

To: Department of Work and Pensions, EU Settlement Scheme
Department for Levelling Up, Housing and Communities
Home Office
Foreign, Commonwealth & Development Office

Subject: Access to benefits for those with pending EU Settlement Scheme decisions

At our meeting of 10 June, we discussed our concerns over people being denied access to benefits while their EUSS applications are pending.

We agreed to send you examples of where this was happening, and we detail some of these below.

Delayed pending application where eligible for settled status “B was born in London but is Austrian. He made an EUSS application in May 2021 and was issued with a Certificate of Application. At the time of reporting this issue to us, the application remained pending and would not be decided until the outcome of pending criminal charges, and/or deportation process, which was likely to take a long time. In the meantime, he had been refused Universal Credit (and the refusal was upheld on Mandatory Reconsideration). He made a UC claim in July 2021. He was classed as having jobseeker status and failed the right to reside and habitual residence test. He has lived here all his life and has been educated here, although he only has secondary school evidence. Please note, we understand that the criminal charges have been dropped very recently, so there will now not be a deportation process. However, he is still awaiting a universal credit decision.”

Delayed pending application where eligible for settled status “L, a non-EEA national mother and her children waited 15 months for an outcome of an application to the EUSS. She had lived in the UK for 7 years when she applied for status. Her application for Universal Credit was refused as she could not establish a right to reside without access to her EEA husband’s work history. Instead, she had to wait until her EUSS application was decided, and she was granted settled status. During this time, she had to rely on charities and foodbanks. By the time her application for settled status was decided she had missed out on over 13 months of Universal Credit payments. She could not appeal the initial refusal as the date of her settled status was awarded at the point of decision rather than the date of application. The length of delay in this case was unreasonable and caused significant hardship to the family affected.”

Rights during appeal “D was in receipt of Universal Credit before a period of detention. He was detained in July 2021. DWP accept that he was a worker for several periods, the earliest of which was April 2016. So if he was a qualified person continuously from April 2016 he would have Permanent Residence as at May 2021, when they say he last stopped working. DWP say that there were “gaps” when he had “no status” (pre-detention) but they don’t seem to have considered whether he retained worker status during the gaps. D was released on bail in March 2022. He had made an in-time EUSS application but his Settled Status was refused based on previous convictions. An appeal is pending; appeal against the deportation decision is also pending. D has long-standing mental health problems. In the UK he has had one caution and five community orders for shoplifting in early 2020. He is supported by his local Council. They have done a lot to get him off the streets, but they rely on the Home Office to tell them about his immigration status. They did not really understand the issues around the UC claim and it took a very long time to get them to assist the client to request written reasons for refusal. He is now appealing the refusal of UC and the case was taken on by a solicitor.”

Pending application without Certificate of Application “G has a Certificate of Application but is unable to generate a share code, as the online account is not working. Her legal representative has raised this with the EU Settlement Resolution Centre repeatedly over the last four weeks. Initially the CoA did not have an email/phone attached to it, despite this being supplied with the paper application. After four weeks this was attached so that the legal representative could log in and receive a security code, but rather than the system displaying the CoA, it displays the error “We cannot find your status in this service.” The legal representative has contacted EUSRC again, insisting on this being escalated due to the client’s vulnerability, but no timescale could be given. The Council is refusing to house G without a share code, and the DWP keep closing her Universal Credit claim.” [This is despite the fact that the Home Office have stated that “the necessary infrastructure and systems to make information about a person’s immigration status automatically to other government departments, minimising the instances where individuals need to prove their status” are “already in place for DWP and HMRC in assessing benefit claims”¹].

Pending application without Certificate of Application “E had lived in the UK for over 5 years and made an application for the EUSS just before the deadline. She had to make a paper application for the scheme as she had no ID documents after they were destroyed in a house fire. 4 months later she had still not received a certificate of application. E had been working in the UK for 3 years before the Covid-19 pandemic meant that she lost her job. She found other work but then left after a few months when she gave birth. When trying to apply for UC she was told that she could not apply as she had no proof of EUSS status or an application. Her adviser rang the EUSS resolution centre and asked if they could provide confirmation - to DWP - of an application, they said that they could not but did confirm - to the adviser - over the phone that an application had been made.”

Pre-settled status but rules for pending applications applied “P and his family arrived in the UK in late 2020. In 2021, P worked in a series of jobs and self-employment roles while providing care to his ill wife and pregnant daughter. They all received pre-settled status but when making an application for UC they were refused on the basis of not showing evidence of work from before the end of transition. Conversations on the phone with the decision maker revealed that they were applying the requirements for those with a pending application to access benefits from domestic UK legislation, rather than pre-settled status. The adviser reported to us that in a phone call with the UC decision maker they had said that “The EU regs have no relevance now. It doesn't matter if he is working now, if he can't prove Habitual Residence from before Jan, he will never be entitled to anything now. You can't question this, it's all been passed in Westminster.” After intervention the decision was overturned, P and his family were awarded UC. This case illustrates the level of confusion around eligibility for EEA nationals whether they have pre-settled status or a pending application. (This decision was made before “Memo 19/21 Claimants without a status under the European Union Settlement Scheme at the end of the Grace Period” was published.)”

We also raised the issue of simplicity and consistency of policy and guidance relating to pending applications, ensuring that individuals with an EUSS Certificate of Application can access their rights equally across all departments of Government.

¹ Page 9 of Equality Impact Assessment, dated October 2021: <https://www.gov.uk/government/publications/digital-only-right-to-work-and-rent-checks-equality-impact-assessment>

In the **Home Office's 'Public Funds' guidance**², page 30 sets out the conditions under which those with a pending application can be eligible for benefits:

"Persons who can show that they have been residing in the UK for more than five years (and who are expected to be granted settled status) are eligible to access benefits (subject to eligibility) on the same basis as any other British citizen. Persons who can show that they have been residing in the UK for less than five years (and who are expected to be granted pre-settled status) are eligible to access benefits (subject to eligibility) providing that they can demonstrate they are exercising a qualifying right to reside, such as having worker or self-employed status."

It is not, however, clear how the criterion of being 'expected to be granted settled status' could or should be given effect by benefit decision makers, especially as this factor is not even mentioned in the DWP guidance.

The **DWP's ADM 19-21**³ guidance attaches rights to those within the scope of Article 10 of the Withdrawal Agreement, without indicating how that is to be determined. Paragraph 8 states that a claimant who has a CoA has the protection of Article 18 of the Withdrawal Agreement. Paragraph 9 goes on to say that such a person can access benefits from the CoA date.

However, paragraph 11 then contradicts earlier paragraphs and says that those with CoAs are not eligible for non-contributory benefits until they have been granted status, unless they are in scope of Article 10 of the Withdrawal Agreement.

This contradicts the Home Office Public Funds guidance, in particular for someone who is expected to be granted settled status. the3million receives regular reports of people, expecting to be granted settled status, waiting for extended periods (months or even years) for their decision - both initial applicants, and people with pre-settled status looking to upgrade to settled status.

Furthermore, this appears to contract Article 18(3) of the Withdrawal Agreement which states all rights provided for by the Withdrawal Agreement will be deemed to apply to those with pending applications. Indeed, this was the stated intention as per the Home Office's announcement on 6 August 2021⁴.

Additionally, in light of the delays that we continue to see in Certificates of Application being issued, many are not able to access their rights once as soon as a valid application is submitted.

Will this ADM 19-21 be updated to ensure that those with who have submitted a valid EUSS application will be eligible for benefits on the same basis as British citizens?

You indicated in our meeting of 10 June that you would be looking to review DWP internal guidance. **Can you confirm whether that internal guidance reflects the position that those who have submitted valid EUSS applications will be eligible for benefits on the same basis as British citizens?**

Kind regards,

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Professor Charlotte O'Brien and Dr Alice Welsh
EU Rights and Brexit Hub

² <https://www.gov.uk/government/publications/public-funds>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033100/adm19-21.pdf

⁴ <https://www.gov.uk/government/news/temporary-protection-for-more-applicants-to-the-settlement-scheme>