THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12905

Does Digital Status Unlawfully Penalise EU Citizens Accessing the UK's Private Rented Sector?

Jed Meers,* Joe Tomlinson,† Alice Welsh‡ and Charlotte O'Brien§

In the past few years, more than six million EU citizens living in the UK have transitioned to a new immigration status. The only evidence they have of this new status is in digital form. This group is now navigating the UK's 'compliant environment,' designed to deter unauthorised migration, with this new form of status. This has created an unpredictable new dynamic with serious risks of discrimination in everyday interactions, such as when people are trying to rent a property. In this article, we explore the impact of this digital-only status by drawing on a large-scale discrete choice experiment with private rented sector landlords, which shows that people with digital-only immigration status are substantially penalised on the private rental market due to the form of their ID. We argue that this discrimination is not only troubling in substance but also arguably amounts to a breach of non-discrimination and equal treatment provisions under the Withdrawal Agreement (Article 12 and Article 23 respectively). The apparent lack of effective enforcement points to the potential limits of such protections after Brexit.

INTRODUCTION

During the negotiations in the wake of the UK's vote to leave the European Union (EU), the UK Government and the European Union prioritised reaching a settlement on the rights of EU citizens already resident in the UK and UK citizens resident in the EU. What rights these individuals hold became the subject of extensive provisions in Part Two of the Withdrawal Agreement (WA).[1] At the heart of that Agreement is the right of those within its scope to a new residence status that allows them to continue to reside in the State of residence post-Brexit. This study focuses on the rights of the more than six million EU nationals in the UK reliant on these provisions and this status.

*Senior Lecturer in Law, University of York. This research was kindly funded by the Research England Policy Support Fund, as allocated by the York Policy Engine, and the Economic and Social Research Council, grant reference number ES/S007385/1. We are grateful to the team at YouGov, and particularly Patrick English, for their efforts and support on this research. Earlier drafts of this paper were presented at the Public Law Project's 2022 Trends and Forecasts Conference and at a York Law School seminar, where many participants provided helpful comments.
†Professor of Public Law, University of York.
‡Lecturer in Law, University of York.
§Professor of Law, University of York.

1 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ CI 384/1 (Withdrawal Agreement).

The UK decided to introduce the EU Settlement Scheme (EUSS), requiring European Economic Area (EEA) nationals and their family members to register for this new WA residence status and be granted 'settled status' or 'pre-settled status' (which could later be upgraded to settled status).[2] This is a constitutive scheme, which means that, unlike prior EU free movement statuses, the registration process is a necessary condition for the status and its attendant rights to exist. Nestled amongst the thorny details of Part Two, the new treaty stipulated that where a country requires registration for a new status, the 'document' given to individuals to evidence that they hold this form of status 'may be in a digital form'.[3]

This provision emerges at a moment when the UK Home Office, the department responsible for implementing the EU Settlement Scheme, is undergoing a digital transformation.[4] As such, when EU citizens living in the UK applied for settled or pre-settled status, they were put through an online process, and much of the decision-making structure relied on automation and data-sharing arrangements.[5] While the WA appears to license the use of digital proof of immigration status, it did not mandate it. Nonetheless, in keeping with its efforts to become digital, the Home Office decided to offer those with settled or pre-settled status digital-only proof of their immigration status. This policy was adopted despite arguments from campaign groups that people would be better off with a physical 'back-up',[6] resistance in the House of Lords,[7] and a legal challenge which sought to draw attention to the potential for discriminatory effects of the policy.[8] As a Home Office minister told Parliament at the time, '[m]oving to online services is part of our declared aim of moving to a system which is digital by default, whereby all migrants, not just EEA citizens, will have online access to their immigration status, rather than having physical proof'.[9]

By 2023, there were more than six million applications to the EU Settlement Scheme, meaning that millions of people are now reliant on digital-only proof of their right to reside in the UK – a significant minority of the UK's population. These people must now navigate systems and processes with this new status under the 'compliant environment' (better known as the 'hostile

2 Certain categories of family members of EEA nationals were not included in the WA but have been included in those eligible for a status in the EUSS. This includes primary carers of EEA national (including UK national) children whose residence is required to enable those children to reside in the territory of the EU and UK under the rules in Case C-34/09 *Ruiz Zambrano* v *Office national de l'emploi* EU:C:2011:124 and family members of UK nationals who lived with them in another Member State before returning with them to the UK under the rules in Case C-370/90 *The Queen* v *Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* EU:C:1992:296.

3 WA, Art 18(1).

4 For wider context, see Jack Maxwell and Joe Tomlinson, *Experiments in Automating Immigration Systems* (Bristol: Bristol University Press, 2022).

5 For a full analysis of the wider application system, see Joe Tomlinson, 'Justice in Automated Administration' (2020) 40 *Oxford Journal of Legal Studies* 708.

6 The campaign group the3million led the prominent #deniedmybackup campaign.

7 The House of Lords passed an amendment to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, which required the provision of physical proof of status, but the amendment was later removed.

8 *R (The 3million Ltd)* v *Secretary of State for the Home Department* [2021] EWHC 1159 (Admin).

9 HL Deb vol 806 col 467 5 October 2020 (Baroness Williams).

environment') policy, which has installed checks for migration status in private law contexts such as getting a job or renting a property.[10] The mixture of the digital-only status and compliant environment policies creates an unpredictable new dynamic in these everyday settings. For instance, in the context of the private rental market, when landlords are picking between potential tenants – as they often must do in the modern competitive rental market – they are required to check proof of a tenant's 'right to rent'.[11] When they do so, they momentarily become *de facto* immigration enforcement officers who are making decisions about the validity of documents which prove a right to reside. How would landlords make such decisions when presented with a 'share code' that links them to them an online proof of status? Previous research has shown there is a 'passport premium' – that is, that landlords prefer passports to other forms of ID – but would there be a 'digital disadvantage' for those exercising rights under the WA? Such empirical questions go to the heart of how far the rights of EU citizens after Brexit exist as a matter of sociological reality or if they are often merely rights on paper.

In this article, we argue, first, that landlords do in fact discriminate against digital forms of ID. While this is typically a hidden psychological bias, people exercising rights under the WA are substantially penalised on the private rental market as a result. We demonstrate this through a large-scale discrete choice experiment (DCE) of private rented sector landlords. Second, we argue that this bias is not only troubling in substance but also raises questions about whether the UK is in breach of the WA; while the WA gives the UK the right to use digital proof of immigration status, it does not give it the right to implement such a scheme in a way that is discriminatory. It also raises issues about the effectiveness of mechanisms to protect rights under the WA.

THE MECHANICS OF DIGITAL IMMIGRATION STATUS

We start by briefly setting out how digital immigration status operates in practice when someone tries to rent a property. When someone seeks to rent a property in the UK, they are subject to a 'right to rent' check. For British nationals, this usually involves them showing the landlord their passport – a relatively straightforward exercise involving a recognisable document. The process for those with digital-only proof of their immigration status is considerably different.

When a person has lodged an application for settled or pre-settled status, they are granted a digitally accessible 'certificate of application' so they can continue to exercise their rights while their application is pending. Once a person is granted either pre-settled or settled status, they are notified by an automatically generated email notification. This message itself is not proof of

10 For a critical overview, see Melanie Griffiths and Colin Yeo, 'The UK's Hostile Environment: Deputising Immigration Control' (2021) 41 *Critical Social Policy* 521.

11 Noora Mykkanen and Tom Simcock, *The Right to Rent Scheme and the Impact on the Private Rented Sector* (Private Renting, Analysis and Research Lab, 2018) at https://www.nrla.org.uk/research/special-reports/right-to-rent [https://perma.cc/4MGD-XNGM].

status but only a notification. The actual proof of status can only be accessed online. In principle, a person holding pre-settled or settled status can access (if they have the technology, internet, and sufficient capabilities) their status anywhere and at any time by logging in to the relevant government webpage.[12] They can also share their status with others who may need to see it, including landlords, by giving the relevant person a 'share code'. There is no other way a person can view and share their proof of immigration status – as the Home Office put it, the digital status policy meant that '[e]vidence of … status will be given to EU citizens in digital form; no physical document will be issued to them. They will control who they wish to share this with'.[13]

In practical terms, when asked to prove their 'right to rent', people reliant on digital status have to take a series of steps, and so too must landlords. For physical forms of identification, the process is shorter: the landlord checks the document (usually in the presence of the prospective tenant), ensures the photograph is consistent with their appearance and the document appears genuine, and then makes a copy of it, noting the date they conducted the check.[14] The process for checking digital status is different. Figure 1 sets out the steps that are followed by both the prospective tenant and the landlord to facilitate the check.

While the nature of these steps raises important questions about whether the practicalities of the sharing process create a disadvantage for holders of digital immigration status,[15] our focus in this article is on whether ID status is a factor that affects a landlord's decision to let their property to an individual and – if it is – whether those with digital immigration status face a disadvantage relative to those with other forms of ID. It is this question to which we now turn to investigate in detail.

PROVING DIGITAL DISADVANTAGE

In order to explore whether a tenant's type of ID – and having digital status in particular – impacts access to the private rented sector, we adopted a method that examines the 'tenant preferences' of English private rented sector landlords: the characteristics of a prospective tenant that influence a landlord's willingness to rent to them.[16] These tenant preferences are particularly significant in a market where demand far outstrips supply. In areas where the private rented

12 It has been reported there have been numerous problems with accessing the 'view and share' service, see for example The3Million, 'Submission to Independent Monitoring Authority – Challenges around maintenance of a UKVI account' (March 2022) at https://the3million.org.uk/sites/default/files/documents/t3m-report-IMA-DigitalStatusMaintenance-08Apr2022.pdf [https://perma.cc/9CW2-UJ4G].

13 Home Office, *Home Office EU Settlement Scheme: Statement of Intent* (21 June 2018) [7.2].

14 See Home Office, 'Landlord's Guide to Right to Rent Checks' (8 February 2024) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139304/2023.02.28_Landlords_Guidance.pdf [https://perma.cc/X5B9-APLE].

15 For a full analysis of these issues, see Joe Tomlinson, Jack Maxwell and Alice Welsh, 'Discrimination in Digital Immigration Status' (2022) 42 *Legal Studies* 315.

16 Julie Rugg and Alison Wallace, *Property Supply to the Lower End of the English Private Rented Sector* (University of York, Centre for Housing Policy, 2021) at https://eprints.whiterose.ac.uk/177564/ [https://perma.cc/3H6Q-FTK3].

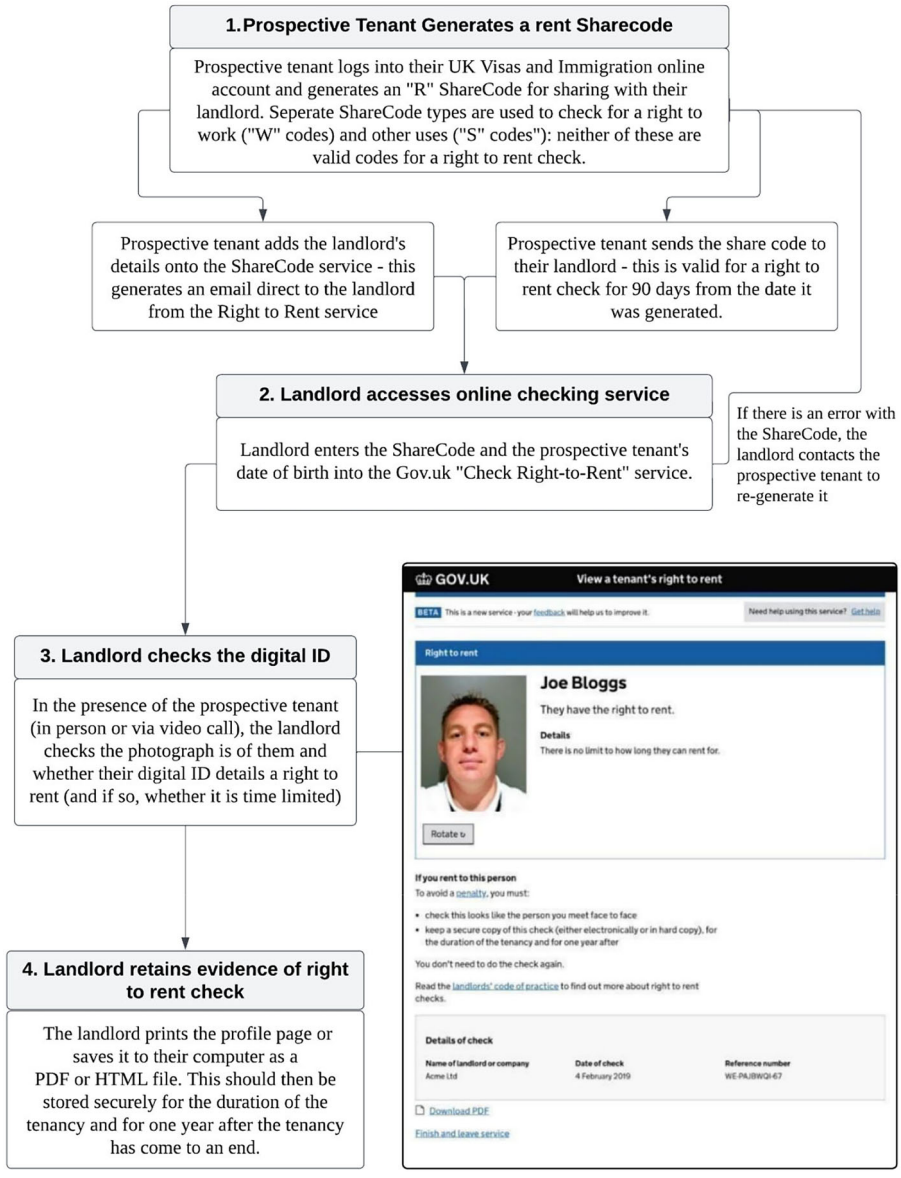

Figure 1: Steps landlords take to check a prospective tenant's digital immigration status. [Colour figure can be viewed at wileyonlinelibrary.com]

sector is under pressure (which is the case in most cities across the UK), multiple renters register an interest for each property. In London, for instance, an average of 23 tenants are vying for every home for rent.[17] This means that landlords or their agents almost always have a choice between multiple prospective tenants.

17 Foxtons, *The London Report: 2023* at https://www.foxtons.co.uk/reports/the-london-report/london-report-2023 [https://perma.cc/GZ8J-S7VW].

These landlord decisions are particularly salient for EU citizens in the UK, as they are disproportionately exposed to the private rented sector market. A far greater proportion of people living in the UK who were born in the EU rent the property they live in – 44 per cent of individuals – compared to just 14 per cent of those born in the UK.[18] The private rented sector specifically has a significantly higher proportion of EU nationals than the social housing sector. In 2021–22, 14 per cent of households in the private rented sector were from the EU, compared to three per cent of social renters.[19] This means that any one EU national is more likely than a UK national to be affected by, so face any disproportionate impact of, the preferences of private rented sector landlords.

Method

With this context in mind, the study design sought to answer two questions about landlords' tenant preferences. First, are the tenant preferences of English private rented sector landlords influenced by ID status? Prior work has found that the 'right to rent' scheme has led to a reluctance by some landlords to rent to those without a British or 'recognizable EU' passport.[20] At best, there is the 'hassle of dealing with the additional checks' associated with other ID types (as outlined in Figure 1 above), and, at worst, the possibility of prosecution if they 'made a mistake'.[21] A 2018 survey of nearly 3,000 landlords by the Residential Landlords Association found that 44 per cent said they were less likely to consider letting to individuals without a British passport.[22] However, research has not examined the extent to which other ID types – and particularly 'digital status' – impact on landlord decision-making. Put simply, prior research has identified a 'passport premium' whereas our study examines whether there is a 'digital disadvantage' compared to a range of other ID types.

Second, if tenant preferences are influenced by ID status, then to what extent is it a significant factor, relative to other issues already known to influence landlord decision-making? Prior work has identified the role that age, gender, ethnicity, and occupation play in landlords' tenant preferences.[23] For instance, faced with a choice, landlords tend to prefer to rent to a junior financial analyst

18 Marina Fernández Reino and Carlos Vargas-Silva, 'Migrants and Housing in the UK' (The Migration Observatory, Briefing, 2 September 2022) at https://migrationobservatory.ox.ac.uk/resources/briefings/migrants-and-housing-in-the-uk/ [https://perma.cc/ZC2R-T9KU].

19 Department for Levelling Up, Housing and Communities, 'English Housing Survey 2021 to 2022: Private Rented Sector' (National Statistics, 13 July 2023) at https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-private-rented-sector/english-housing-survey-2021-to-2022-private-rented-sector [https://perma.cc/52R2-ZCKR].

20 Kim McKee and others, 'Redrawing the Border Through the "Right to Rent": Exclusion, Discrimination and Hostility in the English Housing Market' (2021) 41 *Critical Social Policy* 91, 101.

21 *ibid*.

22 Mykkanen and Simcock, n 11 above, 4.

23 Magnus Carlsson and Stefan Eriksson, 'Ethnic Discrimination in the London Market for Shared Housing' (2015) 41 *Journal of Ethnic and Migration Studies* 1276.

over a shop assistant or construction worker, and a female tenant to a male one.[24] Prospective tenants are never one-dimensional. We raise the following question: if landlords do prefer certain ID statuses over others, what impact does it have relative to these other factors that are well-explored in the existing literature?

To explore these two questions, we undertook a discrete choice experiment (DCE) with a sample of 1,020 English private rented sector landlords, drawn from YouGov's online survey panel, between 24 January and 6 February 2023. These landlords were recruited to be representative of UK landlords as a whole across their age, region, nationality, and the number of properties they let out. 51 per cent of the sample were male and 49 per cent female; 92 per cent were from white ethnic backgrounds, and eight per cent were from non-white ethnic backgrounds; and 91 per cent were born in the UK, with nine per cent born outside of the UK.

In common with other discrete choice experiments, we presented landlords with a hypothetical choice task. Each landlord saw three pairs of emails from prospective tenants and were asked to choose which of the two they would prefer to let their property out to. Drawing on prior studies of landlord decision-making, we varied each email randomly across five factors, their: gender, nationality (both via their name), occupation, age, and – to explore the two questions set out above – their proof of ID. The levels within these factors are set out in Table 1.

Names for the British and Eastern European tenants and the occupations were based on a prior correspondence study examining landlord decision-making in London.[25] The West African and Sub-Continental Asian names were developed in co-ordination with YouGov, based on names they have adopted in prior studies. The age increments – 20 and 45 years old – and the phrasing of the tenant emails and other factor levels were informed by a pilot study with a smaller sample of 205 English landlords undertaken on a sample recruited on Prolific – a panel provider used widely in academic research. In the present study, each landlord saw a random allocation of three pairs of tenants from a pool of 240 possible individual tenant profiles.

Proof of ID was varied across five factors: a British passport; a photograph of a British passport; a UK residence card; digital-only status (via a share code for use on the UK government website); and a certificate of application for digital-only status (via a share code to confirm their application). Varying the factors in this way allows us to move beyond the 'passport premium' and explore the relative preferences of landlords across all five ID types. Including a scanned photograph of a British passport alongside a physical one allows us to explore whether having a physical copy is a statistically significant advantage over having a digital one (or vice versa), even if it is the same ID type. Distinguishing between a digital status share code to prove a tenant's right to live in the UK after Brexit, versus one to prove they have applied to do so allows us to explore if the 'certificate of application' mechanism is likely to place prospective tenants at

24 *ibid*; Michelle Feldman and Allyson Weseley, 'Which Name Unlocks the Door? The Effect of Tenant Race/Ethnicity on Landlord Response' (2013) 42 *Journal of Applied Social Psychology* 416.
25 *ibid*.

Table 1. Factors and levels varied in the DCE.

Ethnicity/Gender		
	Male	*Female*
British	Mark Brown	Chloe Brown
Eastern European	Piotr Kowalski	Krystyna Kowalski
West African	Maduka Okoye	Christy Ohiaeriaku
Sub-continental Asian	Mohammad Yasir	Sandhiya Ranganathan
Age		
20 years old		
45 years old		
Proof of identity		
'can provide my original British Passport.'		
'can email you a scanned photograph of my British Passport.'		
'can provide my original UK residence card.'		
'can email you a 'share code' so you can confirm my right to live in the UK on the UK Government website.'		
'can email you a 'share code' so you can confirm that I have applied for my right to live in the UK after Brexit on the UK government website.'		
Occupation		
Retail assistant		
Construction worker		
Junior financial analyst		

a further disadvantage. The factors outlined in Table 1 were transposed into an email from a prospective tenant, based on text used in a prior correspondence study:[26]

> Hello,
> My name is [*name*]. I just saw your ad and the property sounds perfect for me.
> I'm [*age*] years old and work as a [*occupation*]. For proof of my identity, I can [*proof of ID*].
> Would it be possible to arrange a viewing? Please send me an email if so.
> Regards,
> [*Name*].

In addition to this choice task, landlord respondents were also asked about other socio-demographic information (their age, gender, country of birth, employment status, first language, nationality), information about their activities as a landlord (such as the number of properties they let out and the extent to which they use the services of a lettings agent); and – after they had selected between prospective tenants so it would not affect their responses – about their understanding of the right to rent process, prior experience of conducting right to rent checks, and their views on immigration.

26 See Carlsson and Eriksson, n 23 above.

Adopting this approach has a number of advantages over traditional survey methods. Most landlord surveys ask respondents directly about their tenant preferences, for example: 'are you now less likely to consider letting to any of the following groups as a result of the "Right to Rent" scheme?'[27] This approach risks answers being affected by social desirability bias, where respondents answer questions in line with social expectations rather than give their honest view. Likewise, given the many factors at play for each individual prospective tenant (such as their gender, age, occupation, and ethnicity), it may be difficult for the respondent to answer questions in the abstract about their own decision-making. Presenting respondents with a simulated choice situation minimises the risk of social desirability bias and allows for an analysis of the trade-offs between a number of different tenant characteristics.[28]

Our findings below draw on a Bayesian regression analysis – a widely adopted statistical method for analysing the results of a discrete choice experiment.[29] This analysis measures the effect of each factor in the experiment, whilst controlling for all the other factors and landlord demographics in the experiment. This allows for analysis of which factors – such as ID type, gender, occupation and so on – exert a statistically significant influence on landlord decision-making and, of those that do, which are the most important. The results are reported in full in Table 2. The 'estimate' column lists the average effect of each attribute level on the tenant being chosen in the experiment (while controlling for all other factors). A positive number suggests a positive effect (more desirable), while a negative number suggests a negative effect (less desirable). The standard deviation column shows the variability or uncertainty of the estimate – these are low across all factors, showing a high level of confidence in the estimate. The confidence intervals show the lower and upper bounds of the range where we can be 90 per cent confident that the true effect lies. For instance, for the Eastern European characteristic, there is a 90 per cent chance that the effect size is above 0.31, and 90 per cent chance that it is lower than 0.56. The nature of the analysis means that the results for attribute level (for instance, being 45 years old) is displayed relative to another factor (for instance, being 20 years old). The attribute level which is used as the point for comparison is listed in brackets in the first column of the table.

Key findings

Focusing on the ID status factor in particular, our analysis of the data reveals three key findings. First, landlords were far less likely to choose tenants with digital proof of status than tenants with physical proof of status. In terms of ID type, regression analysis demonstrates that the order of preferences of landlords

27 Mykkanen and Simcock, n 11 above, 10.

28 Yusaku Horiuchi, Zachary Markovich and Teppei Yamamoto, 'Does Conjoint Analysis Mitigate Social Desirability Bias?' (2021) 30 *Political Analysis* 535.

29 See Brett Hauber and others, 'Statistical Methods for the Analysis of Discrete Choice Experiments: A Report of the ISPOR Conjoint Analysis Good Research Practices Task Force' (2016) 19 *Value in Health* 300.

Table 2. Bayesian regression analysis of the conjoint analysis results – randomised prospective tenant attribute level.

Attribute Level	Estimate	Standard Deviation	Lower 90% Credible Interval	Upper 90% Credible Interval
Intercept	−0.09	0.1	−0.24	0.07
Ethnicity (White)				
Eastern European	0.43	0.08	0.31	0.56
West African	0.11	0.08	0.007	0.26
Sub-continental Asian	0.07	0.08	−0.05	0.2
Gender (Male)				
Female	0.11	0.05	0.03	0.2
Age (20 years old)				
45 years old	0.74	0.05	0.65	0.83
Occupation (Retail Assistant)				
Construction worker	0.12	0.07	0.01	0.23
Junior financial analyst	0.66	0.07	0.6	0.77
Id Status (British Passport)				
British passport scan	−0.76	0.09	−0.9	−0.62
Email Share code	−0.96	0.09	−1.10	−0.82
Share code application	−1.31	0.09	−1.5	−1.17
UK residency card	−0.75	0.09	−0.89	0.61

Figure 2: Extent of disadvantage relative to a British passport controlling for all other factors (expressed as Bayesian regression coefficients). [Colour figure can be viewed at wileyonlinelibrary.com]

is: a British Passport, a UK residence card, a scanned photograph of a British Passport, digital status and – least of all – a digital proof of a pending application. Figure 3 details the regression coefficient for each ID type in the experiment, relative to a British passport.

The coefficients in Figure 3 express the order of preferences within the model. Expressed instead in terms of probabilities of being chosen within the experiment, this means that a male tenant – aged 20 years, working as a retail assistant and with the same name – would have a 48 per cent probability of being chosen with a British Passport, a 28 per cent probability with 'digital status' and a 21 per cent probability with proof of application for digital status.

The nature of a the fixed-effects logistic regression model used to analyse these data means that the impact of one characteristic is shown by reference to another (for instance, the increased choice of choosing a female is relative to that of choosing a male), as in the results of the Bayesian regression analysis

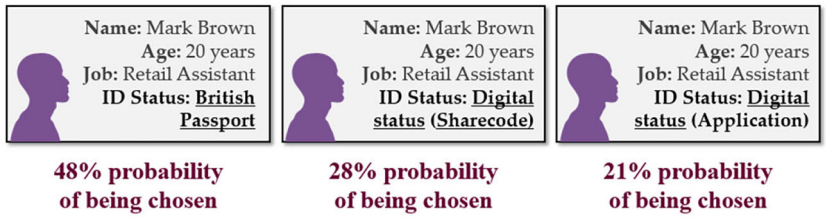

Figure 3: Probabilities of being chosen by a landlord in the survey. [Colour figure can be viewed at wileyonlinelibrary.com]

in Table Two above. Although Figure 4 shows a particular combination of characteristics (British (name), male, young, retail worker), if we were to change the reference categories for each of the other fixed effects, although the overall probabilities listed may change, the difference between those probabilities would remain the same. For instance, a female construction worker aged 40 would still have a 20 per cent higher chance of being chosen with a passport (when compared to a share code), and a seven per cent higher chance of being chosen with a share code (when compared to an application).

Taken together, these findings make clear that by far the least preferred ID type by the respondent landlords were the two forms of digital status. The results suggest that this is not solely a result of their ID status being 'digital' alone – a scanned photograph of a British passport was substantially preferred over the forms of digital status, alongside a UK residence card. The findings therefore illustrate a statistically significant systematic disadvantage faced by holders of share codes, relative to those with physical passports and UK residence cards.

Second, format of proof of status was the most important factor in the landlord's choices. The age, gender, ethnicity, and occupation of a tenant all have an effect on whether they are picked by the landlord or not. However, even when controlling for the effects of all of these other factors, the effect of different formats of proof of status on the probability of a tenant being chosen still holds. In fact, ID status format has the largest effect of all factors varied in the survey, suggesting that it is the largest driver of landlord decision-making out of the factors included in the study.

Finally, this digital-status disadvantage is not explained by the landlords' own socio-demographic factors. We investigated the potential that the lower likelihood to pick a prospective tenant with a share code as a form of ID could be driven by landlord-level factors: namely, landlord age, gender, ethnicity, education level, industry experience, attitudes and beliefs about (or towards) immigration and technology, or prior experience of right to rent checks including respondents' familiarity with digital status and prior use of share codes. None of the landlord-level attributes explained why digital status reduces the probability of a tenant being chosen, suggesting it is the form of ID itself that landlords disfavour. For certificates of application, a lack of confidence in technology, a lack of familiarity with right to rent checks, and negative sentiment towards immigration, and (perhaps surprisingly) a higher level of education, all made a landlord less likely to choose a tenant with this ID type. These findings suggest that increasing familiarity with right to rent checks and

with the use of technology among landlords may reduce the greater extent of disadvantage seen for tenants with a pending application, but the disadvantage remains even when we control for those factors.

What emerges, therefore, is evidence of a statistically significant disadvantage faced by holders of digital status in landlord's tenant preferences. This effect holds when varying tenant-level factors that are widely addressed in the literature, such as age, occupation, ethnicity, and gender, and a variety of landlord-level factors, from their views on immigration to their familiarity or prior experience of digital status or right-to-rent checks more generally.

Limitations

Before turning to our analysis of the legal implications of these findings, we must note that all surveys have limitations, and this experiment is no different. As a discrete choice experiment, our findings deal with a simulated choice task – not a real-world experiment, as is the case for correspondence studies where researchers pose as real tenants and contact landlords in response to real property advertisements. Likewise, our study does not include lettings agents in the sample. In practice, some landlords do not exercise decision-making over prospective tenants, having delegated the full management of their property to agents. Although our study found that there was no statistically significant difference in the responses between landlords who manage the renting of the property themselves and those who partially or fully use the services of a lettings agent, it remains that our sample only reflects landlord decision-making and not that of lettings agents. Finally, our analysis reveals other trends outside of the ID status factor, in relation to the age, ethnicity, occupation, and (to a lesser extent) gender of the prospective tenant. Because our focus here is on the role of the ID type (and to ensure our analysis is succinct), we have not set out analyses of these other factors in detail. Our conclusions below should be read with these limitations in mind.

RIGHTS IMPLICATIONS

Having established the context and results from the study, this section explores the implications of the discrimination our data has uncovered for tenants reliant on digital-only identification. The WA, while introducing a new residence status for EEA nationals in the UK, permits the adoption of either a declaratory or constitutive scheme. In a declaratory scheme, such as that under which free movement operates in the EU, what matters is meeting the substantive conditions, and registration is itself a formality.[30] A similar regime under the WA would mean individuals just had to demonstrate that they met the conditions

30 Under Directive 2004/38 there can be sanctions for failing to register where Member States require it, but they must be proportionate; non-registration does not obviate the underlying right to reside.

of the WA when trying to exercise their rights. Under a constitutive scheme, on the other hand, registration is not a formality, but is part and parcel of (constitutive of) the new status. And where registration is required, Article 18(1) of the WA requires the UK to issue a 'document evidencing such status which may be in a digital form'. The UK government introduced the digital-only immigration status for those applying under the EU Settlement Scheme in an effort to abide by Article 18 of the WA. The 27 EU Member States instead made a collective agreement to issue uniform physical residence cards to comply with Article 18 of the WA.[31]

While the UK was and is entitled to adopt a digital system for evidencing WA status, this section observes that any system adopted under Article 18 of the WA must still comply with other duties in the WA, including non-discrimination duties. The survey results indicate that the UK's chosen method for introducing a digital status policy, and its interaction with the right to rent checks that landlords must undertake, create a significant risk of discrimination for EEA nationals trying to access private sector rental housing in the UK. Some administratively differential treatment is inevitable under a new Article 18 registration scheme, but this section will argue that the UK's choice of method of implementing a digital-only status policy generates disproportionately discriminatory treatment, and therefore breaches the WA duties to protect the rights of equal treatment and non-discrimination.

The simple fact of adopting a digital-only status is not in itself in contravention of the WA; that policy is clearly permitted. However, Article 18(1) does not give *carte blanche* to adopt any digital scheme regardless of other provisions in the WA. When implementing Article 18, the UK remains bound by the non-discrimination (Article 12 of the WA) and equal treatment rights (Article 23 of the WA) and the requirement to implement provisions that refer to Union law in accordance with the general principles of EU law,[32] and possibly the Charter of Fundamental Rights (on which more below). The method through which the UK chooses to implement Article 18 should not result in a breach of other WA provisions – a principle that has already been tested and endorsed in court. The EUSS was designed so that temporary status (pre-settled status) would automatically expire after five years, creating an obligation to re-apply for another new status, using the same registration process set up under Article 18. But this aspect of the registration scheme, set up under Article 18 of the WA, was found, in *R(IMA)* v *SSHD*, to breach the Article 13(4) obligation to 'not impose limitations and conditions for obtaining, retaining or losing residence rights'.[33] In that case, the High Court found that pre-settled status should not expire after five years, as had been proposed by the Home Office, and that those with PSS who became eligible for settled status should acquire it automatically.

31 European Commission, 'Implementing Decision of 21.2.2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of the Agreement on the withdrawal of the United Kingdom of Great Britainand Northern Ireland from the European Union and the European Atomic Energy Community' COM (2020) 1114 final.

32 WA, Art 4(3).

33 *R (Independent Monitoring Authority for the Citizens' Rights Agreements)* v *Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) (*R(IMA)* v *SSHD*).

As such, evidence of a status under Article 18(1) that displayed an expiry date or which would automatically expire after five years would breach the WA.

It is possible to imagine other digital forms of residence document that would be non-compliant with the WA and so not permitted. A digital status which failed to show continuing rights for those appealing an EUSS decision would be a clear breach of Article 18(3) of the WA, which protects rights until a final determination on an application is made. The Article 18 registration process must comply not only with other aspects of Article 18, but also other provisions – especially those which speak to fundamental rights. As such, a digital status that creates discriminatory hurdles for EEA nationals to access the private rented sector, that are not experienced by comparable UK nationals, should be considered as a potential prima facie breach of the UK's duties in the WA. It is not the choice to provide a digital immigration status itself that is potentially unlawful. Rather it is the method that the UK has chosen to provide this status, and the way that it interacts with the existing right to rent scheme that creates a cumulative breach of the duties of non-discrimination (Article 12 of the WA and Article 11 of the EEA Separation Agreement) and of equal treatment for EEA nationals (Article 23 of the WA and Article 22 of the EEA Separation Agreement).[34]

Non-discrimination on the ground of nationality in Withdrawal Law

Equal treatment is regarded by the CJEU as a 'general principle of EU law'.[35] The CJEU has limited the protection from discrimination on the grounds of nationality to only those who were deemed to be 'lawfully resident',[36] ie those resident in a Member State under the conditions of Directive 2004/38 most commonly through economic activity.[37] Discriminatory treatment of EU citizens living lawfully in another Member State is viewed as a potential obstacle to economic free movement. Deterrents to taking up opportunities for free movement, or even obstacles to returning to a home State after having exercised free movement, have been periodically deemed unlawful and removed.[38] While the equal treatment and non-discrimination provisions in the WA operate in a different context, they draw from these established expectations. Rather

34 Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union (2018) (EEA Separation Agreement).

35 Case C–356/12 *Wolfgang Glatzel* v *Freistaat Bayern* EU:C:2014:350 at [43].

36 For full analysis see Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597; Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Law' (2016) 53 *Common Market Law Review* 937.

37 Case C-333/13 *Dano* v *Jobcenter Leipzig* EU:C:2014:2358. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Directive 2004/38), Arts 7, 15.

38 For example Case C-224/98 *D'Hoop* v *Office national de l'emploi* EU:C:2002:432; Case C-370/90 *The Queen* v *Immigration Appeal Tribunal and Surinder Singh, ex parte SSHD* EU:C:1992:296.

than removing obstacles to free movement across the EU, we argue that equal treatment in the WA must remove *obstacles to EU nationals continuing to reside* in the UK (and for UK nationals, in the EU).

In order to claim protection from Articles 12 (non-discrimination) and 23 (equal treatment) of the WA, it is necessary to establish that those with EUSS status fall into the personal scope of the WA. We consider that all EEA nationals and their family members who have EUSS status, or a pending application, should be treated as falling into this scope. As a new international treaty that has direct effect, the precise boundaries of the scope of the WA and the protection from discrimination based on nationality in Article 12 of the WA are yet to be tested in the courts.[39] We argue that falling within Article 10 of the WA is sufficient; it is not necessary to ascertain whether EUSS pre-settled and settled statuses are equivalent to Articles 13 and 15 of the WA, temporary and permanent residence rights respectively, as Article 12 of the WA specifically refers to 'persons referred to in Article 10 WA'. This point is important, as Article 10 can be interpreted broadly. It includes those who had previously resided in the UK in accordance with free movement rules, most commonly Directive 2004/38, before the end of the transition period (31 December 2020) and who have continued to reside in the UK thereafter. This could include EEA nationals whose residence in the UK, at some point before the end of transition, was based upon the initial three month right of residence in accordance with Article 6 Directive 2004/38. There is no explicit requirement for these EEA nationals to be residing in accordance with free movement rules either right up to the point of transition or after the end of transition. Less generous interpretations (including that adopted by the Independent Monitoring Authority (IMA))[40] could restrict the scope to those who can evidence a right of residence at the immediate end of the transition period, ie on 31 December 2021, but this would require reading extra words into the provision. Read as it is currently written, all EEA nationals who had applied under the EU Settlement Scheme and been found to meet the eligibility requirements (of having resided in the UK before the end of transition period and continued to reside in the UK) would fall into the scope of Article 10 of the WA so within the scope of the non-discrimination protection. This precise question of scope has not been addressed in the case law. The Court of Justice did address the more basic question of whether someone who obtained pre-settled status before the end of the transition period came within the scope of EU law, and found that they did in *CG* v *The Department for Communities in Northern Ireland*[41] (*CG*).

39 Case C-709/20 *CG* v *The Department for Communities in Northern Ireland* EU:C:2021:602, the CJEU identified that the award of pre-settled status and subsequent confirmation of lawful residence, at least under domestic rules, brought CG into the scope of EU law and the Charter of Fundamental Rights. Additionally, in *SSWP* v *AT* [2023] EWCA Civ 1307, while the Court of Appeal agreed that those with PSS had to be in scope of the WA to rely on the Charter, the exact boundaries of WA, Art 10 were not tested as AT was exercising rights under Directive 2004/38 at the end of the transition period.

40 See the IMA's skeleton argument in *C* v *a Local Authority* at https://ima-citizensrights.org.uk/app/uploads/2024/02/IMA-County-Court-Cases-Skeleton-Argument-REDACTED.pdf [https://perma.cc/9HXN-HZ25].

41 *CG* n 39 above.

Similarly, the Court of Appeal of England and Wales in *SSWP* v *AT* (*AT*)[42] found that in matters arising post-transition, someone who had exercised rights under Directive 2004/38 at the end of the transition period and had pre-settled status came within the scope of the Withdrawal Agreement. They explicitly did not make the exercise of Directive rights at the end of the transition period a definitive condition, and left that question open.

Additionally, the successful application for a status under Article 18 of the WA should in itself lead to coverage from Article 12 of the WA. The High Court judgment in *R(IMA)* v *SSHD* recognised EUSS status is granted under Article 18 of the WA and that the 'application process contained in Article 18 was meaningful'.[43] As such, this could mean that pre-settled status represents a grant of a WA residence status and that this status itself must confer 'the rights under this title'. Just as WA status must therefore confer the right to acquire permanent residence rights under Article 15 without a separate application and registration process, so must it also confer the right in Article 12 to protection from discrimination based on nationality.

Having considered personal scope, we now need to consider the relevance of the non-discrimination provisions of the WA. The UK has attempted to detach the domestically-constructed EU Settlement Scheme from their obligations to prohibit discrimination on the basis of nationality in the WA. For example, the UK argued that those with pre-settled status before the end of the transition period also had to demonstrate an additional right of residence, in the old free movement rules, to benefit from equal treatment rights in order to access social assistance. The Court of Appeal in England and Wales disagreed, in *Fratila & Anor* v *Secretary of State for Works and Pensions & Anor*[44] (*Fratila*), and pointed to the CJEU case of *Michel Trojani* v *Centre public d'aide sociale de Bruxelles (CPAS)*[45] (*Trojani)*, to find that the nationality discrimination the rules gave rise to was of a kind that was not susceptible to objective justification.[46] However, the CJEU weighed in on this issue in *CG*, finding that when it comes to accessing social assistance, protection from nationality discrimination under Article 18 TFEU[47] did not extend to those residing in a Member State under domestic rules alone, such as under the EUSS.[48] Instead, it found that Article 18 TFEU non-discrimination rights found specific expression in Article 24 of Directive 2004/38[49] (CRD) in a free movement and social assistance context. As Article 24 of the CRD requires individuals to have a qualifying right of residence under the same Directive (for example as a worker, self-employed person, or family

42 *SSWP* v *AT* n 39 above.
43 n 33 above at [182].
44 *Fratila & Anor* v *Secretary of State for Works and Pensions & Anor* [2020] EWCA Civ 1741.
45 Case C-46/02 *Trojani* EU:C:2004:488.
46 *Fratila* n 44 above, 71, 76. However, we note that even directly discriminatory rules may be rendered lawful through narrow derogations laid down in EU law (for example TFEU, Art 45(3)).
47 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), Art 18.
48 *CG* n 39 above. See Charlotte O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable (*CG* v *The Department for Communities in Northern Ireland*)' (2021) 6 *European Law Review* 801.
49 Directive 2004/38, Art 24.

member of a working EEA national) to benefit from equal treatment rights, the right to non-discrimination was found to only be available to those who met these conditions. This ruling resulted in the UK Supreme Court reversing the Court of Appeal's finding in *Fratila*.[50]

However, there are two key distinctions which separate the discrimination at issue here from the *CG* case. Firstly, that case concerned the rules in the EU treaties which gave effect to free movement rights, not the provisions in the WA. The WA has its own protection from non-discrimination on the grounds of nationality in Article 12, which states that '[w]ithin the scope of this Part … any discrimination on grounds of nationality within the meaning of the first subparagraph of Art. 18 TFEU shall be prohibited in the host State and the State of work in respect of the persons referred to in Article 10 of this Agreement.' This will inevitably lead to the further questions of whether Article 12 of the WA has the same effect as, and whether it is subject to, the same limitations of, Article 18 TFEU, given that Article 23 of the WA provides for a social assistance exception similar to that of Article 24 of the CRD. But, secondly, and even more importantly, regardless of whether or not the *CG* ruling regarding the limitations of non-discrimination rights under Article 12 of the WA for those with pre-settled status applies in a post-transition case, so limiting access of people with pre-settled status to welfare benefits, the form of discrimination under examination is not a matter of social assistance, and cannot be legitimated as a result of the operation of the social assistance exception. This limited derogation does not apply to access to any other public service or employment, housing, or banking etc.

Instead, somewhat intriguingly, we are back at *Trojani*.[51] Once discrimination on the ground of nationality has been identified, in this instance the system of share code immigration status checks designed by the UK government, which falls within the scope of the WA, and is not subject to the specific exception identified in *CG*, we have to go back to the reasoning of the Court of Appeal in *Fratila*. And that reasoning gives us two principles: (i) that discriminatory rules that attach to the EUSS amount to nationality discrimination; and (ii) such discrimination, if of a piece with that in *Trojani*, is not capable of objective justification. Neither of these principles were questioned or overruled in either the CJEU's *CG* or Supreme Court's *Fratila* judgment. In fact, the failure to engage with, let alone repudiate *Trojani* in *CG* was conspicuous. The Court of Appeal in *Fratila* identified no instances in CJEU case law where doubt could be thrown on the *Trojani* decision and stated in no uncertain terms that they were 'bound to follow' the case unless the CJEU or the Supreme Court decided otherwise.[52] While the CJEU is not bound by its own precedent, its choice to disregard *Trojani* is unhelpful in light of the arguments made by *CG* (and

50 *Fratila and another (AP)* v *Secretary of State for Work and Pensions* [2021] UKSC 53. See also Alice Welsh, 'Permission to Discriminate – EU Nationals, Pre-Settled Status and Access to Social Assistance' (2022) 44 *Journal of Social Welfare and Family Law* 133.

51 On the case that the CJEU keeps dodging but cannot quite disavow, see Charlotte O'Brien, 'Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit' (2021) 58 *Common Market Law Review* 431, 464-466.

52 *Fratila* n 44 above at [57].

accepted by the Court of Appeal in *Fratila*) and increases inconsistency to the detriment of legal credibility. It is perhaps best explained by the Court viewing the case before it purely through the lens of a special exception – the rules laid down in Directive 2004/38, which were taken to limit equal treatment rights to social assistance to those 'residing on the basis of this Directive'. Absent that special exception, because we are not dealing with social assistance, nor Directive 2004/38, we have to return to the principles at issue, and the equal treatment right outlined in *Trojani*.

In *Fratila*, the Court of Appeal had to consider whether rules that singled out people with pre-settled status, in requiring of them a further right to reside to qualify for benefit, were in fact discriminatory on the grounds of nationality, notwithstanding that the overall 'right to reside' rules comprised a 'composite test' including various variables, not exhaustively excluding EU nationals, and not exhaustively including UK nationals. The Court answered that yes, the rule was a form of nationality discrimination; having a status under the EUSS was sufficiently connected to EU nationality, that rules which targeted those under the EUSS was in effect a nationality-based rule.[53] That being the case, the discrimination had to be 'prohibited outright' so that the question of justification 'would not arise'.[54]

Does the non-discrimination duty bite in a private renting scenario?

Is the non-nationality-discrimination duty, as interpreted through *Trojani*, or otherwise, applicable to the current problem? On its face it might appear to be the result of personal bias on the part of private individuals, so might not be the responsibility of the State. However, we argue that where there is a causal link between State actions and the discriminatory actions of third parties, there is cause to investigate, and that the prohibition of nationality discrimination: (i) should be interpreted as including access to housing; (ii) requires States to not promote or generate discrimination on the part of third parties; (iii) prohibits obstacles to continuing to reside in the UK (in an echo of the obstacle to moving and residing case law within the EU); and (iv) requires the UK to ensure private individuals observe the principle.

The Nationality Non-Discrimination Duty Should be Interpreted to Include Access to Housing

The material scope of the general nationality non-discrimination duty in EU law has not been elucidated in secondary law or case law. The duty as it applies *to workers* is explained in more detail in Regulation 492/2011,[55] which includes 'all the rights and benefits accorded to national workers in matters of housing,

53 *ibid*, see especially the judgment of Moylan LJ.
54 *ibid* at [72]; [76].
55 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141, 1-12.

including ownership of the housing he needs'.[56] The reference to ownership may be taken to indicate that the private housing sector is included in this provision, so at the least those who can conform to the privileged category of migrant worker should be entitled to equal treatment in matters of housing – a provision carried over into the WA in Article 24(1)(g). Directive 2000/43/EC[57] prohibits discrimination between persons on the basis of racial or ethnic origin and makes clear its scope includes 'access to and supply of goods and services which are available to the public, *including housing*'.[58] It, however, 'does not cover difference of treatment based on nationality'.[59] This leaves us trying to piece together a picture of what Article 18 TFEU nationality discrimination covers and means, but using other examples as guidance. We would suggest that nationality discrimination, in the context of Article 18 TFEU, which involves cross border movement, would not have a narrower scope than Directive 2000/43, which does not necessarily involve cross-border movement. The prohibition of nationality discrimination (against EU nationals) is a fundamental principle of the EU, central to the achievement of the internal market. The wording and application of Article 18 TFEU is deliberately broad; it includes prohibitions on discriminatory rules regarding name changes,[60] on extradition;[61] on eligibility for care insurance benefits;[62] and on a system for processing personal data that appears to fall within the permitted rules on registration of Union citizens but which goes beyond which is necessary 'in light of the prohibition on any discrimination on grounds of nationality'.[63] If we can establish that it, by the same logic, should include a prohibition on discriminatory access to housing, that necessarily informs the interpretation of Article 12 of the WA – what remains is to show the State has a duty (and plays a role) with regard to generating discrimination.

The UK Must Not Promote or Generate Discrimination on the Part of Third Parties

The discriminatory effects observed under this study attach to those with digital-only proof of status – which means they attach to non-UK nationals, and in particular, EU nationals and their family members with EUSS status. As the EUSS gives rise to this disadvantage, attaching to nationality, the UK has played a pivotal, causal role in generating this discriminatory treatment. In so doing, it has failed to prevent or actively introduced administrative hurdles that encourage the discrimination of another – that of private landlords, so failing to adequately protect the right of equal treatment, and so breaching the positive equal treatment duty in Article 23 of the WA. EEA nationals residing on the basis of the WA in the UK 'shall enjoy equal treatment with the nationals

56 *ibid*, Art 9(1).
57 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180, 22-26.
58 *ibid*, Art 3(1)(h).
59 *ibid*, Art 3(2).
60 Case C-541/15 *Mircea Florian Freitag* EU:C:2017:432.
61 Case C-182/15 *Aleksei Petruhhin* EU:C:2016:630.
62 Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri & Barth* EU:C:2004:413.
63 Case C-524/06 *Heinz Huber* v *Bundesrepublik Deutschland* EU:C:2008:724.

of the UK. The Court of Justice has routinely denounced measures that give rise to discrimination on the part of third parties, albeit not in those terms, by prohibiting measures that would make it less attractive to employ nationals from other Member States.[64] By the same logic, Article 12 of the WA can be interpreted to preclude measures that encourage discrimination, or make it less attractive to rent to, EU nationals. Moreover, the nationality non-discrimination duty also prohibits secondary discrimination, or discrimination arising from the interaction between multiple rules,[65] as is the case here.

Article 12 of the WA Prohibits Obstacles to Continuing to Reside in the UK

The CJEU has a long line of case law on the concept of an 'impediment' or obstacle to free movement of EU citizens, developed as a corollary of the right to non-discrimination.[66] However, a substantial amount of non-discrimination/obstacles to movement case law relating to non-workers is tied up with rhetoric on Union citizenship; thus 'the status of Union citizenship *enables* nationals of the Member States who find themselves in the same situation to enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for'.[67] The citizenship element needs to be unpicked from these principles to make sense in a WA context – but that is less of a challenge than it might at first seem. It is arguably simply *the legal requirement of equal treatment* that 'enables [EU] nationals … to enjoy … the same treatment in law'. Just as EU non-discrimination law prohibits Member States from introducing obstacles to the exercise of the right to move and reside, so the WA non-discrimination provisions must prohibit the UK from creating obstacles to EU nationals continuing to reside, for those who fall within its scope *precisely because* they have previously exercised free movement rights.

The UK Should Ensure Private Individuals Observe Article 12 of the WA

While some individuals – namely those who fall within the scope of the definition of worker - can claim that their right to equal treatment is horizontally directly effective,[68] and so could have a claim against individual landlords, this is not an adequate remedy for two main reasons: firstly, it obviously excludes those not defined as workers, for whom equal treatment is at best 'semi-horizontally'

64 Case C 379/11 *Caves Krier Frères Sàrl* v *Directeur de l'Administration de l'emploi* EU:C:2012:798 at [14]: 'This provision could therefore constitute an obstacle to the free movement of citizens of the European Union as provided for by Articles 21 TFEU and 45 TFEU, *the potential employer* of an unemployed person aged over 45 years being *led to prefer the recruitment of a Luxembourg resident*' (emphasis added).

65 *ibid* at [55].

66 Case C-224/98 *Marie-Nathalie D'Hoop* v *Office national de l'emploi* EU:C:2002:432, 26.

67 *Gaumain-Cerri & Barth* n 62 above at [28]. See also Case C-503/09 *Lucy Stewart* v *Secretary of State for Work and Pensions* EU:C:2011:500, 80; Case C-406/04 *Gérald De Cuyper* v *Office national de l'emploi* EU:C:2006:491, 39.

68 Case C-281/98 *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA* EU:C:2000:296, 35-36; C-325/08 *Olympique Lyonnais SASP* v *Olivier Bernard and Newcastle UFC* EU:C:2010:143, 31.

directly effective;[69] and secondly, in practice it will be difficult to pin any individual decision down to discrimination. The European Network of Legal Experts in the Non-Discrimination Field, reporting on *Discrimination in Housing* for the EU Commission, commented that '[w]ith no written evidence or testimony from a third party, it is incredibly difficult to prove that a refusal to let out property was based on prohibited grounds of discrimination'.[70] Rather, it is only through surveying a wide range of decisions that we can see there is a systemic problem – and one caused by the interaction between UK measures.

As these arguments are about the State's generation of 'knock-on', or secondary discrimination, they are more susceptible to a justification analysis than the measures in *Fratila*. In order to consider whether the measure, and its effects, are necessary and proportionate, the degree of detriment they create must be examined.

The digital disadvantage for EEA nationals: a significant detriment

Everyone is required to provide ID when seeking to access certain services or to engage in activities in the UK such as working or renting property. However, the way that a right to rent or work can be demonstrated is different depending on what kind of immigration status is held by the individual. EEA nationals who resided in the UK before it left the EU are fully reliant on the new digital immigration status operated through the 'view and prove' online service. The DCE survey results show that landlords are far less likely to pick EEA nationals with a share code to confirm status as tenants, even though they theoretically have the same right to rent as their UK counterparts. A landlord's psychological bias against tenants without physical proof represented the most significant driver in their decision-making and played a more pivotal role than all other factors tested (gender, ethnicity, age and occupation), suggesting that the personal biases of landlords cannot fully explain the extent of digital disadvantage. The findings from the survey demonstrate the severity of the disadvantage faced by those who have a digital immigration status compared to those who can use a passport or other physical proof to demonstrate a right to rent in the UK. The digital status share code policy therefore creates extra hurdles for EEA nationals putting them at a disadvantage when seeking to rent property in the UK and could be incompatible with the UK's obligations to ensure the equal treatment and non-discrimination of those protected by the WA.

Our data demonstrates an important initial disadvantage for those relying on digital status but also represents only the first hurdle EEA nationals must overcome before the process of securing tenancy continues. If successful, the landlord and prospective tenant would then have to navigate the view and prove

69 Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, NY: Oxford Academic, 2019).

70 Julie Ringelheim and Nicolas Bernard, *Discrimination in Housing*, European Network of Legal Experts in the Non-Discrimination Field (EU Commission, DG Justice, 2013) 48 at https://www.migpolgroup.com/_old/wp-content/uploads/2014/01/Discrimination-in-Housing-EN-FINAL.pdf [https://perma.cc/G954-8QQ7].

system to share and record their status. Some EEA nationals and landlords may face additional barriers when accessing the digital online system.[71] Alongside this, the view and prove system generates status in real-time and is described by Jablonowski as a transactional status, there is no fixed digital status that can be archived and retrieved, it is 'computed anew for each check'.[72] Concerns have been raised by campaign groups about the capabilities and technical failures of the view and prove system.[73] Reports of frequent technical errors, glitches and data losses mean that status can sometimes fail, be lost or jumbled with other records ('data entanglement'). Jablonowski has also identified five types of different system glitches, including incorrectly displaying refusals, showing a different person's status or not updating a status decision after appeal, which can take months to resolve.[74] When digital status goes wrong, EEA nationals must turn to the EU Resolution Centre, a call centre with limited opening hours (Monday to Friday 8am to 8.30pm; Saturday and Sunday 9:30am to 4:30pm) and a poor track record of picking up calls,[75] to fix the problem. Even if an EEA national manages to contact the resolution centre, a technical error in the view and prove process must be passed on to an IT team. In these instances, call handlers are unable to provide a timescale for when the IT team will resolve the issue. In the meantime, tenants are encouraged to direct the landlord to use the Home Office landlord checking service. This service is advertised as providing an answer in two working days,[76] but for many this will be too late. Where competition in the private rental sector is high, landlords may simply decide to pick a new tenant.

Technical faults and delays in resolving them could result in EEA nationals wrongfully losing out on tenancies, especially where alternative tenants are available with a more convenient physical proof. Errors and irregularities could also result in a loss of confidence and trust in the system, which could see landlords being further disinclined to offer tenancy to those with a digital immigration status. For example, it was recently reported that the Home Office had failed to update the statuses of those whose EUSS applications were refused between 27 June 2021 and 19 April 2022, meaning that over 140,000 EEA nationals' digital statuses incorrectly displayed an old certificate of application, and a positive right to rent check, rather than a refused status until the problem was

71 Tomlinson, Maxwell and Welsh, n 15 above; Catherine Barnard, Sarah Butlin and Fiona Costello, 'The Changing Status of European Union Nationals in the United Kingdom following Brexit: The Lived Experience of the European Union Settlement Scheme' (2022) 31 *Social and Legal Studies* 365.

72 Kuba Jablonowski, 'Data Doubles, Status Multiples, and Transactional Borders of Brexit Britain' [2023] *Journal of Ethnic and Migration Studies* (forthcoming).

73 the3million, 'Challenges Around Maintenance of UKVI Account' (Submission to Independent Monitoring Authority, March 2022) at https://the3million.org.uk/sites/default/files/files/t3m-IMA-4-EUSS-maintenance-report-v2-08Apr2022.pdf [https://perma.cc/4GCV-NK3V].

74 Kuba Jablonowski, 'A Glitch or a Feature? Systemic Problems with Digital Proof of Immigration Status' (Free Movement, 31 July 2023) at https://freemovement.org.uk/transactional-design-and-glitches-in-digital-immigration-status/ [https://perma.cc/QX5V-TJBV].

75 Andreea Dumitrache, 'More Than Half of Calls to EU Settlement Scheme Helpline Unanswered' *Free Movement* 26 January 2022.

76 Home Office, *Landlord's Guide to Right to Rent Checks* (18 October 2023) 41-42 at https://assets.publishing.service.gov.uk/media/652febccd06662000d1b7cdb/Landlord_s_guide_to_right_to_rent_checks._Oct_23_final.pdf [https://perma.cc/E56W-Q2XH].

resolved some eight months later, in January 2023.[77] Glitches and technical issues in the view and prove system are therefore likely to compound the already disadvantageous position of EEA nationals in the private rental sector, particularly when in competition with prospective tenants with a more convenient physical proof.

Compounded detrimental impact for those in the Home Office backlog

The results of the survey also show that those with a pending EUSS application face further disadvantage. Demonstrating a right to rent for those with a pending application or ongoing appeal requires sharing a certificate of application which is normally accessible through the share code system.[78] Article 18(3) of the WA is clear that those who are waiting for an outcome of their application have all their rights under 'this part' of the agreement protected. This means that the entirety of 'Part Two: Citizens Rights', including protection from discrimination on the grounds of nationality (Article 12 of the WA) and equal treatment rights (Article 23 of the WA), should be protected throughout the time that applications are being considered or until the final determination of an appeal. Importantly, there are no further qualifications to Article 18(3). The only requirement is to have a pending EUSS application or an ongoing appeal.

The number of those reliant on a certificate of application to prove their right to rent in the UK is difficult to fully ascertain. As of June 2023, 154,330 EUSS applications had yet to be decided by the Home Office.[79] Not all of these applications will represent those relying solely on a certificate of application as evidence of their rights in the UK. Some of these outstanding applications will be repeat applications or applications to upgrade from pre-settled to settled status. However, the Home Office's slow trawl through this backlog is evident through data revealing that over 30,000 had been waiting 12 months.[80] Administrative reviews of EUSS decisions paint a similar picture, with nearly 7,000 undecided administrative reviews waiting over 12 months on 30 September 2023.[81] For many thousands of EUSS applicants, a certificate of application

77 Independent Monitoring Authority, 'IMA Statement on Work to Address Concerns Raised with EU Settlement Scheme' (News, 22 May 2023) at https://ima-citizensrights.org.uk/news_events/ima-statement-on-work-to-address-concerns-raised-with-eu-settlement-scheme/ [https://perma.cc/E87J-RPNX].

78 Some applicants will receive a certificate of application through an email or letter. Home Office guidance to landlords states that where they receive an email or letter of a certificate of application they must use the Landlord Checking Service to verify the document.

79 Home Office, 'EU Settlement Scheme Quarterly Statistics, June 2023' (Official statistics, 24 August 2023) at https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-june-2023/eu-settlement-scheme-quarterly-statistics-june-2023 [https://perma.cc/8WKE-9G3B].

80 'EU Settlement Scheme Waiting Times as at March 2023' (Freedom of Information request from the3million to the Home Office, response received from UK Visas and Immigration, 20 June 2023, Freedom of Information reference 76502) at https://www.whatdotheyknow.com/request/eu_settlement_scheme_waiting_tim_8 [https://perma.cc/A6UH-T5N6].

81 Freedom of Information request from Alice Welsh to the Home Office, response received from UK Visas and Immigration 8 February 2024, Freedom of Information reference

is not a short-term proof of status. During this process, if the administrative review is challenging a decision not to grant status, applicants will only have a certificate of application to demonstrate their rights in the UK, a proof of status which our results have found creates the highest risk of discrimination in the private rented sector.

The survey showed that a share code for a pending application was the least preferred ID format for landlords and so those stuck in the Home Office backlog are likely to face further disadvantage when seeking to rent property in the UK. One potential factor relevant to this disadvantage could be landlords' caution to offer tenancy to someone with a seemingly 'temporary' status, one that does not confirm an individual's right to live in the UK past the time it takes for the Home Office to determine their application. This may seem like a legitimate concern from the perspective of the landlord wishing to avoid the additional administrative burden of a follow-up right to rent check, as required by the Home Office guidance,[82] and having to find a new tenant should their EUSS application be refused, all underpinned with the risk of potential future fines for getting it wrong. Nevertheless, it leaves those with this temporary status at a statistically significant disadvantage.

Those with pre-settled status also face the additional hurdle of landlords being required to check their status more frequently. Since the High Court found that pre-settled status could not expire after five years,[83] as was originally planned, the Home Office has introduced an automatic two-year extension to the status. This extension is to be applied just one or two months before the expiration date shown on their digital status.[84] Even though the extension is automatic, landlords checking a potential tenant's status will encounter a misleading expiry date, that could show an expiration anywhere up to the next three months.[85] Confusion aside, even where a landlord has the requisite knowledge and confidence in pre-settled status being extended in the future, the right to rent guidance instructs them to conduct an additional mandatory check one year later or on the expiry date shown (whichever is latest) to confirm if the tenant's status was actually extended.[86] This introduces a new risk for landlords who may now fall foul of the right to rent requirements and subsequent sanctions if they fail to complete this extra check and could encourage them to see those with pre-settled status as too much of a liability.

FOI2024/00437 at https://www.whatdotheyknow.com/request/euss_administrative_reviews_30_s_2#incoming-2547445 [https://perma.cc/2W4H-M7EP].

82 Home Office, n 76 above.

83 *R(IMA)* v *SSHD* n 33 above.

84 Home Office, *Landlord's guide to right to rent checks* n 14 above, 51.

85 The text displayed on the right to rent online checking service, as of 30 January 2024, states: 'They have the right to rent until [expiry date]'. At the very bottom of the display it explains that 'Their permission to stay will be extended unless the holder no longer meets the requirements for it'.

86 Home Office, *Landlord's guide to right to rent checks* n 14 above, 51.

Unequal treatment

Before the UK left the EU, EEA nationals could demonstrate their right to rent in the same, much more straightforward, way as UK nationals – providing an EEA passport or national identity card.[87] All EEA nationals could demonstrate their right to rent in this way, regardless of whether or not they were 'residing on the basis of this directive'. In effect, prospective tenants and landlords took the same steps to verify a right to rent for both EEA nationals and UK nationals. This arrangement could have been influenced by a desire for administrative ease; to avoid requiring EEA nationals to register for a residence status confirming their right to rent. Especially when requiring such a registration may have resulted in calls to ensure those registered have equal treatment with regard to social assistance, relying on *Trojani*. Alternatively, the Home Office's decision to allow EEA nationals to prove their right to rent on the same basis as UK nationals may represent a desire to avoid any potential conflict with non-discrimination and equal treatment rights, whether for workers,[88] or for EU citizens more generally.[89] A government policy creating extra hurdles to access housing could have been viewed as an unlawful obstacle to free movement. While the context of the UK's withdrawal from the EU means that it would be ineffective to permit EEA passports alone as proof of right to rent, as free movement for all EEA nationals to the UK has ended, it is still useful to examine past policies that complied with the rights that are replicated in the WA.

In comparison, the digital status scheme and share code process adopted creates a discriminatory disadvantage in the private rental sector for EEA nationals, making it more difficult to secure housing when compared to their UK counterparts who can demonstrate a right to rent through a physical document, most commonly a UK passport. The decision to introduce a policy which requires landlords to check status and then the creation of a more cumbersome status for EEA nationals, that is prone to errors and requires additional checks, reinforces or encourages nationality discrimination in the private rental sector. The data demonstrates that the government's current share code checking system provides EEA nationals with the least desirable status for landlords. A reduction in access to secure housing in turn jeopardises EEA nationals' ability to exercise their residence rights, open a bank account and access employment, all contained in Title II of the WA (and Title II of the EEA SA).[90] The detriment that the current mechanism creates in the exercise of WA rights produces unequal

87 Home Office, 'Right to Rent Document Checks: A User Guide' (December 2016) at https://web.archive.org/web/20200401094209/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/573057/6_1193_HO_NH_Right-to-Rent-Guidance.pdf (last visited 31 October 2023).

88 Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance [2011] OJ L141/1, Regulation 9.

89 TFEU, Art 18.

90 Gemma Byrne, *The Postal Paradox: How Having No Address Keeps People Homeless* (Citizens Advice, December 2018) at https://www.citizensadvice.org.uk/Global/CitizensAdvice/Post%20and%20Telecoms/Homelessness%20report%20-%20Final.pdf [https://perma.cc/5WX3-FAWH].

treatment and a significant barrier to continued residence in the UK. Drawing from the construction of equal treatment in an EU context, it is easy to see how these restrictions would have constituted an unlawful obstacle to free movement. Now, however, it can be argued that the stakes are much higher. A barrier to secure housing is *an obstacle that could prevent an EEA national from continuing to reside in the UK*. This in turn could result in them having to leave, potentially for long enough to permanently and irrevocably lose their residence rights in the UK.[91]

Having established personal scope, demonstrated discrimination, and identified detriment, if we treat the discriminatory effects/potential failure to ensure equal treatment as being a function of indirect discrimination, it is now necessary to consider whether the measures are in aid of a legitimate objective, and whether they go further than they need to, and so whether they are proportionate and necessary in light of their objectives. CJEU case law has been clear that policies creating indirect discrimination can be 'capable of being objectively justified if there existed no other appropriate and less restrictive means to achieve the pursued aims'.[92] One clear aim of the policy is to provide EEA nationals who were resident in the UK before it left the EU with the means to demonstrate that they are protected by the WA and therefore have enhanced rights in the UK compared to those who arrived after the end of the transition period. Previous analysis of official documents and ministerial statements identified further aims of the digital immigration status policy as increased convenience and efficiency, enhanced security, greater accessibility for vulnerable groups, and administrative coherence.[93] While it is questionable whether the current digital immigration status meets these aims, they are most likely legitimate objectives. We now need to consider whether there could be an alternative and less disadvantageous policy that would equally (or better) meet those aims.

Notably, the survey results show a clear preference among landlords for a physical residence card or even a digital scan of a physical document over the share code system. This suggests that the impact on EEA nationals could have been reduced by providing an alternative or additional physical WA residence card or a more accessible digital format, such as a digital document or a QR code that could link to an immigration status. These alternative proofs of status would meet the core aim of the digital status policy – to provide proof to assured individuals, the government and third party checkers that an EEA national is protected by the WA but would clearly not expose EEA nationals to the digital disadvantage of the share code system in the private rental sector. As the results of the survey show that landlords prefer a physical proof of status they can check, it could be argued that this would also represent a more convenient and efficient option for both users of the status and third party checkers.

91 WA, Art 15(3) states that a permanent right of residence can be lost when the EEA national has been absent from the UK for a 'period exceeding 5 consecutive years'.

92 Case C-83/14, *'CHEZ Razpredelenie Bulgaria' AD* v *Komisia za zashtita ot diskriminatsia* EU:C:2015:480.

93 Joe Tomlinson and Alice Welsh, *Digital Immigration Status: A Monitoring Framework* (Public Law Project Research Paper, September 2020) at https://publiclawproject.org.uk/content/uploads/2020/10/PLP-Report-Digital-Immigration-Status.pdf [https://perma.cc/MT6B-M6PC].

It is also possible to imagine digital alternatives that would have been available to the government. For example, a digital document that can be downloaded and shared, or the provision of physical token, such as a QR code, as proposed by campaign group the3million,[94] that could provide a link to a digital record of immigration status. Both alternatives have the potential to deliver the desired security and accessibility improvements of a digital immigration status and may not suffer the same extent of digital disadvantage as the share code system. The results also suggest that a digital document (like a PDF document), rather than a computed status through a share code is preferable for landlords when choosing tenants. While it is not the aim of this article to promote any particular alternative method, it is clear that appropriate and less restrictive methods of providing an immigration status, even a digital one, are available, indicating that the current mechanism may be disproportionate and unnecessary. It could further be argued that the measure adopted is inappropriate to meet the purported legitimate objectives of accessibility and security,[95] given the reports on digital exclusion[96] and data entanglement.[97]

Our evidence shows that the mechanism adopted by the UK government creates a significant penalty for EEA+ nationals. Our DCE results show that ID status is the most determinative factor for landlords choosing tenants, and the share code mechanism is the factor most likely to lead to rejection, but it is the only way that EEA nationals with EUSS status can demonstrate their residence rights, and landlords are obliged to request and check it. UK nationals will not suffer the same penalty, as there are no digital-only forms of ID for UK nationals that rely on the view and prove system. The share code scheme, therefore, creates a mandatory disproportionate disadvantage for EEA nationals protected under the WA, a cohort who are entirely reliant upon this mechanism. The policy choice to provide EEA nationals with a digital process for proving status that is both more cumbersome and prone to errors is likely to encourage discrimination from landlords. Such a choice therefore could be viewed as the creation of a significant obstacle to continued residence in the UK. While the data is focussed on landlord preferences, share code immigration checks are also required for employers and banks. Should these sectors' preferences for proof of status reflect that of landlords, the risk of discrimination and impact on residence is intensified. The current share code digital status system is clearly unhelpful and unnecessary but the severity of the consequences and the strength of statistical evidence from the DCE survey suggests that the UK government have failed to comply with its obligations under Article 12 of the WA prohibiting discrimination on the grounds of nationality and Article 23 of

94 the3million, *Fixing the Digital Status: A Proposal for Safe and Simple Proof of Rights* (June 2021) at https://the3million.org.uk/sites/default/files/files/t3m-proposal-DigitalStatusSecureQRCode-10Jun2021.pdf [https://perma.cc/US8Z-YZBR].

95 'Appropriateness' of an indirectly discriminatory measure is frequently treated as one of the components of justification; see Case C-158/07 *Jacqueline Förster* v *Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.

96 Dora-Olivia Vicol, 'EUSS Digital-Only Status Remains an Issue for 2 in 5 EU citizens' (Work Rights Centre, 5 May 2022) at https://www.workrightscentre.org/news/euss-digital-only-status-remains-an-issue-for-2-in-5-eu-citizens [https://perma.cc/EF92-2DB9].

97 Jablonowski, n 72 above.

the WA ensuring equal treatment with UK nationals. Instead the share code digital status method through which the UK has adopted to abide by Article 18(1) of the WA puts EEA nationals at risk of discrimination.

The Charter of Fundamental Rights and access to housing

The fact that Withdrawal Law is a completely new body of law means that there are substantial, significant issues of scope, content and interpretation yet to be thrashed out. One issue that has already reached the courts is the question of whether the EU Charter of Fundamental Rights[98] forms part of the Withdrawal Agreement, and if so, to what extent. While in general, the Charter is no longer part of UK law, having been explicitly excluded from the body of EU law 'retained' in UK law in the EU (Withdrawal) Act 2018,[99] it still forms part of the law that applies to those within the scope of the Withdrawal Agreement, according to the UK courts. In *CG*,[100] the Court of Justice of the EU found that people with pre-settled status, a domestic right to reside, were not, by virtue of that status entitled to protection from nationality discrimination. However, they were deemed to have exercised an Article 21 TFEU right, and the awarding of pre-settled status brought them within the scope of the Charter of Fundamental Rights; in particular, the UK authorities could not refuse applications from people with pre-settled status for universal credit until after they had ascertained that such refusal would not jeopardise the applicants' right to live in dignity under Article 1 of the Charter.

This case concerned facts arising before the end of the transition period, when EU law was still applicable in the UK. Inevitably, the question arose as to whether the findings in *CG* about the effect of the Charter *post* transition period, when applicants' rights are now vested in Withdrawal Law rather than EU law. In *SSWP* v *AT*, a three-judge panel of the Upper Tribunal found that the Charter does apply to people with pre-settled status, because Article 13 of the WA refers to Article 21 TFEU, which in turn must be interpreted through the prism of the Charter.[101] This finding has been upheld by the Court of Appeal of England and Wales.[102] The Court of Appeal noted that the Charter is explicitly included in the definition of 'Union law' in the Withdrawal Agreement (Article 2), and concluded that it also forms both a 'method' and a 'general principle' of interpretation as per Article 4(3) of the WA. The residence right in Article 13 of the WA drew upon Union law, Article 21 TFEU, so must be interpreted in line with the Charter.

The Court made clear that the WA does not reintroduce the Charter completely into UK law; (for example it cannot recreate EU voting rights – *EP* v *Préfet du Gers and Institut national de la statistique et des études économiques*[103])

98 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.
99 EU (Withdrawal) Act 2018, s 5(4).
100 *CG* n 39 above.
101 *SSWP* v *AT* [2022] UKUT 330 (AAC).
102 *SSWP* v *AT (Aire Centre and IMA Intervening)* n 39 above.
103 Case C-673/20 *EP* v *Préfet du Gers and Institut national de la statistique et des études économiques* EU:C:2022:449.

rather certain provisions in certain contexts remain applicable; it 'only applies if and insofar as it can attach to rights … [in] the Withdrawal Agreement'.[104] While the case is primarily concerned with the Article 1 right to dignity, the same logic can be extrapolated to other Charter provisions. Since the Supreme Court has refused permission for the Secretary of State to appeal, and no question was referred to the CJEU,[105] the Court of Appeal's decision is final – the Charter must also play a role in the UK's implementation of non-discrimination and equal treatment rights in the WA.

In adopting a mechanism that leads to systematic discrimination against EU nationals in the private rented sector, the UK could jeopardise their ability to access housing, and *AT* confirms that '[h]ousing and accommodation will invariably be an important component of any system of support' relevant to living a dignified life.[106] If the UK's digital system left EU nationals struggling to be housed, and/or at risk of homelessness, then following the logic of *AT* and *CG*, their right to live in dignity might be at risk. However, the risks to dignity found in *CG* and *AT* were fairly extreme – meaning that there might be a high threshold to be met before the duty began to bite. Moreover, all they gave rise to was a right to an individualised assessment on a case by case basis – they did not call into question the system that risked stripping EU nationals of their right to live a dignified life. It is therefore unlikely this avenue would successfully challenge the digital status scheme at issue – it would be more likely to open up the possibility of an individual assessment, albeit one that only helped the most vulnerable in the worst circumstances.

Even if not creating (the risk of) homelessness or destitution, but rather creating discriminatory obstacles in accessing housing, the UK might be at risk of violating EU nationals' *other* Charter rights. This could include Article 24 on making the best interests of the child a primary consideration (where would-be tenants struggling to secure housing have children); and Article 7 of the Charter which protects the right for respect for private and family life. This last provision should be interpreted in light of Article 8 of the ECHR, according to Article 52(3) of the Charter, which states: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

Article 8 of the ECHR encompasses rights to housing; while the private rented sector is subject to a different degree of human rights-based judicial oversight compared to the public sector (especially when it comes to eviction), the legislature is supposed to consider tenants' Article 8 rights to housing.[107] Moreover, in non-eviction matters, where the core problem creating an obstacle to accessing housing is one created by the legislature, it is arguable that the matter would fall within the scope of judicial review. The Council of Europe

104 *SSWP* v *AT (Aire Centre and IMA Intervening)* n 39 above at [103].
105 As permitted in WA, Art 158.
106 *SSWP* v *AT (Aire Centre and IMA Intervening)* n 39 above at [128].
107 *F.J.M.* v *United Kingdom*, Application no 76202/16, Decision, 6 November 2018.

guidance on Article 8 of the ECHR[108] states: 'Whilst Article 8 protects individuals against interference by public authorities, it may also entail the State's adoption of measures to secure the right to respect for one's 'home' (Novoseletskiy v. Ukraine, § 68),[109] even in the sphere of relations between individuals (Surugiu v. Romania, § 59).'[110] It is therefore (at least theoretically) possible that the digital disadvantage could also breach the Charter rights of those exercising WA residence rights to private life and access to housing.

A further possible tool in the Charter lies in Article 21 on non-discrimination. While it is unlikely to provide much by way of a stand-alone principle (and of course, Charter rights can only piggy-back onto other provisions of Union law as carried through into the WA), and might appear redundant in light of Article 12 of the WA, it could nevertheless provide the rhetorical flourish of *fundamentality*, the light in which Article 12 of the WA should be read, that (as noted above) was previously provided to the equal treatment case law by Union citizenship.

CONCLUSION

We have established that the UK's implementation of digital-only immigration status under the EU Settlement Scheme has created a significant disadvantage for EU citizens seeking to access private rental housing in the UK. Our survey experiment demonstrates that landlords are substantially less likely to rent to prospective tenants who can only provide digital proof of their immigration status compared to those with other forms of ID. This 'digital disadvantage' cannot be explained by differences in tenants' gender, age, ethnicity, occupation, or characteristics of the respondent landlord, such as their attitudes to immigration, number of properties let or socio-demographic characteristics.

The depth of this digital disadvantage raises serious questions about the UK government's compliance with its non-discrimination and equal treatment obligations under the WA. While the WA permits the use of digital status, it does not allow implementing such a mechanism for proof of status in a way that unlawfully discriminates against EU citizens, especially where this discrimination results in a barrier to effective residence in the UK. Although increasing administrative efficiency and security were likely legitimate aims behind digital-only status, the government could have adopted less restrictive alternatives, like issuing physical residence cards or digital documents. The availability of such alternatives suggests the current digital system could be disproportionate and that the digital disadvantage obstructs EU citizens' abilities to continue residing in the UK, contrary to the WA's purpose. If EU Charter rights apply to the WA's implementation – as indicated in recent case law – the

108 Council of Europe, *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*. Updated on 31 August 2022 at https://www.echr.coe.int/documents/d/echr/guide_art_8_eng (last visited 4 June 2024).
109 *Novoseletskiy* v *Ukraine* Application no 47148/99, Judgment, 22 February 2005.
110 *Surugiu* v *Romania* Application no 48995/99, Judgment, 20 April 2004.

digital disadvantage could also be at risk of breaching EU Charter obligations to respect private life and access to housing.

The wider question that our findings and legal analysis raises is the extent to which the rights of EU citizens living in the UK after Brexit are being meaningfully protected. This is an important socio-legal question with serious, continuing implications for a significant minority of the UK population. While this question has many complex manifestations, we have examined in detail one of the most important domains in which this question is arising, and our evidence suggests there are grounds to be concerned that the rights protections for this group are not being effectively implemented.