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Dear Monique Hawkins and Zoe Bantleman,

Thank you for your correspondence of 4 September 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 are grateful for your continued engagement with us on the clause.

As you know, the intention of clause 42 is to provide legal clarity for EU citizens and their family members with EU Settlement Scheme (EUSS) status who are in scope of the Withdrawal Agreement (WA) – the so-called 'true cohort' – that it is the source of their rights in the UK. It does so as simply and straightforwardly as possible, by providing that all EU citizens and their family members with EUSS status – whether they are in the 'true cohort' or, as the EU citizen was technically not residing in the UK in accordance with EU law at the end of the transition period, in the 'extra cohort' – are to be treated, as a matter of UK law, as a WA beneficiary for as long as they hold EUSS status.

As you appreciate, treating all EU citizens and their family members with EUSS status as a WA beneficiary in UK law – able, by way of section 7A of the European Union (Withdrawal) Act 2018, to rely directly on WA rights in the UK for as long as they hold that status – is a significant measure. In our letter of 9 July, we therefore welcomed the confirmation in your letter of 26 June that, where subsection (2)(c) of clause 42 is concerned, you are not seeking to treat those who have genuinely been granted EUSS status in error as WA beneficiaries as a matter of domestic law. However, that would be the effect of allowing such individuals to benefit from clause 42, which would, in turn, be the effect of removing subsection (2)(c) or of otherwise applying to the loss of pre-settled status manifestly granted in error WA safeguards to which, by definition, the person is not entitled.

As was noted in the Minister's letter of 2 June, the Government is concerned that, in providing legal clarity for EUSS status holders in the 'true cohort' as to the basis of their rights in the UK, clause 42 does not have unintended adverse consequences, by conferring directly effective WA rights in the UK on a person who clearly should not have them. We are therefore grateful for the time and consideration you have given to the clause and seek to respond below to your further questions.

On your Q1 and Q5, where it has been established that a person's pre-settled status was manifestly granted in error – and after they have been given every opportunity to show that it was granted correctly and have failed to do so – our approach, as with grants of limited leave in error in other immigration routes and recognising the error on our part, has been to allow them to continue to enjoy a basis of stay in the UK, and the right to work and so forth, for the remaining period of that leave. During that period, they can apply for leave to remain in the UK under any immigration route available to them.

The cases in question involve a clear-cut error in the granting of pre-settled status. As you know, the Independent Monitoring Authority for the Citizens' Rights Agreements referred in its report on clause 42<sup>1</sup> to the example of a third country national durable partner who was incorrectly granted pre-settled status where they did not obtain the residence card which free movement law required, had no other lawful basis of stay in the UK and was therefore living in the UK unlawfully before the end of the transition period on 31 December 2020. Other possible scenarios also involve a simple error by the caseworker – misreading November 2021 as November 2020 say – as to when a person granted pre-settled status as an EU citizen resident in the UK before the end of the transition period obtained their EU citizenship or first arrived in the UK.

As you recognise, it would not be appropriate for a person with no basis of qualification under the EUSS – and who in all cases is able to test that by means of the statutory appeal rights available to them, or to a family member relying on the pre-settled status granted to them in error, through the refusal of any valid EUSS application – to be given WA rights in the UK, as would follow from the removal of subsection (2)(c) of clause 42. This would mean that their pre-settled status could not be curtailed, or allowed to expire, on the basis that it had been granted in error, as there is no WA basis for doing so.

It would therefore give them unwarranted preferential treatment over those whose EUSS application was correctly refused, in line with the WA and the Immigration Rules for the EUSS in Appendix EU. It would also undermine the integrity of the EUSS by giving them the same rights in the UK as a pre-settled status holder who complied with those requirements and is thereby in scope of the WA or of clause 42. You will appreciate that those are not outcomes which we can entertain.

Nothing in clause 42 affects the WA-compliant appeal rights which are in place for the EUSS under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. However, we do not consider that it would be appropriate to create an additional right of appeal for these error cases, beyond those WA-compliant appeal rights which, notwithstanding the fact that they are outside the scope of the WA and of clause 42, are already available to the person (and to any family member) under the EUSS.

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<sup>1</sup> [Border Security, Asylum and Immigration Bill – Clause 42 - Independent Monitoring Authority for the Citizens' Rights Agreements](#)

On your Q2, Q3 and Q4 concerning proportionality assessment, the same point arises: such a WA safeguard is not applicable in cases which, by definition, are outside the scope of the WA and of clause 42. It cannot be disproportionate to allow a person's pre-settled status simply to run its five-year course where they had no entitlement to that limited leave in the first place.

On your Q4 in particular, the WA rights of a WA beneficiary do not expire if their pre-settled status expires, hence our arrangements for the automatic extension of pre-settled status before expiry where the person has yet to obtain settled status.

There can be no breach of the WA where our caseworking and direct engagement with the person concerned – under the process which is applied where their pre-settled status is initially assessed as having perhaps been granted in error – establishes that it was in fact granted correctly. The person will continue to have pre-settled status (which will be extended before expiry where they have yet to obtain settled status) and, by virtue of clause 42, they will enjoy WA rights in the UK if they do not already do so.

Were that caseworking and engagement process to conclude wrongly in the case of a WA beneficiary that pre-settled status had been granted in error and that status was allowed to expire, the person's WA rights would persist by way of their direct effect in UK law. They could make a further application to the EUSS, with a further right of appeal against refusal, to re-obtain status under the scheme as evidence of those rights. Again, there would be no breach of the WA.

In ensuring equal treatment for EU citizens and their family members with EUSS status, be they in the 'true cohort' or the 'extra cohort', clause 42 will give legal effect to what has been UK policy from the outset of the EUSS. In delivering that legal clarity by the simplest means possible, it will also ensure, via subsection (2)(c), that the largest immigration scheme the UK has ever operated does not confer directly effective WA rights in the UK on a person who should not have them.

Thank you once again for raising these important issues with us.

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