

By email:

The Rt Hon Robert Jenrick MP - Minister for Immigration
Lord Murray of Blidworth - Parliamentary Under Secretary of State at the Home Office

CC:

Home Office SUG team
Independent Monitoring Authority

28 April 2023

Dear Robert Jenrick MP,

Accessing rights for those waiting on a decision on an EU Settlement Scheme application

We are writing to express our concern about the problems people face in accessing their rights despite having a Certificate of Application [CoA] under the EUSS.

We have previously written¹ about delays in issuing CoAs to those applying for status under the EU Settlement Scheme [EUSS], and the Independent Monitoring Authority has an ongoing inquiry² into this issue. We have also written extensively³ about problems with the View & Prove system to access digital status. These are serious obstacles for accessing rights under the Withdrawal Agreement which remain ongoing.

Today, we are writing to report further problems people face even once they have a CoA, and even when they are able to successfully generate a share code to prove that CoA.

Article 18(3) of the Withdrawal Agreement states

*“Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, **all rights provided for in this Part shall be deemed to apply to the applicant**, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).”*

In this letter, we raise the following areas in which people are prevented from accessing their rights as either a direct result of Government policy, or a lack of clear Government guidance:

- NHS - Applying for an EHIC card
- DWP - Applying for a National Insurance number
- DWP - Accessing Universal Credit and other benefits
- Home Office Checking Services - Proving the Right to Work and the Right to Rent
- DVLA - Exchanging a driving licence

¹ <https://the3million.org.uk/publication/2022050501>

² https://ima-citizensrights.org.uk/news_events/ima-launches-inquiry-to-investigate-euss-certificate-of-application-delays/

³ For example, <https://the3million.org.uk/publication/2022112102>

<https://the3million.org.uk/publication/2022112101>

<https://the3million.org.uk/publication/2023011901>

- Family reunion rights
- Travel rights
- Updating UK Visas and Immigration account with a new identity document

This is not an exhaustive list but it reflects the majority of the concerns the3million has been contacted about.

Exacerbation of problems due to length of time between application and decision

These problems are very much exacerbated by the length of time many people are made to wait for a decision on their EUSS application.

Although new EUSS applications⁴ since the 30 June 2021 deadline have held steady at around 55,000 per month, the number of decisions made per month has steadily declined in that time. Whereas July 2021 still saw almost 144,000 EUSS decisions, only just over 51,000 decisions were taken in December 2022⁵.

It appears therefore that the Home Office is not prepared to properly resource the EUSS to clear its backlog. In August 2019 the backlog first breached 190,000 applications. It rose to 400,000 - 600,000 at times of peak applications, in October 2019, December 2020 and June 2021. However, as at the latest published figures of December 2022, the backlog still contains 180,980 applications. We calculate that at the current rate of applications and decisions, it could take two more years to clear the backlog.

As at the end of June 2022, over 25,000 *concluded* EUSS applications had taken longer than a year to decide⁶ (we have not yet received responses to our FOIA requests for the most recent data).

As at September 2022, out of the 188,000 *pending* applications that were in the EUSS backlog at that point:

- over 41,000 had been waiting for over 12 months, of which
- over 15,000 had been waiting for longer than 18 months, of which
- over 7,000 had been waiting for longer than 24 months⁷.

NHS: Applying for an EHIC card

The Government NHS website on applying for an EHIC card⁸ states the following:

“You may be eligible for a new UK EHIC if you meet one of the following criteria:

*[...] you're a national of the EU, Iceland, Liechtenstein, Norway, or Switzerland who has legally resided in the UK since before 1 January 2021 and **are covered under the Withdrawal Agreement**”*

However, people who have a CoA as proof of a valid application under the EUSS are being told:

⁴ Consisting of late applications, upgrades from pre-settled to settled, and family reunion applications.

⁵ <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-december-2022>

⁶ https://www.whatdotheyknow.com/request/eu_settlement_scheme_average_app

⁷ https://www.whatdotheyknow.com/request/eu_settlement_scheme_waiting_tim_6

⁸ <https://www.nhs.uk/get-healthcare-cover-travelling-abroad>

“If you’re awaiting the outcome of your EU settled or pre-settled status application, we will not be able to process your application until your status is confirmed.”

People are instead directed to apply for a Provisional Replacement Certificate⁹, which is much more cumbersome. The website states that a PRC is only needed at the point of receiving medical treatment while abroad. This means it cannot be applied for in advance of needing medical treatment, which is clearly much more stressful and does not compare to having an EHIC card and the peace of mind it provides before travelling abroad.

One individual who contacted us has been waiting for nearly two years for a decision on their application to the EUSS, and has been told they are not entitled to a renewal of their EHIC card. They are understandably extremely anxious about travelling abroad for the first time next month, still without the security of granted status, or without an EHIC card.

- Q1. On what basis does the Government justify withholding an EHIC card from someone who has a CoA for a valid application to the EUSS?
- Q2. Would you agree that this is a breach of Article 18(3) of the Withdrawal Agreement, which states that *“all rights provided for in this Part shall be deemed to apply to the applicant”*, including the rights of non-discrimination and equal treatment?

DWP: Applying for a National Insurance number

The Government website on applying for National Insurance numbers [NINOs]¹⁰ makes clear that people who have the right to work are eligible to apply for a NINO. Although Government information states that it is not essential to have a NINO, in practice a lack of NINO is an unnecessary barrier in many interactions with authorities, such as applying for benefits or child tax credits, child maintenance, student loans, creating a company, and opening bank accounts. It may also result in tax overpayments, through the use of emergency tax codes. Those who have overpaid may only be able to have their tax corrected once they receive their NINO.

People who have a CoA as proof of a valid application under the EUSS, have the right to work. This right is underpinned by Article 18(3) of the Withdrawal Agreement. Indeed, if people are able to access their digital status they will see that their CoA confirms they have a right to work, and that they can generate a share code to demonstrate this right to employers and to other authorities.

Recently however, we have seen several cases where a share code generated from a CoA has not been sufficient for the DWP to issue a NINO. Instead, DWP staff have asked for various other pieces of evidence from applicants at their interview, such as:

- For a joining family member, their sponsor’s passport
- Interrogation about a previous failed application, together with a refusal to look at the CoA of the current application

We therefore ask the following questions:

⁹ <https://services.nhsbsa.nhs.uk/cra/provisional-replacement-certificate/start>

¹⁰ <https://www.gov.uk/apply-national-insurance-number>

- Q3. Is a share code generated from a valid CoA sufficient to demonstrate the right to work for an application for a National Insurance Number?
- Q4. If not, on what basis can the DWP ask for extra evidence of the right to work? What guidance is given to DWP decision makers on this? When was this guidance first implemented?

DWP - Accessing Universal Credit and other benefits

We have previously written¹¹ to the Home Office, DWP, DLUHC and FCDO about the problems people have accessing benefits due to inconsistent and unclear guidance.

Our letter of 18 August 2022 referred to the DWP's ADM-19-21 guidance¹² for "Claimants without a status under the European Union Settlement Scheme at the end of the Grace Period". It highlighted that this guidance does not make clear who is eligible for benefits or how they prove their eligibility. It does not appear that this guidance has been updated since, and the question we asked in that letter has not yet been answered, therefore we restate it here:

- Q5. Will the DWP's ADM 19-21 guidance be updated to ensure that those who have submitted a valid EUSS application will be eligible for benefits on the same basis as British citizens?
- Q6. Furthermore, in the light of the High Court judgment on the case of the Independent Monitoring Authority against the Home Office, and the Home Office's subsequent decision not to appeal this judgment, what provision is being made in guidance to ensure that anyone with permanent residence rights will be eligible for benefits on the same basis as British citizens, even where they have not yet been granted settled status (whether that is because they are waiting for a decision on their settled status application, or because they have not yet applied for settled status)?

Home Office Checking Services - Proving the Right to Work and the Right to Rent

A share code generated from a digital CoA does not suffice¹³ as a proof of Right to Work or Right to Rent. Instead, the employer or landlord is directed to verify status with the Home Office's Employer Checking Service [ECS] or Landlord Checking Service [LCS] to receive a Positive Verification Notice [PVN].

We have received many reports from people who are losing out on jobs and/or accommodation, because of employers / landlords preferring to select someone who does not require the extra step of getting a PVN from the ECS / LCS.

We first raised our concerns about this in our letter to the Home Office of 31 March 2021¹⁴, where we asked how the requirement to engage with the ECS / LCS is compatible with being treated equally with

¹¹ <https://the3million.org.uk/publication/2022060801>

<https://the3million.org.uk/publication/2022081801>

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033100/adm19-21.pdf

¹³ Except if it is a CoA related to an application submitted on or before 30 June 2021

¹⁴ <https://the3million.org.uk/publication/2021033101>

British citizens as provided for under Articles 18(3) and 23 of the Withdrawal Agreement. The reply we received on 19 April 2021¹⁵ did not engage with our questions.

We raised a related issue recently¹⁶, regarding employers who are using Identity Service Provider [IDSP] technology to check share codes (some of which display a share code for a pending application as failing the right to work test). The Home Office reply laid the responsibility solely with the employers who should only be using the IDSP technology to check British/Irish ID, and not to check share codes for other nationalities.

The net result however, is that many of those who are stuck in the Home Office backlog and waiting for a decision on their EUSS application are being discriminated against, and denied the right to work or rent.

One of our reports illustrates very clearly the impact this has on people:

“Although we waited for 6 months between our EUSS application and receiving a CoA, it feels like we are no better off. The digital View and prove status does nothing to prove my pending status. After accessing the service the status says I can work only after the employer has verified this manually with the employer checking service.

I missed over 50 job opportunities as employers stated they simply don't want to take additional time to verify manually and then wait an additional 10 days at least to get the proof when they can hire another candidate without going through this process. I am no closer to working.

Renting was the same and I was lucky to find an agent who would go through this process after 12 rejected me due to the additional process.

Once the CoA was finally granted, having use of View and Prove is redundant for me, it doesn't allow you to view or prove anything unless an additional process is undertaken by the employer or rental agent which I guess defeats the whole purpose of view and prove??”

We therefore ask the following questions:

- Q7. What is the basis of the policy that a share code generated from a CoA is insufficient to prove the Right to Work or the Right to Rent, and that a PVN from the ECS or LCS is required instead?
- Q8. Given that the Home Office recognises an application as a valid application when issuing the CoA, why does it require the extra step of a PVN from the ECS or LCS before allowing someone to work or rent?
- Q9. Can you please list all the circumstances under which a share code from a CoA could result in a denial of a PVN from the ECS or the LCS?
- Q10. In how many cases to date have the ECS and the LCS respectively denied a PVN to an employer / landlord who requested one on behalf of someone with a share code generated from a digital CoA? Can you break these cases down by nationality of the applicant and month / year?

¹⁵ <https://the3million.org.uk/publication/2021041901>

¹⁶ <https://the3million.org.uk/publication/2023011601>

- Q11. Would you agree that the extra required step of receiving a PVN from the ECS / LCS can increase the risk that a candidate with a CoA is discriminated against as compared with someone whose share code is immediate proof of their Right to Work or the Right to Rent?
- Q12. Would you agree that the extra required step of receiving a PVN from the ECS / LCS is a breach of Article 18(3) of the Withdrawal Agreement?

DVLA: Exchanging a driving licence

It appears from reports we are receiving that the DVLA is not willing to exchange an EU driving licence for a UK driving licence unless status under the EUSS has been *granted*.

For example, we have received the following report from someone who:

- is in possession of a CoA for a valid application under the EUSS;
- has been waiting for over 19 months for a decision on their EUSS application;
- is a visa national, and is not entitled to travel and re-enter the UK with their CoA;
- has an EU driving licence which has now expired;
- must be able to drive as they are the sole carer of their spouse with a serious illness

“The Home Office issued me with a certificate of application. 19 months have passed since I have applied for pre-Settled status and still no decision from the Home Office yet. In January, I applied to the DVLA to exchange my [EU] driving licence for a UK one, and a few weeks later the DVLA told me they refused to exchange it stating that I am not normally and lawfully resident in the UK and that my presence in the UK is on a temporary basis and is subject to leave to remain being granted by the Home Office.

I called the DVLA and they confirmed that a certificate of application is not accepted for the exchange and that I need to have the pre-settled status.

I find it very confusing and frustrating, on one hand the certificate of application issued to me by the Home Office states that I can live in the UK, work, study, access NHS ect.. And on the other hand the DVLA is stating that I am not normally and lawfully resident in the UK.

My [EU] driving licence has now expired and according to the Home Office guidance It is not advisable to travel with a certificate of application. So I don't want to risk travelling to [EU country] to renew my Driving licence and to be refused entry to the UK upon return.”

We therefore ask the following questions:

- Q13. Are you aware that the DVLA will not exchange someone’s EU driving licence while they are waiting for a decision on their valid EUSS application?
- Q14. If so, on what basis can the DVLA deny someone their right to a UK driving licence while in possession of a CoA for a valid application to the EUSS?
- Q15. Would you agree that this is a breach of Article 18(3) of the Withdrawal Agreement, which states that “*all rights provided for in this Part shall be deemed to apply to the applicant*”, including the rights of non-discrimination and equal treatment?

Family reunion rights

An EEA citizen who was resident in the UK before 31 December 2020, and has been granted status under the EUSS, is able to sponsor certain family members to join them in the UK. Some of these family members can apply directly for status under the EUSS from abroad, but most are first required to apply for an EUSS Family Permit to allow them to travel to the UK and go on to apply for status under the EUSS. As various Freedom of Information [FOI] requests have shown, these can take an average of nine months to be granted, leading to families being unnecessarily separated for extended periods. This has been raised in our previous correspondence¹⁷ with the Home Office.

In this letter, we would like to highlight that a potential sponsor who is still **waiting** on a decision on their EUSS application is prevented from being joined by a dependent family member. The Appendix EU Family Permit makes clear that an EUSS Family Permit can only be granted once their sponsor has themselves been granted EUSS status.

The extensive EUSS delays further extend the length of time that family members are separated, and frustrate the rights of family reunion set out in the Withdrawal Agreement.

We therefore ask the following questions:

- Q16. How many people, who are currently waiting for a grant of status under the EUSS or for an EUSS Family Permit, have ‘relevant EEA citizen’ sponsors who are themselves still waiting for a grant of status under the EUSS?
- Q17. For these people, how long on average have the sponsor and the joining family member applicant been waiting for a decision on their respective applications?
- Q18. Would you agree that the denial of family reunion rights to someone with a pending EUSS application is a breach of Article 18(3) of the Withdrawal Agreement, which states that “all rights provided for in this Part shall be deemed to apply to the applicant”, including the rights of non-discrimination and equal treatment?

Travel rights

We have corresponded before on the fact that most people with pending EUSS applications are unable to travel to, or out of and back to, the UK while waiting for a decision¹⁸.

We remain deeply disappointed by the processing times of EUSS Family Permit and EUSS applications across **all** nationalities. However, specifically in the case of non-visa nationals the restriction on travel is a curtailment of the right of exit and of entry under Article 14 of the Withdrawal Agreement.

The responses received in August 2022 to questions Q3 and Q4 of our April 2022 letter make clear that the Home Office effectively turns all non-visa nationals into visa nationals as soon as they make an application to the EUSS, or apply for an EUSS Family Permit.

Our November 2022 report to the Independent Monitoring Authority¹⁹ provides extensive examples of the suffering caused by this policy, and makes several recommendations in this area.

¹⁷ See Q3 of <https://the3million.org.uk/publication/2022050501>

¹⁸ <https://the3million.org.uk/publication/2022081903>

¹⁹ <https://the3million.org.uk/publication/2022112301>

One such example was covered by a newspaper article:

“Maciej Szulczynski, 49, has been waiting months for confirmation his EU Settlement Scheme (EUSS) application has been successful, and having returned to Poland for a holiday was barred from returning to the UK. [...] on leaving the country temporarily in April he was told on return by border officials he can’t come back at all until the final decision on his status is made. [...] Having travelled through the Channel Tunnel on May 5, the dad-of-four was stopped and taken to a holding cell after realising his settlement status was pending. [...] Six months on, the 49-year-old is now waiting in limbo in his country of birth and struggling for money having had to forgo a major construction contract in the UK. [...] When he was checking his settlement status before he left, on the first page it says you can come and go, you can work, you don’t need any special reason.” – October 2022, Mirror.co.uk

Below, we reproduce the recommendations that relate to the travel restrictions for non-visa nationals, and for visa nationals who have already been issued with an EUSS Family Permit which has expired due to a delay in an EUSS decision, and we ask for your response:

- Q19. What is the Home Office response to our recommendation that *“Policy change should be sought such that joining family members whose nationality is not on the UK’s visa-national list are allowed to travel to the UK without first needing to have obtained EUSS status or an EUSS family permit. They should be allowed to enter the UK for the express purpose of being reunited with their family sponsor and submitting an in-country EUSS application.”*?
- Q20. What is the Home Office response to our recommendation that *“Policy change should be sought such that with immediate effect, all those whose nationality is not on the UK’s visa-national list can travel to the UK on the basis of an existing pending EUSS or EUSS family permit application. Failure to do so is a breach of Article 18(3) of the Withdrawal Agreement for those with pending EUSS applications.”* ?
- Q21. What is the Home Office response to our recommendation that *“Policy change should be sought such that new-born children of any nationality, whether on the UK’s visa-national list or not, should be able to travel to the UK with parents who have status under the EUSS, without being required to first acquire either an EUSS family permit or status under the EUSS.”*?
- Q22. What is the Home Office response to our recommendation that *“Policy change should be sought such that any visa nationals currently in the UK with a pending in country EUSS application should be able to freely leave and re-enter the UK, even if their visitor visa, EUSS family permit or other leave to enter the UK has expired while waiting for the Home Office to make a decision on their EUSS application.”* ?
- Q23. What is the Home Office response to our recommendation that *“Policy change should be sought such that any non-visa nationals currently in the UK with a pending in-country EUSS application should be able to freely leave and re-enter the UK. Failure to do so would be a breach of Article 18(3).”*?

Updating UK Visas and Immigration account with a new identity document

The Gov.uk guidance on using digital status²⁰ makes clear that *“To prevent unnecessary delays at the border, it is important to ensure the document you travel on is registered to your account, which you can do by updating your details if you intend to travel on a different document (for example a new passport).”*

However, the UKVI Update website²¹ states that *“You cannot change your identity document or name if you’re waiting for a decision on a visa application.”*

This affects not only people who do not yet have EUSS status, and are waiting for a decision. It also affects those who have pre-settled status and are waiting for a decision on an application for settled status.

Therefore people who have full travelling rights (because they have pre-settled status), who have followed Gov.uk guidance to apply for settled status once they are eligible to do so, are facing problems travelling because they are unable to do what is required of them, namely update their UKVI account to link a valid travel document.

- Q24. Why is it not possible for someone without EUSS status, but who has a CoA of a valid application to the EUSS, to update their UKVI account with a new travel document?
- Q25. Why is it not possible for someone with pre-settled status to update their UKVI account with a new travel document when they also have a pending application to the EUSS?
- Q26. What is your advice to someone who is entitled to travel, yet is unable to update their UKVI account with their new travel document, especially in circumstances where their old travel document has been retained by their consulate or embassy upon issuance of a renewed document, or where their old one has been lost or stolen?

Would you agree to meet with us to discuss the above policies? This would allow for developing a systemic approach to ensure applicants who are waiting on a decision on their EUSS application are not denied their rights in the meantime.

Yours sincerely,

Monique Hawkins
Interim Co-CEO and Policy and Research Officer, the3million

²⁰ <https://www.gov.uk/government/publications/view-and-prove-your-immigration-status-evisa>

²¹ <https://www.gov.uk/update-uk-visas-immigration-account-details>