Home Office

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Dear Monique Hawkins and Zoe Bantleman,

Thank you for your further correspondence of 26 June to Minister Malhotra about clause 42 of the Border Security, Asylum and Immigration Bill. Your correspondence has been passed to the EEA Citizens' Rights & Hong Kong Unit for a response. We value your ongoing engagement with the Home Office on citizens' rights.

Removing sub-clause (2)(c)

We welcome your clarification that, where sub-clause (2)(c) is concerned, you are not seeking to treat those who have genuinely been granted EU Settlement Scheme (EUSS) status in error as Withdrawal Agreement (WA) beneficiaries as a matter of domestic law. However, that would be the effect of allowing such individuals to benefit from clause 42.

Our position remains that those who have been granted EUSS status in error are in neither the 'true cohort' nor the 'extra cohort' and, as such, they have no basis of qualification under the EUSS. Having granted them EUSS status in error, it would be inappropriate for us to compound that error by enabling them to benefit from clause 42, which would also, in the case of pre-settled status, remove scope to curtail that leave on account of the error. Granting WA rights in the UK to people who do not qualify for EUSS status would undermine the integrity of the EUSS and is not in line with the purpose of clause 42.

However, as has been previously set out, our current approach is that an EU citizen granted pre-settled status in error will not have their status curtailed; their grant of leave will be honoured until it expires. The individual will be provided with the opportunity to show that it was not granted in error and that they met the relevant requirements of Appendix EU. Where this cannot be shown, a further application to the EUSS can be made, which, if refused, will attract a right of appeal; or, if the error came to light in the course of considering a joining family member application, there is scope for redress via

the right of appeal against the refusal of that application. These avenues ensure that, even for these non-WA cases, WA-compliant procedural safeguards are in place and that an individual granted pre-settled status in error is given every opportunity to demonstrate that they qualify for the EUSS. Clause 42 does not affect that.

As you will be aware, settled status cannot be revoked if it was granted in error as this is not a ground for revocation permitted by section 76 of the Nationality, Immigration and Asylum Act 2002. Our position in relation to pre-settled status granted in error, of allowing it to continue until it expires, is in line with current caselaw (R. v SSHD Ex p. Ram, [1979] 1 W.L.R. 148). Limited leave to enter or remain is not removed in other immigration routes where it was granted because of caseworker error.

We note that you say that there is a difference between a person who was granted EUSS status as a result of a Home Office error, and a person who was correctly refused status in the first instance. We agree and our current policy, where pre-settled status is concerned, of honouring the erroneous grant of leave reflects that distinction.

With regard to your concern relating to the checks carried out as part of the automated process for conversion from pre-settled to settled status, such checks do not generally revisit whether the original grant of pre-settled status was correct. Where the automated process determines that, based on their continuous residence in the UK, a person's pre-settled status can be converted to settled status, this happens automatically without any re-checking of the original decision to grant pre-settled status.

Cases that are unsuitable for the automated process (because continuous residence in the UK cannot be confirmed through tax or benefit records, or where there are additional eligibility requirements) may continue to apply for settled status through the existing application process. Where this happens, the caseworker must check that the applicant meets the requirements for settled status. That involves checking the relevant casework systems to confirm that the person has been granted pre-settled status under the EUSS and that it remains extant. Such checks are not systematically looking behind the decision to grant that status; they are a confirmation process. A caseworker would not routinely make checks beyond those stated unless there was a reason to believe that the pre-settled status was manifestly granted in error.

Similarly, where a pre-settled status holder applies for settled status as a family member of a relevant EEA citizen or as a joining family member of a relevant sponsor, the caseworker must check that the applicant continues to meet the eligibility and suitability requirements of the scheme: for example, that they continue to meet the relationship requirements. In addition, they must also check the relevant EEA citizen's or sponsor's Home Office unique application number to confirm that they have been granted status under the EUSS (under, as the case may be, EU2 or EU3 of Appendix EU, based on their residence in the UK before the end of the transition period at 11pm on 31 December 2020, where they are not in a category in which this is not required). As above, a caseworker would not routinely make checks regarding the relevant EEA citizen or sponsor beyond confirming that they have been granted pre-settled or settled status under EU2 or EU3 of Appendix EU.

Amending sub-clause (2)(a)

Thank you for setting out your position on your amendment relating to sub-clause (2)(a). We can confirm that the exception to which you refer (to the general approach under the immigration system that a person can only hold one form of leave at a time) will ensure that any EU citizen, or their family member, with pre-settled status who obtains leave under another immigration route will continue to benefit from WA rights. Those rights will not be lost by their obtaining leave under the Domestic Abuse or other immigration route.

You raise concern about cases where the Home Office fails to automatically extend pre-settled status due to an error. We are aware of some technical issues affecting a small number of individuals, the majority of which were resolved quickly. We can assure you that we are taking steps to prevent such occurrences in future.

Amending sub-clause (2)(b)

As you know, we do not believe that your proposed amendment to sub-clause (2)(b) is necessary. *Chen* carers (the primary carer of a self-sufficient EU citizen child) and an *Ibrahim / Teixeira* child (in education in the UK, where their EU citizen parent had been a worker here) and their primary carer do not need to be included in clause 42, because they are already in scope of the WA and therefore already benefit from its direct effect by virtue of section 7A of the European Union (Withdrawal) Act 2018.

You raise concern about cases where, in granting EUSS status, the caseworker exercised discretion over the requirements of Appendix EU, as opposed to evidential flexibility. Where EUSS status was granted based on a concession in guidance (later reflected in Appendix EU) or was granted in exceptional circumstances, the individual will be covered by clause 42 because, as per sub-clause (2)(c), each of the requirements on the basis of which leave was granted (i.e. not those where discretion was exercised) will have been met. We hope this clarifies the position.

Thank you once again for taking the time to write to the Home Office.

Yours sincerely,

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