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UK Immigration Policy after Brexit: the EU Settlement Scheme, Citizens' Rights and the Rise of Judicialised Governance.¹

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Abstract

This paper draws on documentary analysis and interviews with key stakeholders to investigate the development of UK immigration policy after Brexit with respect to EU/EEA nationals. While the command powers of the Home Secretary have been considerably strengthened in relation to the immigration control of EU nationals, following the adoption of the EU Withdrawal Agreement, the retained and newly conferred rights of previously resident EU nationals has become a terrain of judicialised contestation between the UK government, the EU and citizens' rights advocacy groups and bodies. At the same time, in the absence of effective parliamentary oversight, the implementation of Withdrawal Agreement law has been left to local authorities, public services and non-governmental organisations which often lack the knowledge and expertise to apply the case law appropriately or to challenge unlawful decision-making.

Keywords: Brexit - Immigration - EU Settlement Scheme - Citizens' Rights - Public policy - United Kingdom

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Introduction

In the aftermath of the Brexit referendum, the then Prime Minister Theresa May stated

‘I couldn't be clearer: EU citizens living lawfully in the UK today will be able to stay’.²

To ensure this outcome, a scheme was introduced (the EU Settlement Scheme) which allowed all those eligible to apply for pre-settled status (for those living in the UK less than 5 years) or settled status (for those living in the UK for 5 years or more).

The decision taken by the UK government to leave the European Union on 31 December 2020 has led to a significant growth in the powers of the central executive in a number of areas where European law and decision-making processes had previously taken precedence—particularly in regard to the freedom of movement of EU/EEA nationals³ and access to UK public funds and publicly funded services (Ward, 2021; Richardson, 2018; Barnard, Fraser and Costello 2022). In particular, the so-called ‘Brexit acts’ including the EU (Withdrawal Agreement) Act 2020 and the EU (Future Relations) Act 2020, which implemented the UK obligations under the Withdrawal Agreement and Trade and Cooperation Agreement respectively, saw one of the largest transfers of power to ministerial departments in post-war history. As a result, the various powers once delegated to the EU were repatriated and placed in the hands of the central executive, which in turn had to quickly establish a new set of

² ‘PM's open letter to EU citizens in the UK’, 19 October 2017. In her open letter, Theresa May referred to the cost of applying for EU Settled Status as being no more than the cost of applying for a UK passport. This fee proposal was later dropped under pressure from EU citizens’ rights organisations who warned that it risked excluding vulnerable categories of EU nationals from accessing the EUSS. A key benefit outlined in the letter was the removal of the requirement for EU nationals to demonstrate that they had taken out Comprehensive Sickness Insurance.

<https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk#:~:text=Updates%20to%20this%20page,Russian%20translation%20added>

³ The term ‘EU nationals’ will be used in the remainder of the paper, but for the purposes of the EUSS this includes EEA nationals as well.

policies in the context of a rapidly changing national and international political environment (Barnard, Fraser and Costello 2022).

These Acts represent a significant reversal in trends in UK immigration policy. Indeed, since the passing of the European Communities Act in 1972, the United Kingdom's sovereign status had undoubtedly changed from a dualist system in which parliament had the discretion to implement international agreements on its own terms and in its own time to one in which EU law became automatically applied (Bogdanor 2019). As Berry and Guild write, 'In the Brexit debate, it was exactly the automatic effect of EU law in the UK constitutional order (as provided for in the EC Act 1972) which inflamed the discussion about state sovereignty' (Berry and Guild, 2020, 1). Indeed, despite the UK government opting out of significant aspects of the EU's security, immigration and border control policies—notably the Schengen 'open border' agreement—there were other areas such as the Dublin Protocols and free movement within the EU/EEA that required the automatic acceptance of European Commission directives and European Court of Justice rulings. This undoubtedly set limits to the UK government's and Westminster parliament's powers to operate freely within this policy sphere (Dennison and Geddes 2018).

However, with the repatriation of EU policy-making, border management and judicial powers to London following Brexit—what Michaela Benson and colleagues have termed 'the re-bordering of Britain' (Benson et al. 2022, Zambelli, Benson and Sigona 2023)—there is growing evidence that the Home Office has struggled to wield them. The *de facto* outsourcing of immigration control since 2006 as a result of the introduction of what might be broadly called 'the hostile environment measures', saw responsibility for border and immigration control devolved to private actors such as landlords and employers, as well as public bodies including health services, schools, colleges, universities, local authorities and

benefits agencies (Darling 2016, Webber 2019, Griffiths & Yeo, 2021). Meanwhile, as the Conservative government began to emulate a points based immigration system on the Australian model, specialist expert committees such as the Migration Advisory Committee were created to advise on key aspects of immigration policy including shortage occupations and suitable minimum earnings thresholds for economic migrants into the UK⁴--in effect placing key questions of immigration policy implementation and operation outside the direct control of the Home Office.

The paper seeks to explain this dynamic of increasing policy autonomy combined with declining policy control using the example of the Home Office's European Union Settlement Scheme (EUSS). The central argument is that while 'taking back control' may have been the *leitmotif* of the Brexit referendum and in particular the Boris Johnson administration that completed divorce proceedings with the European Union, it is important to distinguish the rhetoric of central executive command from the reality of an often messy and non-specific manifestation of policy control on the ground. This is especially the case where the policy area is large scale, involving all four nations of the union and subject to international treaty regulation and external monitoring—as is the case with the EUSS (O'Brien and Welsh 2024).

Based on 33 interviews with local authority and NGO stakeholders following the launch of the EU Settlement Scheme, our research revealed that the delivery of the EUSS relied on supporting and funding a sector that had not traditionally been allied to the 'hostile environment' bordering regime that had defined the coalition and Conservative governments since 2010 (EU Rights and Brexit Hub 2022). At the same time, the EU Withdrawal Agreement set binding obligations on the UK and other EU member states with regard to EU

⁴<https://www.gov.uk/government/organisations/migration-advisory-committee>

citizens who had been ordinarily resident before December 2020 and required the establishment of a new statutory monitoring body—the Independent Monitoring Authority for Citizens’ Rights (IMA)—that exercised a quasi-judicial enforcement function in relation to public bodies and provided some checks and balances on central government departments in their dealings with those EU nationals making settlement claims and / or accessing public services or benefits, employment or housing (IMA 2023a, 2023b).

This empirical contribution of this paper therefore forms two parts. The first provides a detailed analysis of the changes in UK immigration policy since the UK’s exit from the European Union. Specifically, the powers granted to the Home Secretary under the 2020 European Union (Withdrawal) Act [EUWA], the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 [ISCA] and the 2022 Nationality and Borders Act [NABA]. This draws on detailed documentary analysis of the relevant legislation and associated policy papers together with speeches by government ministers, senior civil servants, MPs and experts in the relevant legal and policy fields.

The second part presents the findings of a case study of the EU Settlement Scheme (EUSS) conducted as part of an ESRC funded project, ‘The EU Rights and Brexit Hub’,⁵ drawing on 35 interviews with MPs and Peers and 33 interviews with Local Government officials and NGOs recruited by the Home Office to deliver the scheme alongside analysis of Home Office guidance and policy documents—tracing the EUSS from its inception in 2018 to its roll-out

⁵ Originally the EEA Public Services Research Clinic, this 3-year project funded under the auspices of the ESRC’s *Governance After Brexit Programme* is the first of its kind to develop a nation-wide, legal action research hub. It is an interdisciplinary, inter-institutional, multi-method three-year project investigating how Brexit affects the social rights of EU & EEA nationals in the UK.

and implementation in 2019 to 2021.⁶ While widely regarded as a successful programme with over 6.5 million EU citizens resident in the UK applying to the EUSS,⁷ the EU Settlement Scheme also presented systematic challenges for the Home Office which were only overcome due to the cooperation and intervention of key national and local stakeholders.

⁶ MPs and Lords were selected according to two criteria: estimated EU nationals as constituents, and membership of relevant parliamentary policy networks. Potential participants were drawn from the top two deciles of EEA nationals by constituency as specified in the Annual Population Survey and verified by the Home Office EU Settlement Scheme Statistics and Department of Work and Pensions National Insurance Number statistics. Invitation letters explaining the purpose of the project were sent to constituency offices together with follow up emails. While we endeavoured to strike a balance between the parties present in the House of Commons, opposition party MPs were more willing to agree to interview than MPs from the governing Conservative Party. Members of the House of Lords were invited to participate based on their membership of relevant committees or All-Party Parliamentary Groups as well as frequent contribution to debates involving discussion of the EU settlement scheme and the rights of EU nationals in the UK more generally in the wake of the EU Withdrawal Agreement. We also conducted semi-structured interviews with 12 of the 72 local government and third sector organisations funded by the Home Office to support applications to the EUSS. Interviews were subsequently transcribed and deposited with the UK Data Service (O'Brien, C. (2024). Ethics approval was granted by the University of York Faculty of Social Science's Ethics Committee and consent to anonymously publish interview responses was obtained from each interviewee. Where a consensus between interviewees is discernible the in-text citation refers to 'MPs interviews', 'Peers interviews', 'Local authority interviews' or 'NGO interviews' with a note of the year where relevant. In order to preserve anonymity descriptors were limited to party affiliation and in the case of MPs the region or whether the constituency was urban or rural (except where this might identify the MP, for example in the case of Select Committee membership).

⁷ <https://www.gov.uk/government/statistics/eu-settlement-scheme-statistics-june-2022/eu-settlement-scheme-statistics-june-2022>

That said, there is growing evidence that enforcement networks, both across government departments and civil society, have been slow to accommodate the new rules leading to risks of discrimination and future crises (O'Brien 2021, Morris and Qureshi 2021, O'Brien and Welsh 2022, Tomlinson, Maxwell and Welsh 2022). This demonstrates that while in the aftermath of Brexit the Home Office has been able to secure greater autonomy over *immigration policy making*, it is increasingly inhibited by its limited ability to control *immigration policy implementation* on the ground due to the proliferation of exclusionary border regimes across government departments and local authorities as well as the 'embedding' of civil society actors such as employers, landlords, and education and healthcare providers in the wake of the hostile environment immigration legislation (Webber 2019, Griffiths and Yeo 2021). Therefore, it is to lawyers and judges rather than their elected representatives that EU citizens and others affected by the EU Withdrawal Agreement and allied treaties have had to turn in an often-vain attempt to uphold their retained and acquired rights since the United Kingdom formerly left the European Union.

Post-Brexit Legislative Reform and Scrutiny

The 2020 European Union (Withdrawal) Act [EUWA] largely served to incorporate the Withdrawal Agreement into UK law, but it sits alongside the European Union (Withdrawal Act) 2018 which provided for a snapshot to be taken of 'Retained EU law' as at 11pm on 31 December 2020 and whose extensive list of subordinate and retained EU legislation was significantly reduced by the Retained EU Law (Revocation and Reform) Act 2023. Most significantly for our purposes, section 3 of the 2023 Act abolished the principle of the supremacy of EU law while section 4 abolished the general principles of EU law (Harrison et al. 2025, 314-317).

However, the majority of the Withdrawal Act had the function of incorporating the existing body of EU law into UK law, thus rendering any such provisions amendable by future UK legislation alone. The EUWA also included two significant provisions constraining the sovereign power of the UK government: the Northern Ireland Protocol and the Agreement on Citizens' Rights. While the former has been covered extensively elsewhere (Murphy, 2021; Murphy and Evershed, 2022; Hayward, 2021) the main implication for the Home Office and other key government departments such as the Department of Work and Pensions is the Agreement on Citizens' Rights, which has received far less attention (Sumption and Fernández-Reino, 2020). Part 3 of the EUWA sets into UK law the rights of EU citizens residing in the UK as defined by the Withdrawal Agreement (discussed in more detail below) and goes on to establish an independent body—the Independent Monitoring Authority on Citizens' Rights which '...must monitor the implementation and application in the United Kingdom of Part 2 of the withdrawal agreement and Part 2 of the EEA EFTA separation agreement', and keep 'under review the adequacy and effectiveness of—(a) the legislative framework which implements or otherwise deals with matters arising out of, or related to, Part 2, and (b) the exercise by relevant public authorities of functions in relation to Part 2' (EUWA, schedule 2, c.22 1-2).

Thus, the initial act of leaving the European Union had the effect of both constraining and expanding the powers of the Home Office. On the one hand the EUWA bound the Home Office to secure the rights of EU citizens already resident in the UK and created an independent body to monitor this implementation (the IMA). Crucially this is a statutory body with the power to lead inquiries into government departments for their failure to comply and to mount legal challenges to government policy decisions if they are seen to be in breach of the Citizens Rights' provisions of the Withdrawal Agreement (EUWA, schedule 2, c. 25-30). While on the other hand the EUWA granted the UK government the freedom to use

future legislation to rescind the freedom of movement and apply immigration regulations to EU citizens without consulting or being constrained by the EU. Something the Home Office did promptly by passing the Immigration and Social Coordination (EU Withdrawal) Act [ISCA] in November 2020.

The ISCA, in contrast to the EUWA, mainly serves to enhance the powers of the Home Office over immigration policy by largely enabling it to bypass parliamentary scrutiny. Where the EUWA laid the foundations for the UK to ‘take back control’ of its borders the ISCA delivered on it. Its purpose was first to formally set an end date for the freedom of movement from the EEA to the UK (31 December 2020) and to grant the Home Secretary the power to change the rights of EU citizens in the UK using secondary legislation (ISCA, s.5). Crucially the powers contained in this Act are exceptionally sweeping ‘Henry VIII powers’ that allow the government to directly amend primary legislation, including the EUWA, through the use of secondary legislation, without the need for additional parliamentary scrutiny (Lords Select Committee on the Constitution, 2020).

The House of Lords Delegated Powers and Regulatory Reform Committee’s report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, ‘argued these regulation-making powers (then in clause 4 of the bill) were too broad in scope’ (Scott 2020) and described the provisions as representing a ‘very significant delegation of power from Parliament to the Executive’ (House of Lords Delegated Powers and Regulatory Reform Committee, 2020). While in a letter to MPs, Kevin Foster, the Minister for Future Borders and Immigration, said the powers were necessary and would be used in a limited way, claiming that, ‘[t]his power is needed to align the immigration treatment of EEA and non-EEA citizens under the future global points-based immigration system from January 2021’ and argued that ‘[t]he Government has no intention to use the powers to make wide-ranging

changes to immigration policies or fees, as some reports have suggested’ (Scott 2020), which rather begs the question as to why a government would create powers that it has no intention of using.

Thus while the Home Office was in principle bound by the European Union Withdrawal Agreement, it had complete discretion as to how to interpret the rights granted to EEA+ citizens in the UK, in the first instance at least.⁸ While in principle this legislation allowed the Home Office to enact the EU Settlement Scheme and provided a mechanism for amendments to the legislation in order to comply with ongoing negotiations with the EU,⁹ it also meant that Home Office decisions could be imposed by fiat largely exempt from parliamentary challenge or scrutiny (Lords Select Committee on the Constitution, 2020). Indeed, a recurring theme of our interviews with MPs was that they felt that they could no longer effectively scrutinise immigration policy due to the preponderance of secondary legislation (Interviews, MPs, 2019-2022).

The advantage of using delegated legislative powers is that it allows ministers to determine expansive areas of law while giving such provisions the full legal effect of a statute.

However, because House of Commons scrutiny committees are notoriously understaffed and often of little interest to MPs given the highly technical nature of the legislation being passed (MP interviews), statutory instruments can be introduced with little or no debate. For example, the emergency measures introduced during the Covid lockdown and which affected

⁸ EEA+ nationals relates to all non-British citizens covered by the EU Withdrawal Agreement and it includes family members who do not have EU/EEA citizenship as well as the carers of EU/EEA national children who would have enjoyed residence rights under previous EU legislation, known as Zambrano carers. Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), EU:C:2011:124. For a critical study of the legal uncertainties facing Zambrano carers in the UK see O’Brien (2019).

⁹ Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee, 24 July

2020. Available at: <https://publications.parliament.uk/pa/bills/lbill/58-01/121/5801121-DPM.pdf>

the lives of millions of people were all promulgated using statutory instruments (Dey and Murphy 2021, 476).

Increasingly therefore the Home Office is able to execute its political policy preferences without prior scrutiny, while more detailed scrutiny often only occurs after the policy has been implemented through select committee inquiries (Interview, Senior Opposition MP, 2021)—a mechanism that has increasingly become ineffective as Ministers simply reject or ignore Select Committee recommendations. As one senior opposition member of the Home Affairs Select committee put it:

It's almost like anything anybody else suggests, they're not interested in. And I think that's really poor government and I think it's really disrespectful of Parliament, as well, actually. I feel really strongly that Parliament's role of scrutiny and trying to improve legislation is just being completely avoided, really, by this government (Senior Opposition MP interview, 2021).

Often the only means of challenging immigration policy is to draw as much public attention to the issue as possible, but this relies on a media news agenda that opposition MPs in particular find it difficult to influence.

...there's no doubt that they have taken powers to make it easy for them to make the change. The big question is, what are these changes they want to make? And how will politics and public opinion react to those changes? If you then find that there's a huge hoo-ha, like any hoo-ha, government, even with a majority of 80, realises that it needs to either think again on the process or think again on the policy. If they can't win the argument. (Interview, Senior Opposition MP, 2021)

Unless we embarrass them into change, which isn't easy to do, you can't outvote them anymore (Interview, Opposition member of Home Affairs Select Committee, June 2021).

While the 2022 Nationality and Borders Act did not specifically address the status of EU/EEA citizens in the UK, since its main purpose was to criminalise illegal entry and to increase the Home Office's ability to remove those without a right to remain, parliament also legislated to make asylum claims from EU nationals inadmissible on the grounds that all member states of the European Union were deemed to be 'safe third countries'.¹⁰

Significantly the government took the decision to introduce the NABA as a bill where the sponsoring minister had to declare the legislation had a better than 50 per cent chance of being successful if challenged on the basis of international law. Whereas the more recent Illegal Migration Act 2023 (whose provisions were mostly repealed by the Labour government's Border Security, Asylum and Immigration Act 2025)¹¹ 'is the first piece of immigration legislation for which the Government has made what is called a Section 19(1)(b) statement, meaning that 'we [the government] believe we have credible legal arguments for the legislation but recognise that because it is novel, ambitious and untested, we cannot be sure we have a better than evens chance of success in the European Court in Strasbourg'.¹² Because the need to be compatible with the European Convention on Human Rights is a

¹⁰ Nationality and Borders Act 2022—nationality provisions, LexisNexis
<https://www.lexisnexis.co.uk/legal/news/nationality-borders-act-2022-nationality-provisions>

¹¹ See Clause 41 (1) and (2) of the Border Security, Asylum and Immigration Act 2025 (Repeal of certain provisions of the Illegal Migration Act 2023). For a rationale see Minister of State for the Home Department, Dame Angela Eagle's response in the Border Security, Asylum and Immigration Bill Deb, 11 March 2025, c216).

¹² 'Nationality and Borders Act compared to Illegal Migration Bill: factsheet', Updated 20 July 2023. Section 19 of the Human Rights Act 1998 requires there to be 'a statement of compatibility' with the European Convention on Human Rights on the face of a Bill which is sponsored by a Minister of the Crown.

fundamental requirement of the Northern Ireland Protocol, an assertion of the command powers of the UK Home Office with regard to EEA and foreign nationals more generally will inevitably require the UK courts to decide on the lawfulness of some of the government's more 'novel, ambitious and untested' approaches to migration and human rights via judicial review.

The Role of Judicial Review in Implementing and Contesting the EU Withdrawal Agreement and the Powers of the Home Secretary

In the absence of effective legislative challenge and scrutiny to the central executive, the primary remedy against the Home Secretary's rule making and decision taking has taken the form of judicial review. Here an individual, group or organisation with appropriate legal standing can challenge a Home Office decision on the basis that it contravenes the legislation set out by parliament or is otherwise unlawful. These judicial remedies serve as an important, if limited, break on the power of the UK executive by limiting the ability of ministers of the crown to simply 'decide' policy (see for example McKinney 2019, Yeo 2023). In the case of EU citizens' rights this is particularly important, for while the ISCA allows the Home Office the ability to unilaterally determine the future rights of EU citizens, it must do so within the terms of the EUWA and under the scrutiny of the IMA aided by the judicial rulings of UK courts in compliance with or guided by CJEU case law.¹³

It is not surprising therefore that the law courts have become a key arena in contesting immigration policy. However, judicial review is fraught with uncertainty, involves significant

¹³ 'UK courts must consistently interpret CJEU case law handed down until the end of the transition period (Art 4(4)), and pay due regard to CJEU case law handed down after that date (Art 4(5)); UK judicial and administrative authorities are empowered to disapply any inconsistent or incompatible national legislation (Art 4(2))', Harrison et al (2025) Chapter 6.

costs, and can be subject to protracted delays especially if decisions are appealed to the Court of Appeal and Supreme Court or ultimately to the European courts.

Within the context of EU citizens' rights, for example, three key cases have been brought with mixed outcomes. The first, *Fratila v Secretary of State for Work and Pensions* [2020]¹⁴ was a challenge to the government's requirement for EU nationals with limited leave to remain ('pre-settled status' under the EUWA) to provide additional evidence of their right to welfare support, which was unsuccessful, allowing the government to continue to discriminate on the grounds of immigration status (see O'Brien, 2021). The second, *IMA v Secretary of State for the Home Department* [2022]¹⁵ was a challenge to the right of the Home Office to unilaterally revoke the rights of EU citizens with pre-settled status after two years if they had not secured indefinite leave to remain (known as 'Settled Status' under the EUWA). A policy which was successfully challenged thereby requiring the Home Office to extend the rights of those with pre-settled status potentially indefinitely and grant indefinite leave to remain automatically to those that meet the criteria of five years residence (Home Office 2023). The third, *Celik v Secretary of State for the Home Department* [2023] concerned a partner of an EEA national who resided in the UK (without immigration status) at the end of the transition period who married the EEA national shortly after the end of the transition period. The appellant claimed that the marriage had been delayed due to the Covid-19 pandemic. The court held that the appellant could not benefit from the provisions of the Withdrawal Agreement because he did not have a residence document confirming him as a durable partner under the previous EEA Regulations 2016. In this case the IMA unsuccessfully intervened on behalf of the appellant and the Appeal Court ruled that neither

¹⁴ *Fratila & Anor, R (on the application of) v Secretary of State for Work and Pensions & Anor* [2020] EWHC 998 (Admin) (27 April 2020).

¹⁵ *Independent Monitoring Authority v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), 21 December 2022.

the Charter of Fundamental Rights nor EU law can assist where a person falls outside the provisions of the Withdrawal Agreement.¹⁶

What these three different cases illustrate is how post-Brexit rights for EEA+ nationals across a wide spectrum of rights and entitlements are not clear and transparent but rather opaque and contested in judicial forums where the UK government is almost always on the ‘rights limiting’ side of the litigation. While the IMA as the ‘rights defending’ intervening authority is forced to play catch up when some of the most egregious cases come to light, often following the intervention of campaign organisations such as the3million operating at ‘multi-scalar modes of lobbying to mobilise EU nationals and stakeholder organisations at local, national and international levels’ (Vathi and Trandafoiu 2023, 28). This piecemeal and haphazard construction of ‘Brexit law’ via judicial review by both the Conservative and Labour governments reveals the lack of clear policy intent in regard to the management of differentiated citizenship and a delegation of what are important sovereign powers to government legal representatives who are not expected to consider the wider social, economic and political consequences for approximately 1 in 10 British residents (the3million 2026b).

In the field of immigration policy, Brexit has served to strengthen the already formidable powers of the Home Secretary enabling them to set increasingly broad areas of policy with little or no parliamentary scrutiny—as with the announcement in April 2026 that ‘the Home

¹⁶ Harrison et al. 2025, 323-4. For an explanation of why the IMA had decided to intervene in *Celik v The Secretary of State for the Home Department (CA-2022-002008)* and its argument before the Court of Appeal see ‘IMA statement following Court of Appeal judgment relating to durable partners under the EU Settlement Scheme’, 31 July 2023 available at https://ima-citizensrights.org.uk/news_events/ima-statement-following-court-of-appeal-judgment-relating-to-durable-partners-under-the-eu-settlement-scheme/ accessed on 26 April 2026.

Office will begin removing pre-settled status from individuals who have clearly ceased to maintain continuous residence in the UK'.¹⁷

More recent legislation has explicitly reduced the scope for legal challenge to orders made by the Secretary of State for the Home Department, and in the case of the 2023 Illegal Migration Act, certain categories of unauthorised entrant to the United Kingdom have been taken outside the scope of the Refugee Convention and the European Convention on Human Rights altogether.¹⁸ However, the increased command powers of the Home Secretary, driven in part by political and media pressure to curb irregular migration and asylum claims, and partly by the restoration of immigration and border controls over EU nationals post-Brexit, have come at the cost of a reduced capacity to implement immigration policy on the ground—especially when policy implementation relies on the organisational support of devolved governments, local authorities and non-governmental organisations as with the EU Settlement Scheme.

The Implementation of the EU Settlement Scheme

The EUSS was launched on 1 November 2018 in anticipation of, and then in accordance with, the EU Withdrawal Agreement. Its purpose was and is to incorporate the immigration status and rights of EU nationals residing in the UK under EU law into UK law. Crucially the EUSS is a constitutive system that required EU nationals living in the UK prior to 31st December 2020 to make an application for settled status with the UK government, which if

¹⁷ See Luke Butterfly, 'Deeply troubling': 63% of parents wrongly targeted in HMRC child benefit fraud crackdown', The Detail, 21 December 2026 <https://thedetail.tv/articles/deeply-troubling-hmrc-child-benefit-crackdown-incorrect-nearly-two-thirds-families/hmrc-child-benefit-025> Lisa O'Carroll 'UK starts crackdown on EU citizens' post-Brexit rights', The Guardian, 11 April 2026 <https://www.theguardian.com/politics/2026/apr/10/home-office-starts-crackdown-on-eu-citizens-post-brexit-rights-to-live-in-uk>

¹⁸ This provision in what is now the Illegal Migration Act 2023 was subsequently disapplied by the incoming Labour government in the Border Security, Asylum and Immigration Act 2025. See Note 10.

successful would confer a new immigration status (settled or pre-settled). EU nationals were required to make this application by a hard deadline of 30th June 2021 or risk forfeiting their rights to work, housing and welfare. In effect those without settled, pre-settled status or a valid pending application would default to the status of being ‘unlawfully present in the United Kingdom’ and they would become potentially subject to detention and forced removal.

However, as Charlotte O’Brien (2021) notes, the UK’s constitutive system goes beyond existing EU free movement law in not requiring evidence of a *right to reside*, it is sufficient to have shown *continuous residence*, extending immigration status to many who may have struggled to meet the criteria set out in EU law. The downside is that for late applicants to the scheme who cannot convince a Home Office decision-maker that they had ‘reasonable grounds’ for a late application, the end of the EU settlement scheme application period ‘turns the deadline for non-exceptional cases into a cliff-edge, with the prospect of unregistered EU nationals permanently losing their rights to stay, with accrued rights negated overnight’ (O’Brien 2021, 443).

With its ability to determine the application process, evidence requirements and the criteria for ‘late’ applications the Home Office can wield significant discretionary power over the fates of EU nationals in the UK. However, in the wake of the Windrush scandal (see Williams 2020), potential stories of EU nationals being denied their rights and forced into destitution due to administrative failures on the part of the Home Office were of significant concern, especially in the case of marginalised groups such as the elderly, children, racialised minorities, those with mental health issues, the unhoused, and the disabled—that significant resources were invested into identifying and assisting more vulnerable groups to apply for pre or settled status (Jablonowski and Pinkowska 2021). Nevertheless, at the start of 2026 almost

50,000 EU citizens remain in limbo— ‘waiting, often for months or even years, for the Home Office to decide their EUSS applications. Over 9,000 of them had been waiting for more than four years for a decision. And almost 28,000 others are still waiting—often for years—for the outcome of a review of their EUSS decision’ (the3million 2026a).

Enrolment into the EU Settlement Scheme

The central problem facing the Home Office when administering the EUSS was that it required EU citizens residing in the UK to both be aware of the scheme and to successfully submit an application. While the Home Office could structure the system to be as accessible as possible its success would ultimately depend on individuals making applications for themselves and their dependents. If a sufficient number of EU citizens were either unable or unwilling to make an application then the Home Office would be faced with potentially needing to detain and deport significant numbers of long-term UK residents, damaging relationships with the EU and risking political scandal.

Indeed, after the Windrush Scandal and following the recommendations of the Williams ‘Lessons Learned’ report the Home Office accepted that it had a duty not to expose vulnerable populations to deportation or deprivation of rights due to administrative failure (Williams 2020). With this risk of scandal in mind, and faced with the potentially herculean task of processing over 3.5 million applications in two years, the Home Office took advantage of integrated information systems and the prevalence of smartphones to streamline EUSS applications through a pilot ‘online-only’ system (Home Office 2019).

Applications were cross-referenced with HMRC and DWP records of employment and certain benefits to automatically confirm length of continuous residence with additional documentation required to fill gaps in central records. Furthermore, the specialist team in the

Home Office which had been instructed to adopt a policy of ‘look to approve’ and reported a relatively quick average application turnaround of five working days, for applications that did not require additional documentation (Independent Chief Inspector of Borders and Immigration 2021, 72). This led to the EUSS processing 5,446,300 applications, out of the 6,015,400 received by June 2021 (Jablonowski and Pinkowska 2021, 7).

However, the online-only design of the scheme also led to indirect discrimination, placing vulnerable groups of EU citizens at risk. As Tomlinson et al (2022) point out, applying to the EUSS requires the applicant to have access to a smartphone with an internet connection and be able to complete eight separate steps of ID verification and data entry, without making mistakes. This requires users to be both literate and familiar with smartphone interfaces. However elderly and disabled people are statistically much less likely to have access to a smartphone with 18% of disabled people reporting never having used the internet, and with working class groups disproportionately affected (Tomlinson, Maxwell and Welsh 2022, 321-2). This problem was conceded by the Home Office’s own Equality Statement, which went on to acknowledge that the limited integration with central tax and benefits records meant that periods of illness or maternity leave would not be fully captured, placing an additional burden on women and disabled EUSS citizens to provide documentation to fill ‘gaps’ in their employment records (Home Office 2020). Meanwhile the Law Centres Network reported a pattern of disproportionate impact on Black and Ethnic Minority EU/EEA citizens and family members who made up 44.3% of Law Centre clients with complex EUSS cases (Jablonowski and Pinkowska 2021).

Operation of the EUSS

While the Home Office’s ‘digital by default’ system (Burrell, Key and Botterill 2025) allowed for the rapid processing of applications, it also created the possibility that a

significant minority would become unlawfully resident, hence risking an even bigger policy disaster than the Windrush scandal. Indeed the persistence of ‘hostile environment’ attitudes within Home Office decision-making teams was noted by the Home Affairs Select Committee which observed, ‘It is a damning indictment of the Home Office that the design and operation of [the Windrush Compensation Scheme] contained the same bureaucratic insensitivities that led to the Windrush scandal in the first place’ (Clyne and Savur 2023, 16). Thus although EUSS case workers differed from typical Home Office decision-making officers in looking to grant permanent or at least temporary status wherever possible, for those who were rejected or whose applications were deemed inexcusably late, they could expect no special right to remain compared to foreign nationals who had fallen foul of UK immigration legislation and immigration rules, and this ultimately meant that they would be faced with voluntary or forced removal.

While the Home Office was aware of the risks that imposing a constitutive EU settlement scheme would generate, it faced several barriers to ensuring a successful roll out of the EUSS. Specifically

1. the institutional design of the Home Office as a highly centralised policy silo
2. the fragmented structure of local and regional governance in the UK
3. the lack of reliable immigration data on EU nationals
4. the lack of a strategic ability to coordinate local actors

As Richards et. al. (2023) outline, the executive dominance of the British state over the last four decades has been met with a continuous degradation in operational capacity as key services and operations become outsourced or delegated to third parties. This is especially true for the Home Office where private contractors such as Clearsprings, Serco and G4S provide key services such as housing and detention, while immigration enforcement has been

delegated to employers, landlords, welfare officers and healthcare workers (Collins and Yeo, 2021). This leaves the Home Office with little direct power over the public ‘street level bureaucrats’ or the semi-public and private actors that are now required to enforce UK immigration policy other than through the imposition of sanctions, fines and criminal penalties for transgressors.

Thus, the Home Office’s ability to directly support those disadvantaged by the design of the EUSS, and thereby avoid any associated scandal, was limited to a national call centre - the EU service centre - which EU nationals could call for advice when filling out the application (Home Office, 2019). Direct support for disadvantaged groups was instead outsourced to 72 Home Office funded NGOs and local authorities whose housing, social services and education departments had more direct everyday contact with EU citizens (Evemy 2021, Home Office 2020, Besse 2024). However as Iusmen and Koren (2025, 1811) write, ‘[t]he outsourcing of complicated tasks to third parties’ made ‘the question of accountability, for instance in cases where EUSS applications were unsuccessful, blurry’, which highlighted the often fragmented and poorly coordinated attempt to support vulnerable groups, with the Home Office hindering as much as helping those to whom it had outsourced responsibility.

Local implementation of the EUSS

Local government and governance arrangements in the UK are a complex web of overlapping authorities (Diamond and Laffin, 2021; Richards and Smith, 2015). To summarise briefly, each of the devolved governments in Scotland, Wales and Northern Ireland have different powers and local authority structures, while England is an overlapping system of County, Councils, District Councils, Unitary Authorities and Metro Mayors, each with different elected bodies, powers and duties creating what Richards et al. (2023) refer to as an ‘incoherent state’ of local actors.

This was particularly true of the network of local organisations recruited by the Home Office to provide support to EU nationals in relation to the EUSS. As Figure 1 illustrates the Home Office funded organisations were unevenly distributed across the UK with 22 of the 72 funded organisations based in London, while half of the advice providers were based in urban centres across the Midlands. Although this does somewhat mirror the distribution of EU nationals in the UK (Census, 2021), it also creates a significant risk of ‘advice deserts’ where applicants ‘had to rely on ‘advice sharks’ (Barnard and Costello 2022), who charged money to help EU nationals to apply for the EUSS’ (Iusmen and Koren 2025, 1812. Furthermore, the EUSS advice centres were not coordinated on the ground to the extent that local authority officials reported that they were unaware of some of the other support that existed in their area for EU nationals applying to the EUSS (Interview, Local Authority Officer, 2021).

Figure 1. Geographic distribution of Home Office Funded NGOs



Source: Derived from Home Office data (2020).¹⁹

¹⁹ Each dot represents a Home Office funded EUSS advice centre. The then Home Secretary, Priti Patel, reported to the House of Commons on 30 June 2022 that ‘Over 450,000 individuals have been supported to apply to the EUSS by our network of grant-funded organisations across the UK. This includes victims of human trafficking and domestic abuse. Between 2019 and 2022, the Home Office provided £17 million in funding for EUSS specialist support and advice to which 72 organisations successfully applied.

This picture was further complicated with the launch of regional support programmes by the Devolved Governments in Scotland, Wales and Northern Ireland which were generally supportive of the European Union and the rights of EU citizens in the UK and which sought to capitalise on a growing resentment against the increasingly centralist mode of Westminster politics (Interview, Devolved Authority Official, 2022). While on the one hand these regional NGOs were better integrated with the relevant local authorities, they were also outside of the Home Office system and therefore lacked access to decision makers. Meanwhile, attempts by local governments to coordinate with Home Office funded NGOs quickly became burdensome due to the need to provide service performance data and feedback on the operation of the EU Settlement Scheme to the Home Office as well as other funding bodies (Interview, Home Office funded NGO, 2021). As a major national refugee and migrant organisation explained

there is quite a lot of information in there where we are asked to comment on what challenges we've had and things like that. I always raise all these issues but we don't get any feedback on that. It does feel like, it's part of the reporting process and obviously they're asking for this information but I have no idea... What they're doing with it.

(Interview with Home Office funded National NGO, March 2022)

The result was a complex, fragmented and overlapping system of support for EUSS applicants with limited central coordination, which was dependent on local actors identifying and coordinating support that was unevenly distributed (Iusmen and Koren 2025, 1815).

The second operational challenge faced by the Home Office was poor data quality and availability. Inadequate data capabilities and a lack of evidence in decision making is a well-

established feature of the Home Office (House of Commons Public Accounts Committee, 2019) and this appeared to be particularly acute in the case of EU nationals. With the census almost 10 years out of date and publicly available estimates of EU demographics based on population surveys only available at the local authority level (and with error margins of up to 10,000) local government officers felt they had little guidance about how best to target their resources (Interview, Local Authority Officer, 2021),

Furthermore, the Home Office was either unable or unwilling to share more granular data about the number of applications it received to organisations providing support. Rather than share local support providers with breakdowns of applications by district or postcode, the Home Office was only willing to release data at the generic local authority level. This meant that local support providers could not target help and advice to areas with low application rates or divert resources away from highly subscribed areas or combine Home Office data with their local knowledge.

Honestly if the council could have looked at the spread of the postcodes and gone ‘right we know where to go’ because that’s the local knowledge [...] but we have never had that chance throughout the year to kind of just look at where applications are coming from. And it feels like we’ve got away with it because the numbers would suggest that we have. But if the problem [had] gone the other way we wouldn’t have done and we wouldn’t have had the opportunity to take targeted local action (Local Authority Officer, Unitary Authority)

Ironically this highlighted the Home Office’s reliance on the same local actors that they were wary of sharing data with in order to achieve their EUSS enrolment goals and thus avoid conflict with the IMA, EU representatives and those MPs and peers who were willing and able to call the government to account.

The relative success of the EUSS appears to have been less to do with the effectiveness of the Home Office's delivery of support to vulnerable EU citizens than the effective engagement of local government and civil society organisations operating outside the direct command function of the Home Office. For example, local authorities and NGOs were able to liaise with schools which would normally refuse to cooperate with the immigration authorities to locate EU households at risk (Interview, Local Authority Officer, 2021), as well as incorporating conversations about the EUSS into regular conversations with users of their adult and social care services (Interviews, Local Authority Officers, 2021) and directly engaging with community leaders to reach isolated individuals (Interviews, Local Authority Officers & NGOs, 2020). Furthermore, they were seen as trusted sources and allies as NGOs and some local authorities have historically been advocates *for* migrant communities *against* the hostile environment fostered by the Home Office.

The 'Status Pending' EUSS Time Bomb

Prior to the EUSS application deadline of June 2021, the EUSS backlog stood at around 334,500, but although numbers have fluctuated, the total backlog up until December 2024 has never dropped below 122,380 (the 3million 2024b). While the backlog of applications for Administrative Review (a way to challenge a decision to refuse temporary or full settled status) stood at 3,300 as at 1 December 2025 with a typical wait time of 30 months.²⁰ A pending application is an interim status that in principle gives an applicant the right to rent, work and access benefits. But a pending application may be revoked at a moment's notice, making landlords and employers, who are often seeking a tenant or an employee for a year or

²⁰ The Home Office has declared that any application for administrative review of a EUSS decision submitted on or after 4 April 2024 will not be considered.

more, reluctant to risk renting to or employing someone who may subsequently have no right to remain in the UK.

Many of my clients have had issues where their employer is like, ‘Your ID has expired. Where’s your new ID?’ and he’s like, ‘Oh, my application is pending’ [...] And their employers basically hassle them for another ID card. And although we write to them and say, ‘There’s a portal. I can confirm in writing that my client has a right to work’, it doesn’t always work (Interview, Home Office Funded NGO, 2021)

As the EUSS demonstrates, the lack of direct connection to most of these surrogate civil society border agents means that changes in policy, the creation of new types of status or the use of new systems are almost impossible to communicate to all those affected. This leads to uncertainty, discrimination and the denial of rights that have been mutually agreed by the UK and the European Union under the terms of the Withdrawal Agreement, particularly in relation to what have been termed ‘Brexit families’ (Kofman 2017, Elfving and Marcinkowska 2021, Zambelli, Benson & Sigona 2024).²¹ Furthermore, in the absence of clear statutory authority or ministerial guidance, service providers such as local housing authorities were not incentivised to work with the Home Office and other government departments to overcome any Withdrawal Agreement implementation issues, leading to

²¹ For an analysis of the persisting problems with the EU Settlement Scheme and the transition to the eVisa system see (2024a). The IMA has also expressed concern at the continuing problems with EU citizens who have a valid certificate of application to the EU Settlement Scheme being denied entry by UK Border Force officials and in some cases facing deportation to the EU country they have travelled from. See Lisa O’Carroll, ‘EU citizens awaiting UK residency status have right to travel, Home Office told’, *The Guardian*, 11 August 2025, https://www.theguardian.com/uk-news/2025/aug/11/eu-citizens-awaiting-uk-residency-status-have-right-to-travel-home-office-told?CMP=Share_AndroidApp_Other

several instances of unlawful discrimination against EU citizens and other populations with associated rights.²²

Conclusion: The Unsettled Status of EU Settlement Rights

When Boris Johnson used his first speech as Prime Minister to say, ‘the first step is to repeat unequivocally our guarantee to the 3.2 million EU nationals now living and working among us ...thank you for your contribution to our society thank you for your patience and I can assure you that under this government you will get the absolute certainty of the rights to live and remain’,²³ few could have imagined the complex conditionality that would apply to EU citizens and their dependents according to how long they had been resident in the UK before 31st December 2020 and whether they or their family members had been working or self-employed, studying or self-sufficient (the so-called ‘true cohort’) or whether they had been ‘simply resident’ at the end of the implementation period (the so-called ‘extra cohort’).

Indeed, an exasperated Upper Tribunal immigration judge wrote in early 2023 about the immigration rules implementing the EUSS:

²² See for example the case of Newham Council which initially sought to remove EU citizens with pending applications to the EUSS from council house waiting lists because they could not produce proof of settled or pre-settled status https://ima-citizensrights.org.uk/news_events/ima-reaches-second-early-case-resolution-with-local-authority-over-eu-citizens-housing-access/ and Pembrokeshire Council’s social housing application process which the IMA identified as causing widespread problems specifically for EU, EEA and EFTA citizens https://ima-citizensrights.org.uk/news_events/citizens-rights-body-intervenes-to-secure-eu-citizens-access-to-local-authority-housing/

²³ Boris Johnson, First Speech as Prime Minister: 24 July 2019

<https://www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019>

‘Having spent many hours considering this part of the rules one finds that there is nothing natural or plain about the wording that might reveal its intended meaning’ (the3Million 2024a).

As the3Million EU citizens’ rights campaign group observed, far from delivering the security and certainty that being an EU citizen in a pre-Brexit United Kingdom once conferred

As well as becoming ever more complex and confusing, the rules have become stricter, less reasonable, and are failing a cohort who have now become undocumented, through no fault of their own, despite having lived in the UK for decades. For those who are lucky enough to get access to legal advice, appeals and judicial reviews have become the only solution—and the tribunal and court backlogs bear testimony to this (the3Million 2024a).

This paper has argued that while the UK’s exit from the European Union has served to significantly increase the executive power of the Home Office, it is not clear this enhanced policy making capacity has been met with a meaningful increase in the Home Office’s implementational power on the ground. While the end of freedom of movement and the use of ‘Henry VIII powers’ have undoubtedly enhanced the Home Secretary’s ability to set immigration policy by secondary legislation, bypassing much of the parliamentary scrutiny process, the Home Office presides over a complex and unwieldy ensemble of immigration enforcement actors with limited information about the numbers of irregular migrants that reside in the UK and whether they have the right to remain.²⁴

²⁴ Who are the UK's undocumented population? The Joint Council for the Welfare of Immigrants, August 2022. <https://www.jcwi.org.uk/Handlers/Download.ashx?IDMF=54432211-968f-4eb4-a6c2-a6aca110d234>

As we saw with the Home Office recruitment of local government advice bodies and civil society migrant support organisations to target populations who risked being excluded from the digital only EUSS enrolment system, as Jones and Sha (2020, 9) write, ‘Intermediaries can be viewed as a challenge to states’ claims to be the only legitimate arbiters of migration’ (cited in Besse 2024, 86). Thus while we may agree that the post-Brexit policy space has largely led to a reassertion of executive dominance in British politics, it is more questionable whether this has led to an increased capacity for the state to deliver on complex policy areas which require cooperation and ‘buy in’ from other devolved governments, sub-national government and service providing civil society organisations. While it might not be admitted publicly, the need to cooperate with devolved authorities in order to ‘make Brexit work’ was privately conceded even at Cabinet level (Interview with Senior SNP politician, March 2022).

Nevertheless, for EU citizens and other migrant communities residing in the UK, the implications are stark, as Brexit has served to accelerate parliament’s diminished capacity to challenge, amend or even effectively question immigration policy.²⁵ Consequently, the courts and tribunals have become the last remaining institutions where the policies and decisions of the Home Office continue to face anxious scrutiny. In the absence of clear legislative framing and uncertainty around the status of EU retained rights in the EU Withdrawal Act and treaties, the clash between an assertive executive state and a judiciary that is often unfairly tasked with making sense of complex public law/public policy conflicts and overlaps is likely to continue long into the future.

²⁵ Most notoriously with the announcement by the Home Secretary, Shabana Mahmood, on 5 March 2026 of a change to the immigration rules (Statement of Changes in Immigration Rules (HC 1691) which represents a significant policy shift towards a new ‘core protection model’ whereby adults and accompanied children who claim asylum on or after 2 March 2026 now receive 30 months of leave to remain, replacing the previous five-year grant. See <https://www.gov.uk/government/news/refugee-protection-to-be-reviewed-every-30-months#:~:text=At%20a%2030%2Dmonth%20review,be%20expected%20to%20return%20home>.

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The full transcripts of interview material quoted in this article can be found at the UK Data Service: EU Rights and Brexit Hub, 2020-2023 [data collection]. SN: 857411, DOI: 10.5255/UKDA-SN-857411.

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