Thank you for inviting me to participate in the Wednesday 03 July 2019 meeting.

As an introduction, I am the Solicitor and Director of Seraphus, a firm specialised in all aspects of immigration, asylum and free movement law. We are partnered with the www.freemovement.org.uk website. We provide a level of pro-bono assistance, and advice to individuals, businesses, and public bodies. One client is the European Commission Representation in the UK (EC Rep) with whom we have been contracted to provide a range of services since January 2017.

These written submission form our view on the EU Settlement Scheme informed by our work with the EC Rep as well as advice and assistance that we have provided to hundreds of EU, EEA and Swiss citizens (for ease of reference I will us the term ‘EU citizens’ to include all relevant nationalities), and their family members, since June 2016. It highlights some of the issues discussed on 03 July 2019 and recommends a declaratory scheme as a method to resolving these issues.

**Assistance to EU citizens by the EC Rep and the Embassies**

The EC Rep and embassies are providing a range of support and communication services to EU citizens. These include:

- Organising free citizens’ rights information and Q&A sessions for their communities;
- Funding our lawyers to assist non-profit organisations/individuals who wish to organise their own citizens’ rights information and Q&A sessions. This service is available to anyone who wishes to inform and educate their communities on the EU Settlement Scheme (EUSS). A member of our team can be booked via our EU Citizens’ Rights website at [https://www.eurights.uk/events/new](https://www.eurights.uk/events/new). Please do share this link to anyone you know who wishes to take advantage of this free service. The website also has a central UK-wide searchable database for EU citizens to find organisations that free advice and assistance;
- Developing ongoing social media and offline communication campaigns to raise awareness of the EUSS and encourage take-up of the scheme. See for example [https://www.facebook.com/ECinUK/](https://www.facebook.com/ECinUK/);
- Supporting outreach services/pop-up events in partnership with non-profit sector organisations, including the3million;
• Hosts an informal group of stakeholders to monitor the EUSS. This takes the form of bimonthly meetings and ongoing online communications. The stakeholders include non-profit organisations, community champions, lecturers and experts on immigration and EU law.
• Takes part in the Home Office Safeguarding and Consular User Group Meetings. The User Group Meetings are regular (either monthly or bimonthly) meetings organised and chaired by the Home Office to maintain regular communications between them and relevant stakeholders (some stakeholders attending these meetings may also be attending the monitoring group).
• Ongoing communications (formal or informal) with the Home Office to discuss all aspects of the EUSS, to improve the scheme, or to resolve problems with the scheme.

Though the EU Rep is providing a range of services, it is intended to supplement not substitute the responsibilities of the UK Government and the Home Office.

Lack of physical proof of status

Through our work with the EU Rep we have met thousands of EU citizens, from a diverse range of backgrounds, across the entire UK. As an illustration, we have met the Roma communities in London, East Timorese/Portugese communities in Northern Island, the nordic community in Edinburgh, the Goan/Portuguese community in Southall, the Somali/Dutch community in Birmingham. Every single community is concerned at lack of physical documentary evidence of the status granted under the EUSS.

• There have been reports of EU citizens applying under the Home Office Windrush Scheme for a physical document. The document issued under the Windrush Scheme is a lesser form of Indefinite Leave to Remain (ILR) in comparison to the ILR (an ‘ILR plus’) granted under the EUSS. EU citizens have been doing for the sole purpose to obtain a physical document. Should they fail to subsequently apply under the EUSS they will lose a range of benefits including family reunification;
• There is the significant potential issue of no transitioning between not requiring digital status (during the transition period under the Withdrawal Agreement (WA) or the UK created immigration implementation period in a no-deal situation), to having to evidence status through digital status (from 01 January 2021);
• The Home Office's assumptions that possessing a digital status will be sufficient for EU Citizens to evidence rights to employers, NHS, landlords, banks, Border Force
etc are not based on any significant testing on this scale as no-one should be asked for digital status until 01 January 2021. In case the WA is implemented with EUSS deadline being 30 June 2021, it is unclear how employers, NHS, landlords and bank would establish whether an EU27 citizen is covered by the WA in that six month period.

Notwithstanding the following reasons given by the Home Office for avoiding a physical status document:

- A digital identifier cannot be lost (unless IT breakdown);
- It is easy and cheap to amend/update it if needed;
- Access to information could better controlled/shared (different levels);
- The HO intends to deploy digital statuses to all categories of visas.

A lack of a physical status document will result in discriminatory tactics, intentionally or otherwise, to EU citizens. We draw your attention to the JCWI report titled "No passport Equals No Home" report on the right to rent checks. There are interesting parallels with the right to rent checks, which involved, in many cases a much simpler online eligibility check hosted on the Home Office website. It confirmed that 65% of landlords are less likely to consider tenants who cannot provide documents immediately.

It is for this reason that we propose at the very minimum, in addition to the digital status, an optional physical status, which could be issue on request on the basis of:

- A reasonable fee;
- For a fixed validity (e.g. 10 years).

This is a proposal unanimously supported by the EC Rep and all the Embassies.

The HO has not given convincing reasons for not giving physical proof in addition to digital status. They said that a citizen with a physical document may have a situational advantage over another who just has the digital identifier. However, this situation already exists now, even under the EUSS, as third country family members (and third country citizens under different categories of visas) do have physical documents.

Home Office advertising campaign
We do appreciate that the campaign which ran between end of March and early May was the first phase deployed by the Home Office. We understand that the Home Office wanted to ensure that they can meet the demand right after the public launch on 30 March. However, the campaign has had several shortcomings:

- It was not clear that applying is not optional and failing to do so would have consequences;
- It was addressed to EU Citizens only (third country family members, EEA and Swiss nationals or family members of dual/Irish citizens were not addressed);
- The advertising was done in English only;
- It failed to include mainstream media (e.g. television) which is more likely to accessible to the more vulnerable communities in comparison to Spotify adverts;
- Although we've had several Home Office presentations on communications, it is still not clear what are the next phases or when they would be launched. We understand that there will be roadshow/pop-up series possibly starting in September, but not details on this have emerged.

A campaign re-starting in September will be too late. Those who need to apply under the EUSS need to be educated now to give them ample opportunity to obtain the relevant documentation required to evidence their eligibility under the scheme. For instance, obtaining identity documents can take several months, and upwards of a year for first time applicants, and may, in some cases, need to be done from outside the UK. This will mean some may struggle to obtain the relevant identity documents prior to the earliest deadline (30 December 2020 in the event of a no-deal) even if they started that process now.

The Home Office’s £9million of grant funding

We have concerns that the vulnerable grants scheme is being used as a substitute for Legal Aid which is the more appropriate and established method to fund complex applications for vulnerable EU Citizens and their non-EU family members.

- We are not yet clear whether there is enough advice provided at OISC\(^1\) level 2 and above by Grant Funded Organisations (GFOs). The Home Office expects cases to be

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\(^1\) Immigration advice in the UK is regulated. Most, if not all, GFOs are accredited by the Office of the Immigration Services Commissioner. The OISC provides levels of accreditation, level 2 confirms a higher level of knowledge required to deal with complex immigration issues.
triaged by EUSS OISC level 1 GFOs to a higher level where appropriate, while at the same time, not providing any triage service or overall logistical management of the GFOs. As the GFO funding has only recently been implemented, we have no way of knowing at this point whether the advice provided is sufficient for the volume and complexity of vulnerable cases.

- The Home Office are making incorrect referrals to the GFO instead of resolving issues themselves. We know of an example where the Home Office - Settlement Resolution Centre recommended that a non-EEA applicant should seek financial support from a GFO to attend the UK Visa and Citizenship Application Services (UKVCAS) centre to enrol their biometric information as is a mandatory part of the process (there are only 7 centres nationwide (called core centres) who offer “free” appointments and therefore the applicant has the choice of paying travel costs to attend a core centre or paying £60+ to have an appointment at a non-core centre which may be more geographically local to them). The Home Office grant funding is for the purpose of providing legal advice not for the purpose of assisting applicants enrol their biometric information.

- The funding is insufficient to deal with the number of EU citizens who are categorised as vulnerable. The Home Office estimates that 10% to 20% of the total EU population is vulnerable. Taking the lower percentage this puts the number anything between 600,000 to 300,000 individuals, equaling to £30 to £15 of support per person. This is extremely inadequate. Legal aid, for example, while not sufficient for most cases, used to be £234 per person for immigration matters. Our research has categorised the following groups as being vulnerable to the EUSS:

1. Third country family members
2. Dual EU/Third Country citizens (East Timor, Sudan, Eritrea, Somalia e.t.c)
3. Durable partners
4. Third country citizens abandoned by EU citizens
5. Those who required but did not obtain Worker Registration Status
6. Non-English-speaking citizens
7. Long term residents (including pensioners)
8. Digitally illiterate/challenged
9. Those lacking capacity or are cared-for including residents of institutions
10. Those with dependency needs
11. Isolated citizens
12. Those working in the informal economy
13. Women and children
14. Looked After/Abandoned/Informally fostered children/care leavers
15. Children born to those who have not applied or have pre-settled status or who incorrectly believe their British
16. Those vulnerable to exploitation/trafficked persons (e.g. by employers and lawyers)
17. Those at risk of domestic violence or exploitation by family members
18. Those incorrectly believing they’re British and not required to register
19. Those with criminal offences (regardless of its seriousness)
20. Prisoners and those released from prison
21. Those detained under immigration powers
22. Traveller and Roma communities
23. Those EU citizens who face higher instances of discrimination, particularly Eastern Europeans
24. Those taking up residence in the UK close to the relevant deadlines
25. Those living in informal living conditions
26. Those living in sheltered or religious communities
27. Undocumented EU citizens
28. Street homeless persons, particularly those with mental health and dependency issues
29. EU citizens living outside the UK
30. Family members living outside the UK
31. Those who receive pre-settled status, whether correctly or otherwise, and need to continue to comply with the requirements of settled status
32. Those who receive pre-settled status but can’t access support to apply for settled status
33. Those who receive either status’ but can’t access social support and assistance
34. Those who receive pre-settled status but become vulnerable later and prior to acquiring settled status
35. Those who acquire settled status but lose that status/Home Office re-investigating those who obtained settled status/those subject to the process for losing settled status
36. + There will be citizens who will be aware, but will nonetheless refuse to apply

• In absence of any impact assessments it is unclear how the Home Office considers the funding to adequately protect the above categories of vulnerabilities on the level of funding provided. It is our opinion that, the funding is inadequate to support the range of complex vulnerabilities, with the majority likely to have multiple vulnerability characteristics.
• The geographical spread of the GFOs is insufficient. Based on what we know (the Home Office has yet to provide details of the GFOs and its subsidiaries), the spread will not be sufficient for EU citizens to access the services. For example, Cardiff represents the entire Wales service, Glasgow, Kirkcaldy, and Edinburgh for Scotland, Newcastle for the entire north of England, nothing for central England and the South West with Bristol being the closest service. See this map for the distribution of GFOs noting that we have yet to receive the confirmed list from the Home Office: https://www.google.com/maps/d/viewer?mid=1Hlgkb8AUxH-OfpWTvwV0nymQLeC2sZRM&ll=52.57345818198159%2C2.712052580362979&z=7.

Our recommendation is for immigration to be brought back into the scope of legal aid so that those vulnerable to the EUSS can tap into the pre-existing network of advisors across the United Kingdom.

EU citizens experience with the IT

Our experience is that some EU Citizens have found the IT easy to use, some are totally overwhelmed by it. The problem is that generally speaking, there is no alternative to using the IT and so those who are overwhelmed may avoid making the application full stop, meaning that they face becoming unlawfully resident post-December 2020.

• Additionally, the online form is not clear, confusing or, in some cases, incorrect. For example, it is not clear (though legally it is) whether applications can be made from outside the UK. The Home Office website says that – in case the chip-checking is not possible on an Android device – IDs must be submitted by post from within the UK but simultaneously explaining that it cannot be posted from outside the UK. This prevents an obstacle for those wishing to apply from outside the UK (see: https://apply-for-eu-settled-status.homeoffice.gov.uk/web-or-app).

• The online form provides inadequate information relating to the criminality questions and fails to link to guidance concerning the assessment of criminality in the EUSS decision making process. This will put off those who are confused about whether or not their criminal history will impact their EUSS application and they will be less likely to apply.

• There is no way of knowing if the automated residence checks do not show ‘the relevant information’ unless you know whether the information exists in the first place. Public Beta 1 report states “73% of decided adult cases did not need to provide any further evidence of UK residence following the automated checks or
because they held a valid permanent residence document or existing indefinite leave to remain”. That should not be taken to assume that 73% of cases where an automated check was carried out, the correct result was received by the applicant (the automated check might award pre-settled status and the applicant may accept this rather than adding in additional evidence). In this case, the Home Office treats the incorrect grant of status as a ‘success’ while the applicant considers it ‘failure’. The refusal of settled status should be treated as an immigration decision that is recorded in the statistics and provides for a remedy either in the form of an administrative review or an appeal.

• Despite several requests, we still have not seen any samples for the paper form application. The paper form is not automatically provided, an applicant needs to provide justification why a paper form is required before an personalised form is sent to them. This represent a hurdle for those with one or more vulnerable characteristics where they are unable to access support or assistance.

• There is a public law issue of not knowing what residence data has been checked by the Home Office and what data is missing in order to prove settled status. This could be the difference between one piece of paper or six to achieve settled status, for the particularly vulnerable this is major issue. The Data Protection Act ‘immigration exemption’ can be used by the Home Office\(^2\) to refuse to disclose data if it may impact on their ability to control immigration. Meaning a person will never know what data is held.

We recommend a paper form is made available to anyone, not select categories, who wishes to use it. We recommend clearer guidance from the Home Office on the more complex areas of the scheme including criminality assessments. We recommend the Home Office disclose data relating to the residence checks and, where a person who should have been granted settled status but was instead granted pre-settled status, treats that as an immigration decision with full written reasons that attract a right of appeal.

**Exercising of rights granted under the Scheme**

We have concerns about habitual residence tests being incorrectly used against EU Citizens with settled status when attempting to access benefits. To access benefits one needs to demonstrate that they meet two conditions:

1) Meet one of the following two conditions: (a) Show that they have settled status, or (b) Pass the habitual residence test (2 parts) (b)(i) show that the UK, Ireland, Channel Islands or Isle of Man is their main home and they plan to stay (b)(ii) show that they have a 'right to reside' (e.g. that they are, or have been working / self-employed under the Free Movement Directive or hold EEA permanent residence)

2) Show that they are eligible for the benefit they are claiming (does not discriminate on nationality)

The difference between meeting Condition 1(a) and Condition 1(b) is that where an applicant holds settled status, this is their automatic passport from Condition 1 to Condition 2 meaning, no further information needs to be provided at Condition 1 stage (beyond proof of settled status).

Where an applicant holds pre-settled status, to show they have the right to reside they will need to show evidence of exercising free movement rights or someone with EEA permanent residence in order to move from Condition 1 to Condition 2. This means that holding pre-settled status does not automatically qualify EU Citizens for benefits. This is a major issue for those incorrectly granted pre-settled status instead of settled status.

What is not clear at the present time is how the DWP will apply the habitual residence test/right to reside test to those holding pre-settled status after free movement ends (either on Brexit day in a no-deal or 01 January 2020 with the Withdrawal Agreement), as in theory, the concepts of EU Citizens’ residence in the UK under the Free Movement Directive will cease to be applicable frames of reference.

A further issue appears to be a lack of understanding by DWP staff that there is no requirement to apply the habitual residence test to holders of settled status; we have received numerous examples of those with settled status being refused benefits for this reason (sometimes having made multiple applications).

We understand that DWP staff have been issued with Memo ADM 09/19 which states, “Where a claimant has been granted ILR i.e. Settled Status under the EUSS, they will satisfy the right to reside element of the Habitual Residence Test for the purposes of claiming [universal credit]”. Accordingly no holder of settled status should be denied universal credit solely on the basis that they do not satisfy the habitual residence test.
There is a clear issue of training internally in DWP and communications between DWP and the Home Office. This needs to be improved immediately with additional guidance on how the test will be applied for those holding pre-settled status after Brexit day.

**Applying for settled status from pre-settled status**

We are unaware of any plans that the Home Office has to “help” people with pre-settled to apply for settled status. The Home Office position appears to be that it is incumbent on individuals to make applications under the EUSS as they will not grant confirmatory status nor assist people to apply.

The Home Office has indicated that there will be a reminder sent to holders of pre-settled at some point before the expiry of that status, reminding them to apply for settled status.

We also understand that pre-settled status holders will need to provide evidence covering the entire 5 year period, not just the gap pre-settled and settled status.

We recommend the Home Office accepts the periods of residence checked and approved in the pre-settled status period, to reduce the burden on applicants later applying for settled status. We recommend the Home Office increases the communications and education on the importance of maintaining a continuous residence in the UK during the period of pre-settled status to avoid large scale refuses of settled status in five years.

**Biometric Residence Permit issued to non-EEA family members**

There is a lack of information provided to non-EEA family member that the Biometric Residence Permit (BRP) that they are issued with under the EUSS is not the equivalent of a Biometric Residence Card (BRC) that would be issued if they applied under the EEA Regulation 2016 (implementing the free movement directive). A BRC is an Article 10 residence card which allows for visa free travel to the EU27 whereas a BRP issued under the EUSS is not recognised in the EU27.

There is no Home Office process for replacing an expired BRCs issued under the EEA Regulation 2016 for a holder who has subsequently obtained status under the EUSS (ie, the BRC was valid at the point when they obtained status under the EUSS and thus they retained this document but, it has since expired). This has the effect of preventing
non-EEA family members from travelling out of the UK as they require a BRP/C to re-enter the UK.

This means from now entry to the EU27 without a BRC issued under EEA Regulation 2016 requires a visa from third country nationals (as their relationship to the EU citizen cannot be established).

Late Applicants

The Home Office has not provided any written guidance as to what the immigration status will be for those who fail to apply to the EUSS before the deadline (either 30 June 2021 under the WA or 31 December 2020). The stock Home Office response is that those with a reasonable excuse will be able to apply to the EUSS after the deadline has passed.

However, this does not address the issue of the persons unlawful immigration status in the period after the deadline has passed until their application is granted (assuming that their reasonable excuse is accepted as such by the Home Office decision maker). If their excuse is not accepted by the Home Office their application under the EUSS will not be considered. This means there would be people eligible under the scheme but unable to avail themselves of it in absence of a justifiable (in the view of the Home Office) reason.

We also do not know what will happen to those applicants whose reasonable excuse is rejected by the Home Office, and whether they be removed from the UK.

No Deal Issues

In the event of a no-deal Brexit the EUSS will be less generous in the following ways:

- It only applies to EU citizens who arrive before the withdrawal date;
- Have a shorter deadline for applications, of 31 December 2020;
- Have no right of appeal, only an internal administrative review or full-blown judicial review as remedies;
- Lower threshold for deportation for criminal offences;
- More restrictive for non-EU family members by introducing a cut-off point for family members of EU citizens with settled status (i.e., the status needs to be obtained before a family applies) to join them in the UK:
• 29 March 2022 for close family members where the relationship existed before the withdrawal date
• 29 March 2022 for children born by this date
• 31 December 2020 for spouse and partners and other dependent relatives whose relationships were established after the withdrawal date
• Travelling without an EU acceptable residence document is not available without a visa

The protections and benefits under the EUSS, including the right of appeal, should be the same whichever form Brexit takes.

Without a right of appeal many issues will remain unresolved due to the limitations of an internal Home Office review and an expensive judicial review. Additionally, the EUSS does not allow for human rights grounds to be submitted or considered. Meaning applicants with human rights issues will be required to make an additional paid-for application costing £1033 in Home Office fees, £1000 in immigration health surcharges, and £19.20 in biometric residence permit fees, per person. These applications are more likely to be made during periods of unlawful residence after a EUSS/good reason refusal, at a time when the EU citizen will be prevented from working.

Even with a right of appeal, there are deficiencies, particularly in the lack of residence data held and used by the Home Office (see above).

Statistics

The Home Office is currently publishing monthly reports (there has been two so far, one in April and one in May) and quarterly reports (intending to start in August 2019). The monthly reports only confirm the number of applications and the number per EU nationality. The two monthly reports have confirmed a 55-50+% drop in the number applications, representing a significant drop-off since the commencement of the scheme.

We recommend future reports to contain, at the very least, the following statistics:

• Those who were granted pre-settled status, and refused settled status with reasons for the refusals;
• Number of applications made from people with protected characteristics (age, race, disability, sex);
• The length of processing times (in the figures published to date 176,400 appear to remain undecided) and reasons for the delay;
• Locations of applicants (to determine areas where extra support or communications is required);
• How many applications have been processed by the GFOs;
• The nationalities of non-EEA national applicants (to determine which communities are present in the UK so to inform future support and communications).

Declaratory v Constitutive System

As you know, there are significant problems with a scheme that is intended to be simple and easy. All of these problems, including those highlighted above, can be remedied with a declaratory system.

A declaratory system means EU citizens and their family members retain their status whatever form Brexit takes. That status is intrinsic within them, it exists on the basis of their EU nationality and family relationships. They carry this status whether or not they have been issued with a document by the Home Office. The Home Office document represents the physical manifestation of the status within them. Those who comply with the conditions of a declaratory system (i.e. confirm their EU nationality or family relationship and that they were in the UK before Brexit day) can obtain the physical document evidencing their status.

In this way, their rights cannot be taken away or lost. The Home Office can choose to require EU citizens to apply for the physical document by a deadline just as they do under the constitutive (i.e. EUSS) system. This will avail their concerns about possible low-take up in a declaratory system. Those who fail to obtain a document before the deadline will face obstacles in accessing their rights, for example applying for a bank account, but because they have never lost their rights, they will never be subject to the ‘hostile environment’ rules. At the point they face obstacles, they can apply for the document to resolve those obstacles, thus ensuring those who need a document are continually encouraged to obtain one (for example, a student entering higher education for the first time in 10 years time). The declaratory system to obtain a document should be made available indefinitely for that reason, thus preventing a repeat, but on a much larger scale, of the Windrush scandal.

In comparison, a constitutive system incorporates a mandatory application as a condition for obtaining the future enjoyment of rights. Future rights can only be enjoyed if the Home Office accepts an individual meets an application criteria and grants a status to an individual. The status comes into existence at the point that it is granted by the Home Office. A person will lose their pre-existing rights that were
intrinsic within them on Brexit day and, if they failed to comply with the mandatory process or is refused by it, will not receive replacement rights from the Home Office. Where they fail to apply by the deadline, they will have no status and will be subject to the entire mechanism of the ‘hostile environment’ process.

The declaratory system is the only sensible solution to avoid issues of unlawful residence on a large scale which will affect not just the individuals themselves but everyone who interacts with them from a central to local level. However simple a scheme the Home Office develops, the law behind it and the lives of those who must comply with it is immensely complex. There will not be a 100% take up of the EUSS and if we are not able to comfortably accept that then the declaration process is the only appropriate system available. It will have the benefit of reciprocity by the Member Status, in protecting British citizens abroad in the same manner.

July 2019