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Dear Lord Oates, Baroness Ludford and Earl of Clancarty,

BORDER SECURITY, ASYLUM AND IMMIGRATION BILL – CLAUSE 42

Thank you for the opportunity on 10 June to discuss with you and Lord Oates clause 42 of the Border Security, Asylum and Immigration Bill. I welcome your broad support for the measure, which is intended to provide legal clarity for EU citizens and their family members with EU Settlement Scheme (EUSS) status who are in scope of the Withdrawal Agreement (WA) – the so-called 'true cohort' – that the WA is the source of their rights in the UK.

As you appreciate, clause 42 achieves this outcome as simply and straightforwardly as possible. It does not require EU citizens and their family members with EUSS status to show that they are within scope of the WA, by evidencing that they were (or that their EU citizen family member was) residing in the UK in accordance with EU law at the end of the transition period at 11pm on 31 December 2020. This would have been very burdensome and undermined the streamlined approach to protecting citizens' rights taken under the EUSS.

Instead, clause 42 provides that <u>all</u> EU citizens and their family members with EUSS status – whether they are in the 'true cohort' or, as the EU citizen was technically not residing in the UK in accordance with EU law at the end of the transition period, in the 'extra cohort' – are to be treated, as a matter of UK law, as a WA beneficiary for as long as they hold EUSS status. In doing so, it is giving legal effect to what has been UK policy from the outset – to treat both cohorts the same – which, as you know, some legal judgments since the end of the transition period, e.g. *IMA*, *AT*, have made more difficult.

You raised three main areas of concern and I will respond to them in turn.

<u>EUSS status and WA rights</u>

First, you asked why we are concerned to maintain the position that not all EU citizens and their family members with EUSS status are within scope of the WA, unless that is going to matter at some future point and, if it is, whether that could lead to Windrush-type difficulties.

The position is that the UK cannot unilaterally change the scope of an international treaty like the WA to include people who are outside its scope. A person who does not meet the personal scope definition under Article 10 of the WA cannot be made to meet that definition by UK legislation. As you noted, the Government does not accept the proposition, as advanced by the3million in *Fertre*, that all EU citizens and their family members with EUSS status are WA beneficiaries.

The UK's greater generosity than the WA requires – in basing eligibility for the EUSS on continuous residence in the UK at the end of the transition period, not also on whether the EU citizen was then in qualifying activity, or had a right of permanent residence, under EU law – does not mean, as a matter of law, that an EUSS status holder who is outside the personal scope of the WA, as set out in Article 10, is brought within it.

Clause 42 therefore goes as far as the UK can go without treaty change, by providing for all EU citizens and their family members with EUSS status to have WA rights in the UK as a matter of UK law. They will be able, by way of section 7A of the European Union (Withdrawal) Act 2018, to rely directly on WA rights in the UK for as long as they hold EUSS status.

Clause 42 also means that there can be no question of an EU citizen or their family member with EUSS status being required at any point in the future to show that they are in the 'true cohort'. There will be no need for an EU citizen or their family member with EUSS status to prove that they were living in the UK in accordance with EU law at the end of the transition period, because it will provide them all with WA rights in the UK. It will not matter whether they were exercising free movement rights in the UK at the end of 2020, as the WA requires.

We therefore see no risk of clause 42 giving rise to Windrush-type difficulties. Indeed, the EUSS itself – in providing all applicants who qualify with secure proof of their immigration status – reflects the lessons learned from Windrush, where indefinite leave to remain was conferred on certain persons by Act of Parliament without them being notified of this or provided with proof of that status.

<u>Losing WA status</u>

Second, you were concerned that an EU citizen or their family member with EUSS status, whether in the 'true cohort' or the 'extra cohort', could lose that status – and with it their WA rights in the UK (in light of clause 42 in respect of the 'extra cohort') – without being able to access the procedural rights for which the WA provides.

You recognised that this cannot occur where EUSS status is cancelled, curtailed or revoked, as this gives rise to a right of appeal under regulation 3 or 4 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. Your concern was with those cases in which a person's pre-settled status (five years' limited leave to enter or remain) – which would otherwise be automatically extended by five years where the person had yet to obtain settled status (indefinite leave to enter or remain) – is allowed to expire because the Home Office has established that it was granted in error.

The Home Office has no policy of systematically rechecking EUSS status. We are concerned here only with the rare circumstances in which, generally through the caseworking of a subsequent family member application relying on it, we establish that a grant of pre-settled status was manifestly made in error. In those circumstances, we have a responsibility – both to those applicants who met the requirements of Appendix EU and to those who have been correctly refused status under the EUSS because they do not qualify for it – to take action.

In such a case, we will contact the person and give them a reasonable opportunity to provide us with information or evidence which shows that the grant of pre-settled status was correct. If they cannot do so, our current policy – recognising the error on our part – is not to immediately curtail their pre-settled status, but to allow them to remain in the UK for the remaining period of that leave. We also make clear to them that they can reapply to the EUSS – which they can do online and free of charge, and without having to wait for their pre-settled status to expire – and present any information or evidence they wish of their qualification for EUSS status. If such an application is made and refused, it will give rise to a right of appeal. Any family member application which is refused because the sponsor was granted pre-settled status in error will also give rise to a right of appeal.

This approach cannot breach the WA procedural rights of an EU citizen or their family member with EUSS status who is in the 'true cohort' or, in light of clause 42, who is in the 'extra cohort'. A person in the 'true cohort' or the 'extra cohort' cannot be granted EUSS status in error, because, by definition, they qualify for status under Appendix EU. By contrast, an EU citizen granted pre-settled status in error – for example, because the caseworker simply misread their date of arrival in the UK as being 1 December 2020 when it was 1 December 2021 (and they have no relevant prior residence or family members in the UK) – is not in the 'true cohort' or the 'extra cohort'. They have no basis of qualification under the EUSS and, having granted them pre-settled status in error, it would be inappropriate for us to compound the error by extending that status. Our current policy allows them to retain their pre-settled status until it expires, during which time they can make an application for leave to remain under another route if they wish to do so.

Settled status can be revoked, subject to a right of appeal, where it was obtained by deception, but not if it was granted in error.

You rightly noted that it would be contrary to the WA to require a person with EUSS status who is in the 'true cohort' to reapply to the EUSS. Where a person in scope of the WA is granted pre-settled status, they cannot lose their WA rights for failing to make a further application to the scheme. That is why we put in place the process of automatically extending pre-settled status by five years before it expires, where the person – whether by application or under our new process of automatically converting pre-settled to settled status where possible – has yet to obtain settled status. Nothing in clause 42 can affect their position one way or the other, because, as a member of the 'true cohort', they are outside the scope of the clause.

You also rightly noted that it would be contrary to the WA to require a person with EUSS status who is in the 'true cohort' to re-establish that they are a member of the 'true cohort'. That cannot happen under the EUSS, as it does not test whether the

relevant EU citizen was residing in the UK in accordance with EU law at the end of the transition period. Again, nothing in clause 42 can affect the position of a person in the 'true cohort' as they are outside its scope.

As we discussed, the purpose of clause 42 is to provide legal clarity as to the basis of their rights in the UK for those who are in scope of the WA, not to bring people into the scope of WA rights in the UK who should not benefit from them. Clause 42(2)(c) therefore ensures that a person who did not meet the suitability or eligibility requirements of Appendix EU for the EUSS status which they hold cannot benefit from clause 42 and thereby enjoy directly effective WA rights in the UK.

Otherwise, as the Independent Monitoring Authority for the Citizens' Rights Agreements has noted in its report on clause 42,[1] an EU citizen or their family member with EUSS status who had no basis of qualification under the EUSS – such as a third country national durable partner who was incorrectly granted pre-settled status where they did not obtain the residence card which free movement law required and had therefore been living in the UK unlawfully – would be given WA rights in the UK.

This would mean that their pre-settled status could not be curtailed, or allowed to expire, on the basis that it had been granted in error, as there is no WA basis for doing so. It would give them unwarranted preferential treatment over those whose EUSS application was correctly refused, in line with the WA, because they had not complied with free movement law as it applied in the UK until the end of the transition period. It would also undermine the integrity of the EUSS by giving them the same rights in the UK as a pre-settled status holder who complied with those requirements and is thereby in scope of the WA.

You will appreciate that those are not outcomes which we can entertain. In providing legal clarity for EUSS status holders in the 'true cohort' that the WA is the basis of their rights in the UK, and in doing so by the simplest means possible and which requires no action on their part, we need to ensure, via clause 42(2)(c), that we do not confer directly effective WA rights in the UK on a person who should not have them.

I would add in this context that there is no question of any EUSS status holder having to re-establish their qualification for that status in order to benefit from clause 42. We are working across departments to ensure that updated guidance to decision-makers in public authorities is clear that they must not 'look behind' the Home Office decision to grant a person EUSS status but must accept that decision at face value. You will note that paragraph 325 of the Bill's Explanatory Notes[2] makes this point clear.

[1] Border Security, Asylum and Immigration Bill – Clause 42 - Independent Monitoring Authority for the Citizens' Rights Agreements
[2] 6508

Domestic abuse victims

Third, you were concerned about the position of those who swap their pre-settled status under the EUSS for leave under the Domestic Abuse route,[3] which gives them access to public funds where the WA does not.

We have listened carefully to the representations which stakeholders have made to us on this important issue. The fact that the Domestic Abuse route makes more generous provision in terms of access to public funds than the WA requires for those with pre-settled status, means that it is unlikely that such a person will need to rely on their WA rights in practice. Nevertheless, we agree that the WA rights of an EU citizen or their family member with EUSS status who is in the 'true cohort' – or, in light of clause 42, who is in the 'extra cohort' – are not lost by obtaining leave under another immigration route.

We have therefore decided that, where an EU citizen or their family member with pre-settled status obtains leave under another immigration route, such as the Domestic Abuse route, they will retain their pre-settled status. This is an exception to the general approach under the immigration system that a person can only hold one form of leave at a time.

In such a case, the person's digital status – which currently can only reflect their latest grant of leave – will display their leave under the Domestic Abuse or other non-EUSS route. Nevertheless, their pre-settled status will remain live and checkable on Home Office systems, e.g. via the Employer Checking Service. This will show that they still have WA rights, should they need to rely on them. If their non-EUSS leave expires or is cancelled, their digital status will be manually reverted to displaying their pre-settled status.

We are currently updating relevant guidance to reflect this change.

Otherwise, clause 42(2)(a) prevents a person who meets the requirements in subsection (2), save that they no longer hold EUSS status – because, for example, they are a foreign national offender who has been deported from the UK – from continuing to have WA rights here. We think that is an important safeguard.

Digital status

Lord Oates also raised the important issue of how evidence of EUSS status is provided, via the digital status – or eVisa – which can be seen by the holder, and securely shared by them with an employer or other third party, via the 'View and Prove' system. The EUSS, under which more than 5.7 million people now hold such status, pioneered this digital transformation and, by end of April 2025, more than 4.3 million people with non-EUSS leave have successfully created a UK Visas and Immigration account to access their eVisa.

[3] The Migrant Victims of Domestic Abuse Concession and Appendix Victim of Domestic Abuse

Lord Oates asked whether we could provide a ‘permanent’ form of digital status, rather than one based, like ‘View and Prove’, on a link to live systems. We agree that such digital evidence can be useful where, as with the COVID-19 vaccination record for example, it provides secure evidence of a past event. But where, as with immigration status, the evidence needs to reflect the current position, which can change over time (including, in this context, where pre-settled status is automatically converted to settled status), it is the link to live systems which enables it to do so. As set out in the Immigration White Paper, ‘Restoring control to the immigration system’,[4] the Government is committed to this principle.

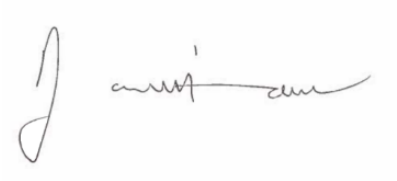
The underlying data used to generate the person's current status is secure. Immigration decisions – and the rights and conditions that flow from those decisions – have been recorded digitally by the Home Office since the turn of the century, and maintaining digital records of immigration status is not a new concept. Safeguards are in place to protect Home Office data from accidental or deliberate loss. Immigration data is saved across multiple secure locations, frequent backups of data are made, and robust security controls are in place to protect people’s data against unauthorised access: only those who need access to perform their job are granted it.

We remain open to suggestions of how the changeover to eVisas can best be supported, but our ongoing engagement with employers tells us that, for them, the move to digitised processes represents a more secure and cost-effective practice than navigating the wide range of physical documents on which foreign nationals with the right to work in the UK could previously rely.

I do hope this response is helpful in clarifying the Government’s position on these issues. Thank you again for raising them with me and do let me know if a further discussion would be helpful.

I am copying this letter to Lord Oates and the Earl of Clancarty, and a copy will be placed in the House of Lords Library.

Yours sincerely,



Rt Hon Lord Hanson of Flint

[4] Restoring control over the immigration system: white paper - GOV.UK: paragraphs 203-206.