HERE FOR GOOD

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Head of Euro and Settlement, and EU Settled Status Customer Resolution Centre
Visa and Citizenship Operations
UK Visas and Immigration
Home Office

By email only

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We are writing in relation to the recent updates to the guidance EU Settlement Scheme Family Permit and Travel Permit Version 10.0 ('the Guidance'). We have a number of concerns in relation to its legality and are also seeking clarification as to how the Guidance will be implemented in practice.

The Guidance confirms that those extended family members who made an application by 31 December 2020 and who would have qualified for an EEA family permit had the route not closed should now be issued with an EUSS family permit. The Guidance at pages 11 and 12 states as follows:

> *Subject to the guidance in this section, we are obliged to issue a product to all those whose EEA family permit application was successful, including on appeal, even though the route closed on 30 June 2021.*
>
> *…*
>
> *If you need further information or evidence to determine whether the applicant is eligible for an EUSS family permit, you must seek to contact them and request this from them before making your decision.*
>
> *Where, **save for the required application process and subject to the relevant suitability checks and to any material change in circumstances** (for example, where the sponsor has died since the EEA family route closed on 30 June 2021), the applicant meets the requirements for an EUSS family permit, as set out in Appendix EU (Family Permit) and this guidance, you must issue an EUSS family permit. In addition, as a temporary concession outside Appendix EU (Family Permit), this approach will incorporate:*
>
> - *EEA family permit applications from extended family members (other than durable partners), and those relying on derivative rights, made by 31 December 2020 (and where the sponsor was resident in the UK by that date) who would have qualified for an EEA family permit (including following an allowed appeal) had the route not closed*

- *cases where an EEA family permit with an expiry date of 30 June 2021 was issued on or after 1 June 2021 and the applicant has contacted the Home Office to advise that they were not able to travel to the UK by 30 June 2021*

- *cases where an EEA family permit was issued before 1 June 2021, the applicant has contacted the Home Office to advise that they were unable to travel to the UK by 30 June 2021 and there were compelling practical or compassionate reasons (for example, ill health or pregnancy) or COVID-19 related reasons (for example, their country of residence was red listed at the time) why the applicant was not able to travel to the UK by 30 June 2021 [emphasis has been added]*

Legality

We are concerned about the added requirement that, as part of the Secretary of State for the Home Department's (SSHD) assessment whether the applicant meets the 'concession', there would be a review of whether there has been a material change in circumstances and whether the applicant falls foul of the suitability requirements. In practice, this would require applicants to provide additional evidence to prove that there has been no material change in circumstances, i.e. that they continue to be dependent. This appears to be inappropriate and unlawful in the context where an individual has succeeded on appeal in that it offends the principle of finality of litigation as is well-established in caselaw. The Home Office is bound by a Court Order of the Tribunal allowing the appeal. The SSHD cannot seek to re-open the decision on account of the delay which she has caused by her unlawful action to refuse to grant the applicant entry clearance hitherto.

The SSHD herself recognises the finality of litigation principle in her policy guidance on 'Implementing Decisions', version 1.0, published on 4 August 2020 and confirms that, "Where an appeal is allowed, you should not look for new evidence to undermine the findings of the determination" and "an allowed appeal should normally be implemented irrespective of any change of circumstances between the appeal being allowed and leave being granted" (pages 10 and 11). The Guidance appears therefore not only unlawful but also breaches and is inconsistent with her own policy which confirms the legal position.

It is our view that the imposition of these additional requirements could also constitute a breach of Article 18(1)(e) of the Withdrawal Agreement, which requires host States to "ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided".

Furthermore, the applicants will be required to apply for pre-settled status within three months of entry to the UK at which point evidence of dependency will have to be provided and security checks will be conducted again. In the event that an applicant does not meet the Rules at this stage, their pre-settled status application will be refused and they will be required to leave the UK. There is therefore already an additional level of decision making available to the SSHD within a very short period of time. In addition, the SSHD has cancellation and curtailment provisions available to her, should they be appropriate in individual cases.

It is appears therefore that it is neither lawful (in breach of the principle of finality) nor necessary and indeed most unusual for there to be consideration whether the applicant continues to meet the provisions at the time of issuing entry clearance. This is in most cases a simple implementation of a Tribunal decision rather than a re-opening and fresh assessment of the case.

The Guidance is also legally problematic as to the remedy available in the event of a refusal of entry clearance in these circumstances. This cohort is mainly, if not exclusively made up of individuals who have succeeded on appeal or the SSHD has conceded and appeals are subsequently withdrawn. As such, the right of appeal against refusal has already been exercised. Secondly, any such refusal would not appear to be made pursuant to either the EEA Regulations or the Immigration Rules since this is being operated as a "concession" through policy. As a result, there is no statutory right of appeal,

which a refusal under the Regulations or the Immigration Rules would provide. The only option at that stage it would appear, is judicial review.

Applicants within this cohort are then disadvantaged by the SSHD's delay and breach of the withdrawal agreement to date by failing to provide a mechanism for this cohort to be granted entry. Arguably this situation raises a further breach of 18(1)(r) of the Withdrawal Agreement.

Whereas the remedy provided following cancellation or curtailment is clear and uncontroversial.

In light of the above, we suggest that the Guidance is amended either to remove these additional requirements altogether or in such a way that the requirement that there be no material change in circumstances is assumed and is met in all case where the SSHD's decision to grant a family permit application or the Tribunal decision to allow an appeal pre-dates the publication of the Guidance on 1 November 2021.

Practical implementation

We further seek clarification on the following points referred to in the Guidance:

(i) How applicants will be informed that they should now be issued with an EUSS family permit
(ii) What the 'required application process' in order to be issued with an EUSS family permit refers to
(iii) How any relevant suitability and/or material change in circumstances checks will be carried out

We address each of these points in turn below.

1. How applicants will be informed that they should now be issued with an EUSS family permit

   In order to ensure that all applicants who do now qualify for an EUSS family permit are issued with a permit as soon as possible, we request that all eligible applicants are contacted by the Home Office within the next 28 days to inform them that they will now be issued with an EUSS family permit. They should be contacted by email on the email address(es) provided on their application forms, or on any other more recently used email address(es) you have been provided with. We ask that any email correspondence clearly sets out when the applicant's passport should be returned to the VAC for issuance of the EUSS family permit.

   As some applicants will have changed legal representative or will no longer be contactable on the details provided on their application forms, we also request that a dedicated Home Office inbox is created for these types of applications such that applicants can also contact the Home Office. We request that this dedicated inbox is created within the next 14 days and the email address is shared with Here for Good and the3million.

2. What the 'required application process' in order to be issued with an EUSS family permit refers to

   All extended family members who are eligible for EUSS family permits under the Guidance are required to have made an application for an EEA family permit by 31 December 2020. All applicants have, therefore, already submitted an application and, where the outcome is now known, the application has then either been granted or allowed on appeal. There should be

no reason for any additional application process to be instated that this stage. Applicants should simply have to resubmit their passport at the VAC where the EUSS family permit can then be printed.

3. How any relevant suitability and/or material change in circumstances checks will be carried out

   Notwithstanding our view that these additional requirements are unlawful and in any event unnecessary (as explained above), we are seeking clarification from you how such check will be conducted in practice. Any process needs to be as quick and straight forward as possible and any relevant suitability questions should be included in the email correspondence sent out to applicants confirming that they are now being issued with an EUSS family permit. There should be a simple way for applicants to provide their responses to the Home Office, i.e. by replying to an email, without any further application process.

   As stated above, if it is absolutely necessary to include a question on material change in circumstances when contacting applicants, then we propose that the same approach as was taken in relation to dependent relative applications under the EUSS up until 30 June 2021 is taken in these cases, and 'no material change in circumstances 'will be assumed prior to issuance of the EUSS family permit. Under no circumstances should additional evidence be required at this stage.

Yours sincerely,

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