



By email: SUG

Copied: Minister's office

15 April 2022

Dear SUG Team,

Pending Applications and Rights

We write to you collectively about the Government's policies relating to pending applications to the EU Settlement Scheme ('EUSS'). Across departments there are contradictory, incorrect and unclear policies on the rights people have whilst their applications are pending. Most notably, there are widespread policies which make access to rights conditional on a person having a Certificate of Application.

We ask that the UK Government, ideally led by the Home Office, urgently review and update policies relating to pending EUSS applications and give rights to all people with pending applications regardless of whether they possess a Certificate of Application.

On 6 August 2021¹, the Home Office produced a statement confirming that the government will protect the rights of late applicants and family members applying to the EUSS until their application and any appeal is decided. The Home Office also committed the Government to implementing this approach.

¹ <https://www.gov.uk/government/news/temporary-protection-for-more-applicants-to-the-settlement-scheme>

Since then, the Home Office has updated its policies relating to Right to Work and Rent. Most recently it has updated its regulations governing these areas to make Right to Work and Rent conditional on the production of a Certificate of Application.²

Notably, those applicants who have not applied in time need to wait for an employer/landlord to engage with the Employer/Landlord Checking Service to pass a right to Work and Rent check in addition to possessing a Certificate of Application.

The Department of Work and Pensions has produced a guidance note making it a condition of passing the right to reside test to possess a Certificate of Application as well as being in scope of Article 10 of the Withdrawal Agreement.³ The department has not updated any regulations governing access to welfare benefits and other entitlements that are conditional on habitual residence/right to reside.

The Homelessness Code of Guidance was updated by the Department for Leveling Up, Housing and Communities setting out that an applicant who has made a valid application, and meets the relevant right to reside test, will pass the eligibility criteria for the purposes of accessing assistance.⁴ There is no condition in the guidance for a Certificate of Application to be produced by the applicant. We are unaware of any legislative changes being made to reflect those in the guidance.

The NHS charging regulations guidance⁵ states that for decision makers to be satisfied that a pending EUSS applicant is entitled to free secondary NHS healthcare they must have a Certificate of Application. This is in contrast to the amendments to the charging regulations themselves which sets out that evidence of a valid application being submitted is sufficient.⁶

The 'EEA Nationals at the Border Post Grace Period' guidance⁷ states that UK Border Force, when deciding which pending EUSS applicants can enter the UK, must make distinctions between in-time and late applications, between those who were resident in the UK before 31 December 2020 or not, and between those who have EEA BRC documentation (not routinely held by EU nationals) or not. Certificates of Application and evidence of pre-transition residence are required. The regulations saving rights of entry for applicants have not been amended to reflect the rights of late applicants to enter the UK.⁸

The 'Access to student finance in England: late applications to the EU Settlement Scheme' guidance was updated on 22 October 2021 to reflect that any applicant with a valid application, evidenced by a Certificate of Application, is entitled to access student finance.⁹ However, the relevant legislation has not been amended to

² <https://www.legislation.gov.uk/ukxi/2022/242/contents/made>

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033100/adm19-21.pdf

⁴ <https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities/chapter-7-eligibility-for-assistance> as well as related allocations guidance here: <https://www.gov.uk/guidance/allocation-of-accommodation-guidance-for-local-authorities/chapter-3-eligibility-and-qualification>

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029984/guidance-on-implementing-the-overseas-visitor-charging-regulations.pdf

⁶ <https://www.legislation.gov.uk/ukxi/2020/1423/made>

⁷ <https://www.gov.uk/government/publications/eea-nationals-at-the-border-post-grace-period>

⁸ <https://www.legislation.gov.uk/ukdsi/2020/9780348212204>

⁹ <https://www.gov.uk/government/publications/student-finance-eligibility-2021-to-2022-academic-year/access-to-student-finance-in-england-late-applications-to-the-eu-settlement-scheme>

reflect this and continues to state that only those who applied in-time to the EUSS are eligible for student finance.¹⁰ Furthermore, those making decisions relating to students who are seeking additional support funding whilst studying are required to consider vague guidance about rights under the Withdrawal Agreement.¹¹

Finally, the above is a reflection (where applicable) on England's legislative and policy framework only. It is not a breakdown of those in devolved administrations. We are aware that some devolved nations have implemented legislation/guidance but this is opaque and not readily accessible.

The above are a number of key examples where the policy is contradictory internally and between departments. This presents a confusing picture for people to understand their rights. These policies are at odds with the Government's commitment to protect the rights of applicants and require urgent review.

The Government has committed at 18(3) of the Withdrawal Agreement¹² to all rights being provided to a person with a pending application. 'Pending application' is neither defined or has conditions restricting its meaning in either the agreement or the associated directives.

The agreements do not specify that for an application to be pending a Certificate of Application must be issued. Indeed, the agreement does not state that for a person to have the benefit of rights whilst an application is pending an assessment must be conducted for them to have been a qualified person within the meaning of EU law.

The above complexity, confusion and inconsistency is having an impact on the constituencies we represent and support. We are aware of people being denied work, housing, and services. There are those who are being refused because of confusion around what the Government's policy position is or because the policy itself is not reflective of the Government's commitments.

There is a clear need to update the regulations that consolidated all the relevant changes to EU citizens' rights post grace period.¹³ This will allow for consistency in implementation of the law across Government, devolved administrations and other decision-making areas. Furthermore, consolidating and grouping together on 'gov.uk' these changes in law and policy across departments should be undertaken so those advising and supporting people can easily refer to them.

These problems are being compounded by delays in the issuing of Certificates of Applications to applicants. As you are aware, there have been cases of people waiting for their certificates since, in the extreme, the June deadline last year. They have, for all intents and purposes, an application with the EUSS but are being held back from being able to live their lives.

¹⁰ <https://www.legislation.gov.uk/ukxi/2021/127/made>

¹¹ End of reference 9.

¹² https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en please note close to identical provisions are within the EEA Separation Agreement here: <https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer> and the Swiss Citizens' Rights Agreement here: <https://www.gov.uk/government/publications/swiss-citizens-rights-agreement-and-explainer>

¹³ <https://www.legislation.gov.uk/ukdsi/2020/9780348212204/part/3?view=plain>

The impact is serious, and we ask that a review be urgently undertaken and anyone with a pending application be granted rights pending the outcome of their application.

Yours faithfully,

Luke Piper, the3million

Nicole Masi, Rights of Women

Marianne Lagrue, CORAM

Julie Bishop, Law Centres Network

Tamara Flanagan, New Europeans UK

Mihai Calin Bica, Roma Support Group

Barbara Drozdowicz, EERC

Rivka Shaw, GMIAU

Anna Yassin, Glass Door