

Rt Hon Priti Patel MP  
Secretary of State for the Home Office  
Sent by email to: [withammp@parliament.uk](mailto:withammp@parliament.uk) and [public.enquiries@homeoffice.gsi.gov.uk](mailto:public.enquiries@homeoffice.gsi.gov.uk)

Kevin Foster MP  
Minister for Future Borders and Immigration  
Sent by email to: [kevin.foster.mp@parliament.uk](mailto:kevin.foster.mp@parliament.uk)

Justin Tomlinson MP  
Minister of State for Disabled People  
Sent by email to: [justin.tomlinson.mp@parliament.uk](mailto:justin.tomlinson.mp@parliament.uk)

Sarah Castle  
Public Trustee and Official Solicitor  
Sent by email to: [enquiries@ospt.gov.uk](mailto:enquiries@ospt.gov.uk)

16 September 2020

Dear Secretary of State and Ministers of State,  
**Re: Adults lacking mental capacity to apply to the EU Settlement Scheme**

EU citizens and their family members must apply to the EU Settlement Scheme ('the Scheme') in order to secure immigration status post-Brexit.<sup>1</sup> Those who fail to apply by 30 June 2021 risk being exposed to the legislative and policy framework targeting those without lawful immigration status (often referred to as 'the hostile environment').

We write to raise our concern that adults lacking in mental capacity to apply to the Scheme face a real risk of being unable to secure lawful immigration status due the egregious failure by the government to make adequate arrangements for them.

### **Adults lacking mental capacity to apply to the Scheme**

There are thought to be at least 7,700 EU citizens over the age of 65 and living with dementia presently residing in the UK.<sup>2</sup> This is just one group of adults who may lack mental capacity to apply to the Scheme. We believe that a far larger number may well be affected but reliable data is scarce.

The Scheme is designed to be simple and straightforward and yet there will be a significant number who lack the mental capacity to apply to it. Many will not have a Lasting Power of Attorney ('LPA') in place for a third party to make an application on their behalf. Indeed, many will not even be aware of the Scheme. We understand that the Home Office recognises this and has repeatedly committed to stakeholders that it will publish a policy.

---

<sup>1</sup> Applications to the EUSS will be permitted out of time where there is a "good reason" for the delay. See the 'EU Settlement Scheme: Statement of Intent' published 21 June 2018 and available here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/718237/EU\\_Settlement\\_Scheme\\_SOI\\_June\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf), p.9

<sup>2</sup> Research by Age UK, which is not specific to EU citizens, suggests that 7% of the population in the UK aged 65 or over have dementia. [https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/older\\_life\\_uk\\_factsheet.pdf](https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/older_life_uk_factsheet.pdf)

## Home Office position

The Home Office has indicated that they will consider the position of adults lacking mental capacity as a group of people who require additional adjustments to ensure effective access to the system. However, despite this, there is still presently no published policy or guidance document to provide clarity on the position of adults lacking in mental capacity applying to the Scheme.

There is widespread confusion among care workers and social workers about whether they are permitted to make applications on behalf of applicants who lack the mental capacity to apply for themselves.

In a response to a Parliamentary question provided on 1 November 2019,<sup>3</sup> Brandon Lewis MP, the then Minister of State for Immigration, stated that:

“Regarding specific support for (a) those with dementia and (b) other similar health conditions, such as those without mental capacity, the Home Office has designed a scheme that allows applicants to consent to an appropriate third party to apply on their behalf. This means that care givers, family members and friends can provide the necessary assistance to those who need it.”

We are troubled by this statement. If an adult does not have mental capacity to decide to make an application to the Scheme, we are concerned that they are unlikely to have mental capacity to decide to consent to a third party making an application on their behalf. If there is not an adequate LPA in place, we consider that it would be unlawful for a third party to make an application on their behalf in these circumstances.

On 22 November 2019, in a response to a Freedom of Information Act 2000 (‘FOIA’) request made by the Public Law Project,<sup>4</sup> the Home Office refused to disclose a policy for adults lacking mental capacity to apply to the Scheme. The Home Office relied upon section 35(1)(a) FOIA on the basis that it was a “live policy issue”. Despite the Scheme’s Statement of Intent being published on 21 June 2018 and a testing phase for vulnerable applicants taking place between 1 November 2018 and 21 December 2018 and the Scheme having been fully open to applications since 30 March 2019, the Home Office has yet to publish a policy or guidance document on this important issue.

The only publication that comes close to addressing this is “EU Settlement Scheme: introduction for local authorities” published on 31 January 2020. This is not a policy. The one paragraph on mental capacity is vague and does not address adults who lack the mental capacity to apply, and are not subject to formal arrangements such as LPAs or Court appointed Deputies.<sup>5</sup>

---

<sup>3</sup>The Parliamentary question from Sarah Wollaston MP and the Minister’s response can be found here: <https://www.theyworkforyou.com/wrans/?id=2019-10-28.6360.h>

<sup>4</sup> The Home Office’s FOIA response is available here: [https://www.whatdotheyknow.com/request/619096/response/1473530/attach/5/FOI%2056419.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/619096/response/1473530/attach/5/FOI%2056419.pdf?cookie_passthrough=1)

<sup>5</sup> See “EU Settlement Scheme: introduction for local authorities” dated 31 January 2020, available here: <https://www.gov.uk/government/publications/eu-settlement-scheme-introduction-for-local-authorities/eu-settlement-scheme-introduction-for-local-authorities>

## Authorising third parties

There are processes through which third parties may obtain authorisation to make an immigration application on behalf of an adult who lacks mental capacity to apply for themselves.

Where no LPA is in place, before an immigration application can be made, there usually needs to be:

1. A Best Interests Assessment ('BIA') as set out in the Mental Capacity Act 2005; and
2. A direction from the Court of Protection ('CoP').

There are likely to be delays in both steps. In September 2019, the average time to complete a health and welfare application before the CoP was 53 weeks.<sup>6</sup>

Local authorities ('LAs') and the CoP do not have the resources to process all EU citizens who lack mental capacity to apply to the Scheme before it closes. As such, there is no effective system presently in place to ensure that this happens.

Importantly, there may be significant confusion even where formal arrangements are already in place. It will be necessary to determine whether, in each individual case, any such formal arrangements that exist have been made with sufficient specificity to cover immigration applications.

It is the Home Office's responsibility to ensure that the Scheme is accessible for individuals who lack the mental capacity to apply. If the Home Office expects LAs to support this vulnerable group in making applications, it should explain why LAs are best placed to do so, publish clear guidance and provide sufficient resources to enable LAs to undertake this work in a lawful manner.

## Action required

We call on the Home Office to:

1. Publish a policy or guidance document to provide clarity on the position of adults who lack the mental capacity to apply to the Scheme. This document should be drafted following a consultation with stakeholders including the Official Solicitor, LAs and charities that support vulnerable applicants to the Scheme.
2. Provide adequate resources for this policy to be effective.
3. Publish a policy or guidance document on what constitutes "good reason" for a late application to the Scheme, with reference to adults who lack mental capacity to apply for themselves.
4. Monitor the number of applications from adults who lack the mental capacity to apply to the Scheme.

---

<sup>6</sup> See minutes of the Court of Protection's Court User Group Meeting of 15 October 2019, available here:

[http://www.mentalhealthlaw.co.uk/media/2019-10-15\\_COPUG\\_Minutes.pdf#:~:text=Health%20and%20Welfare%20%E2%80%A2%20In%20September%202019%20the,month%20in%20September%202018%20%28397%20as%20against%20198%29.](http://www.mentalhealthlaw.co.uk/media/2019-10-15_COPUG_Minutes.pdf#:~:text=Health%20and%20Welfare%20%E2%80%A2%20In%20September%202019%20the,month%20in%20September%202018%20%28397%20as%20against%20198%29.)

5. For adults who lack the mental capacity to apply to the Scheme, either: a) introduce a declaratory, rather than constitutive Scheme; b) remove the deadline for applications to the Scheme or c) extend the deadline for applications.

We look forward to hearing from you. In light of the urgency and importance of the issue we raise, we ask you to respond within three weeks, by 7 October 2020.

Yours sincerely,

Brian Dikoff  
Legal Organiser  
Migrants Organise

Nicolas Hatton  
CEO  
the3million

Councillor Janet Burgess M.B.E.  
Labour Councillor for Junction Ward  
Deputy Leader of the Council  
and Executive Member for Health & Adult Social Care  
Islington Council

Councillor Una O' Halloran  
Executive Member for  
Community Development  
Islington Council

**Endorsed by**

**AIRE Centre**  
**ASIRT**  
**Butterflies Ltd**  
**Deighton Pierce Glynn Solicitors**  
**Dorset Race Equality Council (DREC)**  
**EERC East European Resource Centre**  
**Ella's**  
**Europia**  
**Global Bradford**  
**Hackney Migrant Centre**  
**Haringey Migrant Support Centre (HMSC)**  
**Here for Good**  
**Hope Housing**  
**Joint Council for the Welfare of Immigrants (JWCI)**  
**Latin American Women's Rights Service**  
**Law Centres Network**  
**Lewisham Refugee and Migrant Network (LMRN)**  
**Liberty**  
**Liverpool Law Clinic**

**migrants  
organise**

migrants and refugees acting for justice

**the 3 million**

**Matthew Gold Solicitors**

**Migrant Voice**

**Miles and Partners**

**Notre Dame Refugee Centre**

**Osbornes Law**

**Polish Migrants Organise for Change (POMOC)**

**Public Interest Law Centre**

**Roma Support Group**

**Samphire**

**Seraphus**

**Simpsons Millar**

**Southwark Law Centre**

**The BaRE UK**

**West London Welcome Centre for Refugees and Migrants**