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Dear Zoe, Luke and Mala,

Thank you for your letter of 7 January about EU Settlement Scheme (EUSS) applications from durable partners who did not apply for a residence document under the EEA Regulations before the end of the transition period on 31 December 2020.

The durable partner of an EU citizen resident in the UK before the end of the transition period (where the partnership was formed and was durable by then) is within scope of the Withdrawal Agreement where, in line with Article 10(2), their residence in the UK was facilitated in accordance with the Free Movement Directive before the end of the transition period, by obtaining a relevant document under the EEA Regulations. Such a durable partner is also within scope of the Withdrawal Agreement where, in line with Article 10(3), they applied for such a document before the end of the transition period and this was issued afterwards. There are equivalent provisions in the other Citizens' Rights Agreements. Otherwise, unless they had another lawful basis of stay before the end of the transition period, such as a student visa (in which case they can apply to the EUSS and rely on alternative evidence that the partnership was formed and was durable by the end of the transition period), they will have been in the UK unlawfully.

Where they were in the UK unlawfully before the end of the transition period, it would not be appropriate to enable them to remain in the UK by simply applying to the EUSS, as this would reward them for not complying with the requirements for a lawful basis of stay. This would also penalise the many EEA citizens and their durable partners who complied with those requirements, including where the partner remained overseas before the end of the transition period (or where the couple made arrangements to marry overseas before then) rather than choosing to reside in the UK unlawfully.

Where the spouse or civil partner of an EEA citizen resident in the UK before the end of the transition period is concerned, they will be eligible for the EUSS where they are themselves an EEA citizen and can rely on their own residence in the UK by 31 December 2020, or where the marriage or civil partnership was formed after that date and, in line with the requirements of the Free Movement Directive and the Citizens' Rights Agreements, the couple were durable partners by that date.

Notwithstanding the date on which the marriage or civil partnership was formed, an EEA citizen resident in the UK before the end of the transition period who obtains status under the EUSS has a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020, where the relationship continues to exist when the family member seeks to join them here. In addition, the EUSS permits a person who was living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner), but who did not obtain a residence card under the EEA Regulations and had no other lawful basis of stay in the UK, still to bring themselves within the scope of the scheme as a joining family member.

To do so, as you note, the person will need to break the continuity of their residence here by leaving the UK for more than six months. They will then be able to apply to the EUSS from overseas (where eligible to do so) or in the UK (by returning here via an EUSS family permit) as a joining family member of their EEA citizen sponsor, where the sponsor has obtained status under the EUSS. This is not "an unnecessary and disproportionate administrative burden". Rather, it enables them to come within the scope of the EUSS – which the Citizens' Rights Agreements do not require – rather than having to meet other requirements of the Immigration Rules in order to be able to reside in the UK. It places them in an equivalent position to those durable partners of EU citizens resident in the UK before the end of the transition period who were outside the UK at that point (for whom Article 10(4) of the Withdrawal Agreement provides) and means they are not advantaged by having chosen to remain in the UK without a lawful basis of stay before the end of the transition period.

You propose that the Home Office should treat any EUSS application as a durable partner made by 31 December 2020 as an application for a residence card made under the EEA Regulations. We do not agree that this is appropriate, for the reasons set out below.

Firstly, you state that "this cohort of applicants clearly intended to apply for confirmation and protection of their rights of residence under EEA free movement law and the Withdrawal Agreement". It is not possible to verify this claim. However, it has been clear for many years that the durable partner of an EEA citizen living in the UK was required to apply for a relevant document under the EEA Regulations to facilitate their residence here in line with the Free Movement Directive. In addition, the 'EU Settlement Scheme: evidence of relationship' page on GOV.UK1 set out that durable partners applying to the EUSS and relying on residence in the UK by 31 December 2020 needed to hold a 'relevant document', which includes an EEA family permit or residence card.

You suggest that it is not open to the Home Office to argue that an application for EUSS status is not a valid application for a residence card under the EEA

1 http://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-relationship-to-an-eu-citizen#documents-you-must-provide-to-show-evidence-of-your-relationship

Regulations because to predicate the validity of a residence card application on having used the required application form goes beyond the requirements of the Free Movement Directive. You cite Rehman (EEA Regulations 2016 – specified evidence) [2019] UKUT 195 (IAC). We disagree with your analysis. Durable partners do not have a right of residence under the Free Movement Directive; they have the right of facilitation of residence. Therefore, Article 10(2) of the Directive, and the determination in Rehman, do not apply in such cases in the way you suggest. In any event, Article 10(2) and Rehman do not preclude the mandating of a specified application form.

You propose alternatively that the Home Office should exercise the discretion provided by regulation 21(6) of the EEA Regulations 2016 to waive the requirement to use the specified application form. However, that discretion was available where there were circumstances beyond the applicant's control which meant they were unable to use the specified application form. That was considered on a case-by□case basis where requested by the applicant. Otherwise, the Home Office did not have discretion to waive the requirement to use the specified form.

Finally, you suggest conflicting advice was provided by the Settlement Resolution Centre. It answers thousands of calls each day and our agents strive to provide the best information possible. On the rare occasions when we receive feedback that the information is unclear or incorrect, we will follow this up, provide feedback and issue updates clarifying guidance to agents, where required.

Thank you for raising these issues with us.

Yours sincerely,

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