# BETWEEN THE DEVIL AND THE DEEP BLUE SEA: VULNERABLE EU CITIZENS CAST ADRIFT IN THE UK

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**Abstract**

*Both the UK government and the EU negotiating team have let down vast numbers of EU citizens in the UK. The creation of continuing EU responsibilities in a newly ex-Member State, for EU citizens who exercised their EU free movement rights before withdrawal, is an unprecedented challenge. This piece explores four growing threats to their rights. (1) The conditions laid down in Directive 2004/38 loom large in the Withdrawal Agreement, disproportionately disentitling women and children from a right to stay in their homes. (2) The Withdrawal Agreement contains a dramatic departure from standard practice in EU law; allowing the UK and Member States to make registration constitutive, not declaratory, of the right to stay. It will transform thousands into unauthorised migrants overnight. (3) The UK’s new EU Settled Status is fraught with risks of administrative injustice, which affect the vulnerable most. (4) The UK’s attempt to separate welfare rights from ‘pre-settled status’ means that the problematic right to reside construct has not gone away – and is more consequential than ever. In short, vulnerable EU citizens emerge in this process not so much as bargaining chips as collateral damage, with the UK government displaying a considerable appetite for, and the EU tolerating, a real risk of large-scale disentitlement.*

## **1. Introduction**

Four years on from the referendum in which the UK electorate voted to leave the European Union, the upheaval and disruption inflicted upon EU citizens in the UK (and UK citizens in the EU 27)[[1]](#footnote-1) shows little sign of abating. In spite of reassuring rhetoric and warm words,[[2]](#footnote-2) there was a conspicuous failure to offer immediate, unilateral guarantees.[[3]](#footnote-3) The plans were eked out over a lengthy period of time[[4]](#footnote-4) and the resulting regimes are riddled with substantive gaps and procedural pitfalls, meaning that thousands of EU citizens are set to become wholly disentitled and expected to leave their homes.

Some of the gaps in the coverage are more damaging versions of the holes already perforating the status of EU citizenship. By magnifying the continuing tolerance for the residence insecurity experienced by mobile EU citizens, Brexit pushes us to ask ourselves uncomfortable questions about the extent to which equal treatment for EU citizens is meaningfully protected in EU law, so we can then ask what EU citizenship means for those who are still EU citizens, but working and living in a former Member State. To what extent can or should the effects of EU citizenship survive, ensured by the EU outside of its territory, and respected by a State that had previously signed up to it but has since withdrawn?

There are two main sets of provisions to examine; the Withdrawal Agreement between the EU and the UK,[[5]](#footnote-5) and the UK’s Settled Status scheme.[[6]](#footnote-6) The next section of this paper analyses the gaps in the Agreement, which came into effect at the end of January 2020.[[7]](#footnote-7) It forms an important blueprint for how the EU constructs obligations to EU citizens in former EU territory. It reveals underpinning assumptions about the limits of the personal scope of EU law, by cleaving closely to the conditions laid down in Articles 7 and 16 of Directive 2004/38.[[8]](#footnote-8) But these conditions have systematically disadvantaged vulnerable workers, and people whose employment history has been made up of a series of short term, or casual, low paid work, or whose history has been punctuated by periods of incapacity for work due to disability, or by care responsibilities – disproportionately disadvantaging women.[[9]](#footnote-9) And the directive by default prevents children from asserting a right to reside in their own right – at best all they can claim is a parasitic right as a family member. The Withdrawal Agreement amplifies and adds to existing discriminatory disadvantages in the free movement framework, and simply excludes the most vulnerable EU nationals.

The unfortunate swerve in the context of EU law, represented by the option in the Withdrawal Agreement (and the decision in the UK’s EU Settled Status scheme) to make registration itself constitutive, rather than declaratory, of the right to stay in the UK is examined in the third section. Those who fail to register by the deadline[[10]](#footnote-10) will automatically and irreversibly lose their (EU law based) entitlement to stay in the UK, and accrued periods of residence and/or work will be negated, disproportionately impacting upon the disadvantaged and vulnerable. The people most likely to fall through the gaps include those who do not even know about the scheme, or do not realise that they need to register; those who would have difficulty amassing the required evidence; and those who do not have sufficient IT access or literacy.

These problems are heightened, especially for vulnerable citizens, the fourth section argues, by risks of administrative injustice built into the UK’s EU settled status scheme. But the considerable differences between the UK’s scheme and the Agreement means it is not clear whether and to what extent EU citizens will have the support of the EU in challenging adverse decisions. The question of enforcement is especially pressing in light of concerns about the accuracy of decision-making so far, especially the risk of misclassification as ‘pre-settled.’ But it is important to get it right. Under the UK scheme, EU citizens who have not yet been resident for five years but otherwise meet the eligibility criteria are entitled to pre-settled status. Section five explores the new UK rules that exclude pre-settled status from the list of rights to reside that create entitlement to benefits.[[11]](#footnote-11) This exclusion raises thorny questions about the content of EU citizenship law (is *Trojani*[[12]](#footnote-12)still good law?), and of its reach. This section argues that it is possible for EU citizenship rights to have traction in the question of the rights attaching to pre-settled status – possibly even beyond the end of the transition period.

The means to secure EU citizens’ rights in the UK raises huge questions about the limits and legal reach of EU citizenship for still-EU citizens in former-Union territory. Together, the risks to the rights of EU nationals in the UK tell a worrying tale, by which the UK government has agitated to be allowed to restrict rights, and the EU has tolerated those demands. We are hurtling towards large-scale disentitlement, in which even a right to ‘permanent residence’ under (pre-existing) EU law is no longer any such thing. And this is not part of a negotiation strategy – it is not risk-taking brinkmanship, treating EU nationals as bargaining chips. Rather, it appears to be an end in itself for the UK government; unnecessary disadvantage for the sake of it, while the EU side has been remarkably sanguine about the UK undermining the “underlying logic”[[13]](#footnote-13) of the free movement regime with rules that make vulnerable EU citizens collateral damage, thrown under the (infamous) Brexit bus.[[14]](#footnote-14)

## 2. **The Withdrawal Agreement abandons vulnerable EU citizens**

The citizens’ rights provisions[[15]](#footnote-15) proved to be among the least controversial aspects of the Withdrawal Agreement – agreement was reached relatively swiftly; the provisions in the March 2018 draft[[16]](#footnote-16) were largely reproduced in the text that was approved by the EU 27 in November 2018,[[17]](#footnote-17) and again in the version agreed in October 2019, which came into force on 1 February 2020.[[18]](#footnote-18) Somewhat startlingly, EU citizenship means very little with regard to the those the agreement seeks to protect.

### 2.1 *Swathes of EU citizens not covered by the Withdrawal Agreement*

The agreement covers EU citizens who ‘exercised their right to reside’ in the UK, (and UK citizens who exercised that right in the EU), before the end of transition, and continue to reside there thereafter.[[19]](#footnote-19) It also covers UK/EU frontier workers,[[20]](#footnote-20) and family members of covered residents/workers under certain conditions[[21]](#footnote-21) – including children born or adopted in the future.[[22]](#footnote-22) Part II of the agreement addresses citizens’ rights, with Title II of that part providing for ‘rights and obligations’, and Title III providing for continued coverage under the social security coordination framework. Article 13 provides for the continued enjoyment of residence rights for EU nationals, EU national family members, and third country national family members, and makes clear from the outset that the new regime is constructed around the *limitations* *and conditions* in Directive 2004/38.[[23]](#footnote-23) Mere residence is not enough; an EU national must show they fall within a qualified category – which in the UK, thanks to restrictive approaches taken to other categories such as self-sufficiency, typically means being in work, or the family member of a worker.[[24]](#footnote-24) Article 24[[25]](#footnote-25) appears to reproduce part of a right to reside that falls outside of the Directive – the right to reside for primary carer of the descendant of an EU migrant worker based on Article 10 of Regulation 492/2011, giving effect to the primary carer right found in *Baumbast*.[[26]](#footnote-26) This right was explicitly extended to create a right to equal treatment, and so to benefits, in *Ibrahim.*[[27]](#footnote-27) The Withdrawal Agreement nods to *Ibrahim*, by providing that the right shall continue to exist where the migrant worker parent ‘has ceased to reside in the host State’ – so where the working EU national parent moves, leaving the child and their carer behind. But this does not on its face encompass the *Teixeira*[[28]](#footnote-28) situation where the working parent stays in the host State (ie the UK), but *ceases to work*, perhaps due to childcaring complications (or labour market fluctuations affected by Covid 19)[[29]](#footnote-29) and becomes the primary carer.

For primary carers who are covered, there is some ambiguity over accessing secure, permanent residence rights. The CJEU found in *Alarape*[[30]](#footnote-30) that residence under *Teixeira/Ibrahim* rights does not count towards the five years of lawful residence required for permanent residence – only residence in accordance with the conditions of Directive 2004/38 counts. The Withdrawal Agreement reproduces the concept of permanent residence in Article 15, and appears only to require residence be ‘in accordance with Union law for a continuous period of 5 years’,[[31]](#footnote-31) which Spaventa[[32]](#footnote-32) and Peers[[33]](#footnote-33) have both argued means that other forms of lawful residence (such as *Ibrahim* based residence) should count towards it. However, the same provision states that the right to permanent residence is ‘under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC’, which might be an attempt to codify the *Alarape* principle. It is also worth noting that the following article refers to those ‘who before the end of the transition period resided legally in the host State *in accordance with the conditions of Article 7 of Directive 2004/38/EC* for a period of less than 5 years,’ which may give us a clue as to how Article 15 is meant to be understood. This seems likely to be source of dispute at some point.

When an EU national has exercised their right to reside in accordance with Union law/under the conditions of Directive 2004/38 for a continuous period of five years in the UK, they should be entitled to WA permanent residence. While the Agreement implies that those who have got EU permanent residence should be able to, relatively automatically, swap this for WA permanent residence (they have a “right to exchange that document… for a new residence document”), in reality by requiring “verification of their identity, a criminality and security check… and confirmation of their ongoing residence”,[[34]](#footnote-34) this is another application process. Once an EU citizen can show that they are entitled to a (temporary or permanent) right to reside under the agreement, then a series of rights and entitlements follow. These include a right to equal treatment,[[35]](#footnote-35) and the rights of workers contained in Article 45 TFEU and Regulation 492/2011.[[36]](#footnote-36)

### 2.2 *Not business as usual: Directive 2004/38 is an inappropriate yardstick*

The thinking behind the agreement’s provisions seems to be to offer continuity – that applying broadly the same rules as pre-Brexit to citizens who had already exercised their free movement rights, they should not suffer too much by way of loss of rights.[[37]](#footnote-37) The problem with this approach is that we are moving to a completely new regime, and the rights at issue are not the same. A loss of a Directive 2004/38 right to reside is really a loss of equal treatment rights, not, typically, a loss of residence rights. And even then, it is meant to be temporary; the EU national may usually continue to reside *qua* EU citizen, and the suspended equal treatment right is reignited once they can bring their circumstances into line with the provisions. But in the context of withdrawal, there is no provision for residence rights beyond those in Article 13, and so failing to meet the conditions of the Directive could result in a *permanent* loss of not only equal treatment rights, but rights to live in the State that has become their home.

The limitations in Directive 2004/38 are underpinned with the basic (not to say unproblematic) presumption that EU nationals who are not entitled to social assistance in the host state can ‘fall back’ on the protection of their home Member State. For example, a woman who cannot work while her young child has extra support needs, may temporarily return to family in her home state, with the option of returning to the host State once she is in a position to again exercise her EU free movement rights (ie resume work). This logic does not hold good in the context of withdrawal. If an EU national does seek to temporarily decamp to their home State, and find that they fall foul of the continuity of residence requirements in the Directive for the purposes of permanent residence, then they may be permanently forfeiting their right to live and work in the UK.

Transplanting the conditions of the Directive from one set of rights in one legal framework, to another, is not as logical as it might seem on its face and will result in more severe consequences. And the significant and problematic gaps in the Directive, which have disproportionate impacts upon vulnerable EU nationals already, will make the residence rights of those individuals particularly perilous in a withdrawal context. Disproportionately female social security risks are ignored in the list of conditions during which worker status will be retained – illness and unemployment are covered, but temporary interruptions due to periods of care or domestic abuse are not.[[38]](#footnote-38) Moreover, children receive no direct protection in the Directive, so (unless they are in the fortunate position of having sufficient resources,[[39]](#footnote-39) and assuming we do not expect children to be in work) are unable to assert a right to reside that entails equal treatment entitlements in their own right. Thus as family members, their rights to access support in a host state are entirely dependent upon the employment, migratory and relationship choices and misfortunes of their parents – particularly disadvantaging children in care and/or who have become estranged from their parents. Further, the Directive makes an assumption that there are bright lines between economic activity and inactivity. In reality, there is no such bright line; many people in low paid, insecure work move in and out of work, while many people performing substantial part-time economic activities may find themselves defined by domestic rules as ‘not workers’ (an example being the way in which the Minimum Earnings Threshold has been used in the UK).[[40]](#footnote-40) Atypical or vulnerable workers – people whose hours and pay go up and down, because of being on zero hours contracts, or having a series of short, fixed term appointments - and disabled workers who may also move in and out of periods of economic activity, with varying hours, are all at risk of falling through the gaps. This creates right to reside gaps, preventing the accrual of permanent residence rights, and these people will find it hardest to assert a right to reside under the WA in the first place, and then to continue to demonstrate that they are exercising it until such a time when they can evidence entitlement to permanent residence. Dougan notes that those with “’non-linear’ or ‘non-standard’ migration experiences (such as insecure or irregular work, careers breaks due to care responsibilities, and vulnerable children in social care)” and also those “resident outside the strict scope of Union law yet without any objection by their host country”[[41]](#footnote-41) might face serious consequences if the agreement is taken at face value; indeed, they are simply outside of the agreement, cut adrift from any continuing EU protection – even though they may well have been model EU citizens, contributing to the objectives of the internal market.

The Directive is an imperfect tool for deciding who does and does not get access to equal treatment in the context of welfare benefits. But it is a manifestly inappropriate tool for deciding who gets to stay in the country they call home. Adopting this framework means that swathes of EU citizens will not be covered, and thus offered no residence security – even though many of them may be long term residents, and may have substantial work histories, but who simply fail, due to evidential barriers, or repeated re-startings of the five-year clock, to fall within the rigid confines of the Directive. The normal application of the Directive – the context of claiming benefits within an EU Member State – is to some extent mediated by EU citizenship. As a “fundamental status” it requires nationals of a host Member State to recognise “a certain degree of financial solidarity” with nationals of other Member States.[[42]](#footnote-42) This rather limited form of solidarity is mainly expressed through having regard to proportionality when applying the limitations and conditions attached to free movement.[[43]](#footnote-43) But this muted nod to EU citizenship has become more subdued in recent years, especially in the UK, which does not bode well for the minimal proportionality requirement in the Agreement having any purchase at all.

### 2.3 *Turning a weak proportionality duty into a minimal one*

In the context of free movement of EU citizens, the ECJ has backed away from the use of proportionality, finding that certain parts of the Directive are to be treated as inherently proportionate and so screened from that aspect of judicial review,[[44]](#footnote-44) and did not even mention proportionality when it found that UK rules which, in the words of the Commission, “systematically and ineluctably” exclude categories of people from having a right to reside are nevertheless lawful.[[45]](#footnote-45) Proportionality has had even less traction in domestic courts in the UK, with judges finding that it helps almost no-one, other than in exceptional circumstances,[[46]](#footnote-46) and/or where a claimant almost meets the conditions of the Directive, but just technically misses out.[[47]](#footnote-47) As children are not covered in the Directive, unless they can be attached to someone who does fall within the Directive’s categories, they are meant to fall through the gap. An example of how this works in practice is the UK case of *Sequeira-Batalha.*[[48]](#footnote-48) In that case, a Portuguese child was born in the UK and lived in the UK all of her life. At the age of sixteen, she was abandoned by her mother, who went to a third country. As no evidence was presented as to her mothers’ activities while in the UK, Patsy Sequeira-Batalha at the age of seventeen – still a child – was found not to have a right to reside in the UK under Directive 2004/38. Her actual residence could be tolerated, as an EU citizen, but she was not entitled to equal treatment and was refused Income Support. This, the UK tribunal found, was a substantial gap in the Directive, but a deliberate one; it was ‘not a case in which the conditions for a category are so close to be being met that it would be disproportionate to insist on strict compliance’.[[49]](#footnote-49)

Women who fall through the gaps are similarly not helped by proportionality. Periods of care – for children, and for disabled and older relatives, can cause their five year ‘clock’ to get constantly restarted, so that after substantial periods of time, permanent residence remains persistently out of reach. Women who experience domestic abuse can also face difficulties founding a claim; if they have to be relocated, that can involve an interruption in their work. If they are not married to their abuser then their right to reside as a family member is not automatic in the first place. EU law requires Member States to ‘facilitate entry and residence’ for a ‘partner with whom the Union citizen has a durable relationship, duly attested’.[[50]](#footnote-50) Pre-Brexit UK law provides for residence rights as an ‘extended family member’ for a partner ‘in a durable relationship with, an EEA national’ where they are ‘able to prove this to the decision maker’.[[51]](#footnote-51) If they have been able to assert residence rights as a ‘durable partner’, they stand to lose these on separation (unlike separated spouses, who continue to have family member status and a right to reside). So leaving an abuser becomes an even more perilous decision.[[52]](#footnote-52) Time and again, the UK government, and UK frontline decision makers, view the cases of vulnerable EU citizens claiming support through restriction-tinted lenses, construing EU law as conferring maximum scope for refusal.[[53]](#footnote-53) And UK courts are not always assiduous in asking the ECJ’s take on the legitimacy of restrictive measures.[[54]](#footnote-54) So in placing much of the responsibility for upholding the rights of its EU residents upon the UK – especially as CJEU jurisdiction runs out eight years after the end of transition[[55]](#footnote-55) – the Withdrawal Agreement would need to create strong, clear, positive duties where the EU expects the UK authorities to exercise discretion in favour of EU citizens. But it does not do this. Eight years continued CJEU jurisdiction might sound like a long time, but those covered by the Agreement are entitled to the benefits in Part Two of that agreement, for their lifetime. In the context, in particular, of social security coordination, the pension rights of those within the scope of the Agreement may not crystallise for decades.

The Agreement pushes proportionality further into the side-lines. The obligation at Article 3(4) WA to interpret Union law and concepts ‘in accordance with the methods and general principles of Union law is rather too vague to be a realistic means of asserting the principle of proportionality, given that UK courts, even when the UK was an EU Member State, veered away from proportionality. The only specific mention of proportionality in the context of citizens’ rights is in the context of appeals of decisions ‘refusing to grant the residence status’; there should be judicial and administrative redress procedures, for reviewing questions of law and fact, and “[s]uch redress procedures shall ensure that the decision is not disproportionate”.[[56]](#footnote-56) But this is a rather muted requirement. Only a small minority of claims would reach an appeal stage, and the absence of any mention of a positive proportionality duty (as opposed to a negative check for disproportionality) built in as part of the *original* decision-making process, or any detail as to what should be considered in a proportionality review, means this passing mention is unlikely to carry much weight. Moreover, the statement “refusing to grant the residence status” might be interpreted as only applying to outright refusals – rather than to challenges of grants of the wrong status (pre-settled instead of settled).

In response to a letter from three (then) MEPs (Jill Evans, Jean Lambert and Alyn Smith), raising concerns about the people who are left out of the scope of the Withdrawal Agreement, the EU’s chief negotiator stated that it reflected a “choice of relying on known Union law concepts and provisions”, to allow provisions to be “interpreted in conformity with the relevant case law of the Court of Justice of the European Union”.[[57]](#footnote-57) But, even in light of the restrictive turn in ECJ case law, proportionality and Union citizenship have played significant roles in the development of equal treatment rights. They are very much “known Union law concepts”, and arguably could have had greater prominence in the agreement to ensure that a substantial fraction of the EU population in the UK is not irreversibly stripped of rights to live in the UK. Ignoring them reinforces the false bright line between economic activity and inactivity, and is deeply blinkered to the lived realties of the people it excludes. The tolerance of large-scale disentitlement of vulnerable EU nationals is also evident in the way the right to stay is conceived. As explored in the next section, both the Withdrawal Agreement and the UK’s EU Settled Status scheme make registration constitutive of the right to stay in the UK – a factor that makes disentitlement, especially of vulnerable EU nationals, inevitable.

## 3. **Making registration constitutive of residence rights creates a rupture in Union citizenship**

Disentitling swathes of EU citizens from the right to stay in the country that has become their home in which they have formed families and become integrated through work, friends, neighbours and communities, in some cases, over decades, on the basis of not conforming at a given moment to the categories of favoured EU migrant in Directive 2004/38, is disproportionate. To quote the ECJ in *D’Hoop*, it “unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant” and the UK, “to the exclusion of all other representative elements”.[[58]](#footnote-58) But in drawing up the Withdrawal Agreement, both negotiating sides have allowed for that element – status at the point of the deadline – to become determinative.

### 3.1 *A hard deadline is damaging– especially in the UK*

In EU law, residence rights are typically vested in the meeting of key conditions, and any certification or registration – ie compliance with administrative formalities – can only be declaratory, not constitutive of the right. In other words, the underlying right to reside cannot be lost just because of failing to register as required by a host State. In *Royer*,[[59]](#footnote-59) the ECJ confirmed that the right to move and reside in other Member States was conferred directly by the Treaty, independently of any permit, and the ‘mere failure’ of an EU national to comply with the formalities on entry and residence (in that case, acquisition of a residence permit), was not grounds for expulsion – ie for loss of residence rights.

In a pivotal departure from the custom of EU law, the withdrawal agreement creates a hard deadline, and permits States to make the registration process constitutive of the right. This appears to have been at the insistence of the UK government;[[60]](#footnote-60) having agreed, Michel Barnier, lead EU negotiator, seems to now have concerns about what this concession could mean.[[61]](#footnote-61) Article 18(1) allows States to require registration by a set deadline, (which must “not be less than 6 months from the end of the transition period”), for retaining a right to reside. The Agreement also provides for case-by-case consideration of applications where the deadline “is not respected by the persons concerned”, so long as the application is submitted “within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline”,[[62]](#footnote-62) which seems to offer a route for exceptional late applications – without it being clear what constitutes a “reasonable ground” and does not offer much to those deemed to apply *too* late. This turns the deadline for non-exceptional cases into a cliff-edge, with the prospect of unregistered EU nationals permanently losing their rights to stay, with accrued rights negated overnight.

The UK’s EU Settled Status scheme is a constitutive regime. The Home Office intend the eligibility criteria for the UK’s EU Settled Status scheme to be “more generous” than the Withdrawal Agreement;[[63]](#footnote-63) only evidence of *residence* for five years is required for settled status, not evidence of having been exercising a right to reside. Those resident before the end of the transition period, but for a period of time less than five years will be entitled to ‘pre-settled’ status for a period of five years, again, regardless of whether or not they are exercising a right to reside. Appendix EU, containing the new rules, does not address what happens after the deadline, or the question of late applications. The Home Office Statement of Intent in June 2018 did suggest that late applications would be considered with “good reason”, but did not indicate what would constitute a good reason, or how exceptional it would be (general UK immigration law is not very liberal on this point).[[64]](#footnote-64) The Home Affairs Committee has noted with concern that “this prospective system remains unconfirmed and vague: the Home Secretary told us that the Home Office has ‘not developed what would exactly happen beyond the deadline”’.[[65]](#footnote-65) Those who do not apply in time will be subject to domestic immigration rules – and without having secured some other status, will become unauthorised (or ‘illegal’) migrants, subject to the hostile environment and possible removal.[[66]](#footnote-66) Failure to register in time wipes out entitlement to the status, regardless of the period of time spent in, or degree of integration into, the UK. The (then) Home Secretary stated in 2019 that failure to register before the deadline “would be against the immigration rules”.[[67]](#footnote-67) The effects of the UK’s hostile environment would create a sudden and seismic shift in rights and status for non-registered EU nationals, who would be committing criminal activities by working or driving on public roads,[[68]](#footnote-68) and making criminals of people around them – for example employers and landlords.[[69]](#footnote-69)

This web of criminal liability spins out from the constitutive scheme. A hard deadline creates cliff edges, and will create thousands of unauthorised migrants and even criminals. A declaratory scheme, in contrast, would mean that a person’s entitlement to the status resided in their meeting the substantive conditions; what is important is having the requisite years of residence pre-Brexit, not having applied for the status at a given moment. This has hitherto been the standard approach to residence rights guaranteed by the EU. The rights associated with permanent residence, for example, may not be made conditional upon possessing the relevant document.[[70]](#footnote-70) EU migrants not yet entitled to permanent residence can be required to register within a set time frame[[71]](#footnote-71) when residing in a host Member State for longer than three months and failure to comply may “render the person concerned liable to proportionate and non-discriminatory sanctions”.[[72]](#footnote-72) Revocation of the right to reside would undoubtedly be considered a disproportionate (and probably discriminatory) sanction.

### 3.2 *A hard deadline will have catastrophic effects on the most vulnerable*

Substantial groups of people are at risk of failing to register, as highlighted by a range of researchers and NGOs.[[73]](#footnote-73) The House of Lords EU Justice sub-committee has raised concerns about awareness, especially among vulnerable and harder-to-reach groups.[[74]](#footnote-74) The risks are, in many cases, gendered, and children are particularly susceptible to falling through the gaps.[[75]](#footnote-75) The UK government’s belief is that “no-one will be left behind”.[[76]](#footnote-76) But some amount of non-registration is inevitable. Corum Children’s Legal Centre, a UK charity, has raised concerns that tens of thousands of EU national children could become undocumented migrants, noting that one in three local authorities in England do not even know how many children in their care may be directly affected by Brexit.[[77]](#footnote-77) At the other end of the age-spectrum, older migrants, especially those in care homes, or with dementia might not understand that they need to apply even if they are aware of the scheme.[[78]](#footnote-78)

Long term residents may also mistakenly believe that they have an enduring right of residence; an inspection of the second pilot of the Settled Status scheme found that “a large proportion of people” do not understand that they need to apply.[[79]](#footnote-79) In particular, the spike in applications for Permanent Residence since the referendum[[80]](#footnote-80) suggests many EU nationals may believe that it gives them residence security, not realising that it will shortly mean nothing in the UK. Moreover, data suggests that a significant minority of applicants are mistaken about their current status, with some thinking they already have indefinite leave to remain.[[81]](#footnote-81) It is also not uncommon for migrants to mistakenly believe that their children are British, so would not need to apply. The Migration Observatory estimates that around 239,000 UK-born children are reported to be UK citizens by their parents, “but available data suggest that tens of thousands of these children may not be”.[[82]](#footnote-82) Roma migrants are at an increased risk of non-registration – in part due to “limited English, low literacy, a limited and closed network of friends/colleagues/relatives”.[[83]](#footnote-83) Awareness remains a problem even late on in the process - a study comprising interviews with 90 mostly lower-skilled EU migrants in the fenlands, conducted in 2020, found that “barely half of interviewees were aware of the EU Settlement Scheme”.[[84]](#footnote-84)

The complete transformation of the rights of EU nationals in the UK should create strong, positive duties to inform and support those affected. In the context of supposedly ‘permanent’ rights being stripped away, there must be *proactive* measures in place to protect those in positions of dependence (such as children, the elderly, those with reduced capacity), those with limited social contact, and those with limited technological, or language, literacy. The UK government has granted funding to a range of civil society organisations supporting vulnerable individuals to make their applications.[[85]](#footnote-85) Such extra support is doubtless valuable, but there is a risk that the Home Office is outsourcing its responsibility, and does little to pick up the vulnerable migrants who do not encounter those specific organisations. The Independent Chief Inspector of Borders and Immigration, David Bolt, noted that the organisations involved believed that the “Home Office was significantly underestimating the practical challenges with the process, as well as other obstacles, that vulnerable applicants were likely to face”.[[86]](#footnote-86) Bolt went on to recommend that the Home Office make explicit that it was not seeking to delegate its responsibilities to NGOs, but instead to be “clear [that]… it recognises and accepts that it remains responsible for ensuring the EU Settlement Scheme meets the needs of everyone who is eligible.”[[87]](#footnote-87)

It is not just awareness of the scheme that creates a barrier to registration; vulnerable groups may find it harder to amass the evidence of residence required, so find applying difficult, or face rejections/requests for further evidence, or misclassification as ‘pre-settled’, rather than settled. Migrants may have difficulty providing documentation as a result of rough sleeping and/or cash in hand employment,[[88]](#footnote-88) while children in care may have little access to documents to evidence a status claim. Roma children are also “more likely to experience interruptions in their education than other EU migrant children, making it difficult to prove continuity of residence through school records”.[[89]](#footnote-89)

### 3.3 *Constitutive rights create a dramatic rift in the framework of free movement and Union citizenship*

As the emphasis in EU law is usually upon underlying eligibility, the shift towards constitutive formalities in the Withdrawal Agreement is striking. By allowing the creation of a hard deadline, the Withdrawal Agreement introduces a new element of residence insecurity into the free movement framework, which normally seeks to prevent those who have exercised free movement rights suffering disproportionate disadvantages,[[90]](#footnote-90) to make free movement less perilous in the face of unexpected events,[[91]](#footnote-91) to give effect to rights earned through (primarily economic) integration,[[92]](#footnote-92) and to recognise the spirit and purpose of free movement law, rather than subordinate it to administrative formalities.[[93]](#footnote-93) For example in *Lounes* the ECJ found that someone who ceased to be a migrant worker, because they acquired the nationality of the host state should not lose the rights of a non-national EU citizen, otherwise “the effectiveness of Article 21(1) TFEU would be undermined.”[[94]](#footnote-94) Even though the worker no longer fitted within the letter of Directive 2004/38, which provides for detailed family member rights, the directive “must be applied, by analogy” to the applicant’s situation,[[95]](#footnote-95) to avoid reducing Union citizens’ rights “in line with their increasing degree of integration in the society of that Member State.” A focus on the spirit of free movement law, and the ethos of EU citizenship, would be considerably at odds with a scheme in which years or decades of integration of EU citizens into a then-EU Member State could be eradicated as a result of failing to register for a residence status by a certain date. This is an outcome that the EU negotiating team should have strongly resisted, and their failure to do so creates a startling fissure in the construct of Union Citizenship.

Member States must ensure that they respect the principles of EU law when instigating measures relating to the withdrawal of *national* citizenship;[[96]](#footnote-96) it might not be such a stretch to expect that when Member States themselves exercise a national prerogative to withdraw membership, their treatment of EU citizens already resident in their territory still respects EU legal principles. It seems odd for a withdrawal agreement that offers “lifelong protection” of (already exercised) residence rights[[97]](#footnote-97) to disregard underlying entitlement. Even those who qualify for a right to stay in the UK, but fall short of the required five years of continuous work for permanent residence, will cease to be protected by the Agreement if before they reach the five year benchmark their work status oscillates. The moment they dip out of the scope of Directive 2004/38, they fall outside of the scope of the Agreement.

Not only do the perilous consequences of the constitutive regime and the gaps in the coverage of EU citizens covered in section 2, affect the vulnerable most acutely; there are a number of tripwires and pitfalls in the UK’s EU Settled Status scheme that make it even more likely that the vulnerable fall through those gaps, or over the cliff edge deadline. The next section looks at difficulty of challenging the ways the UK’s EU Settled Status scheme courts risks of administrative injustice, thanks to problems arising from dual regimes and mixed routes of enforcement. It highlights problems that emerge from automated and opaque decision-making, and the inevitability of decision-maker confusion, noting the dire results that could ensue from (mis)classification as pre-settled.

## 4. **The devil in the detail: risks of injustice in the UK scheme**

As noted above, the UK government has adopted the position that the EUSS scheme is ‘more generous’ than the Withdrawal Agreement, because it only requires evidence of residence. On the face of it, that is true. But, predictably, it is not quite so simple as that. In creating a scheme that operates quite differently to the rights outlined in the Withdrawal Agreement, the UK has rather obscured the different lines of challenge and enforcement.

### 4.1 *When do the schemes coincide? Blurred enforcement mechanisms*

EU level monitoring and enforcement will only extend to those within the scope, asserting the rights in the material scope, of the Withdrawal Agreement. But it is not clear whether having a (digital) document as mentioned in Article 18 WA is enough to bring someone in the scope of the Withdrawal Agreement, or whether individuals must nevertheless also demonstrate that they fall within the scope of Article 13 WA. EU law, as discussed above, does not customarily treat documents as decisive, instead looking to whether the substantive conditions are met. But if EU authorities insisted on looking behind an EUSS document, to see whether the *WA* conditions are met – this would leave EU nationals subject to the worst of both worlds; with registration being treated as constitutive, when it means thousands being left without residence rights, but then having it treated as declaratory in order that people are excluded from the protection of the Agreement. Insofar as the Agreement permits the UK to adopt a constitutive approach, the EU, as a matter of legal rationality, legitimate expectations, and administrative pragmatism, should be required to consider the awards of pre/settled status as conferring the equivalent status under the Agreement.

Even if we consider that EUSS registration brings an individual within the scope of the Agreement, it is not clear if and how this would assist in cases of misclassification as pre-settled instead of settled. In those cases, while the EU authorities may accept the award of pre-settled status as being equivalent to having a right to reside under Article 13(1), it semes unlikely that an applicant would derive support from the Agreement in requesting settled status, equivalent to permanent residence under Article 15(1) WA, unless they could show that they met the conditions laid down therein – that is, having been exercising a right to reside in accordance with Union law for at least five years.

But at what level, and by whom, is the differentiating between individuals who might be entitled to supra-national protection to be done? How much evidence gathering will be required before access to, e.g. a CJEU preliminary reference, is countenanced? And further down the line, the issue of protection could get murkier still. While those entitled to settled status are in theory awarded a secure status with equal treatment rights, for life, so long as they do not forfeit the status by e.g. leaving the UK for longer than the permitted break in residence, in practice, their rights are contingent upon the will (and whims) of the UK government. We have already seen some tinkering around the edges of settled status, which gives some cause to wonder whether the status will be as secure as we have been led to believe.[[98]](#footnote-98) But if an individual wants to challenge a change in their status or rights imposed in some years’ time, even while the CJEU still has jurisdiction, will it be enough to show that they fell within the scope of the UK scheme, or will such a challenge only have EU input if that person can retrospectively amass the evidence required to show that they fell within the scope of the *Agreement*? As experiences in pre-Brexit benefit claims cases show, demonstrating a right to reside can be especially tough for migrants on the margins. It would be even more so, several years on from the material time, and after they had already been told they did not need to keep evidence of work etc.

### 4.2 *The EUSS: complex, opaque, and screened from EU scrutiny*

Coming back to the immediate problem of getting settled status before the deadline, there is a risk that the dual-but-different set of protections might in effect insulate erroneous decision making within the UK from supra-national scrutiny, and it is a system that raises a host of accountability problems. The Settled Status scheme is replete with risks of error, while the lack of transparency about the highly automated decision-making process makes it hard to identify and challenge wrong decisions. The system uses an Application Programming Interface (API) to process the data submitted, and also sweeps DWP[[99]](#footnote-99) and HMRC[[100]](#footnote-100) records, in order to churn out a decision quickly. Without meaningful information about the processes of decision making, it becomes impossible for applicants, or for supranational authorities seeking to enforce the withdrawal agreement, to verify the quality of data and challenge the outcome. Cobbe has noted the particular transparency challenges in a public law context posed by automated decision-making – a problem termed “algorithmic opacity”.[[101]](#footnote-101) The Immigration Law Practitioners’ Association has also noted that in general “DWP data quality is low”, resulting in “inconsistent” data matching,[[102]](#footnote-102) but applicants are unlikely to be able to identify where the error has occurred.[[103]](#footnote-103)

Applicants may find it difficult to navigate the digital application platform – especially those with complex circumstances and evidence. While work per se is not necessary for settled status, the evidence considered relevant to demonstrating residence does lean towards work history and HMRC footprint.[[104]](#footnote-104) People who have a choppy work history – perhaps having been in a long series of short term or casual contracts – may find it difficult to amass the documentation to cover all of the 60 months in a five year period. Where they can amass those documents, they then face the document limits imposed on the online portal – a 10 document limit – with a 6MB limit each, so they cannot even scan everything into large files to be uploaded.[[105]](#footnote-105) While caseworkers can get involved and invite further evidence after an initial application, there is still a risk of automatic refusal, while the difficulty in knowing what to upload creates a barrier to application in itself. Some may have their applications deemed ‘invalid’ for, e.g. using the incorrect route, or because their proof of identity is not provided or accepted. Concerns have been raised over whether applicants will understand this outcome, and realise their application has not even been considered.[[106]](#footnote-106)

It is not just automation that creates a risk of error – human decision-makers are fallible too, especially in circumstances where they are under enormous time pressure, face a substantially increased workload, and are coping with significant changes in rules and policy. During periods of legal transition, the risks of administrative injustice become more acute.[[107]](#footnote-107) Decision maker confusion is heightened, and the complex rules are often accompanied with reams of decision maker guidance, produced at speed, without parliamentary scrutiny, and susceptible to inaccuracy. But this hastily compiled guidance effectively displaces the law when dealing with decision makers who announce that they “do not look at the law – just the guidance”.[[108]](#footnote-108) Brexit is a mammoth legal transition, and these problems are not going to become less pressing. The schemes completely erase existing residence rights, while creating new ones and instituting a mandatory application scheme for millions of EU nationals resident in the UK. When we factor in the transformation of rights of newly arrived EU migrants,[[109]](#footnote-109) the various constellations of complexity come into sharper focus still. There will be multiple overlapping immigration regimes each carrying different entitlements, and requiring different forms of evidence, and conferring different rights upon family members. There will be people under the ‘old’ regime who have not yet registered; people who have registered, and are then divided into settled or pre-settled; people with different rights during the ‘grace’ period depending on whether or not they have registered;[[110]](#footnote-110) and people who arrive post-transition and are subject to the new immigration regime, provided for in the Immigration and Social Security Coordination Bill,[[111]](#footnote-111) which will be starkly different.[[112]](#footnote-112)

### 4.3 *A disaster waiting to happen: refusals, delays and misclassifications*

Refusals of status are on the increase; having been at a very low level to start with,[[113]](#footnote-113) as of September 2020 there had been 16 600 refusals (and no information available on following up those cases). There are is also a mounting backlog of delayed decisions[[114]](#footnote-114) – which, as well as creating a significant problem in itself for applicants,[[115]](#footnote-115) may indicate cases that are missing evidence and might eventually result in a refusal. One group of applicants facing starkly higher refusal rates is that of *Zambrano* carers – relying on the *Zambrano*[[116]](#footnote-116) case in which it was found that non-mobile children in the Member State of their nationality, had a right rooted in their EU citizenship not to be de facto expelled from the EU, through a refusal to grant a residence right to their third country national parent. As this is a right granted to own-nationals in their home state, and UK nationals will cease to have EU citizenship by virtue of UK nationality, *Zambrano* rights fall outside of the scope of the Withdrawal Agreement. However, the UK government has decided to extend the settled status scheme to Zambrano carers (resident before the end of transition). But as of June 2020 there was a 61% refusal rate for *Zambrano* applications to the scheme,[[117]](#footnote-117) compared to less than 1% for claims based on other derivative rights, and an overall refusal rate of 0.09% (0.4% by September). This is likely influenced by the guidance, which draws upon the UK’s established, highly restrictive approach (even while an EU member state) to defining *Zambrano* carers. The guidance states that an EUSS applicant cannot be a *Zambrano* carer where they have not previously made a separate application to reside based on Article 8 ECHR, under different immigration rules, but where there would have been a realistic prospect of success of an Article 8 claim.[[118]](#footnote-118) (The pre-EUSS guidance required decision makers to refuse a *Zambrano* right to reside where no Article 8 claim had been made, if that avenue was available).[[119]](#footnote-119) Moreover, the guidance states that an application to the EUSS as a Zambrano carer must be refused if there are suitable ‘alternative care’ arrangements for the British citizen child. While paying lip service to the ECJ finding that *Zambrano* status decisions must take the best interests of the child into account, before summarily transferring primary carership, the guidance nevertheless continues to insist that neither a ‘lack of financial resources’ nor a ‘lack of willingness to assume caring responsibilities’ would ‘be a sufficient basis for a person to claim they are (or were) unable to care for the child’.[[120]](#footnote-120)

As well as refusal, there may be decisions misclassifying applicants as pre-settled instead of settled. As of September 2020, 42% (over 1.4 million) of applications resulted in pre-settled status. Judicial appeal rights were only introduced in 2020,[[121]](#footnote-121) but as figures on that route are not yet available, the most useful data we have on erroneous decision-making relate to administrative review requested of settled status decisions – administrative review having been possible since the start of the scheme. The Public Law Project found that in September 2019 that the application rate for administrative review of EUSS decisions was unusually low, (there had been review requests for only 0.05% of decisions that might be eligible for review – ie granting pre-settled status or ‘other outcomes’) combined with an exceptionally high success rate – 89.5% of applications for review resulted in the overturning of the challenged decision. As Tomlinson and Welsh note, this success rate “is drastically higher than other Home Office administrative reviews, which were recorded in 2015/16 as 8%, falling to 3.4% in 2016/17”.[[122]](#footnote-122)  The combination of a very low review-request rate, combined with a very high success rate should set administrative justice alarm bells ringing; it suggests that a large number of people are misclassified who do not challenge the original classification. This could be for a number of reasons – lack of awareness of how the original decision was reached and of what evidence was/was not considered, or difficulties adducing the necessary evidence. And there is likely a low understanding of the importance of getting settled, rather than pre-settled status – applicants may not think it makes much difference.

But the correct classification is important, not least due to the insecurity of pre-settled status. It is valid for five years, after which it is expected that applicants will re-apply for settled status. The government has not yet produced any details about the process but has rejected the possibility of automatic transition.[[123]](#footnote-123) This creates another point of friction, and another opportunity for the vulnerable to fall through the gaps. The risk that a second deadline will be missed is substantial – people might not understand the need to re-apply; they might forget; or the circumstances of relevant individuals might change. For example, someone might lose capacity, and their carers be unaware of the pending new deadline. Or children whose care arrangements change might become dependent upon people who do not know that they only have a temporary registration. And each applicant will have a different new deadline depending on when their pre-settled status was granted, so it will not be possible to have a high-profile campaign concentrated around a specific single date. The cliff edge will fragment into multiple personalised cliff edges. There are no current plans to provide for an extension of pre-settled status, so people may well face the same evidential obstacles as they did the first time round – but this time face an all-or-nothing decision; settled status or bust.

The risk and result of error will be disproportionately borne by vulnerable applicants. They may be more susceptible to misclassification as pre-settled, and less likely to challenge that decision (or reapply). And it is not at all clear whether those individuals will derive any protection from the Withdrawal Agreement. As well as entailing disastrous-but-delayed consequences for residence rights, pre-settled status creates immediate disadvantages, as it is excluded from the UK’s list of rights to reside that confer equal access to benefits.[[124]](#footnote-124) Making such access conditional on *also* exercising a right to reside under the Immigration (European Economic Area) Regulations 2016 echoes the conditional residence rights in the Withdrawal Agreement, based on Article 7 of Directive 2004/38. But there is a significant difference between the schemes; the UK Scheme creates a free-standing, temporary, right to reside that *is not conditioned, even implicitly, by Article 7.* This poses some compelling questions on EU and Brexit law: in spite of the *Dano*[[125]](#footnote-125) caselaw, does *Trojani* remain good law? Can a free-standing domestic right to reside create non-discrimination rights in Article 18 TFEU? And, if so, can EU law can in effect be used to assert an equal treatment right of those reliant on a domestic construct – pre-settled status – notwithstanding claimants *not* being contained in the withdrawal agreement? The Court of Appeal of England and Wales have, in quite a dramatic turn of events, found that it *can* – though this judgment is likely to be appealed to the UK Supreme Court. If the judgment holds good, this raises the question as to whether such rights subsist now the transition period has ended, as a result of the non-discrimination provision in the Agreement.

## 5. **Pre-settled status and the *Fratila* challenge: can EU law intervene in the rights under the EUSS?**

The risks of misclassification as pre-settled, discussed in section 4, are all the more serious as pre-settled status is excluded from the UK’s list of relevant rights to reside for claiming benefits. This exclusion is problematic, in part because of the decisions critiqued in sections 2 and 3. The Withdrawal Agreement gave parties the option to make a right of residence conditional upon meeting the criteria in Directive 2004/38, but (probably for reasons of administrative expedience, and to avoid the political fall-out and cost of mass disentitlement), the UK did not take up that option, and created an unconditional right to reside. Moreover, as discussed in section 3, the UK could have opted for a declaratory system, whereby having the status was not determinative of rights, but meeting substantive conditions was. But it did not do so – instead it pushed to be allowed to create a constitutive regime (to the detriment of vulnerable EU citizens). In light of these choices, it is now faced with the question of what duties Member States, or former Member States, owe to EU nationals to whom they have extended an unconditional, constitutive, domestic right to reside.

### 5.1 *Is Trojani still good law?*

The ECJ in *Trojani* found that once an EU citizen had a legal right to reside in another Member State, they were entitled to rely upon “the *fundamental principle* of equal treatment”.[[126]](#footnote-126) Member States are entitled to protect their public finances from claims from EU nationals deemed economically inactive, but the proper route, on this logic, is to deny or withdraw the right to reside if the EU citizen becomes an unreasonable burden.[[127]](#footnote-127) But so long as they have that right, a fundamental entitlement to equal treatment cannot be waived. The exercise of a right to reside just based on Article 18 EC – now Article 21 TFEU – could be made subject to conditions and limitations. But, “once it is ascertained that a person… is in possession of a residence permit, he may rely on Article 12 EC [now Article 18 TFEU] in order to be granted a social assistance benefit such as the minimax.”[[128]](#footnote-128)

The reasoning in *Trojani* would imply that someone who has been granted a domestic right to reside – such as pre-settled status – is entitled to equal treatment rights under Article 18 TFEU. However, the UK government has rushed through secondary legislation to discount this specific type of right to reside from the list of rights creating entitlement to benefits; people with pre-settled status must also show that they also meet the conditions under the Immigration (EEA) Regulations 2016 (which implement Directive 2004/38) to claim benefits.

While there has been a noted regressive turn in citizenship case law in recent years,[[129]](#footnote-129) putting conditions before freedoms, and elevating the limitations of Directive 2004/38 to the status of general principle of restriction through which other free movement laws should be read,[[130]](#footnote-130) there has been no explicit reversal of *Trojani*. Rather, what we see, is an acknowledgement that where a right to reside is conditional on, or pre-supposes*, meeting the conditions of the Directiv*e, then Member States are entitled to require that those conditions are met in fact before a claimant has benefit entitlement. But pre-settled status is a right to reside in itself.

It is common ground that but for the new regulations introduced in 2019, persons with pre-settled status would have had an entitlement to equal access to welfare in the UK. The explanatory note attached to the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 states that the regulations “reflect that a new right to reside has been created for nationals of European Economic Area states” that their effect “is that this new right to reside is not a relevant right to reside for the purposes of establishing habitual residence”.[[131]](#footnote-131) The regulations excluding pre-settled status from the list of relevant rights to reside were challenged unsuccessfully in the High Court of England and Wales,[[132]](#footnote-132) but the Court of Appeal granted the appeal in a majority judgment (2:1) – finding that *Trojani* does indeed apply, and that the regulations in question were unlawfully discriminatory.[[133]](#footnote-133) The Secretary of State resisted the claim that individuals with pre-settled status have a right to rely on Article 18 TFEU, inferring from *Dano* and *Alimanovic*[[134]](#footnote-134) that “*Martinez-Sala, Grzelczyk*and*Trojani*all precede the enactment of the CRD and should no longer be seen as good law in the EU field.”[[135]](#footnote-135) Some academic commentary appears to accord with the Secretary of State’s approach; Jesse and Carter for example suggest that Directive 2004/38 “has been interpreted to create a closed system for the definition of legal residence whereby, with very limited exceptions, only residence that is considered lawful under the Directive itself will be accepted by the Court”.[[136]](#footnote-136)

However, the Court of Appeal disagreed, finding that “far from *Trojani* no longer remaining good law, the CJEU has again expressly adopted the same reasoning”[[137]](#footnote-137) (in *Jobcenter Krefeld*)*.*[[138]](#footnote-138) The crucial difference, in the eyes of the court, was that cases in which the ECJ appears to have been more restrictive on citizens’ rights all relate to cases in which the right to reside asserted was based on Directive 2004/38. Rights to reside other than those in the Directive have to be taken into account, and can confer equal treatment rights. In *Teixeira*[[139]](#footnote-139)and *Ibrahim*,[[140]](#footnote-140) it was found that the *Baumbast* derivative right to reside awarded to the primary carer of the child of a EU national worker/former worker, did not presume self-sufficiency of the carer as “the Court did not base its reasoning even implicitly on such a condition”.[[141]](#footnote-141) In *Jobcenter Krefeld*, the CJEU rejected attempts to curb welfare eligibility of *Teixeira/Ibrahim*  carers, affirms that rights to reside can exist outside of Directive 2004/38, and moreover, that rights which fall outside of the scope of the Directive are not subject to the conditions and limitations imposed by that Directive. The derogation from equal treatment in Article 24(2) “is only applicable to persons falling within this paragraph 1, namely to citizens of the Union who are staying in the territory of the host Member State ‘by virtue of [the said] directive’.”[[142]](#footnote-142) While *Krefeld* itself, concerning jobseeking *Teixeira* carers, may only apply to a fraction of the cohort under discussion (vulnerable EU nationals in in the UK), it confirms an overarching, applicable principle – as recognised by the Court of Appeal. The possession of a right to reside that did not come within the scope of Directive 2004/38 separates a case from the *Dano* line of caselaw.[[143]](#footnote-143)

In *Brey*[[144]](#footnote-144) the finding that the granting of benefits could be made conditional upon meeting the requirements of Directive 2004/38, was couched in terms of “*meeting the necessary requirements for obtaining a legal right of residence* in the host Member State”.[[145]](#footnote-145) In *Commission v UK*[[146]](#footnote-146) the ECJ stated twice that benefit claiming EU nationals could be required to “fulfil the *conditions for possessing a right to reside lawfully* in the host Member State”.[[147]](#footnote-147) While the applicant in *Dano*[[148]](#footnote-148)possessed a “residence certificate of unlimited duration”, yet was still required to comply with the conditions of Directive 2004/38 to access a special non-contributory benefit,[[149]](#footnote-149) that certificate, (which no longer exists), was not a residence permit and was only declaratory of a person’s rights to exercise EU free movement rights.[[150]](#footnote-150) The High Court judge in *Fratila* noted that written observations from the German government confirmed that the certificate in question did not confer a right to reside, and added that it “only serves to explain why on the facts of that case, there was no scope for any free-standing Article 18 TFEU argument”.[[151]](#footnote-151) In contrast, pre-settled status “exists apart from anything available under the Citizens' Rights Directive” and “has a distinct legal basis”.[[152]](#footnote-152)

Of course, while this is helpful for claims arising under *Fratila*, this creates a further bifurcation in the schemes of residence rights and enforcement, seeding future complications and problems. An argument that a right of residence falls outside of Directive 2004/38 (and indeed is a domestic right) is double edged; it appears to take that individual outside of the scope of the permanent residence provisions of the Withdrawal Agreement,[[153]](#footnote-153) and potentially excludes them from EU level redress when it comes to later disputes. The immediate question, however, is whether the UK can exclude those falling within the scope of Article 18 TFEU from benefits.

### 5.2 *The right to reside test: reaching the limits of the legal fiction of ‘indirect’ discrimination*

For the purposes of claims relating to the period before the end of transition, the High Court and the Court of Appeal have both accepted that Article 18 TFEU applies and that pre-settled status gives rise to an equal treatment claim. This leads to the question of whether the discrimination faced was direct or indirect, and if the latter, whether it was justified.

Without challenging the legal fiction (in UK and EU law) that the UK’s right to reside test is *indirect* rather than direct discrimination, the Court of Appeal have found that that logic can only stretch so far: requiring a right to reside is permissible, and justifiable, but distinguishing between different types of right to reside, solely to the detriment of EU nationals, is not.

Time and again, UK courts have treated the test as not discriminating directly against EU nationals,[[154]](#footnote-154) and the ECJ has acquiesced.[[155]](#footnote-155) Hence, in the High Court *Fratila* judgment, the judge found that the rules constituted justified indirect discrimination because “direct discrimination arises, and only arises, when there is an exact coincidence between the requirement applied and the prohibited characteristic.”[[156]](#footnote-156) But this is not accurate, as the Court of Appeal noted, quoting Lady Hale in the Supreme Court: “‘ [I]t cannot be a requirement of direct discrimination that all the people who share a particular protected characteristic must suffer the less favourable treatment complained of. It is not necessary, for example, that an employer always discriminates against women: it is enough to show that he did so in [one] case.’”[[157]](#footnote-157)

Any requirement that all individuals with the protected characteristic be equally affected is at odds with the legal positioning of pregnancy discrimination,[[158]](#footnote-158) and non-provision for breastfeeding mothers,[[159]](#footnote-159) as forms of direct (or unjustifiable) discrimination, even though many – most – woman are not affected at any one time. But the biggest problem with this approach is the misleading focus on who can pass the right to reside test. The directly discriminatory act is the application of the test in the first place. UK nationals automatically have a right to reside, but EU nationals must fulfil other conditions to do so[[160]](#footnote-160) – rather echoing the extra conditions imposed upon EU nationals in *Grzelczyk*, where the ECJ found that an own-national student “in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimax” so that Grzelczyk’s nationality was “the only bar to its being granted to him”.[[161]](#footnote-161)

Their nationality is the only reason that extra conditions are applied to EU national benefit claimants. Even if we look at the broader ‘habitual residence’ test, of which the right to reside is a component, the numbers tell against an indirect discrimination formulation. In June 2020,[[162]](#footnote-162) there were 41 000 habitual residence tests completed for EEA nationals claiming the benefit Universal Credit; 17% failed.[[163]](#footnote-163) During that time only 1.5% of UK applicants were even subjected to the test (compared to 100% of EEA nationals).[[164]](#footnote-164) Of those, 0.02% of estimated UK applicants failed the test.[[165]](#footnote-165) This suggests that the habitual residence test as a whole is really directly, not indirectly discriminatory. The right to reside component is even more patently directly discriminatory – UK nationals *always* have it, but EU nationals must *always* meet further conditions. The Commission recognised this, arguing in *Commission v UK* that the test is “an automatic mechanism that *systematically and ineluctably bars claimants* who do not satisfy it from being paid benefits, regardless of their personal situation and of the extent to which they have paid tax and social security contributions in the United Kingdom”.[[166]](#footnote-166)

EU institutions simply consider direct nationality discrimination as more palatable, and the ‘indirect discrimination’ fiction has been a handy fig leaf for the Council and the ECJ, given the apparent irreconcilability of the logic of EU law that direct discrimination cannot be justified, with the pragmatic desire to give Member States some lee-way when it comes to protecting their welfare systems from non-nationals. But if the whole rationale for permitting differential treatment is that such treatment does not depend on nationality, but instead on the more neutral ground of whether or not someone possesses a right to reside, then that falls away when excluding a certain *type of right to reside* – only possessed by EU nationals – from equal treatment rights. Here, the Court of Appeal in *Fratila* departed from the reasoning of the High Court, finding that once a right of residence had been established, discrimination was prohibited outright, and the question of justification did not arise – effectively using the ‘direct discrimination’ model.

The situation complained of was different to complaints raised about the imposition of a right to reside test as a precondition to a benefit; the court agreed with counsel for the appellants who stated that they pass the test and “their complaint is that they are specifically excluded from the normal incidents of it by a quite separate exception to entitlement, applicable to EU citizens alone, if their leave to enter or remain is based upon PSS”. Thus the difference is no longer between an EU national who cannot demonstrate a right to reside, and a UK national with a domestic law-based right to reside. It is between a UK national and an EU national who both have domestic law-based rights to reside. But only the EU national must discharge further conditions in order to access benefits, so we are inescapably talking about a difference of treatment based on nationality. If the Court of Appeal’s reasoning is upheld, it will have exposed some limitations of the indirect discrimination fig leaf.

### 5.3 *Departing from a fundamental principle of EU law creates a heavy burden of proof*

Given the findings of the Court of Appeal, the issue of justification did not feature heavily in the judgment. But it is worth considering the argument advanced by the UK government, that the regulations were justified because they “maintain the status quo prior to the introduction of pre-settled status”[[167]](#footnote-167) and to protect the UK’s social security system. Both claims are problematic. Firstly, the imminence of Brexit means that the rights of people who fall outside of the Directive cannot simply be the ‘same’ as they once were. A temporary shortage of resources that impels them to temporarily depart the UK to seek support in their state of nationality, could interrupt the now-necessary continuity of residence and demolish a later claim for settled status in the UK.[[168]](#footnote-168) Their right of permanent return is significantly imperilled, and so the consequences of a refusal of equal treatment could be considerably starker than under the ‘normal’ workings of the free movement regime.

Secondly, the rhetorical logic that the conditions of the Directive are necessary to prevent benefit tourism,[[169]](#footnote-169) does not hold up well to scrutiny under the circumstances. The Court of Appeal noted that pre-settled status confers a right to reside “as an encouragement to integration”. We are, by and large, dealing with people already in the UK – the measures cannot dissuade EU nationals seeking to arrive in the UK post-transition to claim benefits, because they will not be able to do so under the new immigration regime. Instead, we are talking about a minority of a minority of a minority – EU citizens resident in the UK; who qualify for pre-settled but not settled status; and who fall outside of the Directive’s categories and need to claim benefits, and only until they qualify for settled status. Even if we were dealing with *indirect* discrimination, the Secretary of State simply did not meet the appropriate standard of evidence. While typically purely economic or administrative reasons cannot justify a departure from a fundamental principle of EU law,[[170]](#footnote-170) economic reasons in pursuit of the public interest can – such as avoiding the “the risk of seriously undermining the financial balance of the social security system.”[[171]](#footnote-171) But any such claim must “be accompanied by… specific evidence substantiating its arguments”. This must involve an “objective, detailed analysis, supported by figures” which is “capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system”.[[172]](#footnote-172) Given the numbers we are dealing with, which can only, and will reduce, and the finite period of time, there cannot be “solid and consistent data” that shows a credible risk to the balance of the UK’s social security system. Instead, the Secretary of State’s evidence referred “generally to the rationale…of protecting the social security system”,[[173]](#footnote-173) in rather the same way that the ECJ found that the Cypriot Government had “merely allude[d] to a risk of imbalances in the social security system”.[[174]](#footnote-174)

Taking these points together – an entitlement to equal treatment may be an unintended, but inevitable effect of the new regime. In theory, if the government wished to make the right to reside conditional upon meeting the criteria in Article 7 of Directive 2004/38, it could have done so. But it did not, and realistically cannot. As noted with the problematic gaps in the Withdrawal Agreement, if the UK genuinely wishes to make sure no one is left behind, and that swathes of EU citizens are not deemed unlawful by default, it has to make pre-settled status a free-standing right not conditional on the Directive. And it cannot add extra conditions as a matter of practicality. In light of the sheer number of EU nationals who need to be registered in a short period of time, and the capacity of the Home Office (and lack of expertise in the specific provisions), this would not be a feasible way to determine actual residence rights.

This would all suggest that persons with pre-settled status are entitled to a right of equal treatment, and the protection of EU law, at least for matters arising before the transition period ended, giving the CJEU a role even in the apparently domestic issue of welfare rights attaching to a domestic right to reside, where those welfare rights exceed those guaranteed by the EU Withdrawal Agreement. The agreement, as discussed in section 2, effectively gave the UK permission to make a right to reside conditional upon fulfilling the pre-Brexit criteria for a right to reside. But the UK authorities – doubtless partly influenced by administrative nightmare posed by such conditionality – chose *not* to do this. Or it could have opted for a declaratory scheme, in which the status itself did not confer the right to reside. But it chose *not* to do this – as discussed in section 3 – creating a cliff edge deadline, over which the most vulnerable are likely to fall thanks to obstacles analysed in section 4. The UK government created an unconditional right to reside, with the plan of later obstructing access to benefits. In essence, it aims to uphold the pre-Brexit regime, of tolerated (but not granted) residence of EU nationals, while gatekeeping access to welfare.[[175]](#footnote-175) But the UK cannot claim the system is the same as before, and act as though Brexit has not happened. The government is trying to have and eat its cake – adopting a broad constitutive scheme for expediency, while acting as though it had adopted a more selective, declaratory one.

### 5.4 *The future (ir)relevance in the UK of Article 18 TFEU and Trojani?*

Post-transition the limits in the Withdrawal Agreement might in turn limit the possibilities of an EU-law based challenge to restrictions on benefit entitlements arising purely from pre-settled status. Indeed, the claimants in *Fratila* accepted that “the legal basis for their claim (i.e. their ability to rely on Article 18 TFEU) will disappear with effect from the end of the implementation period”.[[176]](#footnote-176) The Court of Appeal judges appeared to assume the effects of their judgment are subject to the same time limit, stating that the “arguments here turn upon the present state of EU law, as it still applies in the United Kingdom during the transition period, after formal secession from the EU and up to the end of the transition period on 31 December 2020.” The judgment’s focus on Article 18 TFEU, which has now ceased to apply in the UK as a matter of EU law,[[177]](#footnote-177) might also set a time-limit on the judgment’s effects, to matters that arose before transition ended.

This reveals something of the ambiguity about the citizens’ rights provisions in the Withdrawal Agreement. Article 12 WA reproduces the rights of Article 18 TFEU for those within the scope of the Withdrawal Agreement. It provides that:

*Within the scope of this Part, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU shall be prohibited in the host State and the State of work in respect of the persons referred to in Article 10 of this Agreement.*

This appears to *retain* the effects of Article 18 TFEU. Moreover, *Trojani* and *Grzelczyk* would still be relevant given the requirement in Article 4(4) to interpret “provisions of this Agreement referring to Union law or to concepts or provisions thereof… in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.” What the incorporation of Article 18 TFEU in Article 12 WA, in combination with the case law conformity requirement in Article 4 would mean in practice is not clear. Article 18 TFEU can operate independently of Directive 2004/38 in situations that do not fall within the scope of that directive. It is less certain that even if someone falls within the scope of Article 10 WA, (being a “Union citizen who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter”), Article 12 WA on equal treatment could operate independently of Article 13 WA on the limitations and conditions attached to residence rights. However, given the *Fratila* litigation, and the fact we are now post-transition, this is a question that will have to be addressed.

Counsel for the appellants in *Fratila* argued that “the respondent could have created PSS to come into effect at midnight on 31 December 2020, when the transitional arrangements for the UK's departure from the EU will cease, and he accepted that if that had been the legislative device used by the respondent, there would have been no direct or indirect discrimination because EU law would not have applied”.[[178]](#footnote-178) Which would suggest that the Secretary of State could simply accept the Court of Appeal’s quashing of the regs, and immediately reinstate them. But it is at least arguable that even when EU law ceases to be applicable in the UK, the Agreement reinstates the duties of Article 18 TFEU. The non-discrimination provision is not subsidiary to, or attached to, the residence conditions of Article 13 WA. If anything, it is more closely bound to the general personal scope provision in Article 10 WA, as both fall under Title I of the Citizens’ Rights Part, named ‘General Provisions’, (whereas Article 13 is the first provision of Title II). And people with pre-settled status fall within Article 10 WA, regardless of current worker status, as ‘Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter’[[179]](#footnote-179) or under as former frontier workers,[[180]](#footnote-180) or as family members.[[181]](#footnote-181)

Article 13 WA permits the limiting of residence rights – much in the same way Directive 2004/38 does. But where a party to the agreement has chosen not to exercise those permitted residence limitations, and has granted legal, autonomous residence rights, Article 13 WA, like the directive, does not provide a general waiver of equal treatment duties. So in creating a duty to respect EU non-discrimination law, the Agreement may (perhaps counter-intuitively) involve EU bodies in enforcing welfare rights not protected within the Agreement. To conclude otherwise would in itself reveal something about the limited scope of the citizens’ rights provisions in the Agreement. Loss of the full protection of the effects of Article 18 TFEU would be a significant detriment – and one that would belie claims that both sides to the negotiation sought to preserve the rights that Union citizens resident in the UK enjoy as a result of free movement. We might find ourselves back with the problems created by the negotiating teams’ heavy reliance upon secondary legislation and the emphasis on limitations and conditions.

## **6. Conclusion**

The gaps in the post-referendum offers made to EU citizens resident in the UK, the continued uncertainty, the inevitability of frictional injustice, and the ready dismantling of rights all make for a dispiriting reflection upon the strength and meaning of EU citizenship in a withdrawing territory. Where EU citizens have moved across borders, exercising the primary right attached to their “fundamental status”, and have become integrated, giving effect to the “underlying logic” of free movement, it turns out that their rights can still be switched off in an instant.

Leading voices of the ‘Leave’ campaign in the UK, Michael Gove, Boris Johnson, Gisela Stuart and Priti Patel issued a joint statement before the referendum that “EU citizens already lawfully resident in the UK… will automatically be granted indefinite leave to remain in the UK and will be treated no less favourably than they are at present”.[[182]](#footnote-182) This has patently not come to pass. The UK government were evasive on EU citizens’ rights for two years, and the shortcomings in the new scheme are perhaps unsurprising; the UK has form for rights-restriction when it comes to EU nationals. But the readiness of the EU’s negotiating team, to accept a highly exclusionary agreement that would disentitle hundreds of thousands of EU migrants – immediately, or further down the line – is more revealing. The Withdrawal Agreement reproduces the gender, child, and disability gaps in the existing free movement framework, as argued in section 2, except it makes them starker, by all-but disregarding considerations of proportionality. With one limited exception, those not on, or not closely conforming to the Directive’s requirements – women with sick babies, children estranged from their parents, people with punctuated work histories – would be susceptible to removal. The Public Interest Law Centre has commented that “The ‘deportability’ of all EU nationals living in the UK – but particularly those who fail to acquire pre-settled or settled status before the end of this year – will increase markedly in 2021”.[[183]](#footnote-183) It is surprising, and disappointing, that the EU negotiating team, and the EU 27, did not push for more/all of the EU citizens in the UK falling within Article 10 WA to be covered in the residence rights under Article 13.

This abandonment of thousands of EU citizens is made all the more dramatic thanks to the sudden shift to *constitutive* rights analysed in section 3. The Agreement allows (and the UK scheme requires) cliff-edge deadlines in which the act of registration by a set point is *constitutive* of the right to stay. Underlying entitlement, by virtue of meeting the substantive conditions, is negated, and rights lost by virtue of failing to comply with administrative requirements by the deadline. This move was unnecessary and goes against the spirit of EU law residence rights. Years or decades of integration and contributions can be wiped out – even for those with ‘permanent residence’, entailing a significant disruption and a rift in the fabric of Union citizenship. It has already been implemented in the UK, and is set to create mass disentitlement overnight – with the most acute impacts on the most vulnerable.

The constitutive status and its inherent hard deadline is all the more problematic in the context of a new, quickly erected scheme, rife with risks of administrative injustice, which section 4 noted increase the risks of the vulnerable missing the deadline or getting refused a status, and suffering all of the disadvantages that entails. The high degree of automation in the decision-making process, along with the lack of transparency about how those decisions are reached, raises concerns about accuracy of decision making. But the creation of a parallel but different regime, alongside the Withdrawal Agreement means there is likely to be some confusion over different realms of enforcement. It is not clear whether an award of Settled Status will be treated as equivalent to permanent residence in the Withdrawal Agreement – and if not, that creates significant gatekeeping and evidential problems for potential claimants.

The different schemes (running alongside a third – the new immigration rules for new arrivals post-transition) carry different entitlements and conditions, while the EUSS also has multiple routes of claim depending on the type of right relied upon. Adding reams of swiftly composed decision-maker guidance into the mix, the schemes promise a landscape of administrative confusion, chaos and error. The significant risk of misclassification as pre-settled weighs disproportionately upon vulnerable groups. Acquisition of pre-settled status is significantly better in the short term than missing the deadline and not securing a status. But it only delays the cliff-edge deadline, and a lot can go wrong in five years. People who become ill or have reduced capacity and become dependent on another; people who do not understand the need to re-apply; and children whose primary carers change – all may fall through the gaps.

Pre-settled status also carries inferior rights as regards welfare entitlement. In choosing not to take the option offered in the withdrawal agreement of creating a conditional temporary right to reside, the UK has created an unconditional right to reside - forcing the questions of whether *Trojani* still has any purchase; whether pre-settled EU nationals can rely on Article 18 TFEU; and whether attaching equal treatment rights with one type of right to reside – always possessed by own nationals, and separating them from another type of right to reside – only possessed by EU/EEA nationals, is really direct discrimination. This scenario makes it considerably harder to uphold the legal fiction that right to reside requirements for accessing benefits are *indirectly* discriminatory. It may become necessary to spell out how relatively sanguine the EU courts and legislature really are about *direct* nationality discrimination in the context of welfare, and in so doing face up to the contradictions between theory and reality of equal treatment law enforcement. This dispute creates an intriguing route by which EU law may be used to enforce rights for which the EU Withdrawal Agreement does not provide. Moreover, the incorporation of Article 18 TFEU rights and case law into the Withdrawal Agreement suggests that equal treatment rights attached to EU citizenship may continue to have purchase in the UK post-transition. If not, then this in itself could be a salutary lesson on the value of EU citizenship within EU territory – and the value of what has been lost.

The lack of safeguards for EU citizens in the event of Brexit highlights a risk few will have contemplated when deciding to exercise free movement rights. The all-too ready dismissal of those who fall through the gaps in Directive 2004/38 is a worrying signal that EU institutions do not consider the status of EU citizenship, acts of integration, or personal circumstances beyond the economic to be legally relevant. Developments regarding rights to stay under the EU and UK schemes are all underpinned with tensions around equal treatment rights and one-down-man-ship when it comes to restricting rights. The problems raised here are pressing, concrete issues that will have significant, and potentially devastating consequences for a considerable section of a sizeable cohort. They should also trigger an alarm bell for the EU. We are here, among this unedifying scrap-and-grab of rights, at least in part, because of years of demonising the free movement of persons in the UK.[[184]](#footnote-184) Rights to reside and to equal treatment could become all the more vital in a withdrawing state. If we do not wish the vulnerable to be cast adrift, or left entirely at the mercy of migrant-hostile governments, then drafting a withdrawal agreement is perhaps an appropriate time to be less diffident about the effects and fundamental status of Union citizenship. The UK continues to supply us with cautionary tales.

1. \* York Law School, University of York. Research conducted within the ESRC-funded project, the EU Rights and Brexit Hub: https://www.eurightshub.york.ac.uk/. Thanks to the many people who have commented on aspects of this work at the Academy of European Law; the Max Planck Institute in Göttingen; the All Party Parliamentary Group on the Rule of Law; and the Bingham Centre for the Rule of Law & UK Law Societies seminar in the European Parliament. Thanks to Alyn Smith MP and Martin Williams (of the Child Poverty Action Group) for sharing materials, and to Alice Welsh, University of York for input, help and support. Many thanks to the anonymous reviewers, for their thorough and constructive feedback.

   Who are not the subject of this study, but see the work under the “Brexit Brits Abroad” project, led by Michaela Benson, available at: <<https://brexitbritsabroad.com/project-team/>> (all websites last accessed 19 October 2020). [↑](#footnote-ref-1)
2. E.g. “EU citizens living in this country will have their rights fully protected” in Boris Johnson, “I cannot stress too much that Britain is part of Europe - and always will be”, *The Telegraph,* 26 June 2016. [↑](#footnote-ref-2)
3. “When it comes to the negotiations, we will protect the rights of EU citizens here, so long as Britons in Europe are treated the same way”. David Davis' speech to Conservative conference, *Politics Home*,2 October 2016, available at: <<https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79518/read-full-david-davis-speech-conservative>>. [↑](#footnote-ref-3)
4. The initial proposals emerged in 2017: Secretary of State for the Home Department, “The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU”, *White Paper*,Cm 9464, available at: <<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf>>), followed a year later by the Home Office, ‘EU Settled Status Scheme: Statement of Intent’, 21 June 2018, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf>). [↑](#footnote-ref-4)
5. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, and the Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ C 66 I, 19 February 2019. [↑](#footnote-ref-5)
6. Not provided for in primary law, but in ‘Appendix EU’ of the Immigration Rules, available at: < <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>>. It is termed the ‘EU Settled Status’ (EUSS) Scheme in the rules and in the UK. But in order to more clearly distinguish it from EU rules in the context of an article that compares the two, I typically refer to the ‘UK’s EU Settled Status scheme’. [↑](#footnote-ref-6)
7. At 23.00 on 31/01/2020 GMT / 00.00 on 01/02/2020 CET. [↑](#footnote-ref-7)
8. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158, 30.4.2004, p. 77–123. [↑](#footnote-ref-8)
9. Currie, “Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: Jessy Saint Prix”, 53 CML Rev. (2016); O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford: Hart, 2017). [↑](#footnote-ref-9)
10. 30 June 2021. [↑](#footnote-ref-10)
11. Regs 2(2)(d); 3(1)(d); 4(2)(d); 5(2)(d); 6(2)(d); 7(2)(d); and 8(2)(d) of The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019, SI No. 872; Regs 2(2)-(3) and 3(2)(b) of The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019, SI No. 867; and

    Regs 3(a) and 4(a) of The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019, SI No. 861. [↑](#footnote-ref-11)
12. Case C-456/04, *Trojani*, EU:C:2004:488. [↑](#footnote-ref-12)
13. Case C-165/16, *Toufik Lounes v Secretary of State for the Home Department*, EU:C:2017:862, 58. [↑](#footnote-ref-13)
14. On the claims on the side of the Brexit campaign bus, see: Full Fact, “£350 million EU claim ‘a clear misuse of official statistics’”, (19/09/2017), available at:https://fullfact.org/europe/350-million-week-boris-johnson-statistics-authority-misuse/. [↑](#footnote-ref-14)
15. Part Two of the agreement addresses ‘Citizens’ rights’; Title II of that Part deals with ‘Rights and Obligations’, and Chapter 1 of that Title provides for ‘rights related to residence, residence documents’. [↑](#footnote-ref-15)
16. Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018, TF50 (2018) 35 – Commission to EU27, available at: < <https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf>> [↑](#footnote-ref-16)
17. And finalised in February 2019, see above, note 5. [↑](#footnote-ref-17)
18. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01); available at: ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement\_en; given effect in the UK through the EU (Withdrawal Agreement) Act 2020. [↑](#footnote-ref-18)
19. Art. 10(1)(a) WA. [↑](#footnote-ref-19)
20. Art. 10(1)(c) WA. [↑](#footnote-ref-20)
21. Art. 10(1)(e) WA. [↑](#footnote-ref-21)
22. Art. 10(1)(e)(iii) WA. [↑](#footnote-ref-22)
23. Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1). [↑](#footnote-ref-23)
24. The application of the ‘right to reside’ test required under the Immigration (European Economic Area) Regulations 2016 is critiqued extensively in O’Brien (2017), op. cit. *supra* note 9. [↑](#footnote-ref-24)
25. Arts. 24 1(h) and 24 (2) WA. [↑](#footnote-ref-25)
26. Case C-413/99, *Baumbast*,EU:C:2002:493. [↑](#footnote-ref-26)
27. Case C-310/08, *Ibrahim,* EU:C:2009:641. [↑](#footnote-ref-27)
28. Case C-480/08, *Maria Teixeira*,EU:C:2009:642. [↑](#footnote-ref-28)
29. Eurostat, “In the EU, GDP down by 11.7% and employment down by 2.6%”, *News Release: Euro Indicators*, 125/2020, 14 August 2020. [↑](#footnote-ref-29)
30. Case C-529/11, *Alarape and Tijani v Secretary of State for the Home Department*,EU:C:2013:290. [↑](#footnote-ref-30)
31. or for the period specified in Article 17 of Directive 2004/38/EC. [↑](#footnote-ref-31)
32. Spaventa, “The rights of citizens under the Withdrawal Agreement: a critical analysis” EL Rev. (2020),

    45(2), 193, 198. [↑](#footnote-ref-32)
33. Peers,“Analysis 4 of the Withdrawal Agreement: Citizens’ rights” (19 October 2019), available at: http://eulawanalysis.blogspot.com/2019/10/analysis-4-of-revised-brexit-withdrawal.html. [↑](#footnote-ref-33)
34. Art. 18(1)(h) WA. [↑](#footnote-ref-34)
35. Art. 12 WA. [↑](#footnote-ref-35)
36. Art. 24 WA. [↑](#footnote-ref-36)
37. Dougan, “So Long, Farewell, Auf Wiedersehen, Goodbye: The UK’s Withdrawal Package” CML Rev. (2020), 57(3), 631, 668. [↑](#footnote-ref-37)
38. Art. 7(3) of Directive 2004/38; Case C-325/09 *Secretary of State for Work and Pensions v Maria Dias* EU:C:2011:498. [↑](#footnote-ref-38)
39. As in Case C-200/02 *Chen* EU:C:2004:639. [↑](#footnote-ref-39)
40. The Minimum Earnings Threshold, in Department of Work and Pensions (“DWP”) Decision Maker Guidance, “Habitual residence & right to reside – IS/JSA/SPC/ESA” (June 2015), at 073035; available at: <www.gov.uk/government/uploads/system/uploads/attachment\_data/file/497585/dmgch07

    03.pdf>. For discussion see O’Brien, “Civis capitalist sum: class as the new guiding principle of EU free movement rights”, 53 CML Rev. (2016), 937; O’Brien, “The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants”, 37(1) *Journal of Social Welfare and Family Law*, (2015), 111. [↑](#footnote-ref-40)
41. Dougan, (2020), op. cit. *supra* note 38, 669. [↑](#footnote-ref-41)
42. Case C-184/99, *Grzelczyk*,EU:C:2001:458, 31, 44. [↑](#footnote-ref-42)
43. Case C-413/99, *Baumbast*,EU:C:2002:493. [↑](#footnote-ref-43)
44. Case C-67/14*, Alimanovic,* EU:C:2015:597. [↑](#footnote-ref-44)
45. European Commission in Case C-308/14, *Commission v UK,* EU:C:2016:436, 47. [↑](#footnote-ref-45)
46. *Mirga and Samin v Secretary of State for Work and Pensions and Anor* [2016] UKSC 1. [↑](#footnote-ref-46)
47. *LO v Secretary of State for Work and Pensions* [2017] UKUT; *JK v Secretary of State for Work and Pensions (SPC);* [2017] UKUT 0179 (AAC); *Secretary of State for Work and Pensions v AC* [2017] UKUT 130 (AAC). [↑](#footnote-ref-47)
48. [2016] UKUT 511 (AAC). For the contrasting approach of Upper Tribunal Judge Ward, see *AMS v Secretary of State for Work and Pensions* [2017] UKUT 381 (AAC). [↑](#footnote-ref-48)
49. Ibid, 11. [↑](#footnote-ref-49)
50. Art. 3(2) Directive 2004/38. This provision is reproduced in Art. 10(4) WA. [↑](#footnote-ref-50)
51. Reg. 8(5) of the Immigration (European Economic Area) Regulations 2016. [↑](#footnote-ref-51)
52. See *Zalewska v Department for Social Development (Northern Ireland)* [2008] UKHL 67. [↑](#footnote-ref-52)
53. O’Brien, (2017), op. cit. *supra* note 9. [↑](#footnote-ref-53)
54. O’Brien, “*Acte cryptique*? *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference”, CML Rev. (2019), 56(6), 1697. [↑](#footnote-ref-54)
55. Art. 158(1) WA. [↑](#footnote-ref-55)
56. Art.18(1)(r). [↑](#footnote-ref-56)
57. Letter from Michel Barnier, 6 February 2019, tf50(2019)318516, shared by Alyn Smith. [↑](#footnote-ref-57)
58. Case C-224/98 *Marie-Nathalie D’Hoop v Office National de L’Emploi* EU:C:2002:432, 39. [↑](#footnote-ref-58)
59. Case 48/75 *Royer* EU:C:1976:57. [↑](#footnote-ref-59)
60. More, “From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union” in Cambien, Kochenov & Muir (eds.) *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges,* (Brill, 2020), 466-7. [↑](#footnote-ref-60)
61. Barnier: “I plead with the United Kingdom, as I do with those EU27 member states which chose to apply a mandatory registration scheme, to have a generous interpretation” of the EU-UK Brexit treaty,” in Brunsden, “Brussels uneasy over EU citizens’ rights after Brexit”, *Financial Times,* 8 January 2020. [↑](#footnote-ref-61)
62. Art 18(1)(d). [↑](#footnote-ref-62)
63. House of Commons, Written Questions and Answers, “Immigrants: EU Nationals: Written question – 191403”, Answered on: 19 November 2018, by Caroline Nokes, available at: < <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-11-14/191403>>. [↑](#footnote-ref-63)
64. See the summary of immigration lawyer Chris Desira: “If you look at good reasons in other areas of immigration law, you need to have fairly good excuses — for example, you were in hospital, comatose and incapable of completing the application yourself”; “EU settled status: the story so far”, *Free Movement Blog,* 23 July 2019, available at: <<https://www.freemovement.org.uk/eu-settled-status-story-so-far/#What_happens_if_people_miss_the_application_headline>>. [↑](#footnote-ref-64)
65. House of Commons Home Affairs Committee, “EU Settlement Scheme”, Fifteenth Report of Session 2017–19, 14 May 2019, para. 48. [↑](#footnote-ref-65)
66. Home Office Minister Brandon Lewis “*told Die Welt (in German): ‘If EU citizens until this point of time have not registered and have no adequate reason for it, then the valid immigration rules will be applied.’*

    *When pressed on whether that would include those who met the legal requirements for residence but did not apply in the next 14 months, he replied: ‘Theoretically yes. We will apply the rules*.’ See BBC News “Brexit: EU citizens who miss registration deadline face deportation – minister”, 10 October 2019, quoting and translating from: Bolzen, “Nach dem Brexit droht nicht registrierten Deutschen die Abschiebung”, *Die Welt*, 10.10.2019, https://www.welt.de/politik/ausland/article201671420/Brandon-Lewis-Nach-dem-Brexit-droht-nicht-registrierten-Deutschen-die-Abschiebung.html. [↑](#footnote-ref-66)
67. Home Affairs Committee, “Oral evidence taken on 27 February 2019, The work of the Home Secretary”, HC 434, Qq772–6. [↑](#footnote-ref-67)
68. Home Affairs Committee, “EU Settlement Scheme: Fifteenth Report of Session 2017–19”, HC 1945, 30 May 2019, para 44, citing Yeo, “Briefing: what is the hostile environment, where does it come from, who does it affect?”, *Free Movement,* 1 May 2018, available at: <https://www.freemovement.org.uk/briefing-what-is-the-hostile-environment-where-does-it-come-from-who-does-it-affect/>. See also York, “The "hostile environment" - how Home Office immigration policies and practices create and perpetuate illegality”, 32(4) *Journal of Immigration, Asylum and Nationality Law,* (2018), 363. [↑](#footnote-ref-68)
69. Yeo, ibid, notes that the Immigration Act 2016 allowed for the prosecution of an employer or landlord who knew ‘or had reasonable cause to believe’, that they were employing or renting a property to someone in breach of the immigration rules. [↑](#footnote-ref-69)
70. Directive 2004/38, Art. 25 (1). [↑](#footnote-ref-70)
71. Directive 2004/38, Art. 8(2); this may not be less than three months from the date of arrival. [↑](#footnote-ref-71)
72. Ibid. [↑](#footnote-ref-72)
73. Sumption & Fernández-Reino “Unsettled Status – 2020: Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?” The Migration Observatory, Report 24 September 2020, available at: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2020/09/Report-Unsettled-Status-2020.pdf;

    Sumption & Kone, “Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?”, The Migration Observatory, Report 12 April 2018, available at: < <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Unsettled_Status_3.pdf>>; Rutter & Balinger, “Getting it right from the start: Securing the future for EU citizens in the UK”, British Future Report, January 2019, available at: < <http://www.britishfuture.org/wp-content/uploads/2019/01/EU-Citizens-report-1-pdf.pdf>>; NPC, “How the EU settlement scheme affects women and girls”, Report 25 October 2018, available at: <<https://www.thinknpc.org/wp-content/uploads/2018/10/How-the-EU-settlement-scheme-affects-women-and-girls.pdf>> [↑](#footnote-ref-73)
74. Letter from the EU Justice Sub-committee Chair Baroness Kennedy to Sajid Javid, 27 February 2019, available at: < <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/HKtoSJ-SettledStatus-260219.pdf>>. [↑](#footnote-ref-74)
75. Corum Children’s Legal Centre, “Uncertain futures: the EU settlement scheme and children and young people’s right to remain in the UK”, Report March 2019, available at: < <http://www.childrenslegalcentre.com/wp-content/uploads/2019/03/EUSS-briefing_Mar2019_FINAL.pdf>>. [↑](#footnote-ref-75)
76. Sajid Javid, Secretary of State for the Home Department, letter to Baroness Kennedy, Chairman of EU Justice Sub-Committee, 17 April 2019, p.2, available at: < <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/HStoHK-on-EUSS-17.04.19.pdf>>. [↑](#footnote-ref-76)
77. Note 75, p. 7. [↑](#footnote-ref-77)
78. Sumption & Fernández-Reino, op. cit. *supra*, note 73, 24-5. [↑](#footnote-ref-78)
79. Independent Chief Inspector of Borders and Immigration, “An inspection of the EU Settlement Scheme November 2018 – January 2019”, May 2019, available at: < <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799439/An_inspection_of_the_EU_Settlement_Scheme_May_WEB.PDF>>, 3.7. [↑](#footnote-ref-79)
80. “Official statistics show that the number of Permanent Residence documents issued to EU nationals increased almost ten-fold to a peak of 168,413 in the year ending December 2017”; ibid, 6.8 [↑](#footnote-ref-80)
81. Nearly 6 000 out of 200,420 applications were put on hold as the applicant “the applicant had mistakenly claimed to hold a valid permanent residence document or existing indefinite leave to remain”; Home Office, “EU Settlement Scheme Public Beta Testing Phase Report”, 2 May 2019, available at: < <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799413/EU_Settlement_Scheme_public_beta_testing_phase_report.pdf>>, p 3. [↑](#footnote-ref-81)
82. Sumption & Kone (2018), op. Cit. *supra* note 73, p2. [↑](#footnote-ref-82)
83. Roma Support Group, “Brexit, EU Settlement Scheme and the Roma communities in the UK”, *Report*, (June 2020), available at: <https://www.romasupportgroup.org.uk/uploads/9/3/6/8/93687016/roma_brexit_euss_report_16.06.2020_final.pdf>. [↑](#footnote-ref-83)
84. Thomas, “Best intentions: EU migrant workers in Fenland”, *Survey,* The Social Market Foundation, September 2020, available at: https://www.smf.co.uk/wp-content/uploads/2020/09/EU-migrants-workers-in-Fenland-Sept-20.pdf. [↑](#footnote-ref-84)
85. Home Office, “EU Settlement Scheme public beta testing phase report”, 2 May 2019, available at: < <https://www.gov.uk/government/publications/eu-settlement-scheme-public-beta-testing-phase-report/eu-settlement-scheme-public-beta-testing-phase-report>>. House of Commons Home Affairs Committee, “EU Settlement Scheme: Government Response to the Committee’s Fifteenth Report of Session 2017–19”, Fourteenth Special Report of Session 2017–19, 23 July 2019, HC 2592, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/2592/2592.pdf>. See also Home Office, “Media Factsheet: EU Settlement Scheme – latest information”, 18 July 2019, available at: < <https://homeofficemedia.blog.gov.uk/2019/07/18/media-factsheet-eu-settlement-scheme/>>, and Sajid Javid’s reference to the funding in the 17 April 2019 letter to Baroness Kennedy, op. cit. *supra* note 76, expressing confidence that “the funding will ensure that we are able to reach a significant proportion of those who need that extra support”. [↑](#footnote-ref-85)
86. Independent Chief Inspector of Borders and Immigration, “An inspection of the EU Settlement Scheme November 2018 – January 2019”, May 2019, available at: < <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799439/An_inspection_of_the_EU_Settlement_Scheme_May_WEB.PDF>>, 6.54. [↑](#footnote-ref-86)
87. Ibid, 4.7. [↑](#footnote-ref-87)
88. Roma Support Group, (2020), op. cit. *supra* note 83, 14. [↑](#footnote-ref-88)
89. Stalford & Humphreys, “EU Roma Children and the EU Settled Status Scheme: Awareness, Access and Eligibility”, *Research Briefing*, (September 2020), available at: <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ecru/EU,Roma,Children,and,the,EU,Settled,Status,Scheme,-,September,2020.pdf>,

    14. [↑](#footnote-ref-89)
90. *D’Hoop*,cited *supra*,note 58. [↑](#footnote-ref-90)
91. Arts. 12 and 13 of Directive 2004/38. [↑](#footnote-ref-91)
92. Case C-287/05, *Hendrix*, EU:C:2007:494. [↑](#footnote-ref-92)
93. *Royer*, cited *supra*, note 59. [↑](#footnote-ref-93)
94. *Lounes*, cited *supra*, note 13, 53. [↑](#footnote-ref-94)
95. Ibid, 61. [↑](#footnote-ref-95)
96. Case C-135/08, *Rottman*,EU:C:2010:104. [↑](#footnote-ref-96)
97. Art. 39 WA. [↑](#footnote-ref-97)
98. Desira, “Welcome and unwelcome rule changes made to EU Settlement Scheme: analysis”, Free Movement, (10/09/2019) available at: https://www.freemovement.org.uk/welcome-and-unwelcome-rule-changes-made-to-eu-settlement-scheme-analysis/. The changes include providing for additional grounds for cancellation and curtailment of EUSS. UK Home Office, Statement of Changes in Immigration Rules,

    HC 2631, 9/09/19, Changes to Part 9. [↑](#footnote-ref-98)
99. Home Office and Department for Work and Pensions, “Process Level Memorandum Of Understanding (PMoU) Between The Home Office And Department For Work And Pensions”, (2019), available at: < <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790668/Home_Office_-_DWP_API_EU_Exit_MoU.PDF>>. [↑](#footnote-ref-99)
100. Home Office and HMRC “Process Level Memorandum Of Understanding (PMoU) Between Her Majesty’s Revenue And Customs And The Home Office”, (2019), available at: < <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790661/Home_Office_-_HMRC_API_EU_Exit_MoU.PDF>>. [↑](#footnote-ref-100)
101. Cobbe, “Administrative law and the machines of government: judicial review of automated public-sector decision-making” *Legal Studies* (2019) 1-20. [↑](#footnote-ref-101)
102. ILPA, ibid, p. 10. [↑](#footnote-ref-102)
103. Tomlinson, “Quick and Uneasy Justice: an administrative justice analysis of the EU Settlement Scheme”, Public Law Project, Full report, 16 July 2019, available ae: < <https://publiclawproject.org.uk/wp-content/uploads/2019/07/Joe-Tomlinson-Quick-and-Uneasy-Justice-Full-Report-2019.pdf>>. [↑](#footnote-ref-103)
104. E.g. initial work on the EU Rights and Brexit Hub (https://www.eurightshub.york.ac.uk/) has encountered people having difficulty applying if they do not have a National Insurance number. [↑](#footnote-ref-104)
105. Home Office “Submitting documents as evidence of residence” in *EU Settlement Scheme: evidence of UK residence: Guidance* available at:

     https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence#submitting-documents-as-evidence-of-residence. [↑](#footnote-ref-105)
106. Benn, “EU Settlement Scheme Refusals and Other Outcomes: What does it mean?” in *Seraphus News: EU Settlement Scheme*, (20/04/2020), available at: https://www.seraphus.co.uk/news/files/9236b9099a570fc8fdb79d29398e082e-24.php. [↑](#footnote-ref-106)
107. O’Brien, op. cit. *supra* note 9, 272. [↑](#footnote-ref-107)
108. Ibid, 207. [↑](#footnote-ref-108)
109. Gower, “The new points-based immigration system”, House of Commons Library, *Briefing Paper,* CBP 8911, 12 May 2020. [↑](#footnote-ref-109)
110. See the draft regulations: The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. [↑](#footnote-ref-110)
111. Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21; progress can be followed at: Parliament.uk: Bills Before Parliament 2019-21: Public Bills https://services.parliament.uk/Bills/2019-21/immigrationandsocialsecuritycoordinationeuwithdrawal.html. [↑](#footnote-ref-111)
112. Gower & Kennedy, “The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21”, House of Commons Library, *Briefing Paper*, CBP 8706, (12 May 2020),

     available at: http://researchbriefings.files.parliament.uk/documents/CBP-8706/CBP-8706.pdf. [↑](#footnote-ref-112)
113. 16 600 refusals as of September 2020: Home Office, “EU Settlement Scheme statistics”, Update 08/10/2020, available at: https://www.gov.uk/government/collections/eu-settlement-scheme-statistics. [↑](#footnote-ref-113)
114. Tomlinson & Welsh, “Tens of thousands of people wait months for an EU Settlement Scheme decision”, *Free Movement*, (02/06/2020), https://www.freemovement.org.uk/tens-of-thousands-of-people-wait-months-for-an-eu-settlement-scheme-decision/. [↑](#footnote-ref-114)
115. Ibid; ‘Statistics retrieved from a freedom of information request show that on 19 October 2019 there were 33,350 applications that had been waiting for a decision for between three and six months, and another 2,920 that were waiting for six months.’  [↑](#footnote-ref-115)
116. Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l’emploi (ONEm)*, EU:C: 2011:124. [↑](#footnote-ref-116)
117. Home Office, “Official Statistics: EU Settlement Scheme quarterly statistics”, June 2020, (27/08/2020), available at: <https://www.gov.uk/government/publications/eu-settlement-scheme-quarterly-statistics-june-2020/eu-settlement-scheme-quarterly-statistics-june-2020>. [↑](#footnote-ref-117)
118. Home Office, “EU Settlement Scheme: person with a Zambrano right to reside”, Version 3.0, (13 February 2020), pp22-23. In *this* context, whereby it provides a means to *refuse* a right to reside, the Home Office takes a rather generous approach to likely hypothetical success of non-existent Article 8 ECHR claims: ‘An Appendix FM application, or ECHR Article 8 claim, will be considered to have (or to have had) a realistic prospect of success where the applicant has family life in the UK with a British citizen and there is no apparent reason why such an application would be refused’. [↑](#footnote-ref-118)
119. Home Office, “Free movement rights: derivative rights of residence”, Version 5.0, (05/05/19), 52. [↑](#footnote-ref-119)
120. Home Office, (2020), *supra* note 118, 43. [↑](#footnote-ref-120)
121. The UK government introduced a judicial appeal mechanism for challenging settled status decisions in January 2020:  Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (SI 2020 No. 61). [↑](#footnote-ref-121)
122. Welsh & Tomlinson, “Administrative Review and the EU Settlement Scheme: What does the 89.5% success rate show?”, Public Law Project Blog, (03/12/2019), available at: https://publiclawproject.org.uk/blog/admin-review-eu-settlement-scheme-what-does-the-89-5-success-rate-show/. [↑](#footnote-ref-122)
123. Sajid Javid, Secretary of State for the Home Department, letter to Baroness Kennedy, Chairman of EU Justice Sub-Committee, 20 March 2019, available at: https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/SJ-LettertoHK-EUSS\_20-03-19.pdf, 5. [↑](#footnote-ref-123)
124. Regulations cited *supra*, note 11. [↑](#footnote-ref-124)
125. Case C-333/13, *Dano,* EU:C:2014:2358. [↑](#footnote-ref-125)
126. *Trojani* cited *supra,* note 12, 40. [↑](#footnote-ref-126)
127. Dougan & Spaventa ''Wish you weren't here...' : new models of social solidarity in the European Union.', in *Social welfare and EU law,* (Hart, 2005). [↑](#footnote-ref-127)
128. Trojani, cited *supra*, note 12, 46. [↑](#footnote-ref-128)
129. Spaventa, “Earned Citizenship: Understanding Union Citizenship Through Its Scope”, in Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2017), 206; Šadl & Sankari “Why did the Citizenship Jurisprudence Change?” in Thym, (ed) *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017); Blauberger, Heindlmaier, Kramer, Sindbjerg Martinsen, Sampson Thierry, Schenk & Werner, “ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence”, 25(10) *Journal of European Public Policy*, (2018), 1422. Cf Davies, “Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication”, 25(10) *Journal of European Public Policy*, (2018), 1442. [↑](#footnote-ref-129)
130. Nic Shuibhne, “Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship”, 52(4) CML Rev, (2015), 889. [↑](#footnote-ref-130)
131. Note appended to regulations available at: https://www.legislation.gov.uk/uksi/2019/872/note/made. [↑](#footnote-ref-131)
132. *Fratila & Anor, R (on the application of) v Secretary of State for Work and Pensions & Anor* [2020] EWHC 998 (Admin) (27 April 2020). [↑](#footnote-ref-132)
133. *Fratila & Anor v Secretary of State for Works and Pensions & Anor* [2020] EWCA Civ 1741. [↑](#footnote-ref-133)
134. Case C-67/14, *Alimanovic,* EU:C:2015:597. [↑](#footnote-ref-134)
135. *Fratila*, cited *supra*, note 133, 19. [↑](#footnote-ref-135)
136. # Jesse & Carter, “Life after the ‘Dano-Trilogy’: Legal Certainty, Choices and Limitations in EU Citizenship Case Law”, in Cambien et al, (2020), op. cit. *supra* 60, 168.

     [↑](#footnote-ref-136)
137. Case C-181/19, *Jobcenter Krefeld - Widerspruchsstelle v JD,* EU:C:2020:794. [↑](#footnote-ref-137)
138. *Fratila*, cited *supra*, note 133, 72. [↑](#footnote-ref-138)
139. Case C-480/08, *Teixeira*, EU:C:2009:642. [↑](#footnote-ref-139)
140. Case C-310/08, *Ibrahim*, EU:C:2009:641. [↑](#footnote-ref-140)
141. *Teixeira*, op. cit. *supra* note 139, 67. [↑](#footnote-ref-141)
142. Ibid, 62 [↑](#footnote-ref-142)
143. Ibid, 87. [↑](#footnote-ref-143)
144. Case C-140/12, *Brey,* EU:C:2013:565. [↑](#footnote-ref-144)
145. Ibid, 44. [↑](#footnote-ref-145)
146. Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2016:436. [↑](#footnote-ref-146)
147. Ibid, 68, 75. [↑](#footnote-ref-147)
148. Cited *supra* note 134. [↑](#footnote-ref-148)
149. Ibid, 36. [↑](#footnote-ref-149)
150. Berlin State Office for Civil and Regulatory Affairs, “Information for nationals of the European Union, the countries of the European Economic Area or Switzerland”, available at <<https://www.berlin.de/labo/willkommen-in-berlin/freizuegigkeit-eu-ewr-schweiz/artikel.597871.en.php>>, linking to “Information zum Wegfall der Freizügigkeitsbescheinigung”, available at: <https://www.berlin.de/labo/\_assets/zuwanderung/wegfall-der-freizuegigkeitsbescheinigung.pdf>. [↑](#footnote-ref-150)
151. *Fratila*, cited *supra*, note 132, 22. [↑](#footnote-ref-151)
152. Ibid, 23. [↑](#footnote-ref-152)
153. Given that Art. 15 WA requires legal residence “in accordance with Union law”, to acquire permanent residence “under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC”. [↑](#footnote-ref-153)
154. *Mirga & Samin* cited *supra*  note 46; *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657. [↑](#footnote-ref-154)
155. *Commission v UK*, cited *supra*, note 45. [↑](#footnote-ref-155)
156. *Fratila*, cited *supra*, note 132, 28. [↑](#footnote-ref-156)
157. Ibid, 74, quoting Lady Hale in *R (Coll) v SSWP for Justice* [2017] 1 WLR 2093, 30. [↑](#footnote-ref-157)
158. Case C-460/06, *Paquay*,EU:C:2007:601, 29, 40. [↑](#footnote-ref-158)
159. Case C-41/17, *Isabel González Castro*, EU:C:2018:736, 63. [↑](#footnote-ref-159)
160. So the characteristic is indissociable from nationality, which would suggest direct discrimination according to AG Sharpston in Case C-73/08, *Bressol,* EU:C:2009:396, 53. [↑](#footnote-ref-160)
161. *Grzelczyk,* cited supra note 42, 29. [↑](#footnote-ref-161)
162. In the four weeks leading up to July 2020 there were 240 000 claims for Universal Credit: Department for Work and Pensions, *Official Statistics,* “Universal Credit Statistics: 29 April 2013 to 9 July 2020”, (11/08/2020) available at: <https://www.gov.uk/government/publications/universal-credit-statistics-29-april-2013-to-9-july-2020/universal-credit-statistics-29-april-2013-to-9-july-2020#claims-on-uc-header>. [↑](#footnote-ref-162)
163. Figures from the government’s response to a Freedom of Information Act request made by Martin Williams of the Child Poverty Action Group; Department for Work and Pensions, FOI2020/52309 (09/10/2020). [↑](#footnote-ref-163)
164. If we estimate that approximately 199 000 UK nationals applied for universal credit (total applications minus the number of EEA habitual residence tests). 3 000 habitual residence tests were completed for UK nationals (ibid). [↑](#footnote-ref-164)
165. 40 applicants; ibid. [↑](#footnote-ref-165)
166. The Commission’s submission in *Commission v UK*, op. cit. *supra* note 45, para 47 emphasis added. [↑](#footnote-ref-166)
167. *Fratila*, cited *supra* note 132, 31. [↑](#footnote-ref-167)
168. The Home Office states that “If you have pre-settled status, you can spend up to 2 years in a row outside the UK without losing your status”. (“Apply to the EU Settlement Scheme (settled and pre-settled status)”, available at: <<https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means>>. But later eligibility for *settled* status requires that there has not been an absence of over six months during the relevant five year period: Appendix EU, op. cit. *supra* note 6, *Definitions*, “continuous qualifying period” (b)(i). [↑](#footnote-ref-168)
169. As expressed in reference to the objective of Directive 2004/38 of “preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State”, *Dano*, 74. Fears of benefit tourism are however not well founded on evidence; see Dustmann and Frattini, “The fiscal effects of immigration to the UK”, 124 Economic Journal (2014); ICF GHK, “A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of

     residence”, Final report of 14 Oct. 2013, available at <ec.europa.eu/social/BlobServlet?docId

     =10972>. [↑](#footnote-ref-169)
170. Case C-220/12, *Thiele Meneses*, EU:C:2013:683, 43. [↑](#footnote-ref-170)
171. Case C-158/96 *Kohll*, ECLI:EU:C:1998:171, 41. [↑](#footnote-ref-171)
172. Case C-515/14 *European Commission v Cyprus* EU:C:2016:30, 54. [↑](#footnote-ref-172)
173. *Fratila*, cited *supra* note 132, 31. [↑](#footnote-ref-173)
174. *Commission v Cyprus*, cited *supra* note 172, 55. [↑](#footnote-ref-174)
175. On this strategy of immigration control, see Heindlmaier & Blauberger, “Enter at your own risk: free movement of EU citizens in practice”, *West European Politics,* (2017), 40(6), 1198. [↑](#footnote-ref-175)
176. *Fratila*, cited *supra* note 132, 15. [↑](#footnote-ref-176)
177. Notwithstanding the effects of retaining EU law as a matter of domestic law. [↑](#footnote-ref-177)
178. *Fratila*, 105, from the dissenting judgment of Dingemans LJ. [↑](#footnote-ref-178)
179. Art. 10(1)(a) WA. [↑](#footnote-ref-179)
180. Art. 10(1)(c) WA. [↑](#footnote-ref-180)
181. Art. 10(1)(e) WA . [↑](#footnote-ref-181)
182. Restoring public trust in immigration policy - a points-based non-discriminatory immigration system”, 1 June 2016, available at: <<http://www.voteleavetakecontrol.org/restoring_public_trust_in_immigration_policy_a_points_based_non_discriminatory_immigration_system.html>>. [↑](#footnote-ref-182)
183. Morgan & Radziwinowiczowna, “Post-Brexit, post-Covid-19, which EU citizens are at risk of deportation?”, Public Interest Law Centre, (01/06/2020), available at:

     https://www.thejusticegap.com/post-brexit-post-covid-19-which-eu-citizens-are-at-risk-of-deportation/. [↑](#footnote-ref-183)
184. Nic Shuibhne warns against the EU swallowing the anti-free movement rhetoric underpinning Brexit; any reforms must be “legally robust and problem-appropriate”, not based on a “hyper-ramping of circumstantial evidence and perceptions”; in “Reconnecting free movement of workers and equal treatment in an unequal Europe” 43(4) EL Rev (2018), 477, 509-10. [↑](#footnote-ref-184)