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Quick and uneasy justice

An administrative justice analysis
of the EU Settlement Scheme

Joe Tomlinson

UK Border



Public Law Project

The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

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- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

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Executive summary

The creation of the EU Settlement Scheme, a consequence of the UK's decision to withdraw from the European Union, is said to set "the tone for the design and values" of the new post-Brexit immigration system. While much has been written about the substantive legal changes this entails, this report seeks to offer an end-to-end administrative justice analysis of the design, and thus the underpinning values, of the Scheme.

Specifically, the analysis seeks to achieve two aims at once: analysing the Scheme on its own terms on the basis of what we know about its design; and analysing the Scheme as a case study of wider issues, both present and those to come, in the underlying model of administrative justice it adopts. This analysis demonstrates that the Scheme represents a new model of immigration administrative justice which relies more heavily on automation and technology.

The central suggestion of this report is that the Scheme represents an acceleration of an existing trend towards quick justice at the expense of important safeguards. The likely result of this shift, in the longer-term, is that there will be greater divergence in individual experiences of administrative justice within the context of immigration.

Foreword by Rt Hon Sir Stephen Sedley

Justice delayed may be justice denied, but the same can be true of justice done in haste. The EU Settlement Scheme shows disturbing signs of demonstrating the latter. This cautious and scholarly study shows why. Poorly reasoned, occasionally unintelligible, and above all inconsistent decisions in this critical area can not only ruin lives; they can become an expensive burden when challenged, and they can eventually bring public administration into disrepute.

These are among the many reasons why *Quick and Uneasy Justice* needs to be read and acted on by policy-makers, administrators, ministers and their advisers, and sooner rather than later. Reform in public administration, especially where it is dealing directly with members of the public, is too frequently delayed until crisis becomes scandal.

There is no need for this to happen, and every reason for anticipating and preventing it. Hence the timeliness of the PLP's intervention. Thirty years ago I was one of the group of lawyers and others who set up the Public Law Project, and it is heartening to see it continuing its work of constructive analysis and action. This well-informed and incisive publication needs to be read and heeded sooner rather than later.

Stephen Sedley

The Rt Hon Sir Stephen Sedley, former Lord Justice of Appeal

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The research was also supported by an engaged and knowledgeable expert working group. They helped shape the direction of the research and I am grateful to them for providing their valuable time to support this project. Outside of the working group, many experts lent their insights to the benefit of the research. In particular, I am grateful to Dr. Adam Harkens, Swee Leng Harris, Sam Smith, Phil Booth, and Dr. Oliver Butler for multiple conversations on automation in the public sector.

Finally, this project was made possible as a result of funding provided to the Public Law Project by the Legal Education Foundation. We are grateful for their continuing support and clear understanding of the value of law and justice research.

Working group

In advance of producing this report, PLP convened a working group of academics and practitioners with expertise in immigration law, administrative justice and human rights to act as a consultative body for this research project. The individuals listed below were members of this expert working group.

PLP is grateful for their guidance in producing this report. However, the report is the work of the author and its analysis and conclusions should not be attributed to either individual members of the working group or the institutions to which they are affiliated.

- Adrian Berry, Garden Court Chambers
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- Nicola Burgess, Joint Council for the Welfare of Immigrants
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Introduction

1. In the fraught and uncertain context of Brexit, the need to register EU citizens already resident in the UK presented a conundrum of policy, law, and administration. The answer that has been offered is the EU Settlement Scheme. It is expected that millions of people, from a wide variety of different backgrounds, will apply to this Scheme to secure their right to continue to reside in the UK after Brexit. To manage this demand, the government is adopting a process which includes online applications, partially-automated decision-making processes, and cross-departmental data-sharing agreements, offering a glimpse into a future of digital administration.¹ These novel features will be integrated into an existing immigration administrative justice landscape which is already undergoing a protracted phase of transition under intense political scrutiny.²
2. There are several dimensions of the Scheme which raise significant administrative justice issues.³ While any administrative scheme gives rise to issues of fairness,⁴ periods of significant political and legal transition can present acute challenges.⁵ Furthermore, the EU Settlement Scheme is being implemented at a time where there are already significant administrative justice concerns about initial decision-making by the Home Office and the functioning of associated redress mechanisms.⁶ Added to this, the

¹ See generally: P. Dunleavy, H. Margetts, S. Bastow, and J. Tinkler, *Digital Era Governance: IT Corporations, the State, and e-Government* (Oxford University Press, 2008); B.S. Noveck, *Wiki Government: How Technology Can Make Government Better* (Brookings Institute Press, 2009); J. Tomlinson, *Justice in the Digital State* (Bristol University Press, 2019). This report considers the general processes under the Scheme and not those applicable to individuals relying on derivative residence rights. Such applicants have been able to apply for settled status since 1 May but *cannot* use online applications and must request a paper application. While this raises multiple potential issues, our focus here is the generally applicable process.

² For critical analysis of policy in recent times, see: M. Goodfellow, *Hostile Environment: How Immigrants Become the Scapegoats* (Verso, 2019); A. Palmer and D. Wood, *The Politics of Fantasy: Immigration Policy in the UK After Brexit* (Civitas, 2017). On changes in modes of redress, see: R. Thomas and J. Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] *Public Law* 537.

³ For the seminal work on, and a definition of, administrative justice, see: J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983). Other literature has attempted to model administrative justice. For recent synthesis, see: T. Buck, R. Kirkham, and B. Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011) Ch.3; Z Richards, *Responsive Legality: The New Administrative Justice* (Routledge, 2018), Ch.1.

⁴ On the inevitable nature of these issues, see: J.L. Mashaw, 'Structuring a Dense Complexity: Accountability and the Project of Administrative Law' (2005) 5(1) *Issues in Legal Scholarship* 1; G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (Walter de Gruyter, 1987).

⁵ C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford: Hart, 2017).

⁶ For discussion of recent high-profile episode, see: House of Commons Home Affairs Select Committee, *The Windrush Generation* (6th Report of Session 2017-19). For concerns within the specific context of Brexit, see: House of Commons Home Affairs Select Committee, *Home Office Delivery of Brexit: Immigration* (3rd Report of Session 2017-19).

Government is claiming that the Settlement Scheme “sets the tone for the design and values of the new immigration system that we will implement from 2021.”⁷ While there has been active consideration of the substantive legal changes involved, there has not yet been a systematic end-to-end analysis of the model of administrative justice that the Scheme relies on, and holds out as the template for the future. The Scheme is therefore worthy of a careful administrative justice analysis, both on its own terms and to explore the wider patterns which it reveals.⁸

3. The administrative justice analysis of the EU Settlement Scheme offered in this report seeks to achieve two main aims at once: first, a detailed evaluation of the Scheme on its own terms on the basis of what we know about its design; and, second, an analysis of the Scheme as a model held out as representing the wider “design and values” of the post-Brexit immigration system. The analysis demonstrates that the Scheme represents a new model of immigration administrative justice which relies more heavily on digital technology, and specifically automation. The central suggestion is that, through the adoption of this new model, the Scheme continues a trajectory in immigration administrative justice which puts an emphasis on speed at the expense of important safeguards. It is also suggested that the long-term implications of this trade-off need to be confronted more explicitly.⁹ In particular, attention is drawn to how a probable consequence of the wider adoption of the model underlying the Scheme will be an increase in the gap between individual experiences of the same administrative justice process.¹⁰
4. New empirical evidence is not presented in this report, though the discussion is naturally rooted in available data on and experience of existing immigration processes. However, it is recognised that building an evidence base on the operation of the Scheme is imperative and the next logical step from the analysis presented here. It is further recognised that detailed and rigorous scrutiny of the Scheme’s performance will be a task that many different actors—including non-governmental organisations, researchers, Parliamentarians *etc.*—will undertake at various points in the coming years.¹¹ The hope

⁷ HM Government, *The UK’s Future Skills-Based Immigration System* (Cm 9722, December 2018) [9.19].

⁸ There has been a raft of more immediate policy responses, *e.g.* J. Rutter and S. Ballinger, *Getting it right from the start: Securing the future for EU Citizens in the UK* (British Future, 2019).

⁹ See generally: J. Easton, ‘Where to Draw the Line? Is Efficiency Encroaching on a Fair Justice System?’ [2018] 89(2) *The Political Quarterly* 246.

¹⁰ The focus is on immigration processes and there is a need for great care in generalising about the wider administrative justice system. The analysis does, however, raise wider issues of administrative justice at various points, especially those which have been neglected in the existing literature.

¹¹ It is worth noting that Article 159 of the Withdrawal Agreement requires the creation of an ‘independent authority’ with powers to ‘to conduct inquiries on its own initiative concerning alleged breaches of [EU Citizen’s rights] by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries.’ We do not consider this here but see: R. Hogarth, A. Stojanovic, and J. Rutter, *Supervision after Brexit: Oversight of the UK’s future relationship with the EU* (Institute for Government, 2018).

is that, in pursuing the two main aims set out above, this report is able to serve as a robust framework for both gathering and analysing evidence, while also suggesting hypotheses which require further assessment.¹²

5. This report is divided into four parts. Part one introduces and examines the political foundations of the Scheme, its legal basis, and its structure. Part two offers a typology of grievances liable to arise from decision-making under the Scheme. Part three assesses the approach to redress under the Scheme, and how well it fits the types of grievances liable to arise under it. Part four analyses the provision of legal advice and other types of support around the Scheme. The approach adopted here to analyse administrative justice issues within the Scheme therefore focuses on four features: the legislative and policy design of the Scheme (*i.e.* the rules); the initial application process; redress systems; and the support and advice landscape.¹³

¹² PLP are taking forward data collection work over the course of the Scheme.

¹³ It is recognised that there may be other valuable approaches to analysing administrative justice processes but these are considered to be the key elements of any end-to-end administrative justice analysis. The issues *vis-à-vis* technology and automation also raise some generally applicable points.

Legislative and policy design

Legislative context

6. There are close to 4 million citizens of other EU Member States enjoying rights of residence in the UK as a function of the free movement rules.¹⁴ These rights are set to be extinguished when the UK leaves the EU. As proclaimed in the Preamble of the key piece of legislation making provision for the post-Brexit immigration system, the Immigration and Social Security Co-ordination Bill, the central policy objective is to “[e]nd rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration.”¹⁵ Facilitating this change is not simple. Over the course of the UK’s participation in the free movement framework, a substantial number of EU citizens and their families have come to call the United Kingdom home, integrating into communities around the country.¹⁶ To quantify this more precisely, between 2004 and 2017, the foreign-born population in the UK nearly doubled from 5.3 million to around 9.4 million (see Figure 1).¹⁷ A substantial portion of that total number are EU citizens who have settled in the UK under different iterations of the free movement rules. By 2017, there were an estimated 3,438,000 non-Irish EU citizens living in the UK.¹⁸ In addition, there were 131,000 non-EU partners of EU citizens (including those from Ireland). The vast majority of these residents should be eligible to make applications to the EU Settlement Scheme.
7. The obvious and pressing need for certainty and clarity on the immigration status of EU citizens resident in the UK—and UK citizens resident in the EU—is why the general area of citizens’ rights was considered a priority for both the UK and the EU when negotiations under Article 50 of the Treaty on European Union first started.¹⁹ The first substantive policy document published by the UK Government after the referendum sought to highlight its intentions on the position of EU27 nationals living in the UK, and British nationals living in other EU Member States.²⁰ Similarly, a position paper transmitted to

¹⁴ The varying estimates which range between 3.5 million and 4 million, see: Migration Advisory Committee, *EEA Migration in the UK: Final Report* (2018); M. Sumption and Z. Kone, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (Oxford Migration Observatory, 2018).

¹⁵ Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC 309).

¹⁶ For general discussion, see: S. Bennett, *Constructions of Migrant Integration in British Public Discourse: Becoming British* (Bloomsbury, 2018); E. Recchi, A. Favell, F. Apaydin, R. Barbulescu, M. Braun, I. Ciornei, N. Cunningham, J. Diez Medrano, D. Neriman Duru, L. Hanquinet, J. Solgaard Jensen, S. Pötzschke, D. Reimer, J. Salamonska, M. Savage, and A. Varela, *Everyday Europe: Social Transnationalism in an Unsettled Continent* (Bristol University Press, 2019). High-profile migrant movements emerged in the UK in response to Brexit, such as The 3million.

¹⁷ C. Rienzo and C. Vargas-Silva, *Migrants in the UK: An Overview* (Oxford Migration Observatory, 2018).

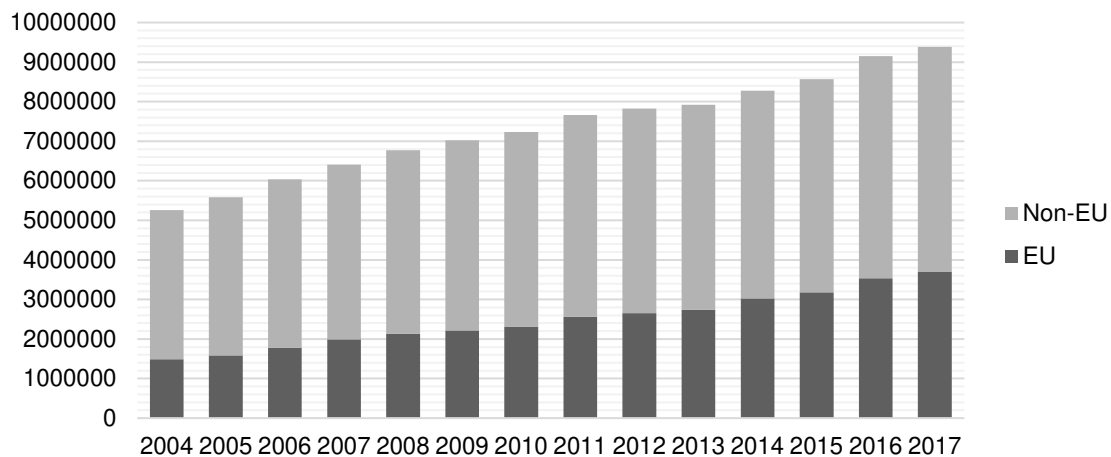
¹⁸ This figure excludes residents of communal establishments (e.g. hostels).

¹⁹ HM Government, *Rights of EU Citizens in the UK* (June 2017).

²⁰ HM, *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* (June 2016, Cm 9464).

the UK by the European Commission in 2017 emphasised “the essential principles on citizens' rights” and the importance of securing “the same level of protection as set out in Union law at the date of withdrawal of EU27 citizens in the UK and of UK nationals in EU27.”²¹

Figure 1: Foreign-born population, EU and Non-EU (2004-2017)



8. Initial signals of good intent were crystallised in the earliest version of the Draft Withdrawal Agreement between the UK and the EU, published in March 2018. In that early draft of the Agreement, the chapter dealing with *Citizens’ Rights* was one of the areas marked out as being “agreed at negotiator level and [would] only be subject to technical revision.”²² This included an obligation for host Member States (including the UK) to “allow” applications for a residence status which would maintain the rights enjoyed by EU citizens across the Union during a proposed transition period.²³ This discretion found expression in Article 19 of the Withdrawal Agreement.²⁴ The EU Settlement Scheme—commonly referred to as the Settled Status scheme—is the administrative realisation of this commitment.

Legislative design: form

9. Perhaps the first key question for the delivery of any administrative scheme is what Paul Craig describes as its “legislative design.”²⁵ This provides the scope and structure of a

²¹ European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom Under Article 50, *Position Paper on “Essential Principles on Citizens’ Rights”* (TF50 (2017) 1/2 Commission to UK, 12 June 2017).

²² European Commission, *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* (Version highlighting the progress made in the negotiation round with the UK of 16-19 March 2018).

²³ *Ibid*, Article 17(a).

²⁴ Department for Exiting the European Union, *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Atomic Energy Community, as endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018* (2018).

²⁵ P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015).

scheme, and is usually set out in the relevant primary legislation, delegated legislation, and soft law.²⁶ In the case of the EU Settlement Scheme, the basis of the scheme has been provided for through additional appendices to the Immigration Rules.²⁷ From the perspective of established practice, the use of the Immigration Rules in this context is not surprising. The Rules have been the preferred mode of regulation, despite possessing various limitations, for successive governments since the Immigration Act 1971 came into force.²⁸ Furthermore, from the perspective of the broader context of the political circumstances of the UK's withdrawal from the EU, the grounding of the EU Settlement Scheme in the Immigration Rules can also be understood as part of the transition of the regulation of EEA migration into the general framework of UK immigration law.

10. Nevertheless, using the Immigration Rules as the legislative basis for the Scheme remains controversial. Three prominent objections can be identified. First, the Rules do not provide for adequate Parliamentary scrutiny either at first instance when they are made, or subsequently when they are amended through the statement of changes mechanism enabled by the same 1971 Act.²⁹ The Immigration Rules are drafted by the Home Office and the default position is that they are scrutinised by Parliament in a manner analogous to statutory instruments laid before Parliament under the negative resolution procedure—a process about which there has been long-standing concerns.³⁰ Second, there is also the concern that the Rules lack the status and authority of primary legislation. The Immigration Lawyer Practitioners' Association (ILPA) has argued that the use of the Rules is unsatisfactory given that the EU Settlement Scheme implements a commitment in an international treaty which will only be ratified after approval by Parliament, in a *sui generis* process which will include the enactment of primary

²⁶ 'Legislative design' is often not sufficiently integrated into administrative justice analysis but is often the seed of successes and problems. Much law is of course secondary legislation or produced in policy forms. On the soft law, see generally: G. Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart, 2016); R. Rawlings, 'Soft Law Never Dies' in D. Feldman and M. Elliott (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015).

²⁷ Immigration Rules Appendix EU: Citizens and Family Members and Immigration Rules Appendix AR (EU).

²⁸ For a recent comprehensive overview, see: The Law Commission, *Simplification of the Immigration Rules: Consultation Paper* (Consultation Paper 242, 2019).

²⁹ Section 3(2), Immigration Act 1971.

³⁰ There is much analysis on the use and scrutiny of statutory instruments. This spans much of the history of the modern administrative state in the UK, see e.g. C.T. Carr, *Delegated Legislation; Three Lectures* (Cambridge University Press, 1921); G. Hewart, *The New Despotism* (Ernest Benn, 1929); R. Fox and J. Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014); E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart, 2001); A. Tucker, 'Parliamentary Scrutiny of Delegated Legislation' in A. Horne and G. Drewry (eds), *Parliament and the Law* (Hart, 2018). Note, however, there is a debate about whether the rules are strictly delegated legislation, see: *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230; *R v Chief Immigration Officer, Heathrow Airport* [1976] 1 WLR 979, [1976] 3 All ER 843; *R v Secretary of State for Home Affairs* [1977] 1 WLR 766, [1977] 3 All ER 452; *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32, [2012] 1 WLR; *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208; Hansard (HL), 12 October 1971, vol 324, col 321 (Lord Windlesham).

legislation as required under the European Union Withdrawal Act 2018.³¹ Third, the availability of statement of changes as a mechanism to amend and/or repeal the Rules leaves the Scheme open to repeated changes by Home Office Ministers. This is notwithstanding the Scheme's foundation in a potential international agreement between the UK and the EU.

Legislative design: substance

11. Appendix EU of the Immigration Rules makes provision for two immigration statuses. It essentially provides for special forms of indefinite leave to remain and limited leave to remain. Though the statuses are popularly referred to as "settled status" and "pre-settled status," including by officials these two phrases do not appear in the Immigration Rules.³² Instead, Appendix EU uses the staple language of "indefinite leave to remain" and "limited leave to remain."³³ Both the eligibility and suitability criteria under the EU Settlement Scheme have been described as "generous" when contrasted with the more stringent position which applies to entitlement to permanent residence under the free movement framework and leave to remain under UK immigration law generally.³⁴ Hence, the UK Government has been at pains to emphasise that "the main requirement for eligibility under the settlement scheme will be continuous residence in the UK."³⁵ This is because the eligibility criteria for both types of leave granted under the Scheme are devoid of the onerous non-residence related requirements under the free movement regulations.³⁶ For example, Appendix EU has no requirement for applicants to have comprehensive sickness insurance, and the grant of indefinite leave to remain under the Scheme is vitiated by a lengthier, five-year period of continuous absence from the UK, as opposed to the shorter two-year period of absence for the purposes of maintaining permanent residence under the 2006 Regulations.³⁷

12. Generally, to be eligible for indefinite leave to remain under the Scheme, an EU citizen, or their qualifying family member, ought to have completed a continuous period of five years of residence in the UK with the qualification that "no supervening event has occurred."³⁸ For the purposes of this Scheme, a continuous period of residence means an applicant has been resident in the UK, and has not been absent from the country for more

³¹ As required under Section 13, European Union Withdrawal Act 2018; ILPA, 'Commentary on the EU Settlement Scheme and Appendix EU' (5 November 2018) [2.1-2.3].

³² These terms were first used in a position paper by the UK Government: *HM, 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* (June 2016, Cm 9464).

³³ For example, see: Rule EU1, Immigration Rules Appendix EU: EU Citizens and Family Members.

³⁴ Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018 [3.1-3.9]).

³⁵ *Ibid*

³⁶ Part 3, The Immigration (European Economic Area) Regulations 2006.

³⁷ Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), p.13.

³⁸ Rule EU11, Appendix EU to the Immigration Rules.

than six months within any twelve-month period. Furthermore, within that five years, the applicant ought not have been absent from the UK for a period exceeding 12 months without an “important reason” justifying their absence. Examples of what constitute “important” reasons include childbirth, serious illness, study, vocational training or an overseas work posting.

13. In addition to having less stringent eligibility criteria compared to the requirements for permanent residence or indefinite leave generally, applications to the EU Settlement Scheme are also subject to less onerous suitability criteria compared to that applied to applications for leave in other parts of the Immigration Rules. As the Home Office outlined at the outset, the general intention was to “identify any serious or persistent criminals, or anyone who poses a [national] security threat.”³⁹ This intention was first translated into fourfold criteria under which applications could be refused on a mandatory basis if the applicant was: subject to an extant deportation order or of a decision to make such an order; the subject of an extant exclusion order or exclusion decision; the subject of a removal decision on the grounds of their non-exercise or misuse of the rights conferred by the Citizenship Directive;⁴⁰ and/or had submitted false or misleading information in their application.⁴¹ The third element of this initial suitability criterion generated controversy as it appeared to deviate from the promise to exclude only serious and persistent criminals from the Scheme. A judicial review brought by the Joint Council for the Welfare of Immigrants (JCWI) against the Home Office sought to challenge this mandatory exclusion of applicants who satisfy the eligibility criteria but were “subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC.”⁴² JCWI contended that the expansiveness of what was then Rule EU 15(c) of Appendix EU was such that it was disproportionate in its effect, and a breach of a legitimate expectation that only serious and persistent criminals were to be excluded from the Scheme.⁴³ In response to this claim, before applications to the Scheme fully opened on 30 March 2019, the Home Office settled JCWI’s claim by agreeing to incorporate the principle of proportionality into the application of that specific element of the suitability criteria to applications made under the EU Settlement Scheme.⁴⁴

³⁹ Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) [1.13].

⁴⁰ Directive 2004/38/EC.

⁴¹ Secretary of State for the Home Department, ‘Statement of Changes in Immigration Rules’ (Cm 9675, 20 July 2018), inserting a new Appendix EU to the Immigration Rules, to provide for applications by resident EU citizens and their family members for leave to remain in the UK under the EU Settlement Scheme.

⁴² Secretary of State for the Home Department, ‘Statement of Changes in Immigration Rules’ (Cm 9675, 20 July 2018); Rule 15(c), Appendix EU.

⁴³ CWI, *Broken Promises: The EU Nationals the Government Intends to Remove after Brexit* (25 October 2018), pp. 2-5.

⁴⁴ Rule EU16(b), Immigration Rules Appendix EU.

14. Applicants who lack the requisite five-year period of continuous residence in the UK at the date of application are eligible for a type of limited leave to remain granted under the EU Settlement Scheme - pre-settled status.⁴⁵ At a minimum, in order to be granted pre-settled status under the Scheme, an applicant ought to evidence at least one month of residence in the UK within the six-month period before they make their application.⁴⁶ This will grant limited leave to remain in the UK for five years.
15. Even though the EU Settlement Scheme is constituted of these two distinct types of leave, there is an important interplay between the two immigration statuses. Applicants granted limited leave to remain under this part of the Immigration Rules will become eligible for the indefinite leave to remain after completing the requisite five-year period of continuous residence in the UK. Evidence from the first two trial-phases, which is considered below, suggests that when information in an application on the residence requirement is incomplete, the approach is to grant pre-settled status. However, individuals granted limited leave to remain (pre-settled status) under the Scheme will be vulnerable to future changes in the Immigration Rules. The political exigencies of the UK's withdrawal from the European Union also mean that when the deadline for making applications has passed and the procedural safeguards offered by membership of the EU are no longer available, subsequent Governments could alter the terms of the Scheme or divert resources from its administration to the detriment of those who have been granted pre-settled status. The major concern here is that the large number of individuals being granted pre-settled status - a time-limited form of leave to remain - creates the risk of a significant number of individuals being left without a legal basis for remaining in the UK when that leave expires.
16. So far, three statutory instruments have been made, by negative resolution procedure, which limit the rights conferred by pre-settled status.⁴⁷ Before these SIs came into force, an individual granted pre-settled status had the same right to benefits, allocation of housing, and homelessness assistance as anyone granted settled status (or any other form of indefinite leave to remain). Following the SIs coming into force, in order for an individual with pre-settled status to access certain types of benefits and tax credits, as well as housing assistance, they now require an additional EU right to reside in the UK, in addition to the limited leave to remain they obtain under pre-settled status. This creates a new layer of differentiation between the effects of the two statuses. There is, of course, scope for further differentiation in the coming years.

Legislative design: temporal dimensions

⁴⁵ Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) [1.13].

⁴⁶ Rule EU14, Immigration Rules Appendix EU.

⁴⁷ The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019; Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019; The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019.

17. The Scheme has essentially been designed to be a “pop-up” measure, intended not as a permanent fixture but to facilitate a transition to a “unified” immigration system in which EU citizens are subject to the same regulatory scheme as other immigrants.⁴⁸ There is therefore an important temporal dimension to the Scheme’s structure, which has a variety of consequences for its administration.⁴⁹
18. The Scheme operates on the basis of a “specified date” by which EU citizens ought to have been resident in the UK in order to be eligible to make applications. In the scenario in which the UK leaves the EU with the Withdrawal Agreement in place,⁵⁰ implementing a transition period, the date by which EU citizens should have been resident in the UK in order to apply to the Scheme is 31 December 2020.⁵¹ In the circumstance of the UK withdrawing from the EU without a Withdrawal Agreement in place, only those EU citizens residing in the UK by exit day can make applications to the EU Settlement Scheme.⁵² Furthermore, under such a no-deal scenario, the deadline for making applications shifts forward from 30 June 2021 to 31 December 2020.⁵³ This has the consequence of cancelling out the six-month grace period required by the present Withdrawal Agreement, and thus shortening the time available to EU citizens and their family members to make applications to the Scheme.⁵⁴
19. The way the timeframes for the Scheme have been conceived can be seen as serving the purpose of incentivizing a steady—and thus manageable—flow of applications to the Scheme.⁵⁵ However, the varying potential timeframes may create complexity and confusion for those making applications to the Scheme, and potentially for those administering it. Furthermore, the time limits on when applications can be made and those that apply to family members seeking to join a grantee under the Scheme may

⁴⁸ The plans for a future skills-based immigration system are set out in: HM Government, *The UK’s Future Skills-Based Immigration System* (Cm 9722, December 2018)

⁴⁹ Issues of time and temporality have been under-developed in the administrative justice literature but there has been interest from public administration and policy scholars, see e.g.: M. Howlett and K.H. Goetz, ‘Introduction: time, temporality and timescapes in administration and policy’ (2014) 80(3) *International Review of Administrative Sciences* 477; C. Pollitt, *Time, Policy, Management: Governing with the Past* (Oxford University Press, 2008). There has been a more longstanding interest in sociology, see generally: J. Hassard (ed.), *The Sociology of Time* (Palgrave Macmillan, 1990); B. Adam, *Time* (Polity Press, 2004).

⁵⁰ In place in the sense that the Agreement is approved and enacted in accordance with the requirements of section 13 of the European Union Withdrawal Act 2018.

⁵¹ Immigration Rules: Appendix EU, Annex 1 – Definitions.

⁵² Department for Exiting the European Union, *Citizens’ Rights – EU Citizens in the UK and UK Nationals in the EU* (6 December 2018) [7].

⁵³ *Ibid* para [9].

⁵⁴ Department for Exiting the European Union, *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Atomic Energy Community, as endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018* (2018), Article 18(1)(b).

⁵⁵ S. Altmann, C. Traxler, and P. Weinschenk, ‘Deadlines and Cognitive Limitations’ (IZA Institute of Labour Economics, 2017).

create harsh results, especially in those cases on the boundary or with otherwise exceptional circumstances.

20. The most important administrative justice implication of the temporary nature of the Scheme is, however, that we have to essentially see the scheme as two administrative justice processes: one before the deadline and one after. Before the deadline, the processes as discussed here will apply. After the deadline (whenever it is), the administrative justice challenge will be shifted to the handling of out-of-time applicants. It is not clear yet how that issue will be handled or what the scale of the issue will be, but it is a challenge which the design of the Scheme effectively stores for another day.

Registration and decision-making

The streamlined application

21. All of the above legal and policy framework naturally places a significant and complex demand on administration.⁵⁶ The Home Office's job in this respect, as the Commons Home Affairs Select Committee observed, is "unprecedented in scale."⁵⁷ Due to the considerable number of people eligible to apply for the new immigration status, over a relatively short prescribed period, there are inevitably questions about the capacity of administration to cope with the sheer number of applicants. There is also a particular set of administrative hurdles associated with the introduction of an immigration status for a category of migrants whom hitherto have not been required to formalise their residence status within the framework of domestic immigration rules. The main response of the Home Office has been to develop a new "streamlined" process for applications. The uniqueness and pressure of the task has forced policy and administrative creativity. While we should be cautious to judge innovation at the outset, there is a real sense in which the Scheme is a giant experiment in administrative justice.

22. In practice, this streamlined application generally relies on two platforms: an app downloadable on a mobile phone or tablet, and an online form filled on the UK Government's website. Those who fall within the personal scope of the Scheme must submit information on both of these two platforms which evidences three broad categories: identity, residence, and suitability. The process is as follows. First, an applicant may submit information which verifies their identity through the EU Exit: ID Document Check app. This is a smartphone application supported by the Android operating system. Once on the app, the applicant is required to confirm whether they are an EU citizen or a non-EU citizen family member. Thereafter, the applicant is required to submit an email address and a phone number through which they can receive an "authentication code," which they will then be asked to enter on a page on the app. Following that, the applicant has to lay their device over their identity document (a passport for EU citizens or a biometric ID card for non-EU citizen family members) so that the biometric chip on the document can be scanned. The applicant is then asked to scan their face, before taking a passport-sized style photo. The applicant is presented with a page with their passport details which they are asked to confirm. Once this is complete, they are provided with a link to the second platform, the online application form.

⁵⁶ For general analysis of the impact of Brexit on administration, see: J. Tomlinson and L. Lovdahl-Gormsen, 'Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit' (2018) 20 *Cambridge Yearbook of Legal Studies* 233.

⁵⁷ House of Commons Home Affairs Select Committee, *Home Office Delivery of Brexit: Immigration* (HC 421, 2017-2019) [11].

23. If an applicant cannot use the app, they can book an appointment to use the “EU Settlement Scheme: ID document scanner” service. An applicant must attend the appointment in person. Once the ID document has been scanned they can make the rest of the application online later using a computer or any other device with internet access. The person must bring their biometric passport from an EU country, Iceland, Liechtenstein, Norway or Switzerland and a mobile phone that can receive text messages or a device that can receive email to their appointment. The document scanner locations are administered by local authorities, some of which charge for the service.
24. An applicant must send their identity document by post if they have a non-EU or EEA passport, biometric residence permit or non-biometric ID card. They can also send any other document in the post if they cannot use the ID Document Check app. The government’s website provides that an individual can get their document back as soon as it has been scanned, which could be before they receive a decision. Once an applicant has posted their document, they can continue with their application online.
25. Once on the GOV.UK website, applicants are required to log-in with personal details from their passport and the same combination of phone number and email address as used for the app or scanner. They then indicate whether they are applying for settled status or pre-settled status. Applicants must declare whether they hold dual nationality or have held other nationalities in the past. In that section of the online form, they also have to confirm whether they have been known by any other names. At this point, a National Insurance Number is then entered, which allows the Home Office to conduct an automated data check—using existing HMRC and DWP data—to determine the residence element of the Scheme’s eligibility criteria. Next, applicants are asked questions relating to the suitability criteria for the Scheme, *i.e.* if they have any criminal convictions or been involved in extremist activity. An applicant is required to make a threefold declaration: that they are present in the UK when making the application; that the information they submitted is correct to the best of their knowledge; and that they are eligible for the scheme on the basis of the cross-departmental automated checks, or further information they hold showing the relevant period of continuous residence in the UK. For EU citizens, the immigration status granted under this Scheme come in the form of an official electronic document accessible through credentials sent via email. The grantee can then share the electronic document as proof of their immigration status where this is sought by service providers, including with their employer or landlord. An individual will not get a physical document unless they are from outside the EU, EEA or Switzerland and do not already have a biometric residence card.

Testing

26. In preparation for the task ahead, the Home Office has been introducing and testing the processes for acquiring leave under the EU Settlement Scheme ahead of the end of the Article 50 negotiation period.⁵⁸ The phased implementation and testing of components of the Scheme very much mirrors that of other big administrative reform projects in recent years, especially those involving technology.⁵⁹ The hallmark of this “test and learn”—or “agile”—process is that components of a process are designed and improved in real time as part of the process of implementation.⁶⁰ The timelines involved here created a particularly compacted design process.
27. The first phase of testing ran from 28 August to 17 October 2018. The scope of those eligible to make applications was limited to EU citizens working at 12 NHS Trusts in the North West and students and staff affiliated to Liverpool Hope University, the University of Liverpool and Liverpool John Moores University. According to the official Report on this phase of testing, there were “no refusals” and “all applicants [were] granted the leave that they expected.”⁶¹ In this initial testing phase, ad hoc centres were set up in the respective place of work and study, and eligible individuals were required to book an appointment before making an application. The structure of this phase of testing was such that it allowed on-site support by officials.
28. For the testing, staff observed how applicants “interacted with the application process and sought feedback to inform future releases of the system.”⁶² The report established that 1053 applications were received and by 30 October 2018, 924 decisions had been made and sent out to applicants. Of these, 591 (64%) were granted settled status. Of those 591 applicants, 93 individuals (16%) were granted settled status either on the basis that they held a Permanent Residence documentation or prior Indefinite Leave to Remain.⁶³ 333 (36%) were granted pre-settled status. Given the design of the application process for the EU Settlement Scheme, perhaps the key finding from this testing phase was the relatively high proportion of what the Home Office has been describing as “straightforward” applications—these are cases where the requisite continuous period of residence in the UK was proved using automated data checks or the applicant was already holding a document which evidenced permanent residence or indefinite leave to

⁵⁸ The original end point was 29 March 2019.

⁵⁹ A similar approach has been adopted for the ‘Universal Credit’ programme: National Audit Office, *Rolling Out Universal Credit* (HC 1123, 2017-2019).

⁶⁰ J. Tomlinson, *Justice in the Digital State* (Bristol University Press, 2019), Ch.4. See also: A. Clarke and J. Craft, ‘The Twin Faces of Public Sector Design’ (2018) *Governance* (online pre-publication); A. Clarke and J. Craft, ‘The Vestiges and Vanguards of Policy Design in a Digital Context’ (2017) 60(4) *Canadian Public Administration* 476; L.G. Anthopoulos, P. Siozos, and I.A. Tsoukalas, ‘Applying participatory design and collaboration in digital public services for discovering and re-designing e-Government services’ (2007) 24(2) *Government Information Quarterly* 353.

⁶¹ Home Office, *EU Settlement Scheme – Private Beta Testing Phase 1 Report* (2018).

⁶² *Ibid*, p.2.

⁶³ *Ibid*, p.3.

remain.⁶⁴ In this first phase of testing, of the 924 decisions decided by 30 October 2018, there were 787 (85%) such straightforward cases. In the remaining 137 cases (15%), the applicant either had to provide additional evidence or partially rely on the automated data checks.⁶⁵ The high incidence of straightforward cases at this stage is perhaps indicative of the purported streamlined process which attempts to shift the evidential burden from the applicant to administration. However, as the Home Office itself cautioned, “findings in this phase cannot be extrapolated to identify the likely customer experience for all 3.5 million resident EU citizens and their family members.”⁶⁶ The relatively small cohort of participants in this initial testing phase had particular characteristics which sought to “support” the testing of individual components of the application process as opposed to the system as a whole.⁶⁷ The high incidence of what the Home Office designates as straightforward cases is likely to be a result of the peculiar characteristics of the demographic groups to which the testing was limited (employed NHS staff, university staff, and students).

29. The second phase of testing ran from 1 November 2018 to 21 December 2018. According to the Home Office report, a total of 29,987 applications were made during this phase.⁶⁸ The personal scope of the second testing phase included staff employed by the 12 NHS Trusts and the three universities in the initial testing phase, plus three more NHS Trusts in that region. In addition, eligibility to make applications in this phase extended to staff employed by higher education institutions across the UK, looked after children in five Local authorities in England, and to those working in health and social care across the UK. Even with its wider scope, the second testing phase was also deliberately calibrated not to capture everyone who will be eligible to apply to the Scheme when it fully opens in March 2019. According to the Home Office, those specific groups were selected in part to support the testing of specific aspects of the system, namely the identity verification app and automated checks of HMRC and DWP data.⁶⁹
30. Of the total number of applications received, 27,211 decisions had been made and sent out to applicants by 14 January 2019. Of these, 19,105 (70%) are reported to have been granted settled status and 8106 (30%) were granted pre-settled status. As was the case with the first round of testing, of the decided applications, there were no refusals. Of the applications for which there was a decision by 14 January 2019, 22,723 (84%) could be categorised as straightforward cases in the sense defined above, *i.e.* the decision is made

⁶⁴ Ibid, p.3.

⁶⁵ According to the report “nearly two thirds only had to provide additional evidence for part of their residence, as the remainder of their residence was demonstrated through automated data checks,” see *ibid*, p.4.

⁶⁶ Ibid, p.2.

⁶⁷ For example, during this phase of testing there was an emphasis on the automated checks of HMRC data.

⁶⁸ Home Office, *EU Settlement Scheme: Private Beta Testing Phase 2 Report* (2019).

⁶⁹ Ibid, p.3.

on the basis of automated checks against HMRC and DWP data, or because the applicant already held a valid permanent residence document or indefinite leave to remain.⁷⁰

31. The second phase of testing also saw recourse to the system of administrative review which accompanies the Scheme. By 14 January 2019, 11 applications for administrative review had been received and processed, and a further 13 were outstanding.⁷¹ In all the decided applications for administrative review, the applicant was challenging grants of pre-settled status instead of settled status.⁷² Of these, 10 resulted in a grant of settled status and one original decision was maintained.⁷³

32. A final public beta testing launched on 21 January 2019 and closed on 29 March 2019. The purpose of the public beta testing phase was to test the scheme at scale and to prepare for the public launch on 30 March 2019. The public beta testing phase was deliberately limited to applications using either an EU passport or a biometric residence card as proof of identity and nationality. This was to allow continued testing of the EU Exit: ID Document Check app. 200,420 applications, from all EU27 countries, were received over 68 days. 187,959 of those applications had been decided by 16 April 2019. 69% were granted settled status, 31% were granted pre-settled status, and no applications were refused status under the scheme. Applicants usually received a decision within 1-4 days. Where extra evidence was required from the applicant or the applicant was required to send in their identity document, this took longer. 161 applications did not result in a grant of leave or a refusal, because they were withdrawn by the applicant; rejected as invalid because they did not submit their passport for verification where they had been unable to use the app; or could not be processed because, for example, they were a derivative rights case not eligible to apply before 30 March 2019 or were void because for example the applicant was a British citizen. There were, however, outstanding cases. Almost 6,000 were reported to be instances where applicant had mistakenly claimed to hold a valid permanent residence document or existing indefinite leave to remain and so had not paid a fee or provided evidence of residence. The causes of other outstanding cases were said to be cases where applicants had not supplied sufficient evidence of residence or where the applicant had to send in their identity document. The government claims these results can largely be extrapolated to the general population of EU citizens.

33. These initial Home Office testing results generally paint, at least at a surface level, something of a reassuring picture. However, much of the testing was conducted on a relatively small scale and dealt with many “straightforward” cases.⁷⁴ Furthermore, the

⁷⁰ Ibid, p.7.

⁷¹ Ibid, p.8.

⁷² Ibid, p.8.

⁷³ Ibid, p.8.

⁷⁴ For analysis, see: Independent Chief Inspector of Borders and Immigration, *An inspection of the EU Settlement Scheme* (2019), pp.5-6.

testing only related to partially-managed application processes and administrative review (*i.e.* Home Office internal processes). It is imperative to interrogate the full end-to-end model of administrative justice, including redress systems, which has informed the design of the Scheme. This is the analysis we provide in the next two sections.

Initial decision-making and automation

34. Determining immigration applications is a difficult business⁷⁵ and there have long been concerns about decision-making in the Home Office, as well as the quality of administrative decision-making in the UK more generally.⁷⁶ Immigration decision-making requires the application of complex law and policy and is usually carried out by relatively junior caseworkers.⁷⁷ The evidence presented by applicants is, for a range of reasons, highly variable.⁷⁸ Home Office decision-making procedures offer an inherently limited form of justice. They are made in short timeframes and under substantial pressure to determine large volumes of applications overall (c.3.5 million each year).⁷⁹ The core aspiration of this kind of process is for decisions to be made efficiently and with accuracy.⁸⁰ The Settlement Scheme represents a significant departure from the Home Office norm *vis-à-vis* initial decision-making. The norm is a paper application on a form, with attached evidence, submitted to a human caseworker who then makes the decision based on law and policy. A decision letter usually then follows. This typical system will be part of the process under the Scheme, but it will effectively become an ancillary process, with automated data checks being given priority, and on the basis of the trials conducted so far, the sole basis on which a decision is made in the majority of cases. This switch fits into a pattern of a rapidly growing role of technology, and particularly automation, in the

⁷⁵ See generally on the complexity of frontline official decision-making: M. Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage, 1980); B. Zacka, *When the State Meets Street* (Harvard University Press, 2017).

⁷⁶ For an exploration of the types of problems identified, see: Administrative Justice and Tribunals Council, *Right First Time* (2011). For materials relating to the specific context of immigration, see: Home Affairs Committee, *The Work of the UK Border Agency*, (HC 587, 2010-11); Amnesty International, *Get it Right: How Home Office Decision Making Fails Refugees* (2004); Amnesty International/Still Human Still Here, *A Question of Credibility* (2013); Independent Chief Inspector of Borders and Immigration, *Entry Clearance Decision-Making* (2011).

⁷⁷ The Law Commission is currently undertaking a law reform project considering the complexity of the immigration rules: The Law Commission, *Simplification of the Immigration Rules: Consultation Paper* (Consultation Paper 242, 2019). See also: M. Williams, 'Legislative Language and Judicial Politics: The Effects of Changing Parliamentary Language on UK Immigration Disputes' (2017) 19 *British Journal of Politics and International Relations* 592.

⁷⁸ There may be numerous reasons for this, such as applicants not having access to historic documents or documents from another jurisdiction.

⁷⁹ Independent Chief Inspector of Borders and Immigration, *Annual Report for the Period 1 April 2017 to 31 March 2018* (June 2018), p.15.

⁸⁰ J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983) (discussing the 'bureaucratic rationality' model).

Home Office and immigration administration more generally.⁸¹ Such use of automation is also growing in the UK public sector more generally.⁸²

35. The automated part of the application process will use an algorithm to check HMRC and DWP data for proof of residency.⁸³ Specifically, three fields of data—an applicant’s name, date of birth, and national insurance number—is sent automatically to the DWP and HMRC. Once this information has been received by those two Departments, it is transferred to a “Citizen Matching Layer,” which identifies the applicant and searches the respective Departmental databases for details about the matched applicant. The information is then relayed back to the Home Office and transferred to its “business logic”—an algorithm which is yet to be disclosed publicly—which processes the information to establish the period of continuous residence in the UK.⁸⁴ The basic details of this data sharing is set out at Table 1 and the data sharing system between HMRC and the Home Office is represented at Figure 2.⁸⁵ It is at this point that a caseworker and the applicant see one of three outcomes: a pass (5 years period of residence); a partial pass (less than 5 years of residence); or a fail (meaning the information sent from the Home Office’s application programming interface matches no existing records). It is at this final stage of the automated check where human official engagement begins. Where the data checks result in a partial pass, and the applicant is seeking indefinite leave to remain, they will be required to submit additional evidence for those periods not sourced by the automated data checks. This can be done through uploading the requisite documents online or sending them through by post.

⁸¹ There has been reporting on various systems which led to a debate in the House of Commons recently, see: HC Deb 19 June 2019, vol 662, cols 316-325. For a recent investigation of data systems in the Home Office, see: The Bureau of Investigative Journalism, *Government Data Systems: The Bureau Investigates* (London: 2019). For research from Canada covering similar trends, see: Citizen Lab, *Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada’s Immigration and Refugee System* (University of Toronto, 2018).

⁸² M. Veale and I. Brass, “Administration by Algorithm? Public Management Meets Public Sector Machine Learning” in K. Yeung and M. Lodge, *Algorithmic Regulation* (Oxford: OUP, 2019). Automation in the public sector is not new, but its use has certainly been accelerating in recent years. For wider discussion and analysis on its current use in the UK, see: Algorithm Watch, *Automating Society: Taking Stock of Automated Decision-Making in the EU* (Berlin: 2019); L. Dencik, A. Hintz, J. Redden, H. Warne, *Data Scores as Governance: Investigating uses of citizen scoring in public services* (Cardiff: Data Justice Lab, 2018); House of Commons Science and Technology Committee, *Algorithms in decision-making: Fourth Report of Session 2017-19* (HC351, 2018).

⁸³ P. Booth, *Automated Data Checks in the EU Settlement Scheme* (MedConfidential, 2019).

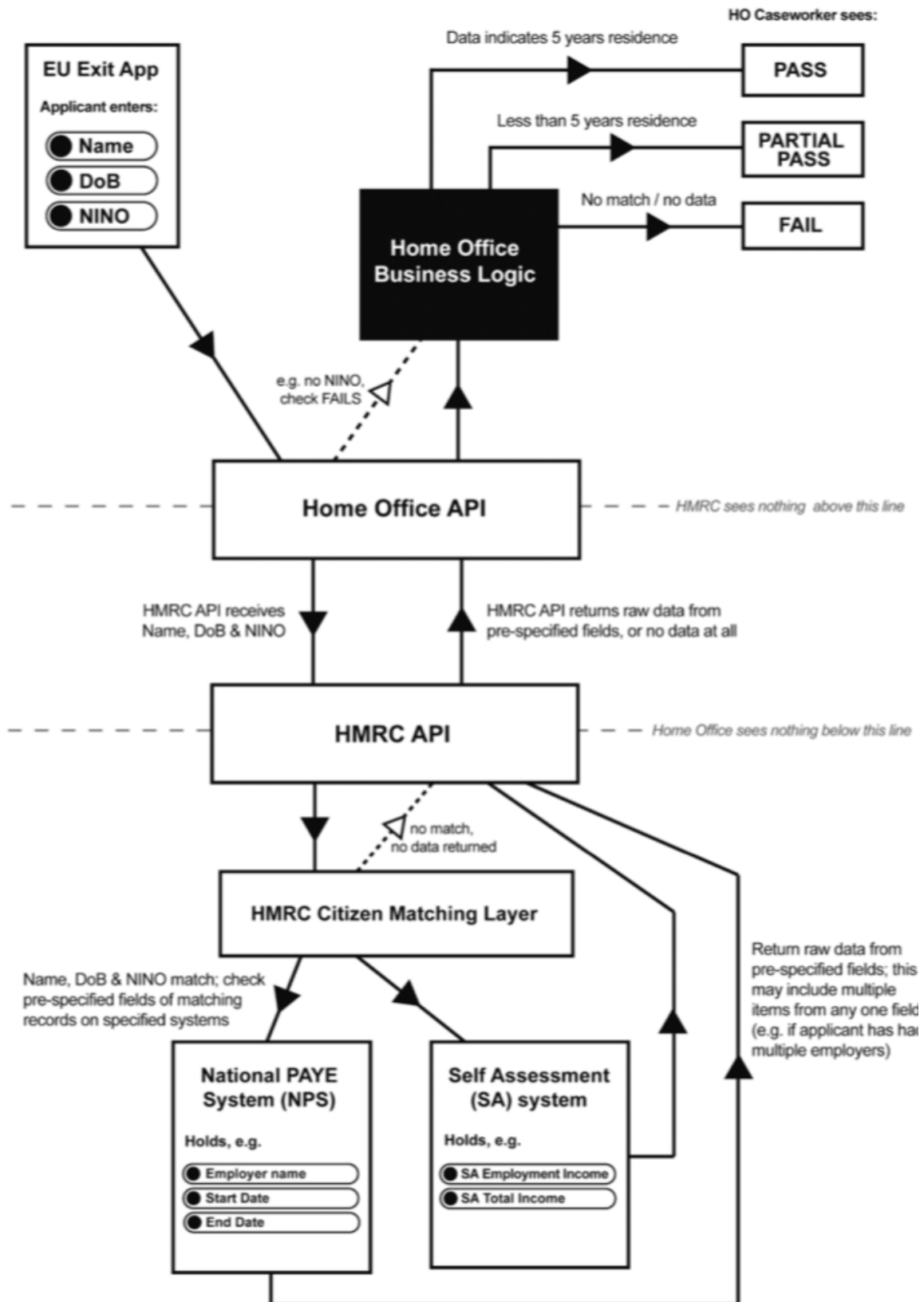
⁸⁴ On the concern about such systems generally, see: F. Pasquale, *Black Box Society: he Secret Algorithms That Control Money and Information* (Massachusetts: Harvard University Press, 2016).

⁸⁵ Figure 2 is taken from the analysis in: P. Booth, *Automated Data Checks in the EU Settlement Scheme* (MedConfidential, 2019).

Table 1: General data sharing structure

	HMRC	DWP
Data fields shared	<ul style="list-style-type: none"> • Employer Name • Employer Reference • Employer Address • Start date • Leaving date • Taxable payment • Payment frequency • Date self-assessment ('SA') record set up • SA Employment Income • SA Self Employment Income • SA Total Income • Tax year • Tax Return Date of Receipt 	<ul style="list-style-type: none"> • Correlation ID • Start date • End date • Benefit type • Date of death • Gone abroad flag • State Pension and New State Pension • Housing Benefit • Jobseekers Employment Support Allowance • Carer's Allowance • Universal Credit • Personal Independent Payment • Disability Living Allowance • Income Support • Maternity Allowance • Incapacity Benefit • Attendance Allowance • Severe Disablement Allowance
Legal basis of data sharing	<ul style="list-style-type: none"> • Section 18, Commissioners of Revenue and Customs Act 2005 (to be read in conjunction with sections 17 and 20 of that Act and section 19, Anti-Terrorism, Crime & Security Act 2001) • Section 36, Immigration, Asylum & Nationality Act 2006 • Section 40, UK Borders Act 2007 • Section 21, Immigration and Asylum Act 1999 • Section 36, Immigration, Asylum and Nationality Act 2006 • Common Law Power of the Secretary of State 	<ul style="list-style-type: none"> • Section 20, Immigration and Asylum Act 1999 (as amended by Section 55, Immigration Act 2016) • Common Law Power of the Secretary of State

Figure 2: Home Office and HMRC data sharing scheme



36. The benefits of the Home Office's evolved design for determining applications are multiple, but two are often cited as being most important. First, there is the cost saving. Conservatively, hundreds of thousands of applications will be determined by automated decisions alone. The *Memorandum of Understanding (Process) between HMRC (Data Directorate) and Home Office* is one of two agreements that enables the automated checks process. The MOU states that the "estimated API development and delivery charges in respect of Income Verification and EU Exit Settlement Schemes are estimated @ £1.1m." This figure does not represent all of the costs of the automated aspects of the Scheme but it is indicative that the planned costs of the Scheme will be very low compared to more traditional forms of decision-making.⁸⁶ This potentially reduces the costs to the taxpayer. Second, the automated checks are very quick. Many who pass through them successfully will get a decision email in very little time. This is no minor gain: one of the major preferences of citizens using administrative justice processes is widely understood to be speed of decision-making.⁸⁷ How and if these checks work in practice—and whether these potential benefits are realised—will likely play an important role in shaping important norms concerning how administration uses automatic decision-making in the coming years.

Types of possible grievance

37. Though it is important to keep the potential benefits of the Home Office's approach to applications in mind, it is equally important, as part of any administrative justice analysis, to examine carefully what grievances an initial decision-making process is liable to give rise to, and thus what shape the demand for redress may take. Michael Adler has articulated a typology of administrative grievances, conceived in respect of non-digital administration, which can help identify the potential problems in this respect (see Table 2).⁸⁸ His framework disaggregates types of grievance and groups them in "bottom-up" (*i.e.* ordinary) terms and a "top-down" (*i.e.* elite) terms.⁸⁹ This has the benefit of a typology that "meshe[s] well with the ways in which people define and describe the problems that they experience but would probably not have reflected some very important analytical distinctions."⁹⁰ Using Adler's typology, it is possible to construct an indicative survey of the types of administrative grievances liable to arise under the

⁸⁶ According to the Impact Assessment, the Scheme is expected to cost the Home Office between £410 million and £460 million, depending on the number and types of applicants. The Impact Assessment also noted that the Scheme was expected to generate between £170 and £190 million in revenue, depending on the number and types of applicants, see: Home Office, *Impact Assessment for EU Settlement Scheme* (HO0316, July 2018).

⁸⁷ See *e.g.* A. Bryson and R. Berthoud, 'Social Security Appeals: What Do the Claimants Want?' (1997) 4 *Journal of Social Security Law* 17.

⁸⁸ M. Adler, 'Constructing a Typology of Administrative Grievances: Reconciling the Irreconcilable?' in R. Banakar and M. Travers, *Theory and Method in Socio-Legal Research* (Hart, 2005), pp.287-288.

⁸⁹ *Ibid*, p.288.

⁹⁰ *Ibid*, p.289.

Settlement Scheme model specifically, and by extrapolation, those entailed in the proposed model for the future of immigration administration as a whole.

Table 2: Typology of administrative grievances

Top-Down Typologies	Bottom-up Typologies	Composite Typologies	Examples
Error of fact Error of law Abuse or misuse of discretion/discrimination	Unjust decisions and Actions	Decision wrong or unreasonable	Decision perceived to be wrong or unfair Decisions involving discrimination Decisions that involve imposition of unreasonable conditions Refusal to accept liability
Incompetence Unreliability Lack of respect Lack of privacy Lack of responsibility No apology	Administrative errors Unacceptable treatment by staff	Administrative errors Unacceptable treatment by staff	Records lost or misplaced; no record of information received Staff rude and unhelpful; staff incompetent or unreliable; presumption of 'guilt' by staff; threatening or intimidating behaviour by staff; staff do not acknowledge mistake or offer apology
Unacceptable delay	Delay	Unacceptable delays	Delays in making appointments; delays in making decisions; delays in providing services.
Lack of participation No information	Information or communication problems	Information or communication problems	Lack of information; conflicting or confusing information; poor communication; objections ignored by staff; lack of privacy.
Lack of choice Resources Value for money	Service unavailable Service deficient in quality or quantity	Benefit/service unavailable or deficient in quality or quantity or too expensive	Benefit/service withdrawn (either for everyone or some people); benefit /service deficient in quantity or quality.
Policy	General objections to policy	General objections to policy Other grievances	Policy unacceptable Other types of grievance not covered in the [composite] typologies.

38. An important preliminary point, however, is that the experience of the application process, and any subsequent complaint will, to varying extents, be conditioned by the circumstances of the individual applicant concerned. Within the population of EU citizens resident in the UK, there are different sub-categories who likely will present challenges for the administration of the Scheme.⁹¹ Notably, there are various vulnerable groups. For instance, 3.3% of EU nationals age 16 to 59 interviewed in the year ending March 2017 said that they had been victims of domestic abuse within the past year.⁹² Individuals with mental health problems may also struggle with the application process, especially if their cases are complex. In 2017, 45,000 non-Irish EU citizens reported that they had mental health, depression and related conditions as a significant health problem.⁹³ Naturally, the EU citizen population also includes a substantial number of children. In 2017, there were an estimated 727,000 children under the age of 18 reported as EU citizens based on the Labour Force Survey.⁹⁴ This figure is not wholly robust due to the way the data is collected, yet the Oxford Migration Observatory estimates that a minimum of 55,000 children would need to apply, and possibly substantially more.⁹⁵ Some groups of eligible applicants may not necessarily be vulnerable *per se* but may present a challenge for the operation of the Scheme. For instance, there are many long-term residents. By 2017, 92,000 EU citizens had lived in the UK for at least 40 years, 146,000 for at least 30 years, and 284,000 for at least 20 years.⁹⁶ One of the key risks here is that those with longer periods of residence may not be as proactive in applying for status, believing the Scheme is for more recent migrants or those without certification of their permanent residence status. Each individual will have particular traits which condition their experience of the Scheme. Such demographics are directly relevant to how the Scheme will be experienced but the analysis here proceeds at a general level.

39. When applying Adler's typology to identify the scope for and nature of grievances potentially arising from the Scheme, it is helpful to think in terms of two spheres of decision-making: the automated decision; and the traditional process. In practice, these spheres are closely linked, and the relationship between the two spheres itself raises some questions, but they constitute distinct processes and therefore are liable to create different grievances also.⁹⁷ Placing both of these categories against Adler's composite

⁹¹ M. Sumption and Z. Kone, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (Oxford Migration Observatory, 2018).

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ See generally: House of Commons Science and Technology Committee, *Algorithms in decision-making: Fourth Report of Session 2017-19* (HC351, 2018); A. Le Sueur, 'Robot Government: Automated Decision-Making and its Implications for Parliament' in A. Horen and A. Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart, 2016). On the importance of considering the interplay between the automated and human decision-makers, see: R. Kitchin, 'Thinking critically about and researching algorithms' (2017) 20(1) *Information, Communication*

typology and drawing upon what is known about the design of the Scheme, and recent experience with immigration administrative justice more broadly, it is possible to identify six broad types of key grievance liable to arise.

40. First, there are those decisions perceived to be wrong or unreasonable. There are a range of familiar concerns in this respect, *e.g.* decisions that are legally flawed, decisions involving discrimination, refusal to accept liability, and decisions where relevant evidence was not considered. One major concern with the Settlement Scheme are those cases where applicants simply may not have the necessary evidence, raising a question of how decision-makers will respond to this. Issues in this respect may, for instance, be particularly acute for those in the precarious labour market or those who are part of communities where stability in employment and residence is less common, for example Roma communities.⁹⁸ The use of automated checks also opens up the possibility of new decision-making behaviours, and thus creates scope for new types of grievance of this kind.⁹⁹ One example may be automation bias, *i.e.* that a decision-maker may favour information produced by a computer over the evidence and claims submitted by the applicant through traditional channels.¹⁰⁰ The system of automated checks itself is also liable to produce various problems. For instance, the basis—or rationale—of automated decisions are unclear. It is understood that the automated data checks will not be retained by the Home Office, creating further concerns about the lack of an audit trail.¹⁰¹ This can make decisions difficult to challenge or even difficult to understand. It is unclear whether applicants will be able to know what information about them has been disclosed to the Home Office by the DWP and HMRC via automated checks.¹⁰² The automatic check mechanism may also give rise to grievances based on perceived discrimination, which is a widespread concern as regards algorithm-based processes.¹⁰³ There is no magic to these systems: they run on information held in databases. The quality of the decision turns heavily on the quality of the database being fed in to the algorithm and the selection of the scope of the database to be included. Two issues have already generated debate in this respect. First, there is the observation that DWP data is of lesser quality than HMRC data (HMRC is a digitally-advanced authority). The concern here is that vulnerable people are more likely to pass through DWP systems than HMRC systems (given their functions), and will therefore be at greater risk of being tripped up by the

& *Society* 14; S.R. Geiger, 'Bots, bespoke, code and the materiality of software platforms' (2014) 17(3) *Information, Communication & Society* 342.

⁹⁸ Joint All Party Parliamentary Group, *Roma and Brexit* (2018).

⁹⁹ See generally: J. Raso, 'Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-Making in Ontario Works' (2017) 32(1) *Canadian Journal of Law & Society* 75.

¹⁰⁰ M.T. Dzindolet, S.A. Peterson, R.A. Pomranky, L.G. Pierce, and H.P. Beck, 'The role of trust in automation reliance' (2003) 58(6) *International Journal of Human-Computer Studies* 697.

¹⁰¹ *Ibid*, p.19.

¹⁰² Open Rights Group and ILPA, 'EU Settled Status Automated Checks: Proposed outcomes, concerns and questions' (2019).

¹⁰³ For a widely-read account of key concerns, see: V. Eubanks, *Automating Inequality* (St. Martin's Press, 2018).

DWP's allegedly lower-quality input data. Second, data from working tax credit, child tax credit, and child benefit records, all managed by HMRC, is *not* being shared. As it is more likely that women are in receipt of these benefits, there is a risk that the exclusion of this data means women are at a greater risk of not passing the automated check.

41. Second, there are those grievances flowing from administrative errors or unacceptable behaviour by staff. Again, many of the grievances liable to arise under the Settlement Scheme are familiar concerns, *e.g.* where staff are rude and unhelpful, where staff are incompetent or unreliable, where there is a presumption of deception by staff, where staff do not acknowledge a mistake or offer an apology, where records are lost or misplaced, or where there is no record of information received. Typical risks here may be mitigated by the particular purpose of the Scheme, which is designed to be generous. The new automated checks system, however, adds a new layer of complexity here too, creating the scope for grievances on the basis of technical faults afflicting individual decisions or where decisions are being based on erroneous or otherwise deficient databases.¹⁰⁴ The mainstream use of automation also opens up the risk of mistaken data leaks and similar problems. Furthermore, some problems with the application of technology are not within the reach of the Home Office. For instance, during the second phase of testing it was found that one EU member country had not implemented one of the international biometric data standards in its passports, which caused the app to identify applications as fraudulent.¹⁰⁵ Another country had used defective chips.
42. Third, grievances may arise from what is perceived to be unacceptable delays. The Home Office has a long history of complaints around delay. There is a clear risk, given the scale of the administrative challenge, that caseworkers making decisions in the Home Office are overwhelmed, especially without further investment in staffing.¹⁰⁶ With the automated checks, delays may be created by technical errors, the system being overwhelmed, or general all-out system failures. During phase two testing, there were two occasions where "a technical disruption" prevented HMRC data being returned to applicants, one of which resulted in the service being temporarily suspended. Inspectors were told this was "an unplanned outage of HMRC systems over a weekend," which had resulted in applicants receiving a "not found" message.¹⁰⁷ Given that speed is one of the widely-claimed benefits of automation, a key issue will be whether the underpinning technology is sufficient to realise that benefit.

¹⁰⁴ For concerns about the databases being relied upon for the Scheme, see P. Booth, *Automated Data Checks in the EU Settlement Scheme* (MedConfidential, 2019).

¹⁰⁵ Independent Chief Inspector of Borders and Immigration, *An inspection of the EU Settlement Scheme* (2019), p.18.

¹⁰⁶ House of Commons Home Affairs Select Committee, *Home Office Delivery of Brexit: Immigration* (3rd Report of Session 2017-19).

¹⁰⁷ Independent Chief Inspector of Borders and Immigration, *An inspection of the EU Settlement Scheme* (2019), p.20.

43. Fourth, grievances may arise from information or communication failings. Grievances of this sort may arise where people are unaware of the Scheme.¹⁰⁸ It may also relate to a lack of information or awareness about how the system works, *e.g.* lack of awareness of deadlines. Given much of the process is digitalized, information about assisted digital services, and the information provided by those services, also may be a source of grievances.¹⁰⁹ Beyond this, there may be familiar issues of flawed communications of decisions and with decision-makers. Perhaps the most important issue from a legal perspective is the meaningful communication of a reasoned decision.¹¹⁰ As the basic logic of the automated checks is not known, it is not entirely clear how the traditional notion of a reasoned administrative decision fits with the Scheme.
44. Fifth, there are grievances which flow from a service being perceived to be unavailable, deficient, or expensive. The particular aspects of the Scheme which may pose problems in this respect include, for example, absence of gateway data needed to use services. A clear example of this is a child. Children are unlikely to receive positive results from the data checks because they will not have a National Insurance Number and are less likely to have any engagement with DWP or HMRC. The digital dimensions of the Scheme also create some particular issues, such as the risk of people being digitally excluded from the service.¹¹¹ Another prominent concern around the Scheme's use of technology is that parts of the application are only compatible with Android smartphones, cutting out vast parts of the population who do not use Android devices or who do not have a smartphone at all.
45. Sixth, there is scope for general objections to policy underpinning the Scheme. In many ways, it is difficult to separate out the policy debate around the Settlement Scheme from wider policy and political debates surrounding migration and Brexit. For instance, some perceive that the need to apply is, in principle, wrong. The Joint Council for the Welfare of Immigrants argued for a "declaratory system" in which people who fall under the scope of the Scheme would register for, as opposed to apply for, the immigration status.¹¹² However, there are a range of more specific policy oriented grievances which could arise under the Scheme. The automated data checks add a new set of considerations here too. We are already seeing growing general objections to government departments sharing

¹⁰⁸ Public awareness of the Scheme is considered in more detail below.

¹⁰⁹ Assisted digital services are discussed in more detail below.

¹¹⁰ *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71. For discussion, see: M. Elliott, 'Has the Common law duty to give reasons come of age yet?' [2011] *Public Law* 56.

¹¹¹ This point is discussed further below.

¹¹² JCWI, *Guaranteeing Settled Status for EEA Nationals* (February 2019).

administrative data and automating processes.¹¹³ Other objections may pertain to the overall lack of transparency in the process.

46. While the possible benefits of the government's approach must be kept in mind, it is clear there are a range of risks involved in the design which are liable to give rise to grievances. Many of these risks are inherent in administrative processes generally but some are specific to the Settlement Scheme and its use of automated checks. The survey here provides a more precise conceptualisation of what an effective system of redress ought to be able to grapple with and fix. The next section of this paper considers the UK Government's approach to redress under the Settlement Scheme, and the extent to which it adequately fits the grievances liable to arise.

¹¹³ For critical analysis of previous attempts to data share for the purposes of immigration administration, see: L. Hiam, S. Steele, M. McKee, 'Creating a 'hostile environment for migrants': the British government's use of health service data to restrict immigration is a very bad idea' (2018) 13(2) *Health Economics, Policy and Law* 107; Liberty, *Care Don't Share: Why we need a firewall between essential public services and immigration enforcement* (Liberty, 2018).

Redress: administrative review, tribunal appeals, and judicial review

47. While political pressures may prove a corrective to high-profile systemic flaws that grab headlines from time to time, there is an accepted need for robust redress mechanisms through which individual applicants can challenge adverse decisions.¹¹⁴ An applicant refused an status under the Scheme before 31 December 2020 can make a further application.¹¹⁵ This means that, in many instances, fresh applications can be made to avoid an onward challenge, potentially providing a quicker and better fix. Redress processes are therefore particularly valuable for those who keep running into a problem at the first stage of decision-making which no amount of fresh applications can resolve, or those who have been assigned what they believe to be an incorrect status. A central administrative justice question to be asked of the Settlement Scheme is what the approach to redress will be for those in this position. The approach in this respect also forms part of the administrative justice vision for the new post-Brexit immigration system. This issue, however, has been something of a sideshow to the discussions around registration and some important issues here are under the control of HM Courts and Tribunals Service (HMCTS) and not the Home Office. This third part of the report therefore interrogates the redress element of the model of administrative justice underpinning the Scheme.

Current models of immigration redress

48. Before turning to what the government is proposing in respect of redress, it is helpful to start with the current operation of immigration redress. There are essentially three main systems. First, there is administrative review.¹¹⁶ This is a mechanism whereby another official in the Home Office reviews the papers from the initial decision for casework errors. The decision can then be changed if there is an error. Second, there are tribunal appeals.¹¹⁷ An appeal is an oral or paper process in the First-tier Tribunal (Immigration and Asylum Chamber) where all aspects of the merits of the initial decision are considered by an independent tribunal judge.¹¹⁸ The judge can substitute a new decision for the Home Office decision. As part of ongoing HMCTS reforms, many of these appeals

¹¹⁴ See e.g. Home Affairs Committee, *The Windrush Generation*, HC Paper 990 (Session 2017–19).

¹¹⁵ Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) [5.18].

¹¹⁶ R. Thomas and J. Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] *Public Law* 537 (providing a full analysis of available evidence and recent reforms).

¹¹⁷ J. Tomlinson and B. Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal' (2019) 33(1) *Journal of Immigration, Asylum & Nationality Law* 47 (providing a full analysis of evidence and recent reforms).

¹¹⁸ There is also an upper tribunal appeal right in some instances.

are due to move online.¹¹⁹ Finally, there is judicial review. This is a process which, in immigration cases, usually takes place in the Upper Tribunal (Immigration and Asylum Chamber). A judge reviews a decision on the basis of narrow legality grounds (e.g. procedural fairness, human rights) rather than providing a consideration of the full merits.¹²⁰ There is a permission stage and, if that is passed, a substantive hearing. The judge can declare a decision unlawful and the decision then has to be retaken afresh by the Home Office.¹²¹ Judicial review is also potentially expensive. Unless they are eligible for legal aid or are granted a Costs Capping Order, claimants are at risk of paying the legal costs of both sides if they lose.¹²² It is possible to imagine different systems of redress being used, but the contemporary policy imagination in this context largely revolves around these three models.

49. These three systems each have their own complex ecosystems, and benefits and disadvantages. They each deal with large and fluctuating caseloads, and have been the subject of extensive reforms in recent years. It is difficult to reduce complex system changes that have occurred in recent years into one overarching trend. However, there is one clear dominant policy drift: that tribunal appeal rights have been restricted, placing greater emphasis on administrative review and judicial review. Recent reforms therefore, collectively, represent a major de-judicialisation of the overall immigration administrative justice system.¹²³ Many applicants, who once had the opportunity of a tribunal appeal before an independent judge, before falling back on judicial review, now only have access to administrative review. There have been some benefits of de-judicialisation, such as reduced costs for the state and quicker decisions. However, the available evidence suggests the growing use of administrative review has resulted in a system where individuals are significantly less likely to succeed in overturning an adverse immigration decision.¹²⁴ Before access to the tribunal was severely restricted by provisions in the Immigration Act 2014, around 49% of appeals were successful.

¹¹⁹ Ministry of Justice, *Transforming Our Justice System* (London, 2016), p.15. For discussion, see: J. Tomlinson and B. Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal' (2019) 33(1) *Journal of Immigration, Asylum & Nationality Law* 47. For wider analysis of the reforms, see: J. Tomlinson, *Justice in the Digital State* (Bristol University Press, 2019), Ch. 3; J. Rozenberg, *The Online Court: Will IT Work?* (Legal Education Foundation, 2017); H. Genn, 'Online Courts and the Future of Justice' (The Birkenhead Lecture, Gray's Inn, 2017). There is a vast literature on online dispute resolution which there is not space to cover here. For some overviews, see: E. Katsh and O. Rabinovich-Einy, *Digital Justice* (Oxford University Press, 2017); B. Barton and S. Bibas, *Rebooting Justice* (Encounter Books, 2017).

¹²⁰ A philosophy famously articulated in *Associated Provincial Picture House, Limited v Wednesbury Corporation* [1948] 1 K.B. 223.

¹²¹ For analysis of how this process works, see: R. Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] *Public Law* 652; R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, 2019).

¹²² See generally: R. Low-Beer and J. Tomlinson, *Financial Barriers to Judicial Review: An Initial Assessment* (London: Public Law Project, 2018).

¹²³ R. Thomas and J. Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] *Public Law* 537.

¹²⁴ *Ibid.*

Whereas, over the same period in 2015/16, the success rate for administrative reviews conducted in the UK was 8%, falling to just 3.4% the year after.¹²⁵ In this changing landscape, it was an open question whether applicants to the Settlement Scheme, which has been widely claimed to be “more generous” in its design, would be given access to a tribunal or not. This questions *still* remains open.

Proposed model of redress under the Settlement Scheme

50. When the long-awaited Immigration and Social Security Co-ordination (EU Withdrawal) Bill finally arrived before Parliament in late 2018,¹²⁶ it was widely expected that a tribunal appeal right would be included for those making use of the Settlement Scheme.¹²⁷ These rights were, however, not present in what was a rather thin piece of legislation, mostly constituted of delegated powers (much of the substantive legal and policy changes around immigration are being implemented through statutory instruments).¹²⁸ As the Home Office indicated in its *Statement of Intent* on the Settlement Scheme published in June 2018, primary legislation is required to make provision for a tribunal right and it was expected this would be in place when the Scheme opened in March 2019.¹²⁹ At present, only a system of administrative review against enumerated decisions made under this Scheme has been established, via the Immigration Rules.¹³⁰
51. Appendix EU identifies two broad categories of decisions amenable to administrative review. First, applicants can seek a review of decision taken under that Scheme if it relates to a refusal of an application under paragraph EU6 of Appendix EU because the applicant does not meet the eligibility requirements for either indefinite leave to remain or limited leave to remain under Appendix EU. Second, applicants can make an application for administrative review of decisions which relate to the grant of limited leave to remain under paragraph EU3 of Appendix EU. Notably, administrative review is not available against a decision where an application is refused on suitability grounds.¹³¹ In contrast to the administrative review system generally run by the Home Office, the system under the Scheme allows an individual to submit further evidence, which will then be considered alongside their original application by another Home Office caseworker. An application for administrative review comes with an £80 fee.

¹²⁵ Ibid.

¹²⁶ Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC 309).

¹²⁷ Home Office, *EU Settlement Scheme: Statement of Intent* (2018).

¹²⁸ Immigration, Nationality and Asylum (EU Exit) Regulations 2019; Immigration (European Economic Area Nationals) (EU Exit) Order 2019; The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019; Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019; The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019.

¹²⁹ Home Office, *Statement of Intent* (2018) [5.19].

¹³⁰ Immigration Rules Appendix AR (EU): Administrative Review for the EU Settlement Scheme.

¹³¹ Rule EU15 and EU16, Appendix EU (AR).

52. The availability of an appeal right for the Scheme was agreed to in the Withdrawal Agreement. The relevant part of the Withdrawal Agreement provides that the pre-existing safeguards for decisions made under the free movement framework also apply to decisions concerning the residence rights of persons who fall under the scope of the Settlement Scheme.¹³² These safeguards principally include “the right to access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision.” Furthermore, under the applicable EU law incorporated into the Agreement, “the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the [decision] is based.”¹³³ This commitment is partly why the UK Government initially promised that a right of appeal against decisions made under the Settlement Scheme would be introduced. In the Government’s own words, “this would allow the UK courts to examine the decision to refuse status under the scheme and the facts or circumstances on which the decision was based.”¹³⁴ Even though the Home Office has now committed to fully implementing the EU Settlement Scheme in the event of the UK withdrawing from the EU without a withdrawal agreement in place—the so-called no-deal scenario¹³⁵—it seems that the Scheme will be without the right of appeal repeatedly promised in previous policy documents. According to a policy paper published by the Department for Exiting the EU in December 2018, in the event of a “no deal” Brexit: “EU citizens would have the right to challenge a refusal of UK immigration status under the EU Settlement Scheme by way of administrative review and judicial review.”¹³⁶ The situation now therefore seems to be that: if there is a withdrawal agreement, and an accompanying Withdrawal Agreement (Implementation) Bill inclusive of an appeal right, then applicants to the Scheme will have access to a tribunal appeal. If there is not a deal, inclusive of an appeal right, then applicants will not have access to a tribunal appeal. Put simply: no deal, no appeal.

Analysis of the proposed model of redress

53. What does this approach reveal about the vision of administrative justice envisioned under this novel Scheme? One possible answer to this question is that immigration redress appears to be an afterthought of the government compared to initial application processes. At one level, this can be justified. There are good reasons for the focus to be on initial decision-making processes, making sure they work well, and prevent the need

¹³² Article 21, *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018*.

¹³³ Article 31, Directive 2004/38/EC.

¹³⁴ Home Office, *Statement of Intent* (2018) [5.19].

¹³⁵ Department for Exiting the European Union, *Policy Paper: Citizens’ Rights – EU Citizens in the UK and UK Nationals in the EU* (2018) [9].

¹³⁶ *Ibid* [11].

for redress in the first place.¹³⁷ However, at the same time, the design of this Scheme reveals a lack of joined-up thinking about the overarching process an individual may pass through, while it is being claimed that “user-friendliness” is being prioritised.¹³⁸ The departmental and operational divide between the Home Office (responsible for initial decisions and administrative review) and HM Courts and Tribunals Service (responsible for tribunals and judicial review) may be, at least in part, responsible for this apparent disjuncture.¹³⁹

54. From another perspective, what is perhaps most striking about the approach to redress under the Scheme is that it appears to be the conscious policy position that the type (and thus quality) of administrative justice that individuals will be afforded is contingent upon a withdrawal agreement being approved by Parliament. Of itself this reveals, perhaps more than any other aspect of the process, how the politics of Brexit and immigration is explicitly shaping the nature and quality of redress processes. To the extent the Scheme reflects the “design and values of the new immigration system,” it is a vision of process based as much on political and economic considerations as it is a pure justice “design vision.”
55. Perhaps the key question, however, is whether the redress system design being adopted for the Settlement Scheme is the correct one to deal with the grievances liable to arise, as identified above.¹⁴⁰ At a general level, there could be a well-grounded concern, based on recent experience, that the absence of a tribunal appeal would lead to a weaker overall system of redress. Based on the analysis of the specific nature of grievances liable to arise set out above, there are two particular issues in this context.
56. First, the automated checks system creates the possibility of novel types of grievance. These include, for instance, grievances which cut across both principles of data and privacy law, as well as the application of general public law principles to automated algorithmically-determined decisions.¹⁴¹ Some consideration has been given to how judicial review may handle such automated decisions, but there has yet to be a case and

¹³⁷ Administrative Justice and Tribunals Council, *Right First Time* (2011); R. Thomas, ‘Administrative Justice, Better Decisions, and Organisational Learning’ [2015] *Public Law* 111.

¹³⁸ For background discussion on the rise of user-centred design in administrative justice policy, see: J. Tomlinson, ‘The Grammar of Administrative Justice Values’ (2017) 39 *Journal of Social Welfare and Family Law* 524.

¹³⁹ This has long been the state of affairs, as was noted in M. Freedland, *The Crown and the Changing Nature of Government* in S. Payne and M. Sunkin, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999).

¹⁴⁰ V. Bondy and A. Le Sueur, *Designing Redress: A Study About Grievances Against Public Bodies* (London: Public Law Project, 2012).

¹⁴¹ There is only very limited discussion on this in the UK, see: M. Oswald, ‘Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing discretionary power’ [2018] *Philosophical Transactions of the Royal Society A*; J. Grace, ‘Algorithmic impropriety’ (Working Paper, 2018); J. Cobbe, ‘Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making’ (2019) *Legal Studies* (forthcoming).

the application of principles are unclear.¹⁴² It could be argued that a tribunal appeal is more fitted to the job of considering the substance of such an issue, given it can engage squarely with the facts of the case and re-take the whole decision. Either way, the Scheme may be the site where judicial review is confronted with automated public sector decision-making.

57. Second, although the EU Settlement Scheme has novel features which mitigate the need for administrative redress, as is the case in other immigration contexts, the matters arising are still fact-intensive. Notwithstanding the use of the automated data checks and the self-administered identity checks, there is still scope, for instance, for ambiguity around decisions concerning an applicant's commencement of residence in the UK, the validity of documentation, and even the identity of an applicant itself. In the last resort, if these facts are at issue, it may be optimal for them to be resolved through an adjudicative procedure looking at all aspects of a claim. As a result, for those who saw administrative review to be a sub-standard redress alternative for tribunal appeal in recent years, it is likely the process will also be seen as sub-standard in the context of the Scheme. Alternatively, it could be the case that administrative review becomes more effective with the scope to introduce new evidence for the reviewer to consider.
58. From a wider perspective, these points highlight how the design of the Scheme does not rest on a coherent theory of fit between grievances liable to arise and the modes of redress adopted. From one viewpoint, this could be viewed as a failure of policymaking. At the same time, administrative justice research is perhaps not as developed as it could be in this respect. There is a range of inductive and deductive attempts to generate principles of redress and redress design.¹⁴³ We also have a relatively developed general accounts of the value of legal forms of justice compared to political and other modes of securing justice against the state.¹⁴⁴ Perhaps the most advanced account is Bondy and Le Sueur's work on redress design.¹⁴⁵ Yet we do not have a sufficiently developed theory of, as Le Sueur and Bondy put it, what "a good 'fit' between the types of grievance and the redress mechanism" looks like.¹⁴⁶ Building a more sophisticated account of this will involve various complex considerations, including: categories of wrongfulness; whether disputes are about legality, about the merits of decisions, or complaints about maladministration; whether disputes are about facts, points of law, or the exercise of discretion; the type of power used by the public body; whether a decision is polycentric;

¹⁴² Other jurisdictions, such as the U.S., has started to see constitutional law challenges, e.g. *Loomis v. Wisconsin*, 137 S. Ct. 2290 (2017).

¹⁴³ For an overview and example, see: Administrative Justice and Tribunals Council, *Developing principles of administrative justice* (2010); Administrative Justice and Tribunals Council, *Principles of administrative justice* (2010).

¹⁴⁴ See e.g. J. King, *Judging Social Rights* (Cambridge University Press, 2012), Ch. 3.

¹⁴⁵ V. Bondy and A. Le Sueur, *Designing Redress: A Study About Grievances Against Public Bodies* (Public Law Project, 2012).

¹⁴⁶ *Ibid*, p.37 (where this is stated as their seventh design principle).

the nature of remedies likely to be seen as sufficient; the gravity of an uncorrected error; and whether professional expertise is required.¹⁴⁷ A general level theory will only take us so far too, as policy and administrative contexts will vary. But the Settlement Scheme shows us clearly the need for thinking along these lines, as the absence of it appears to be an important limiting factor in the policy imagination about how best to address automation-linked grievances justly and proportionately.

¹⁴⁷ Ibid, pp.54-55

Advice and support services

59. Given the potential complexities that even a “streamlined” application process presents, especially in the context of vulnerable applicants, a final critical question of administrative justice around the Settlement Scheme is the extent to which advice and support is available. This includes both legal support and other forms of advice and support. Attempts to “design-in” user-friendliness into administrative justice systems, as has been attempted with the Settlement Scheme, may get around some need for support, yet it will not eradicate the fact there are certain individuals who will need additional support, especially in complex cases or where a dispute turns on a point of law. In some cases, the support required may be very extensive. It is well-established that there are many varied paths to justice and analysing an advice and support landscape around a particular administrative justice process is complex.¹⁴⁸ It is less clear how the current advice sector works and what drives advice-seeking behaviour.¹⁴⁹ In respect of the Settlement Scheme, however, it is possible to sketch the broad landscape of advice provision that applicants will find themselves in. The analysis in this section ought to be viewed against recent trends of advice and support provision, which has widely seen a shift away from public-funded advice provision to reliance on free legal services, self-representation, and designing processes that seek to eliminate the need for advice altogether.¹⁵⁰

Public awareness

60. Perhaps the first-order need for support relates to the issue of public awareness of the Scheme and the need to apply. While Brexit seems a pervasive political issue, ordinary people are often unconcerned with the details of policy and there are commonly important misconceptions.¹⁵¹ Recent evidence also suggests the general population has very little awareness of law and their rights.¹⁵² The Home Office has moved to raise

¹⁴⁸ H. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford 1999); P. Pleasence and N. J. Balmer, *How People Resolve ‘Legal’ Problems* (Legal Services Board, 2014); W. L. F. Felstiner, R. L. Abel and A. Sarat, ‘The emergence and transformation of disputes: naming, blaming, claiming....’ (1981) 15 *Law and Society Review* 635.

¹⁴⁹ P. Pleasence, N. J. Balmer and S. Reimers, ‘What really drives advice seeking behaviour? Looking beyond the subject of legal disputes’ (2011) 1 *Onati Socio-Legal Series* 6; P. Pleasence, N. J. Balmer and S. Reimers, ‘Horses for Courses? People’s Characterisation of Justiciable Problems and the use of Lawyers’ in Legal Services Board (ed), *The Future of Legal Services: Emerging Thinking* (Legal Services Board, 2010).

¹⁵⁰ See e.g. H. Genn, ‘What is civil justice for? Reform, ADR and access to justice’ (2012) 24(1) *Yale Journal of Law and the Humanities* 397; The Bach Commission, *The Right to Justice* (London: Fabien Society, 2017).

¹⁵¹ See e.g. King’s Policy Institute, *Brexit Misperceptions* (London: 2018).

¹⁵² There is an increasing evidence base on public understanding of law. For important recent contributions, see: P. Pleasence, N. Balmer, and C. Denvir, ‘Wrong about Rights: Public Knowledge of Key Areas of Consumer, Housing and Employment Law in England and Wales’ (2017) 80(5) *Modern Law Review* 836; A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart, 2005); L. J. Parle, *Measuring young people’s legal capability* (Independent Academic

awareness of the Settlement Scheme through various initiatives. For instance, they are creating briefings with “key facts.” One prominent activity, designed to enable support with applications, is the dissemination of information about the Scheme to employers—the “employers’ toolbox.”¹⁵³ This is designed to create an environment where “employers, industry groups and community groups in the UK will be able to give EU citizens practical advice on how to apply for settled status.”¹⁵⁴ The toolkit was developed with employers and industry groups and includes videos, how-to-guides, leaflets, and posters. All content has been translated into the core EU23 languages. The precise extent and duration of the planned outreach activities is, however, unknown. The effectiveness of these activities will also likely only become apparent in the longer term, especially when deadlines for registration under the Scheme start to bite.

Advice sector capacity and funding

61. One major factor that will bear on legal advice provision is the amount of capacity in the immigration law and advice sector. There is little sophisticated and robust data on the size of the immigration legal advice sector.¹⁵⁵ Perhaps the best indication of the capacity within the sector is that 2,546 solicitors are registered with the Law Society as practising in immigration, and 80 public access barristers define themselves as immigration practitioners. It remains to be seen whether this will be, in simple terms, a sufficient amount of lawyers to provide advice. It must also be remembered that many of these practitioners will focus on non-EU cases at present and other non-EU immigration work streams will likely continue to flow as usual.
62. Another key issue will be the availability of funding for advice provision. There is a limited amount of free legal services that can be accessed, such as Law Centres. These services provide valuable advice but there is very little capacity in the sector as a whole, and they require sustained funding from charitable donors. The situation is similar for university law clinics, which also have access to limited resources and, due to a range of factors, have struggled historically to take on public law cases.¹⁵⁶

Research Studies and PLEnet, London 2009); P. Pleasence and N. J. Balmer, ‘Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation’ (2012) 46 *Law and Society Review* 297; C. Denvir, N. J. Balmer, and P. Pleasence, ‘When legal rights are not a reality: do individuals know their rights and how can we tell?’ (2013) 35 *Journal of Social Welfare and Family Law* 139. For recent discussion of public legal education, see: Public Legal Education and Support Task Force, *Developing Capable Citizens: The Role of Public Legal Education* (PLEAS Task Force, 2007).

¹⁵³ Home Office, *EU Settlement Scheme: Introduction to the employer toolkit* (2018).

¹⁵⁴ Home Office, ‘Home Office launches toolkit for employers to support EU Settlement Scheme’ (25 July 2018).

¹⁵⁵ The best quantitative data on this point is available from OISC, though it only presents parts of the picture. This is discussed below.

¹⁵⁶ Public Law Project, *Public Law and Clinical Legal Environments: A report on the role of university law clinics in increasing access to justice in public law, and the role of non-governmental organisations* (Public Law Project, 2018).

63. The availability of legal aid under the scheme has been the subject of political debate, and is a key concern of many immigration representatives.¹⁵⁷ The trend in recent years is toward less legal aid being available¹⁵⁸ and the position on its availability for Settlement Scheme matters, including under the Exceptional Case Funding scheme, has not been clarified.¹⁵⁹ Lucy Frazer QC MP, then Minister for Justice, suggested other methods may be preferred above legal aid: “[f]or the majority of cases, the application and review process in relation to the EU Settlement Scheme will be straightforward. However, the Government recognises that not every case will be straightforward and, as with all cases outside the scope of legal aid, exceptional funding may be available where the requisite criteria are met.”¹⁶⁰
64. While legal aid may not be broadly available for Settlement Scheme matters, the Home Office has announced grant funding of up to £9 million. This money has been granted to 57 voluntary and community organisations across the UK. The grants are aimed at helping these organisations “to both inform vulnerable individuals about the need to apply for settled status and support them to complete their applications to protect their status as the UK exits the EU.”¹⁶¹ This fund went to a public competition, with organisations being able to seek between £5,000 and £39,999 or between £40,000 and £750,00. This funding will enable valuable advice and support activities, yet there are concerns this is too limited of a fund.

Advice regulation

65. A potential tripwire in the effective provision of advice and support around the Scheme is that immigration advice is particularly heavily regulated. It is illegal to give immigration advice to an individual unless the person giving the advice is specifically permitted to do so.¹⁶² There is strict regulation in place, with a maximum penalty of two years in prison.¹⁶³ Regulated lawyers (e.g. solicitors and barristers) are authorised to provide advice but

¹⁵⁷ This issue was repeatedly raised in evidence to the Public Bill Committee for the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC 309). For a recent analysis of the immigration legal aid market, see: J. Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (University of Brighton, 2019).

¹⁵⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012; H. Brooke, ‘History of Legal Aid 1945-2010’ (*Bach Commission on Access to Justice*, 2017, Appendix 6); National Audit Office, *Implementing reforms to civil legal aid* (2014); Ministry of Justice, *Post-Implementation Review of Part 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (2019); Ministry of Justice, *Legal Support: The Way Ahead* (2019).

¹⁵⁹ Section 10, Sentencing and Punishment of Offenders Act 2012. The exceptional case funding route provides legal aid in cases where it would otherwise be unavailable but failure to do so would be a breach of: the individual’s Convention rights (within the meaning of the Human Rights Act 1998); any rights of the individual to the provision of legal services that are enforceable EU rights; or that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach. The future operation of this provision, due to its reference to ‘enforceable EU rights,’ is unclear at present.

¹⁶⁰ Immigration: EU Nationals: Written question – 213988 (29 January 2019).

¹⁶¹ Home Office, ‘New fund to support vulnerable EU citizens apply for settled status’ (25 October 2018).

¹⁶² Part 5, Immigration and Asylum Act 1999.

¹⁶³ Section 91(1), Immigration and Asylum Act 1999. There is also a possibility of a fine.

non-lawyers wanting to provide advice must be registered with Office of the Immigration Services Commissioner (OISC). Becoming authorised to give advice involves organisational requirements and exams. In recent years, regulation has been tightly enforced. In the last reported year there were four convictions and 20 prosecutions remain outstanding.¹⁶⁴ The amount of OISC-registered advisers has been decreasing recently, with a total of 3,337 at the most recent count.¹⁶⁵

66. On the one hand, such a regulatory regime is justified because the immigration advice and representation sector has been long-afflicted by both malevolent and incompetent representatives and advisers.¹⁶⁶ The impact of such advice can be devastating. On the other hand, strict regulation can restrict the genuine provision of much-needed support. Competent and well-intentioned advisers can rationally be deterred by the prospect of entering a regulatory minefield. Given this, there is concern around the Settlement Scheme that strict regulation may serve to unduly limit advice availability at a time of high demand.

67. In response to concern about the availability of advice for the Settlement Scheme and the potential deterrent effects of regulation, in early 2019 the OISC created a new registration scheme aimed at organisations that want to advise EU citizens on their applications for settlement in the UK. The registration will be at OISC Level 1 Immigration EUSS, *i.e.* limited to the EU Settlement Scheme only. The application process will be streamlined and is aimed at not-for-profit and charitable organisations. The streamlined application process means that OISC expect to make decisions on applications around 4-6 weeks after receipt of the application.¹⁶⁷ Those approved will be given authorisation for two years only, to run alongside the life of the Settlement Scheme. The aim here is to liberalise the potential capacity in the immigration advice sector to meet demand. However, it is unclear if this relaxed pathway to authorisation will make any great inroads into helping to manage any overall surge of demand for advice that the Scheme will create. It is also yet to be seen how many organisations will take up this new registration route.

Assisted digital services

¹⁶⁴ Office of the Immigration Services Commissioner, *Annual Report and Accounts: 2017 to 2018* (2018)

¹⁶⁵ *Ibid.*

¹⁶⁶ JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* (2018). See also: C. Hutton and S. Lukes, *Trusting the Dice: Immigration Advice in Tower Hamlets* (Toynbee Hall, 2015); SRA, *Asylum Report: The quality of legal service provided to asylum seekers* (2016); Bar Standards Board, *Immigration Thematic Review* (2016).

¹⁶⁷ To demonstrate “fitness and competence,” organisations will need to show that they have satisfied the relevant competency standards and evidenced that they are fit to provide immigration advice. However, they will not be required to undertake the OISC Level 1 written examination.

68. Given that much of the process is online, there is also provision of assisted digital services. This is being provided in collaboration with an external organisation, *We Are Digital*. This organisation then works with local “delivery partners” across the UK. Assisted digital services are designed to help people with technical problems with the online process, especially those who struggle to use the online process, but not to offer substantive advice (though some are sceptical of the possibility of maintaining a clear line between the two in practice).¹⁶⁸ Assisted digital services will be provided through various channels, including over the phone, face-to-face at community locations, and via “in-home tutors.”
69. There is no empirical research on the use of assisted digital services, despite their rapid growth in importance due to the progressive digitalisation of public services. A recent analysis by JUSTICE on assisted digital in courts and tribunals services—which represents one most comprehensive analyses of the issue to date—identified the need for such services to be designed to fit the demands of their diverse users.¹⁶⁹ Specifically, JUSTICE recommended, amongst other points raised, that services should: use a ‘multi-channel’ approach, *e.g.* helping people move with ease between digital access, phone assistance, face-to-face assistance and paper; cater for the use of mobile technology; and be built on the basis of end-to-end pilots. While some of the design choices made around the Scheme may align with this recommended approach, it is yet to be seen how effective such services are at providing the necessary digital assistance in practice.
70. This all paints a complex picture about advice and support provision around the Scheme. It is clear, however, that the Settlement Scheme fits into a wider pattern of recent years where publicly-funded advice provision will be limited. The offset for this, which also maintains a theme of recent policy, is the increased availability of assisted digital services and the promotion of user-friendly services that do not require legal representation or other support. One of the key unanswered questions about the administrative justice vision underpinning the Scheme, therefore, is whether this new advice and support formula works in practice.

¹⁶⁸ JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018).

¹⁶⁹ *Ibid*; Civil Justice Council, *Assisted Digital Support for Civil Justice System Users: Demand, Design, and Implementation* (Civil Justice Council, 2018).

Conclusion

71. The analysis of the EU Settlement Scheme presented in this report demonstrates the Scheme operates on the basis of a new, distinct model of immigration administrative justice, which is heavily influenced by technology and particularly automation. The suggestion made here is that this new model represents the continuation and acceleration of a trajectory towards quicker justice at the expense of safeguards. The likely result of this paradigm shift, in the longer-term, is that there will be a growing gap in individual experiences of administrative justice. For those who get positive outcomes, they will—likely with the growing support of increasingly advanced and integrated technology—get their positive outcomes more quickly. This could be a great benefit, reducing the problems associated with waiting and delay. For those who do not get positive outcomes, however, their fall is less likely to be protected by effective redress and support systems. For those in a position of social and economic advantage, there is a greater possibility of accessing high-quality advice services to cushion the fall. For those in a position of social and economic disadvantage, the landing is likely to be much harder. Given the impact that an incorrect immigration decision can have on the lives of individuals and families, this effect ought not to be underestimated.

