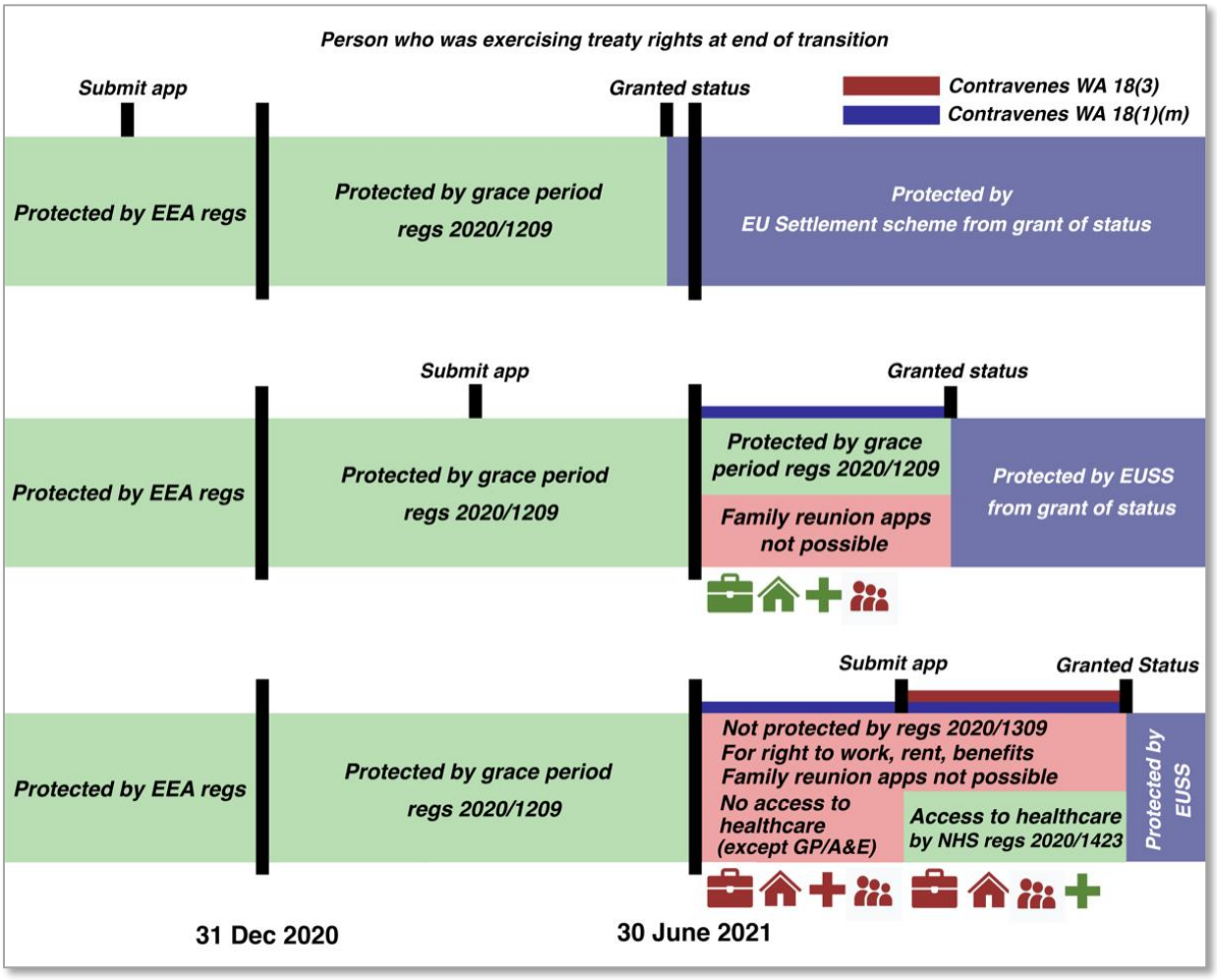
Appendix A: Contraventions of Withdrawal Agreement 18(3)

A.1 - Effect of Rules/Regulations on citizens exercising treaty rights on 31 Dec 2020

The following graphic shows the effect of various regulations[70] and family reunion immigration rules[71] and shows where these are in breach of Article 18(3) and Articles 18(1)(m) respectively of the Withdrawal Agreement.

The graphic shows three separate timeline scenarios:

1. an application submitted during the transition period, status granted during the grace period
2. an application submitted during the grace period, status granted after the grace period
3. a late application submitted after the end of the grace period

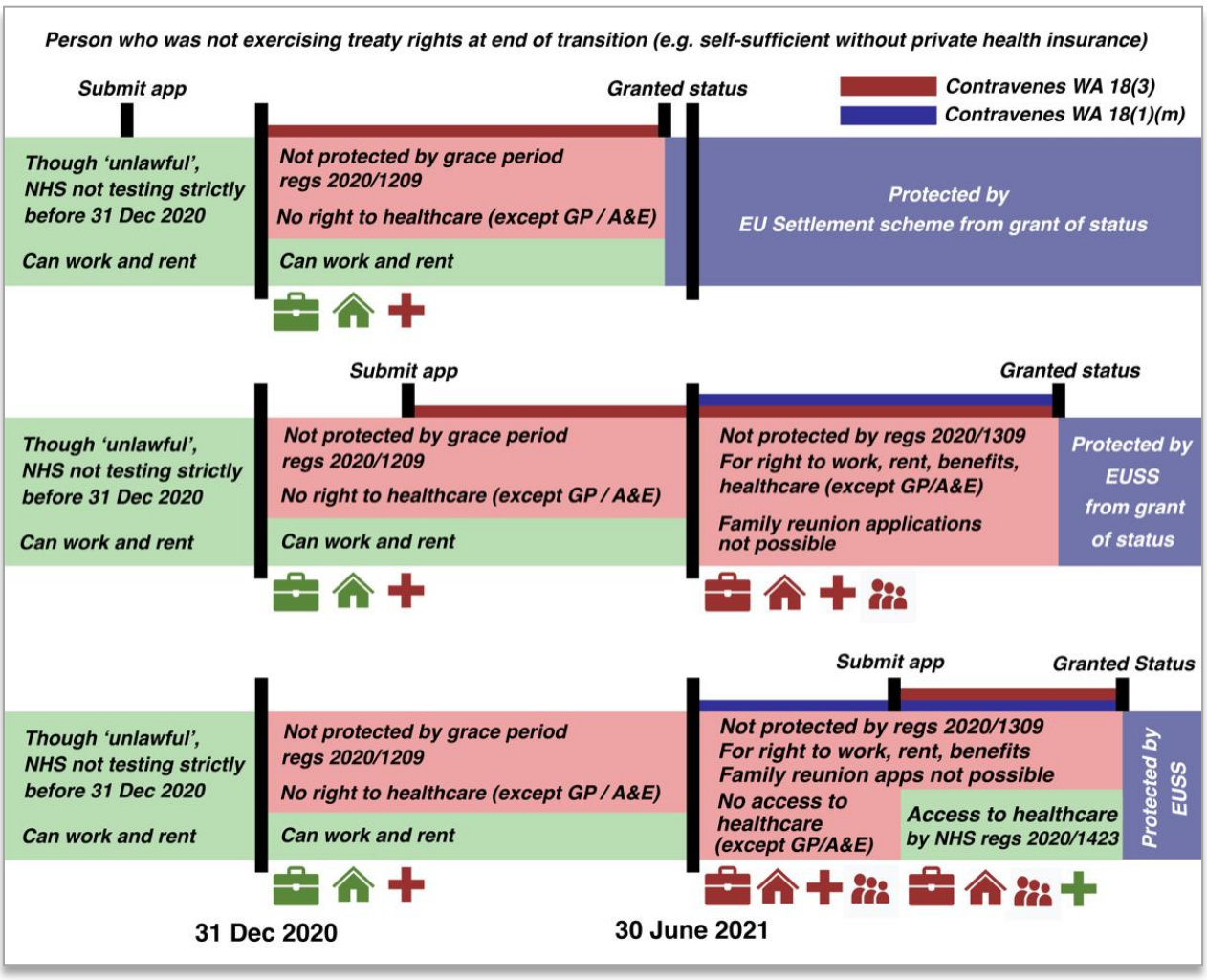


[70] Citizens' Rights (Application Deadline and Temporary Protection) regulations 2020/1209
Immigration Act (Consequential, Saving, Transitional and Transitory Provisions) regulations 2020/1309
NHS (Charges to Overseas Visitors) regulations

[71] Family Reunion applying after 1 July 2021 - https://www.gov.uk/guidance/immigration-rules/appendix-eu-family-permit

A.2 - Effect of Rules/Regulations on citizens not exercising treaty rights on 31 Dec 2020

The following graphic shows the effect of the same regulations and rules on the same three timeline scenarios, but this time for citizens who are eligible for status under the EU Settlement Scheme, yet were not exercising treaty rights. In the vast majority of cases the only reason these people were not exercising treaty rights was by the simple fact of not being in possession of a private health insurance that was barely known by anyone, never required by the NHS, and only ever a requirement for the Home Office. It shows the lack of protection of these citizens until they are ultimately granted status, as well as the more far reaching breaches of Article 18(3) of the Withdrawal Agreement.



Appendix B - Comprehensive Sickness Insurance (CSI)

Under EU Free Movement rules, EU citizens are required to show 'comprehensive sickness insurance' [CSI] if they move to another EU member state, yet are not economically active there (i.e. if they are students or self-sufficient) to be considered lawfully resident. Such a requirement has been grandfathered into the Withdrawal Agreement as a minimum requirement for lawful residence to fall within its terms (see personal scope of the agreement).

In the UK, this requirement was little known or advertised to EU citizens, and the insurance was never needed or even requested in order to access NHS healthcare.

As this article by FreeMovement[72] explains:

> "In other European countries instead of funding their health systems out of general taxation, they required their citizens to buy compulsory health insurance. [...] The NHS doesn't work like that: paying into it is achieved by the simple expedient of paying tax, which even the economically inactive do every day in the form of consumption taxes like VAT."

In 2011, the EU Commission launched an Infringement Procedure against the UK, stating that access to the NHS should fulfil the CSI requirement. In October 2020, the EU Commission relaunched an Infringement Procedure on the same issue. We assume this relaunch is owing to the passing of time and new case law that may affect the legal opinion on the issue. The Commission's position is:

> "In the United Kingdom, EU citizens who are affiliated with the UK public healthcare scheme (NHS) and are entitled to get medical treatment provided by the NHS are not considered as having sufficient sickness insurance. The Commission considers that the UK's relevant rules are in breach of EU law."

The Appeals Service Northern Ireland has also recently referred a case to the CJEU[73] asking questions around the issue of Comprehensive Sickness Insurance.

[72] https://www.freemovement.org.uk/bye-bye-csi-legal-challenges-to-the-comprehensive-sickness-insurance-rule/

[73] http://curia.europa.eu/juris/document/document.jsf?text=&docid=231368&doclang=EN

Appendix C – Consolidated list of recommendations

Those who do not know they need to apply - recommendations:

- The Government should be required to publish the guidance on 'reasonable grounds' as soon as possible
- Funding to organisations helping vulnerable groups apply to the EU Settlement Scheme should be extended to well beyond the 30 June 2021 deadline
- The communication efforts to those who need to apply to the scheme need to be ramped up considerably. Alongside other strategies of active research and targeting, the Government should be required to write a letter to every single household in the UK
- Given that GFOs and various other organisations assisting people with applications are unable to perform to full capacity, the lack of guidance in key areas, the continuing delay in understanding the numbers / types of groups who are still to apply, and the reasons highlighted in this chapter, the grace period should be extended to accommodate
- Ensure the Voluntary Return Scheme and other Border Force / Enforcement Home Office framework includes stringent safeguards to check that citizens are fully informed of their potential rights to apply to the EU Settlement Scheme

Those who know they need to apply but are struggling to do so - recommendations:

- extend the 30 June 2021 deadline for at least six to twelve months to allow for COVID-19 restrictions to lessen and GFO/advice agencies to restart their vital services assisting people with applications
- it should be easier to obtain paper applications where people cannot get a renewed passport or identity card in time (paper applications should be freely available rather than only on agreement from an EU Settlement Resolution Centre caseworker), and it should be easier for voluntary organisations to help people complete paper applications (currently OISC EUSS Level 1 advisors are not able to do so where there is no valid identity document)[74]
- Promote the simplification of Appendix EU and Appendix EU(FM) by the 'Simplification of the Immigration Rules Review Committee'[75].
- Both the rolling absence calculation and the suitability requirements should be updated to reduce complexity of the absence calculation and the risk of individuals being penalised for unknowingly doing something wrong.

[74] https://www.gov.uk/government/publications/guidance-for-euss-advisers
[75] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914010/24-03-2020_-_Response_to_Law_Commission_for_publication.pdf

Those who want to apply but are not allowed to - recommendations:

- Change legislation such that pre-settled status constitutes a right to reside for benefits purposes
- Ensure every citizen who is within personal scope of the Withdrawal Agreement can obtain proof of their rights, include those with right of abode (British citizens) or those holding other immigration status (e.g. DLTR).
- Ensure Appendix EU(FM) Immigration Rules are changed such that after 1 July 2021, family members are able to apply for a Family Permit, join their family member in the UK and apply to the EU Settlement Scheme even if their sponsoring EEA citizen has not yet been granted (or has not submitted an application for) status under the EU Settlement Scheme.
- Consider whether it is possible to change the rules such that an in-country switch from visitor visa to pre-settled status is allowable, as Article 18(1)(e) states "*the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided*".
- Create an exemption for EU students who started a course in, but did not travel to, the UK before 31 December 2020 where they can evidence that they would have taken up residence in the UK but for COVID-19.

Legal protection for those awaiting grant of status - recommendations:

- Simplify the 'saving' regulations such that they cover everyone who is eligible for status under the EU Settlement Scheme.
- Extend the 30 June 2021 deadline for at least six to twelve months in order to reduce the application backlog (which currently stands at 390,000)

Breach of Article 18(3) of the Withdrawal Agreement - recommendation:

- Pressure the Government to change its legislation to ensure that every citizen who has applied for status under the EU Settlement Scheme, whether an in-time or late application, is fully protected by the Withdrawal Agreement from the moment the application is submitted, as required by Article 18(3) of the Withdrawal Agreement.

The Hostile Environment and those awaiting grant of status - recommendation:

- Ensure that the Government changes its guidance, and incorporates into its communication as soon as possible that a Certificate of Application is fully recognised as proof of entitlement to work, rent, access healthcare etc. without requiring any checks on date of application or examination of historical exercise of treaty rights

Late applications - recommendations:

- Ensure that the Government changes its process, so that a Certificate of Application is issued immediately on receipt of a paper application, rather than requiring the applicant to have first completed biometrics

- Ensure that policy is changed such that for late applications, the applicant is deemed to have had lawful status **from 1 July 2021**, as soon as the Certificate of Application is issued

Those who have been granted pre-settled status - recommendations:

- Ensure the government changes legislation so that expiry of pre-settled status cannot result in loss of rights for any reasons other than those specified in Article 20 of the Withdrawal Agreement. An administrative penalty should be the only allowable consequence
- Ensure the government changes legislation so that EU citizens, who were in the UK before 31 December 2020 and therefore within scope of the Withdrawal Agreement, are allowed to apply for settled status even if their five years of continuous residence start after 1 January 2021. This is to comply with Articles 15, 16 and 20 of the Withdrawal Agreement
- In the absence of changing this legislation, at a minimum improve the clarity of information sent to those granted pre-settled status, to clearly indicate the consequences of leaving the UK for more than six months
- Ensure the government changes legislation to give pre-settled status holders equal treatment with British citizens as conferred by an Withdrawal Agreement Article 18(1) document
- Strengthen the EUSS process o make sure that applicants who are entitled to settled status do not accept pre-settled status

Those who have been granted settled status - recommendation:

- The UK should accept that access to the NHS - bearing in mind this is funded by general taxation, including e.g. VAT and not just income tax - satisfies the Comprehensive Sickness Insurance requirement

Applying for National Insurance numbers - recommendation:

- To obtain National Insurance Numbers, citizens should be able to use something like the online service[76] to verify identity (which has been in place since April 2020). It was created for universal credit applications, and should be used for National Insurance Number applications. Alternatively - a regular zoom call between the DWP and the NINo applicant should be sufficient.

Lack of physical proof of EU Settlement Scheme status - recommendations:

- The Government should communicate much more widely and clearly what a 'share code' is.
- The Home Office should urgently engage with the3million and other stakeholders on examining alternatives to the current digital status implementation of the EU Settlement Scheme.

[76] https://dwpdigital.blog.gov.uk/2020/10/15/confirm-your-identity-a-new-way-to-verify-online