Information disclosed pursuant to Freedom of Information Act request reference number 55262.

Policy Equality Statement for the EU Settlement Scheme dated 22 May 2019.

Disclosed on 7 September 2021.

Home Office

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Policy Equality Statement (PES)

EU, EEA and Swiss citizens resident in the UK and their family members

This PES sets out an analysis of the equalities considerations in relation to the policy proposals relating to EU, EEA and Swiss citizens resident in the UK by the end of the planned post-exit implementation period on 31 December 2020, or by exit in a 'no deal' scenario, and their family members. This is known as the EU Settlement Scheme.

The scheme – which will enable those persons to obtain leave under the Immigration Act 1971 based on their residence under the Free Movement Directive – has been developed in light of the agreement reached with the EU on citizens' rights reflected in the draft text of the Withdrawal Agreement published on 14 November 2018,[1] as well as the Separation Agreements with the EEA states[2] and Switzerland[3] on citizens' rights which were published on 20 December 2018. This PES – further to that produced in April 2018 to support policy decisions reflected in the 21 June 2018 Statement of Intent[4] – is intended to support consideration of the scheme's equalities impacts and compliance with the public sector equality duty under s149 of the Equality Act 2010.

1. Policy background

EU, EEA and Swiss citizens and their family members (of any nationality) have been able to exercise free movement rights to live in the UK since the UK's accession to the EU. This puts them in a unique position as compared with third country nationals.[5] In this context, the UK government committed to making the securing of

[1] https://gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

[2] https://gov.uk/government/uploads/system/uploads/attachment_data/file/766995/Agreement_on_arrangements_between_Iceland_the_Principality_of_Liechtenstein_the_Kingdom_of_Norway_and_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_following_the_withdrawal_of_the_United_Kingdom_from_the_European_Union_.pdf

[3] https://gov.uk/government/uploads/system/uploads/attachment_data/file/767003/Agreement_between_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_Swiss_Confederation_on_citizens__rights_following_the_withdrawal_of_the_United_Kingdom_from_the_European_Union_and_the_Free_Movement_of_Persons_Agreement.pdf

[4] https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent

[5] This does not include third country nationals who are family members of EU, EEA or Swiss citizens.

the rights of EU, EEA and Swiss citizens and their family members resident in the UK (and UK nationals and their family members resident in the EU, EEA or Switzerland) a priority for the EU exit negotiations. The UK government has made clear that those approximately 3.4m[6] EU, EEA and Swiss citizens (excluding Irish citizens and representing some 5% of the estimated total resident UK population in October 2017-September 2018) and their family members resident in the UK remain welcome and are a valued part of the UK economy and of the rich and diverse society of which we continue to be proud. We recognise that many have come to the UK and have built a life here on the basis of our EU membership. We want to ensure certainty and clarity as soon as practicable, so that they can carry on with their lives here with minimal disruption for them or for businesses, universities and other organisations.

2. Current immigration policy – EU, EEA and Swiss citizens and their family members

Current UK immigration policy for EU citizens and their family members is governed by EU law, including Treaty provisions and secondary EU legislation on free movement, as implemented in domestic law. Freedom of movement is one of the four freedoms enshrined in the Treaty on the Functioning of the European Union. Agreements on the free movement of persons are also in place between the EU and the EEA, and the EU and Switzerland, to which the UK is currently party. Free movement rights can be exercised by EU, EEA and Swiss citizens, their dependants and, in certain circumstances, other family members. EU secondary legislation, particularly the 2004 Free Movement Directive, and relevant Court of Justice of the European Union (CJEU) case law, set out further detail on the rights of EU citizens and their family members to move and reside freely within the EU. EU, EEA and Swiss citizens and their direct family members can, but are not required to, apply for documentation confirming their exercise of free movement rights.

3. Current immigration policy – third country nationals

By comparison, the migration to the UK of nationals of countries outside the EU, i.e. third country nationals,[7] is subject to control under the Immigration Act 1971 and to the detailed requirements set out in the Immigration Rules made under that Act. Those seeking to come to or stay in the UK other than as a visitor are managed through a system of Immigration Rules for, in particular, the work, study and family routes, under which applicants must meet the relevant requirements and, if they do, are granted limited (or, where they qualify for settlement, indefinite) leave to enter or remain in the UK.

[6] Unpublished Home Office analysis of Annual Population Survey October 2017 – September 2018. Data is rounded to nearest 0.1m.

[7] This does not include third country national family members of EU, EEA or Swiss citizens.

4. <u>Proposed EU Settlement Scheme for EU, EEA and Swiss citizens resident in the UK and their family members, in line with citizens' rights agreements</u>

We want to ensure stability for those EU, EEA and Swiss citizens resident in the UK and their family members. The agreements the UK has reached with the EU, EEA states and Switzerland, mean that such citizens resident here before the UK leaves the EU, and their family members, will be able to continue to live and work in the UK. Their rights to healthcare, work arrangements and access to benefits will continue, and their existing close family members currently living outside the UK will be able to join them in the same way as they can now. Their future children are also generally covered.

The agreements also cover what happens during the period immediately after the UK leaves the EU, known as the implementation period. This period will run to 31 December 2020. The agreements extend the same citizens' rights to those EU, EEA and Swiss citizens and their family members arriving in the UK during the implementation period. This ensures that those planning to come to the UK after exit know what the arrangements will be.

We will ensure that individuals have sufficient time to apply for their new immigration status under UK law after we have left the EU. As confirmed in the agreements, those who are resident here by 31 December 2020 will have until 30 June 2021 to make an application for status under it. Close family members joining an EU, EEA or Swiss citizen here after 31 December 2020 (a spouse, civil partner, durable partner, dependent child or grandchild – including of the spouse or civil partner, and dependent parent or grandparent – including of the spouse or civil partner) will have three months from their arrival in which to make an application for status under the scheme (or until 30 June 2021 if they arrive before 1 April 2021). We have also agreed that, where a person misses the deadline for their application for a good reason, they will be given a reasonable further period in which to make an application.

The aim of the settlement scheme is to provide certainty in respect of the immigration status of EU, EEA and Swiss citizens resident in the UK and their family members. Home Office estimates based on the Annual Population Survey for October 2017 to September 2018 suggest that just under 20% of the resident population of EEA citizens (excluding Irish citizens) are aged under 16, just under 80% are aged 16-64, and the remainder are aged 65 or over.[8] The demographic of the implementation period cohort may differ from this, in that those taking up residence in the UK for the first time during the implementation period for employment or other reasons may be more likely to be younger.

[8] Unpublished Home Office analysis of Annual Population Survey October 2017 to September 2018

Except where the relevant citizens' rights agreement specifies otherwise,[9] there is no intention to adopt a differential approach between citizens of different EU member states, the EEA states and Switzerland, and the provisions of the settlement scheme will be applied across the qualifying cohort. However, it will continue to be the case that, as they did before the UK's accession to the EU, Irish citizens have their own status in the UK, independent of EU Treaty rights. Irish citizens may apply under the settlement scheme if they choose to do so, but they will not be required to do so. Their family members (who are not Irish citizens or British citizens) will be able to obtain status under the scheme by showing that the Irish citizen would be eligible for the scheme if they applied.

Against this background, the settlement scheme will adopt a simplified approach to streamline the transition of EU, EEA and Swiss citizens and their family members resident in the UK to a new settled status or pre-settled status under UK law. The requirements to be met will reflect, or be more generous than, the qualifying criteria of the Free Movement Directive. The UK has decided that the main requirement for status to be granted under the scheme will be residence in the UK, broadly in line with current free movement rules on the continuity of that residence under the Free Movement Directive. This will involve:

(i) the person making a valid application under the scheme, using the required digital application process (with an assisted digital service for those who need assistance to complete the process, or a paper application form where this is required or permitted), providing the required proof of their identity and nationality, and providing the required biometrics.

(ii) being resident in the UK by 31 December 2020. It will also include those previously resident here who are outside the UK on that date but who have maintained continuity of residence here, generally as set out in the Free Movement Directive. In addition, EU, EEA and Swiss citizens resident here by 31 December 2020 will be able to be joined here after that date by existing close family members resident overseas at that date (a spouse, civil partner, durable partner, dependent child or grandchild – including of the spouse or civil partner, and dependent parent or grandparent – including of the spouse or civil partner), if the relationship existed at that date and it continues to exist when the person wishes to come to the UK, and in certain circumstances by children born in the UK or overseas after that date to (or legally adopted by) a parent or parents eligible for status under the scheme.

(iii) to qualify for settled status under UK immigration law (which is referred to under the Immigration Act 1971 as indefinite leave to remain or ILR), either:

(a) having been continuously resident in the UK for at least five years (or less in the circumstances in which a person can qualify for permanent residence under the Free Movement Directive with less than five years' continuous residence, including

[9] For example, under the agreement with Switzerland, settled status will lapse after more than four years' absence rather after more than five years' absence under the other citizens' rights agreements.

following retirement from work, as a result of permanent incapacity to work, or as the family member of such a person or of a worker or self-employed person who has died). Continuity of residence during that five-year period, must not be broken, for example by an absence from the UK of more than six months in any 12-month period, except for a single absence of not more than 12 months for a good reason, such as an overseas posting or study.

Under the Free Movement Directive, in order to have a right to reside for a period of more than three months an EU citizen needs to qualify as one or other of a worker, self-employed person, jobseeker, student or self-sufficient person or (as an EU or non-EU citizen) being a relevant family member of such an EU citizen or having a retained right of residence (e.g. following the death of or divorce from the EU citizen). To minimise the evidential burden on applicants and enable a streamlined approach to applications and caseworking under a digital (or assisted) application process, the scheme will not generally require EU, EEA and Swiss citizens to provide evidence of undertaking such qualifying activity and will focus on evidence of continuous residence in the UK and of family relationship to a relevant EU, EEA or Swiss citizen; or

(b) having acquired the right of permanent residence under the EEA Regulations 2016, without it subsequently lapsing (through absence from the UK of more than five consecutive years (EU and EEA citizens and their family members), or more than four consecutive years (Swiss citizens and their family members), in line with the citizens' rights agreements rather than the two consecutive years for which the Free Movement Directive provides) or been lost (for example, because a deportation order has been made in relation to the person).

and

(iv) not falling to be refused on:

(a) grounds of public policy, public security or public health, in accordance with the Free Movement Directive provisions on restrictions on free movement, for conduct that occurred before the end of the implementation period;

(b) non-conducive grounds under section 3 of the Immigration Act 1971 or on criminality grounds under section 32(5) of the UK Borders Act 2007, for conduct that occurred after the implementation period; or

(c) grounds of fraud or misuse of rights in accordance with the equivalent provisions in the Free Movement Directive.

Where the EU, EEA or Swiss citizen or their family member has been continuously resident in the UK for less than five years, they will be eligible for pre-settled status under UK immigration law (which is referred to under the Immigration Act 1971 as limited leave to remain or LTR). They will be granted five years' limited leave to remain and they will be able to apply for settled status (indefinite leave to remain) as soon as they are eligible for it, generally after they have completed five years'

continuous residence in the UK (as an EU, EEA or Swiss citizen, their family member, a family member with a retained right of residence, or a family member of a British citizen and here lawfully under the 'Surinder Singh' route after living with the British citizen while they exercised their Treaty rights elsewhere in the EU, an EEA State or Switzerland).

Where an EU, EEA or Swiss citizen or their family member has ceased to be continuously resident in the UK, they will be eligible for pre-settled status (limited leave to remain) under the scheme where they return to reside in the UK before the end of the implementation period (31 December 2020).

Based on the Annual Population Survey the Home Office estimates that around 70% of EEA (excluding Irish) citizens resident in the UK in March 2018 arrived here before 2014, and around a further 10% are estimated to be born in the UK.[10] This indicates that a majority of EEA citizens resident here might (if other criteria were met) qualify for settled status in the UK under the scheme if they were to apply for it today. Those who arrive during the implementation period will generally only be eligible for pre-settled status.

Where an EU, EEA or Swiss citizen is resident in the UK by 31 December 2020, their existing close family members of any nationality (a spouse, civil partner, durable partner, dependent child or grandchild – including of the spouse or civil partner, and dependent parent or grandparent – including of the spouse or civil partner) who are living with them here by that date will also be able to apply for status under the scheme. Those family members living here by 31 December 2020 with a retained right of residence under the Free Movement Directive (e.g. following the death of or divorce from their spouse) will also be able to apply for status under the scheme, as will extended family members (i.e. other dependent relatives) living here by 31 December 2020, where they have had this status documented under the EEA Regulations.

An EU, EEA or Swiss citizen living here under the EEA Regulations as a family member will be able to rely on their own continuity of residence to apply for status under the scheme rather than on being a family member. They will need to provide evidence of their family relationship where they rely on that relationship in one of the categories eligible for settled status with less than five years' continuous residence or for retained rights, or they became an EU, EEA or Swiss citizen within a period of continuous residence in which they otherwise rely on having been a third country national family member of an EU, EEA or Swiss citizen.

In addition, as set out above, the settlement scheme will, in line with the citizens' rights agreements, be open to existing close family members resident overseas on 31 December 2020 of an EU, EEA or Swiss citizen resident here by that date, where the relationship existed on 31 December 2020 and continues to exist when the family member applies to come to the UK. The scheme will also be open in certain

[10] Unpublished Home Office analysis of Annual Population Survey April 2017 – March 2018

circumstances to a child born in the UK or overseas after 31 December 2020 to (or adopted by) a parent or parents eligible for status under the scheme.

The requirements set out in the Immigration Rules for the scheme will be strictly in accordance with the conditions agreed under the citizens' rights agreement, except where the UK is applying more favourable criteria as a matter of domestic policy – for example, that the main requirement for status to be granted under the scheme will be residence in the UK, generally in line with the Free Movement Directive on the continuity of that, rather than undertaking qualifying activity in the exercise of Treaty rights. This means that, for example, those in work will not need to satisfy a criterion that their employment is 'genuine and effective' (which may assist those whose employment pattern is intermittent because of caring responsibilities or health reasons), and those who are students or self-sufficient will not need to have held comprehensive sickness insurance (which they may have been unaware of as, in practice, access to the NHS for EU citizens is based on 'ordinary residence', not meeting the requirements of the Directive).

Testing the scheme

On 28 August 2018, we opened the scheme to EU citizens working at 12 NHS Trusts, and students and staff at three universities, in north-west England. This was a managed live trial, or first private beta phase (PB1), of the application process, which ran until 17 October 2018. 1,053 applications were received and all were granted status, with no refusals. While on a small scale PB1 enabled us to us to test certain elements of the scheme and make improvements before opening it more widely.[11]

A second, expanded private beta testing phase (PB2) was launched on 1 November and ran to 21 December 2018 and allowed us to test the online application process as an end-to-end process. During this phase the scheme was open to those working in the higher education, health and social care sectors across the UK, and to some vulnerable applicants being supported by one of five local authorities and seven community groups in England. This phase included the EU Exit: ID Document Check app, which enables applicants to verify their identity remotely without having to send in their identity document, as an integrated element of the end-to-end online application process. The majority of applicants have already received a decision and none of those cases has been refused. 69% of those decided cases were processed in three working days, with 90% of applicants able to use the identity verification app to prove their identity and most able to prove their residence through the automated checks of HMRC and DWP data so that they did not have to send any further information. PB2 also enabled us to make further improvements to the process, including improving guidance material for applicants, increasing the size of files an

[11] https://gov.uk/government/uploads/system/uploads/attachment_data/file/752872/181031_PB1_Report_Final.pdf

applicant can upload and introducing technical safeguards against any disruption in the automated checks of HMRC or DWP data.[12]

In light of the successful testing during the private beta phases, a public beta test phase began on 21 January 2019 and ran until 29 March 2019, and was open to all resident EU citizens with a valid passport and to their non-EU citizen family members with a valid biometric residence card. This enabled us to learn further lessons from applicants' experience of using the system and to make further improvements ahead of the full opening of the scheme on 30 March 2019. 200,420 applications were received during the public beta test phase.[13] By 16 April 2019, 187,959 of these applications had been decided: 69% were granted settled status, 31% were granted pre-settled status and none were refused; applicants usually received a decision within 1-4 days. Of those applicants providing feedback, 81% of respondents reported that the application form was very easy or fairly easy to complete, and 79% found using the EU Exit: ID Document Check app to prove their identity very easy or fairly easy. During the public beta test phase, 88% of applicants chose to provide their National Insurance number as part of their application, enabling the automated checks to be made of HMRC and DWP data for evidence of their UK residence, and 73% of decided adult cases did not need to provide any further evidence of UK residence following the automated checks or because they held a valid permanent residence document or existing indefinite leave to remain (and therefore qualified for settled status on that basis).

The public beta test phase successfully tested the application process at scale, and therefore the full launch of the EU Settlement Scheme proceeded, as planned, on 30 March 2019.

No deal

On 6 December 2018, the UK government announced its approach to the resident EU population in the event of a 'no deal' scenario. It confirmed that the EU Settlement Scheme will continue to run as planned for EU citizens and their family members resident in the UK by exit. The application system will remain unchanged and the eligibility criteria will continue to be based on residence and not permitted activity. However, there would be some changes to the policy as set out in this document to reflect the fact we had not reached a deal with the EU:

- The 'specified date' will move to exit, meaning EU citizens need to be continuously resident by this date in order to qualify for the scheme.
- The deadline for applications will be 31 December 2020 to align with the start of the new UK immigration system.
- The UK deportation threshold will apply to crimes committed after exit.
- EU citizens would have the right to challenge a refusal under the scheme by

[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772139/EU_Settlement_Scheme_Private_Beta_2_Report.pdf

[13] www.gov.uk/government/publications/eu-settlement-scheme-public-beta-testing-phase-report

way of administrative review and judicial review, in line with the remedies generally available to non-EU citizens.

EU citizens resident by exit with settled or pre-settled status under the scheme would be able to be joined in the UK, by 29 March 2022, by existing close family members, such as children, spouses and partners, parents and grandparents living overseas at exit, where the relationship existed by exit (or where a child was born overseas after this date) and continued to exist when the family member applied. After 29 March 2022, such family members will be able to join EU citizens here by applying through the applicable UK Immigration Rules. EU citizens with settled or pre-settled status will be able to be joined by future spouses and partners (where the relationship was established after exit) and other dependent relatives until 31 December 2020, after which point the UK Immigration Rules would apply to such family reunion. Together this would bring the rights of EU citizens in line with the rights of UK nationals from 30 March 2022.

These arrangements will also apply in a 'no deal' scenario in respect of EEA and Swiss citizens resident here by exit, except where the citizens' rights agreements with those states provide for more favourable arrangements.

EU Settlement Scheme: policy proposals
Those here with a valid EU permanent residence (PR) document – The application process will be particularly straightforward for those who already hold a valid permanent residence document. Once identity is confirmed, they will be granted settled status, subject only to a criminality check and confirmation they have not been absent from the UK for more than five consecutive years since acquiring PR (so, for the purposes of the citizens' rights agreements, the PR has not lapsed); no further evidence will be required. Where we have evidence their PR has lapsed (after an absence of more than five consecutive years or four consecutive years for Swiss nationals) or been lost (e.g. because a deportation order has been made against the person) and the applicant does not then provide evidence to the contrary, the application will be refused. There will be scope for a refused applicant to apply again in order to rely on having resumed residence in the UK before the end of the implementation period (31 December 2020), to qualify for pre-settled status under the scheme. This will then enable them to start accumulating the five years' residence necessary to qualify for settled status.
Pre-settled status – Where the applicant does not qualify for settled status solely because they have not yet completed the necessary period of continuous residence, we propose to ensure that they can do so without need for a further temporary leave application by granting pre-settled status under the scheme (five years' limited leave to remain) in every such case. But we will not subsequently grant them settled status automatically once we think they have accrued five years' residence – they will need to apply for it,

so that we can confirm that they have not broken their continuity of residence and, where relevant, have maintained their family relationship (or been able to rely on a retained right of residence) and conduct criminality and security checks.

Continuity of residence – We have agreed with the EU, EEA states and Switzerland that we will reflect Free Movement Directive criteria as to the absence from the UK which will break continuity for the purpose of accruing qualifying residence here, e.g. there have not been a period(s) of absence from the UK (and, generally, also from the Islands: Guernsey, Jersey and the Isle of Man) which exceeds six months in total in any 12-month period. There is no restriction on the number of absences permitted, provided that the total period of absence does not exceed six months in any 12-month period. There are some exceptions:

- a single period of absence which does not exceed 12 months is permitted where it is for an important reason, such as pregnancy, childbirth, serious illness, study, vocational training or an overseas posting.
- any period of compulsory military service is permitted.
- any period spent working in UK territorial waters is permitted.
- continuity of residence is broken (and restarts from scratch on release where this is before 31 December 2020) where the person served or is serving a sentence of imprisonment in the UK of any length.
- continuity of residence is likewise broken if a deportation order, exclusion order or exclusion decision is made, or the person is removed from the UK under the EEA Regulations, unless this has been set aside or no longer has effect; or where the Secretary of State has cancelled their right to reside in the UK as a result of the EEA Regulations for misuse of rights, or made a decision to which regulation 15(4) applies unless that decision arose from a previous decision under regulation 24(1).

Those who break their continuity of residence will be able to start a fresh qualifying period under the scheme if they lawfully return to reside here before 31 December 2020, or before exit in a ‘no deal’ scenario. In line with the citizens’ rights agreements with the EU and EEA, settled status under the scheme will not lapse until the person has been absent from the UK for more than five consecutive years (compared with more than two years in the case of permanent residence status under the Free Movement Directive). In line with the citizens’ rights agreement with Switzerland, settled status granted to Swiss citizens and their family members will not lapse until the person has been absent from the UK for more than four consecutive years.

HM Forces and Crown servants – As a matter of domestic policy, any period of absence will not break continuity of UK residence for the purpose of qualifying for status under the scheme, where the person is a Crown servant

	on an overseas posting, or a family member accompanying them or accompanying a member of HM Forces on an overseas posting if they were previously resident in the UK before undertaking the posting. The Immigration Rules already make some similar provision in respect of the pre-settlement probationary period for non-EU partners and children with a family visa. This approach recognises their commitment to the UK by working for the UK Government and removes any disincentive to going on or continuing an overseas posting. For the purposes of the scheme, Crown servant will be defined, as under the British Nationality Act 1981, to mean a person undertaking Crown service for the UK Government or the Devolved Administrations in a permanent or fixed-term appointment. It is difficult, in this context, to see the rationale for a narrower approach. To avoid creating any disparity with provision for Crown servants elsewhere in the Immigration Rules, we propose to expand in line the provision in the Rules and other secondary legislation for non-EU partners and children of some British citizen Crown servants to serve their pre-settlement period overseas. This is currently limited to those working for the FCO, HO, DFID or British Council. We have amended the Immigration (Leave to Enter and Remain) Order 2000 to provide that, once they are granted leave under the scheme, any time spent on a posting overseas will not count as an absence from the UK for EEA national Crown servants and any person accompanying them, any person accompanying a British citizen Crown servant overseas, EEA national permanent members of the British Council and any person accompanying them, and members of HM Forces and any person accompanying them. This ensures that their scheme leave does not lapse while they are overseas. Those covered by these provisions will necessarily reflect the cohort of Crown servants and members of HM Forces on an overseas posting and persons accompanying them. The profile of that cohort has not been analysed for the purposes of this PES, but any indirect discrimination which may arise is considered to be justified by the public policy reasons for these provisions.
	Overseas applications – In line with our obligations under the citizens' rights agreements in respect of ease of process for applicants, since 9 April 2019 the scheme has provided for overseas applications. A valid application can be made by EU, EEA and Swiss citizens with continuous UK residence for the purposes of the scheme (or with permanent residence status or existing indefinite leave to enter or remain in the UK) and overseas at the point at which they wish to apply. There is also scope under the scheme for overseas applications by non-EEA national family members who hold a UK residence card or permanent residence card issued under the EEA Regulations and who are overseas at the point at which they wish to apply. These individuals will have until 30 June 2021 to apply for a UK immigration

status, in line with the citizens' rights agreements, and they will be granted either leave to enter or indefinite leave to enter according to the length of their UK residence (or whether they already hold permanent residence status or existing indefinite leave to enter or remain in the UK).

We do not plan to provide scope for overseas applications by non-EEA national family members without such a document (and therefore whose identity and family relationship to an EEA national we have not previously verified). They will need to apply for entry clearance to come to the UK (in the form of a family permit – see below) in order to be able to apply under the scheme within the UK, if they wish to remain here with an EU, EEA or Swiss citizen. Such a difference in approach constitutes direct nationality-based discrimination: this is discussed further in the public sector equality duty consideration in section 5 below.

To provide scope for overseas applications, we have amended the Immigration (Leave to Enter or Remain) Order 2000 to enable the Secretary of State to grant or refuse EEA nationals and their family members indefinite or limited leave to enter the UK under the scheme following a valid application made overseas. Indefinite or limited leave to enter could previously only be granted by an immigration officer, so this change was required to allow settlement scheme caseworkers to deal with all applications under the scheme. We have also amended the Immigration (Provision of Physical Data) Regulations 2006 to enable such applicants to be required to enrol their biometrics overseas (a facial photograph and, in the case of non-EEA national family members, scope for them also to be required to enrol their fingerprints at a visa application centre, in line with other routes).

EU Settlement Scheme Family Permit – In line with our commitment in the draft WA to allow close family members to join an EEA citizen resident in the UK at any point, and to support the more limited scope for family reunion for a 'no deal' scenario, a new family permit route to facilitate such travel to the UK will be available from 30 March 2019. This will enable existing close family members (spouses, civil partners, children, parents) and future children overseas to join or accompany EEA citizens with EUSS leave, whether for a short stay or with a view to applying to the EUSS themselves in order to remain here longer term.

The EUSS Family Permit will operate alongside the existing EEA Family Permit while the EEA Regulations continue to operate. The EEA Family Permit, which is also free of charge as per EU law, is only available to non-EEA family members whose EEA citizen is exercising Treaty rights in the UK, which is not a requirement for EUSS leave. We therefore need an additional product to facilitate entry to the UK for non-EEA family members whose EEA citizen has EUSS leave but is not able to sponsor an EEA Family Permit.

The EUSS Family Permit will also be available to applicants whose sponsor is an Irish citizen who does not hold EUSS leave but would qualify for it if they were to apply. Irish citizens enjoy a right of the residence in the UK that is not reliant on the UK's membership of the EU, so Irish citizens are not required to apply for status under the EU Settlement Scheme (but may do so if they wish), and their eligible family members (who are not Irish citizens or British citizens) can obtain status under the scheme without the Irish citizen doing so. Similarly, the EUSS Family Permit will be available to applicants whose sponsor is a 'relevant naturalised British citizen' (a dual EEA and British citizen with rights to family reunion under EU law, in line with the CJEU judgment in Lounes) and who therefore cannot apply for EUSS leave but would qualify for settled status if they were able to do so.

Non-EEA extended family members (durable partners and other dependent relatives) will not be eligible to apply for the EUSS Family Permit while free movement continues and will need to continue to enter the UK under an EEA Family Permit. Their status under EU law requires their entry to the UK to be facilitated via the EEA Regulations and, consistent with that, the EUSS requires that they hold a relevant document under the EEA Regulations in order to be able to apply for status under the scheme. For those durable partners who are protected by the draft WA, the EUSS Family Permit will be made available after the end of the planned implementation period at the end of 2020, to facilitate their entry once free movement has ended.

The EUSS Family Permit will grant entry clearance valid for six months from the date of grant (as per EEA Family Permit), which will have effect as leave to enter for the remainder of that period when they cross the border. Holders of an EUSS Family Permit will not have an automatic right to work, but they will be able to so if their EEA citizen is exercising Treaty rights (while free movement continues). If they wish to remain here (with their own right to work), they will be able to apply in-country under the EUSS by the relevant deadline: 30 June 2021 as per the draft WA or 31 December 2020 in 'no deal'. In the meantime, the EUSS Family Permit, issued to them as the family member of an EUSS leave holder, will serve as evidence that, if that relationship continues to subsist, they come within the cohort eligible to apply to the scheme.

Automated checks with other government departments – To reduce the administrative burden on resident EU, EEA and Swiss citizens and their family members applying under it, the scheme enables the applicant to provide their National Insurance number, if they wish, to allow the Home Office to obtain information on their length and continuity of residence in the UK via automated checks (known as API) with other government departments – tax and benefit records held by HMRC and DWP. This is entirely voluntary and applicants are able to evidence their residence simply and easily through other means (see 'Documents' section, below). Where a

National Insurance number is provided we will use this data to determine whether an applicant was continuously resident in the UK prior to the specified date, and for what status their length of residence and its continuity qualify them, based on that data.

Where the API data indicates that they have been continuously resident in the UK for at least five years, the applicant will be asked to confirm that this is correct and accept the grant of ILR, subject to identity and suitability checks.

Where the API data indicates that the applicant has been continuously resident in the UK for less than five years, the applicant will be invited to:

- confirm that this is correct and accept a grant of five years' LTR to enable them to stay in the UK until they are eligible to apply for ILR under the scheme; or

- claim that they have in fact been continuously resident in the UK for five years, or that they have been continuously resident in the UK for a qualifying period of less than five years but that their circumstances mean that they qualify for ILR under the scheme (in circumstances in which a person currently acquires the right of permanent residence in the UK under the Free Movement Directive with less than five years' continuous residence), and to submit documentary evidence of this.

Where the applicant confirms that they have been continuously resident in the UK for less than five years and accepts a grant of five years' LTR, the caseworker will be invited to the grant five years' LTR, subject to identity and suitability checks.

Where the API data does not return any record of the applicant's continuous residence in the UK prior to the specified date, the applicant will be invited to submit documentary evidence of their residence. If they fail to do so (after being given a reasonable opportunity to do so through at least three contacts, or attempts at this, by the caseworker over at least three weeks and via at least two different methods, such as email, phone call, letter), their application will be refused as ineligible for the scheme (although the applicant will be still able to reapply). If they submit acceptable evidence, they will be granted status in accordance with the evidence provided (and subject to identity and suitability checks).

Broadly, we will use API data to confirm residence in the months in which payment is made. In cases in which the payment frequency is insufficient to evidence the required continuity of residence of at least six months in any 12-month period, the applicant will be invited to submit evidence to demonstrate sufficient residence in that calendar year, subject to the same approach as above in terms of a reasonable opportunity to do so.

Where we have evidence of self-employment from self-assessment returns, we will accept that as evidence of residence for the whole year covered by the self-assessment return where it is accompanied by a declaration from the applicant that they were resident for that period. We will accept receipt of DWP benefits as evidence of residence for the relevant year(s) where evidenced by at least one full year of payments and it is a requirement of receipt of that benefit for the claimant to be in the UK for at least 26 weeks each year, or where DWP can confirm that the claimant was not claiming the benefit from overseas. We will not conduct API checks on holders of a permanent residence or ILR document where the applicant self-declares that the status evidenced by the document remains valid (such applications will still be subject to routine internal checks).
Documents – We have published, and will keep under review, a non-exhaustive list of the types of documentary evidence the applicant can provide of their continuous residence in the UK.[14] We will seek to guide applicants to use the evidence they may have which most readily evidences their continuous residence, but we will not be prescriptive or definitive. We recognise that some applicants may lack documentary evidence in their own name for various reasons, and we will work flexibly with applicants to help them evidence their continuous residence in the UK by the best means available to them. The online application process will allow documents to be scanned and uploaded and we will not generally require the submission by post of physical documents in respect of residence or family relationship. For non-identity evidence, this may be submitted as a copy, and we will only require the original document to be submitted where we have reasonable doubt as to the authenticity of the copy submitted. The application process will be provided in English only. We will provide key guidance on the process in the EU27 official languages, Icelandic, Norwegian and Welsh. Where the applicant submits a document which is not in English, the decision-maker can require the applicant to submit a certified English translation of (or a Multilingual Standard Form to accompany) the document, where this is necessary for the purposes of deciding whether the applicant meets the requirements for settled or pre-settled status.
Family members – EU, EEA and Swiss citizens here as a family member will be able to qualify for status under the settlement scheme on the basis of their own continuity of UK residence and will not generally need to evidence their family relationship with a relevant EU, EEA or Swiss citizen. Because their status here under EU law always depends on their current or past family

[14] https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence

relationship to an EU, EEA or Swiss citizen resident in the UK, a non-EEA national family member will need to provide, for the relevant period:

- evidence of their family relationship for the relevant period, such as a birth / marriage / civil partnership certificate or a relevant document issued under the EEA Regulations on the basis of the relationship. In the case of extended family members here (durable partners – unless coming here after the implementation period, and other dependent relatives), this will need to include such a document issued under the EEA Regulations (as evidence the UK has 'facilitated' their free movement as the Directive requires) and, unless this is a valid permanent residence document (so they no longer depend on that relationship for their status here), evidence which satisfies the decision-maker that the relationships continues to subsist.

- such evidence will generally suffice, but we will take a risk-based approach to further testing the genuineness or continuity of the claimed family relationship where this is required, e.g. by interview if necessary in high-risk cases involving a non-EEA national spouse or other family member.

- the valid passport or national identity card of that EU, EEA or Swiss citizen (unless the decision-maker agrees to accept alternative evidence where the family member applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling compassionate or practical reasons), and evidence of that person's continuous residence during that period.

Eligible family members who are not children will be granted settled status if they have been resident here for the qualifying period, usually five years (including any preceding time resident here in another capacity, e.g. for work), or otherwise pre-settled status (five years' limited leave to remain).

In respect of child applicants – who, under the Free Movement Directive, can be aged 21+ where they remain dependent on their parent(s) – as a matter of domestic policy under the settlement scheme:

- eligible individuals aged under 21 will be granted settled status where their parent(s) has been or is being granted this, or they qualify in their own right.
- otherwise, eligible individuals aged under 21 will be granted pre-settled status, including where their parent(s) has been or is being granted this.
- eligible individuals aged 21+ who remain dependent on their parent(s), where they have not yet completed five years' residence, will be granted pre-settled status (five years' limited leave to remain), where

they remain dependent on their parent(s), and will be able to apply for settled status in their own right once they have completed five years' residence, taking account of the period before they turned 21.

In a 'deal' scenario, EU, EEA and Swiss citizens resident here before 31 December 2020 will be able to be joined after that date by existing close family members (but not future partners), who will be eligible for the scheme; likewise, in certain circumstances children born to or legally adopted by them after that date.

We will also:

- reflect retained rights for family members under the Free Movement Directive (e.g. following the death of or divorce from the EU citizen) as per the citizens' rights agreements, but without the requirement to evidence relevant activity where the Directive requires this.
- reflect Free Movement Directive rights of permanent residence with less than five years' residence, in line with the citizens' rights agreements (e.g. following an EU citizen's retirement or permanent incapacity to work), but as this will qualify the person for immediate ILR, there will in these cases be a requirement to evidence the prior employment or self-employment of the EU, EEA or Swiss citizen in line with the Directive.
- allow family members to rely on their relationship with a dual British-EU/EEA/Swiss citizen who has acquired British citizenship after exercising free movement rights in the UK, consistent with the CJEU judgment in Lounes which found that such dual nationals retain their Free Movement Directive rights.

Dependency –The dependency on the EU, EEA or Swiss citizen (or their spouse or civil partner) required in the case of a parent/grandparent, on which there is no direct case law, will be assumed, so as to minimise the evidential burden on these applicants. The dependency required in the case of another relative (an extended family member) will be established by the document of that status which they will be required to hold under the EEA Regulations and, unless this is a valid permanent residence document (so they no longer rely on that dependency for their status here), by evidence that the relationship continues to subsist (or did so for the relevant period). In the case of a child aged 21+ and 'dependent' on their parent(s), this will be defined by these criteria drawn from case law (CJEU in Reyes):

- having regard to their financial and social conditions, or health, the applicant cannot meet their essential living needs (in whole or in part) without the financial or other material support of the relevant EU, EEA or Swiss citizen (or their spouse or civil partner); and
- such support is being provided to the applicant by that person; and

- there is no need to determine the reasons for that dependence or for the recourse to that support.

Valid application – For an application to be considered as valid under the scheme it must:

- have been made through the required online process, with assisted digital support where appropriate; or on the relevant paper application form where this is required (because the applicant relies on a derivative right to reside: see below, or wishes to rely on alternative evidence of identity etc where they are unable to obtain/produce the required document: see below, which, in both cases, requires additional information and evidence to be provided which it has not been possible to accommodate in the online application form without over-complicating this for other applicants) or is permitted (where the assisted digital service confirms that the applicant is unable to complete the online process owing to their particular circumstances); and
- be accompanied by:
  - where the application is made within the UK, the required proof of identity and nationality (a valid passport or valid national identity card for an EU, EEA or Swiss citizen; a valid passport or valid biometric residence card or permit for a non-EEA citizen), unless the decision-maker agrees to accept alternative evidence where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling compassionate or practical reasons.
  - where the application is made from outside the UK, the required proof of entitlement to apply from outside the UK (a valid passport or valid national identity card, where this contains an interoperable biometric chip, for an EU, EEA or Swiss citizen; a valid biometric residence card for a non-EEA citizen), unless the decision-maker agrees to accept alternative evidence where the applicant is unable to obtain/produce the required document due to circumstances beyond their control or to compelling compassionate or practical reasons.
  - the required biometrics: a facial photograph of the applicant; and (in the case of a non-EEA citizen without a biometric residence card making an application within the UK) the fingerprints of the applicant (unless, in accordance with guidance published by the Secretary of State, they are not required to provide these),[15] in both cases provided in accordance with the required application process.

Suitability and criminality – In line with the citizens' rights agreements, we will refuse an application if the person is subject to a deportation order or a

[15] https://www.gov.uk/government/publications/biometric-information

decision to make a deportation order, or to an exclusion order or exclusion decision. The public policy, public security and public health test, in accordance with the Free Movement Directive, will apply to conduct before the end of the planned implementation period. UK rules will apply to conduct thereafter. Where it is proportionate to do so, based on all the particular circumstances of the case, we may refuse an application which involves deception; or where the applicant is subject to a removal decision under the EEA Regulations for the non-exercise or misuse of Treaty rights; or where the applicant has been refused admission to the UK on public policy grounds in accordance with regulation 23 of the EEA Regulations; or where the applicant had settled or pre-settled status under the scheme (or leave to enter granted by virtue of having arrived in the UK with an EUSS Family Permit) which was cancelled under paragraph 321B of the Rules on public policy grounds in accordance with regulation 27 of the EEA Regulations and that justification continues to apply. In any case, these suitability provisions do not apply where, at the date of decision on the scheme application, the relevant order or decision has been set aside or no longer has effect. Consistent provision will also be made in the Rules for scheme leave to be cancelled at the border or curtailed in-country in appropriate circumstances.

Challenge and redress – Under the scheme:

- the applicant will be prompted or contacted where possible to try to correct any clear errors or omissions before a decision on the application is made. Applicants will also be able to apply again, providing the relevant evidence required.
- there will be a process for the applicant to seek an administrative review by the Home Office of a relevant decision under the scheme, e.g. to grant pre-settled status rather than settled status or to refuse status on eligibility grounds.
- there will be no statutory right of appeal against refusal under the voluntary scheme until after exit, when, consistent with the citizens' rights agreements, this will, subject to Parliamentary approval, be provided by the necessary primary legislation. But, where a pre-exit refusal is based on a deportation decision on public policy grounds that deportation decision under the EEA Regulations will give rise to a right of appeal.
- while free movement rights continue to apply, the applicant could seek judicial redress by applying for status under the EEA Regulations, which generally carries a right of appeal against refusal. The applicant will be able to rely on PR granted following such an appeal in applying for settled status under the scheme. Individuals will also be able to seek judicial review of a decision under the scheme where the decision does not attract a statutory right of appeal.

Fees – Under the scheme:

- from 30 March 2019, an application to the scheme will be free of charge.

Any applicant who has paid a fee during the test phases will be reimbursed. This will ensure that there is no financial barrier for any EU, EEA or Swiss citizen or their family member who wishes to stay in the UK.

- there will be no fee for overseas applications for the new family permit. (including biometric enrolment). This is required by the citizens' rights agreements and will also be provided in a 'no deal' scenario, to facilitate relevant family reunion.

- non-EEA national family members with leave under the scheme (in the UK) will be charged £56 where they request a new biometric residence card to change their name or other personal information or replace a lost, stolen or damaged card. This aligns with the standard approach for biometric residence permits for non-EEA nationals.

- there will be a fee of £80 for applications for administrative review of a relevant decision under the scheme, in line with the fee applicable in other routes. The fee will be refunded where there has been a caseworking error based on the evidence which was before the original decision-maker. The fee will be retained where the original decision is withdrawn solely because of new evidence being provided by the applicant which was not available to the original decision-maker. In other immigration routes, an administrative review is free of charge where there was no fee for the original application because a fee exception or waiver applied; there is little scope to submit new evidence; and in all cases in which the original decision is withdrawn any fee paid for the administrative review is refunded. To the extent these differences, both positive and negative, constitute indirect discrimination, the justification in the context of a scheme for around 3.5m people in which all applications will be free, is described in the public sector equality duty consideration in section 5, below.

- commercial fees apply to some services that are provided by third parties. These apply to services for:

  - biometric enrolment for non-EU citizen family members who do not already hold a biometric residence card using the 'charged for' enrolment locations; there is no Home Office fee to enrol biometrics. Enrolment can take place at contractor run sites: six locations can be used without any commercial charge being incurred; there is a £60 commercial charge in 50+ other locations.
  - 'chip check' locations where applicants can access an android device loaded with the identity verification app. These attract a small commercial charge (set by the provider: £10-20).

- applicants will not be subject to the Immigration Health Charge. To clarify this, we have amended the Immigration (Health Charge) Order 2015 to

confirm that relevant applications under the scheme will not be required to pay the charge.
EU citizens and Windrush policy – EU, EEA or Swiss citizens settled here before 1973 will be able to seek assistance from the Windrush taskforce if they wish to obtain evidence of their existing status here, free of charge. Those with existing ILR confirmed in this way will be not required to apply under the scheme, but they may do so if they wish to swap that for ILR granted under the scheme, with the additional benefits associated with this, e.g. on family reunion.
Long-term residents without official documentation – Aside from the Windrush cohort, EU, EEA and Swiss citizens and their family members who are long-term residents of the UK and who do not have a national passport or identity card will be able where appropriate to provide alternative, state-issued evidence of their identity and will be able to rely on a wide range of possible household and other documents to evidence their residence here. Caseworkers will work with these and other applicants to help them establish their eligibility under the scheme from the material they have.
Indefinite leave to remain – In line with the citizens' rights agreements, we could limit the scope to swap existing ILR for ILR under the scheme (with its additional benefits, e.g. on family reunion) to ILR granted before 1973 (or before the subsequent accession of the relevant Member State), but we not propose to do so. As a result, a non-EEA national granted ILR under Tier 2 who then met and married an EU, EEA or Swiss citizen will be covered, just as a non-EEA national who arrived in the UK as the spouse of an EU, EEA or Swiss citizen will be. The applicant will be able to upload evidence of HO documentation of their ILR (e.g. of a valid BRP, a valid stamp in a passport – whether or not the passport has expired, or a HO letter). The caseworker will also be able to check Home Office records to confirm the applicant's existing status.
Crown Dependencies – We propose that continuous residence in the Channel Islands and the Isle of Man will count as such in the UK for EU, EEA and Swiss citizens and their family members for the purposes of the scheme, consistent with other ILR routes. To support the functioning of the Common Travel Area, we will also amend the Immigration (Leave to Enter or Remain) Order 2000 to ensure that time spent in the Islands (Jersey, Guernsey and the Isle of Man) with scheme leave will not count as an absence to ensure that the leave does not lapse because of time spent in the Islands.
Gibraltar – Continuous residence in Gibraltar will not count as such in the UK for the purposes of the settlement scheme, consistent with other ILR routes.

Derivative rights – We propose that individuals resident in the UK with a derivative right of residence will in a 'deal' or 'no deal' scenario be included in the settlement scheme. This includes:

- Surinder Singh – which allows for UK nationals returning from residing in the EU, and exercising free movement rights there, to bring non-EEA national family members back to the UK without having to meet the stricter UK family Immigration Rules. As announced by the Government on 4 April 2019,[16] there will be access to the EU Settlement Scheme:

  - until 29 March 2022, in deal and no deal, for existing close family members (where the relationship existed on exit day) of UK nationals returning with them from the EU27 having lived there together while the UK national exercised their free movement rights. Close family members are children and grandchildren (including those born overseas after exit day), spouses, civil partners, durable partners, and parents and grandparents. After 29 March 2022, the UK Immigration Rules will apply; and

  - until 31 December 2020, in deal and no deal, for future spouses, civil partners and durable partners (where the relationship was established after exit), and other dependent relatives, of UK nationals returning with them from the EU27 having lived there together while the UK national exercised their free movement rights. From 2021, the UK Immigration Rules will apply.

- Chen – the primary carer of an EU, EEA or Swiss citizen child who is self-sufficient.

- Ibrahim & Teixeira (I&T) – a child of a former EU, EEA or Swiss citizen worker where the child is in education in the UK, and their non-EEA national primary carer.

- Zambrano - a non-EEA national primary carer of a British citizen (either a child or a dependent adult), for whom requiring them to leave the UK would force the British citizen to leave the territory of the EU.

We will assess, in respect of non-EU citizens, whether the individual had a derivative right of residence during the relevant period not just that they were resident in the UK.

5. <u>Public Sector Equality Duty and immigration control</u>

[16] https://www.gov.uk/government/publications/policy-paper-on-the-rights-of-uk-nationals-in-the-eu

The public sector equality duty under s149 of the Equality Act 2010 requires that in exercising their functions public authorities must have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Under s149 the eight specified protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race (including ethnic or national origins, colour or nationality); religion or belief; sex; and sexual orientation.

Schedule 18 to the 2010 Act sets out exceptions to the public sector equality duty. In relation to the exercise of immigration and nationality functions, s149(1)(b) – advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it – does not apply to the protected characteristics of age, race (insofar as it relates to nationality or ethnic or national origins) or religion or belief.

Direct discrimination: The scheme will be applied to all EU, EEA and Swiss citizens and their family members resident in the UK before the end of the implementation period (or exit in a 'no deal' scenario), plus those existing close family members and future children also eligible to apply to the scheme. As noted above, an EU, EEA or Swiss citizen here as the family member of a British citizen or of a non-EU citizen will be eligible to apply under the scheme in their own right, based on their own continuity of residence here.

EU, EEA and Swiss citizens and their family members resident in the UK before the end of the implementation period (or exit in a 'no deal' scenario) are in a unique position in terms of their rights – they are currently exercising generous free movement rights which will fall away and so they will need to regularise their immigration status in UK law to enable them to stay. EU, EEA and Swiss citizens and their family members resident in the UK before the end of the implementation period (or exit in a 'no deal' scenario) will not therefore, including as a matter of UK law, be in a comparable position to non-EEA nationals resident in the UK under domestic Immigration Rules (but not as the family member of an EU citizen who is not a British citizen).

The exceptional circumstances of the UK's exit from the EU, the need to balance the rights of individuals who have lived in the UK for an extended period exercising their EU law rights with the need to bring them, within the domestic immigration system by 2021, and the need for a smooth transition to a post-exit immigration system, mean that is has not been possible to eliminate discrimination entirely at this stage.

Non-EU EEA and Swiss citizens

The citizens' rights agreements reached with the three non-EU EEA states (Iceland, Liechtenstein and Norway) and with Switzerland provide a rational justification for the more favourable provision in some respects made for resident citizens of those countries and their family members, and therefore for the associated direct discrimination in their favour, as compared to resident EU citizens and their family members. They will have lifetime family reunion rights for close family members, where the relationship existed at exit, and for future children. In addition, resident Swiss citizens will be able, for a period of five years from exit, to be joined by spouses and civil partners where the relationship was formed after exit. These measures will be the subject of specific provision in the Immigration Rules, in line with the provision for an exemption under paragraph 17 of Schedule 3 of the Equality Act 2010.

We have also identified direct discrimination in the difference in length of absence period allowed for Swiss citizens and their family members compared to EU and EEA citizens and their family members before settled status is lost – Swiss citizens and their family members can only be absent from the UK for four consecutive years, as opposed to five years for EU/EEA citizens and their family members. This is in accordance with the Separation Agreement with Switzerland. We have also agreed with Switzerland that we will take the same approach to absences in the scenario in which we leave the EU without a deal. We therefore think that this direct discrimination is rational; it will also be the subject of specific provision in the Immigration Rules, in line with the provision for an exemption under paragraph 17 of Schedule 3 of the Equality Act 2010.

Approach to undocumented non-EEA family members

In line with our commitment in the draft WA we will provide an EU Settlement Scheme family permit to allow non-EEA national family members to enter the UK, and apply to the scheme once here. The EUSS Family Permit will be subject to biometric enrolment overseas (a facial photograph and fingerprints, enrolled at a visa application centre), allowing us to check the biometrics of undocumented non-EEA nationals against the Warnings Index prior to entry to the UK, in line with our approach to other non-EEA visa routes. It will also enable us to confirm their relationship to an EEA national before they travel to the UK, including by interview if necessary. If, having successfully obtained an EUSS Family Permit and come to the UK, they wish to remain here, they would need to make an in-country application under the scheme, which would provide a further opportunity to confirm their identity and establish a subsisting family relationship (including by interview in-country if there is good reason to do so) before granting them long-term status in the UK.

We do not intend to provide scope for applications direct to the EUSS from overseas from non-EEA national family members whom we have not previously documented under the EEA Regulations; they must instead use the EUSS Family Permit. This is due to concerns about abuse through these routes, the impact on the business of the

anticipated high refusal rates and the operational challenges of introducing new functionality to support this approach.

The EEA passport or national identity card of the relevant EEA citizen will be required to verify their identity for applications for an EUSS Family Permit relying on a relevant EEA citizen who is:

- an Irish citizen who does not hold EUSS leave but would qualify if they were to apply; or
- a 'relevant naturalised British citizen', who cannot apply for EUSS leave but would qualify for settled status if they were able to do so, together with confirmation, from Home Office records or otherwise, that they have acquired British citizenship.

Non-EEA citizen family members applying to the scheme itself can provide a copy of the passport or national identity card of the relevant EEA citizen, with scope for the original document to be required where the decision-maker has reasonable doubt as to the authenticity of the copy submitted, but this is in the context of an applicant who is already in the UK or whose identity (and that of the relevant EEA citizen) has been established in a previous application for a residence card under the EEA Regulations. An EUSS Family Permit grants an entry clearance to allow an individual to enter the UK whose identity (and that of the relevant EEA citizen) has not been established in a previous application. Therefore, the rationale for the difference in approach is to better safeguard the EUSS Family Permit from the risk of abuse as a means of entry to the UK.

This approach constitutes direct discrimination and requires an exemption under paragraph 17 of Schedule 3 of the Equality Act 2010. Paragraph 17 provides an exemption in relation to the exercise of immigration functions. For example, different visa requirements for nationals of different countries, which arise for a variety of historical and political reasons, do not constitute unlawful race discrimination under the Equality Act 2010.[17]

Such an approach must be justified by available evidence. This evidence is set out below indicating that third country national family members of EEA nationals;

1. are significantly more likely to fall for refusal in their applications for settlement than EEA nationals;
2. potentially present a higher risk of immigration abuse than EEA nationals

Refusal rates for non-EEA nationals:

[17] Explanatory Memorandum to paragraph 17 of Schedule 3 to the Equality Act 2010

The refusal rate for non-EEA nationals applying for permanent residence is currently approximately double that of EEA nationals.[18] When applying for documentation proving their status prior to a permanent residence card application (a registration certificate for an EEA national and a biometric residence card for a non-EEA national) the rate of refusal for non-EEA national applications is approximately triple that of EEA nationals.[19] There are serious concerns that allowing undocumented non-EEA nationals to apply directly to the scheme from overseas will result in large numbers of spurious applications that require caseworking and put an unsustainable pressure on UKVI resources.

A comparison of entry clearance applications is not possible given that EEA nationals are not required to make one, but again the refusal rate for non-EEA nationals applying for entry clearance through the EEA Family Permit route is high, running at approximately a third of all applications since 2016.[20] From April 2015-March 2018 there were 88,640 EEA Family Permit applications submitted for UK entry, of these 67,526 (65%) were issued with 27,885 (31%) refused. Prominent applicants were from India 18,421 (64% issued), Pakistan 14,176 (55% issued), Bangladesh 5852 (71% issued), Nigeria 5049 (55% issued) and Ghana 4272 (48% issued).[21]

Evidence of abuse by non-EEA nationals:

Immigration Enforcement produce a 'national risk assessment' once a quarter to identify nationalities judged as posing the greatest threat to immigration control. The evidence from this report supports the Immigration Minister in giving authorisation under the Equality Act to enable UK Visas and Immigration, Immigration Enforcement, and Border Force to undertake more rigorous examination of those nationals.

The lists are compiled on the basis of breaches of immigration law and adverse decisions. The criteria used to assess breaches of immigration law and adverse decisions from international applications are as follows:

- Visa refusals, adjusted for allowed appeal cases
- Forged documents presented on arrival
- Those arriving without travel documents
- Refusals of entry (asylum), adjusted for allowed appeal cases

[18] European Economic Area data tables immigration statistics year ending September 2018 - Table ee_02: Issue and refusal of residence documentation (excluding Worker Registration Scheme) to EEA nationals and their family members, by country of nationality]

[19] Ibid

[20] European Economic Area data tables immigration statistics year ending September 2018 - Table vi_01_q: Entry clearance visa applications and resolution by category: EEA family permits

[21] Internal, unpublished data from PRAU

- Refusals of entry (non-asylum)
- Refusals of definite and indefinite leave
- Decisions not to recognise refugee status, adjusted for allowed appeal cases
- Illegal entry papers served
- Section 10 offenders (worker in breach / overstayer)
- Absconders (in-country and port)

<redacted>

Another example is the Windrush Scheme for commonwealth citizens to acquire settlement in the UK free of charge based on historic residence. By March 2019, we had seen over 1,000 applications from Bangladeshi nationals (more than from Jamaica), none of which have been granted entry clearance under the scheme.

<redacted>

<u>Approach to derivative rights holders and the requirement to use a paper form</u>

We propose to build a new paper form for use by family members of British citizens under the scheme (Lounes and Surinder Singh), and for derivative right holders. We will build the form in accordance with the procedural requirements in article 17 of the draft Withdrawal Agreement with the EU to ensure it is simple and streamlined and is only asking for the minimum amount of information required to make a decision. The approach to case-working (e.g. opportunity to correct errors, support for applicants in providing the right evidence, discretion in favour of the applicant) and the support for applicants (e.g. guidance, resolution centre, assisted digital) will be available to these cohorts applying using a paper form.

Given the complexity of these cases they will require more information and evidence from the applicant and a more detailed consideration from caseworkers to ascertain that an applicant is eligible for the scheme through one of these routes. This is considerably more information than will be required from other applicants under the scheme and the information cannot be gained from automated checks of HMRC and DWP data, and as a result, we do not think that the online form built for the overwhelming majority of cases is suitable for Lounes and Surinder Singh cases, or for derivative right holders, or can be effectively modified to accommodate such cases without impacting on the overall efficiency of the process. The additional requirements that need to be met and the information needed to prove this increases the complexity of the process and the number of stages and questions the applicant needs to answer meaning this cohort is actually better suited to a paper form which will be easier to navigate.

Furthermore, the refusal rate for documents issued to derivative right holders and family members of British citizens under the EEA Regulation 2016 is high**.** In 2017,

the refusal rate on valid applications for derivative right documents was 71% and for valid applications from family members of British citizens the refusal rate was 56%. This is compared to an overall refusal rate on valid applications for EEA documents of 7% in 2017.[22]

The Surinder Singh and derivative rights routes have historically been used to circumvent the UK Immigration Rules. To ensure that providing these cohorts access to the scheme does not undermine the existing family Immigration Rules and cause unfairness to those applying under them, we will continue to consider applications rigorously to ensure only genuine cases qualify. This will require a more detailed consideration of the case and more evidence from the applicant as set out above. Given the complexity of these cases, and the documentation required to demonstrate the criteria are met the settlement scheme online application could not be modified to accommodate them without reducing the quality of the process for the majority of EU citizens. It would therefore require a separate online form. While numbers of derivative right-holders are difficult to ascertain because individuals are not required to apply for documentation, we expect numbers to be low given the small number of historic applications for such documentation (e.g. there were around 2,000 applications for derivative right documents in 2017 compared with the 340,136 applications for residence documentation from EU citizens and their family members).[23]

As such, it is difficult to justify the cost and resource required to create an equivalent online application route when a similar outcome can be achieved through a paper form and improved case-working processes. The different nature of these cases and the extra information required to ascertain whether or not a person enjoys such a right justify treating them differently to the majority of (simpler) cases.

Indirect discrimination: As set out below, some measures under the scheme may result in indirect discrimination for those with one or more of the eight protected characteristics. The rationale for the policy approach is set out below in order to demonstrate how such discrimination is a proportionate means of achieving a legitimate aim.

To the extent that the policy may result in discrimination, we have considered how this can be minimised and/or mitigated. Where we have been able to put measures in place to mitigate discrimination we have set these out below. The exceptional circumstances of exit, the need to balance the rights of individuals who have lived in the UK for an extended period exercising their EU law rights with the need to bring them, by the end of the implementation period, within the UK domestic immigration system, and the need for a smooth transition to a post-exit immigration system, mean that is has not been possible to eliminate discrimination entirely at this stage. This is a matter which will be kept under review as policy is further developed.

[22] Internal, unpublished data from PRAU
[23] Internal, unpublished data from PRAU

Administrative review fee

As set out above, we will continue to charge a £80 fee where an applicant seeks an administrative review against a relevant decision under the scheme. The fee will be retained where the original decision is withdrawn solely due to new evidence being provided by the applicant which was not before the original decision-maker. The fee will be refunded where the original decision is withdrawn because of caseworking error based on the evidence before the original decision-maker. In other immigration routes, applicants for administrative review can only provide additional evidence in very limited circumstances. Therefore, whenever a decision under review is withdrawn, the £80 administrative review fee is refunded. In other immigration routes, an administrative review is free of charge where there was no fee for the original application because a fee exception or waiver applied.

However, in the context of a scheme for around 3.5m people in which all applications will be free, we consider that any indirect discrimination arising from this approach to be justified. Under the scheme an individual can make any number of further applications free of charge and provide additional evidence to prove the status to which they think they are entitled. Applicants to the scheme will be given a reasonable opportunity by caseworkers to provide additional evidence before a decision is made. Given the flexibility of the scheme in supporting applicants to provide sufficient evidence or allowing them to provide additional evidence in a new application free of charge, we think it is fair to retain the £80 fee if they provide at the administrative review stage new evidence which was not before the original decision-maker and which is the sole basis on which the original decision is withdrawn.

6. Impact on protected characteristics

The proposed scheme, as it operates both before and from exit, will be set out in the Immigration Rules made under the Immigration Act 1971. Decisions on qualification under the Rules will be based on the information and evidence provided by the applicant as part of the application process, together with checks made against relevant government data (e.g. tax and benefits records and the Police National Computer). Applicants refused on eligibility grounds, or granted pre-settled status rather than settled status, will have a route of administrative review for casework errors. Errors of interpretation will be challengeable through judicial review. There will, before exit, be no statutory right of appeal against refusal under the scheme but, where refusal is on public policy grounds that will usually be accompanied by a deportation decision under the EEA Regulations, which will give rise to a right of appeal. Subject to Parliamentary approval of the required primary legislation, there will, from exit, be a statutory appeal right under the scheme, in line with the draft Withdrawal Agreement.

A number of measures are being considered, including in light of consultation with our settlement scheme user groups involving representatives of community groups and others, as part of a strategy in respect of potential applicants to the scheme who, in light of equalities considerations or factors which may indicate potential

vulnerability, may need particular assistance. These measures include:

- **Clear, targeted messaging** to increase awareness.
- **Translations:** key information to be translated and provided as video-content to promote the scheme and aid those with language barriers and/or low literacy.
- **Content and guidance on making an application:** including simple-to-follow guidance in leaflets and content embedded in the technology.
- **Assisted digital support:** UKVI uses a supplier to provide cost-free assistance with applying for customers who cannot access or struggle to use technology. This support is already available in 3.5k libraries or over the phone. Consideration is being to the forms and delivery of such support required for the settlement scheme.
- **Customer resolution team:** call centre staff to be trained to recognise signs of potential vulnerability and handle customers sensitively according to their needs.
- **Proactive mobile team:** pop-up events to be delivered in locations where we can engage with and offer in-person support to otherwise hard-to-reach customers.
- **Caseworking:** all staff to have basic safeguarding training and specialist teams to be established to handle complex cases, e.g. those for children in care.

We have also considered providing assistance for those applying from overseas who may struggle to complete the online application. This may be because they are either unable to use the online service or due to technical issues that make the online application unavailable. As in the UK we intend to make available a paper application form where appropriate and multi-lingual telephone digital assistance to overseas applicants where this is needed.

Providing for paper applications overseas requires identity documents and personal information to be sent internationally. Whilst the large majority of countries allow for this, we are aware that this may indirectly discriminate against those applying from overseas in 47 countries which have domestic legislation that prevents such actions.[24]

Predicting the number of applicants seeking to use paper applications in these countries is very difficult as it is not clear at this stage the factors which would drive an applicant, who has continuous residence in the UK, to choose to apply from overseas, or the volumes involved.

However, research suggests the numbers preferring to use paper applications would be very small. Engagement with stakeholders shows the single most important customer requirement in the scheme is not to be without their identity document for any prolonged period. In research conducted for the Home Office by Britain Thinks

[24] Her Majesty's Passport Office; International Submission Routes and Local Services Policy

just 8% of those surveyed wished to send their passport or identity document to the Home Office.[25] We also know that nationals of these 47 countries accounted for approximately 12.5% of all residence documentation applications under EU law in 2017[26] and the majority of future applicants to the settlement scheme from these countries would be made in the UK and/or online.

Applicants in these 47 countries will not have an alternative paper application when technical issues prevent their online application. Private beta testing has established that technical issues are not common and a number of these have been related to user error and quickly resolved. Applicants applying from overseas will have multi-lingual digital telephone support to ensure that user error issues are resolvable and where a wider technical issue exists we will be able to provide information on the status of the service and when the issue will be resolved so that the applicant can complete their application.

To reach this remaining group through overseas face to face digital support or the provision of a bespoke overseas service would require a resourced presence in each of these 47 countries and potentially at a sub-national level. We have investigated the costs and concluded that they would be prohibitive.

We have considered the possibility of not providing paper overseas applications and overseas support to anyone in order to limit the discrimination to those resident in these 47 countries. This is in line with other overseas application routes, where online applications are mandatory, and where no digital assistance is provided. However, we believe that the potential indirect discrimination to a small number of applicants should not prevent the provision of additional assistance to the large majority of applicants.

The application process for the new EUSS family permit will, like that for the existing EEA family permit issued under the EEA Regulations, be an online process; there will be no paper application form available. As for applications under the scheme, multi-lingual telephone support will be available to assist applicants in making their application through the online process. We consider this provision to be proportionate to the likely need for support, which we do not consider warrants establishing a separate paper-based application process for the new EUSS family permit.

In respect of the provision to be made under the scheme for Crown servants, they have made a commitment to the UK by working for the UK Government and they often have less personal choice than others working overseas, in where, when and for how long they are posted overseas. We therefore consider more favourable treatment for Crown servants and their family members is required to ensure that their service should not disadvantage them in terms of continuous residence under the scheme or the lapsing of leave granted under it. Given this we have not considered the demographic composition of Crown servants and their family

[25] Internal, unpublished report for the Home Office
[26] Internal, unpublished data from PRAU

members, and consider that any indirect discrimination which may arise is proportionate to the legitimate aim of the policy.

6.1 Age

EEA citizens in the UK tend to be young or of working age. As mentioned above, Home Office estimates based on the Annual Population Survey for October 2017 to September 2018 suggest that just under 20% of the resident population of EEA nationals (excluding Irish citizens) are aged under 16, just under 80% are aged 16-64 and the remainder are aged 65 or over.[27]

Applicants will be able to demonstrate their residence through, among other things, employment or self-employment. This will support those of working age. The ONS estimates, that in Q3 2017, of EU citizens (including Irish citizens) estimated to be resident and of working age (assumed to be aged 16-64) around 83% were in employment, with around, 3% unemployed[28] and the remainder estimated to be economically inactive.[29] Therefore, it is anticipated that the majority of those resident EU citizens would be able to qualify in this way under the scheme, with dependent children mainly accounting for the inactive category and able to qualify for leave in line with their EU citizen parent(s).

We are proposing to use data from HMRC and DWP to verify residence, for example evidence as to tax paid on employment or self-employment income or of benefits or tax credits received, and thereby reduce the need for applicants to provide other evidence to substantiate their claimed residence here.

The remainder, particularly those aged 65 or over, may not be economically active and so may be required to provide different evidence of their residence or of their status as a dependent parent or other relative, where they have not already acquired the right of permanent residence here under the Free Movement Directive (which they will be able to use as the basis for an application for settled status under the scheme). The receipt of a state pension will be included in the DWP data used to verify residence, which will further ease the evidential burden on those not working but in receipt of a state pension.

Children aged under 16 who do not have a National Insurance number will not be identified through these checks and so will need to provide evidence of their own residence or of their parents (and of their relationship to their parents). We are taking a flexible approach to the evidence that is available and the amount of evidence required will be kept to a minimum and, if evidence is provided of the parental relationship (e.g. a birth certificate), the child will be granted leave in line with the parent without any evidence of the child's residence here being required.

[27] Unpublished Home Office analysis of Annual Population Survey October 2017 – September 2018

[28] Note the unemployment rate would refer to total estimated to be unemployed as a share of all those who are economically active. This is also around 4%.

[29] ONS 'UK Labour Market: November 2018'

The requirements for settled status under the scheme will also reflect the basis under the Free Movement Directive on which (i) the right of permanent residence here is acquired after less than five years' residence by retirees and their family members, and (ii) the right of residence here is retained by the spouse and other family members of an EU citizen who has died.

To facilitate the application process for EU, EEA and Swiss citizens and their family members, we intend to use a digital application and caseworking system. This may impact on those smaller groups of older applicants who may not be able or inclined to use an online application process. Assuming residents in the UK are representative of scheme applicants' use of the internet: the ONS survey of 'Internet users in the UK'[30] for Q1 2018 found that 44% of those adults aged over 75 years were recent internet users, with 80% of the 65 – 74 years age group similarly profiled (compared to 99% of those aged 16 – 34 years).

The existing permanent residence online form has been tested and designed to include features for those not 'digitally confident' and the intention is to reflect these features in the design of the scheme. It is also planned that, as now, there will be an assisted digital process, with telephone and, in the UK, face-to-face support available to help complete the online application process, with a paper application form available in appropriate circumstances. The period until 30 June 2021 which we have agreed for EU, EEA and Swiss citizens and their family members resident here by 31 December 2020 to obtain UK immigration status will ensure that applicants have adequate time to make their application. We have also agreed that, where a person misses the deadline for their application for a good reason, they will be given a reasonable further period in which to make an application.

These factors, coupled with the fact that the proportion of applicants likely to be adversely affected by an online application process is low and the availability of assisted digital, make any indirect discrimination in this regard proportionate to achieving a legitimate aim of a streamlined, online application process for UK immigration status and of reducing costs to the taxpayer.

For non-EEA citizen family members resident in the UK before the end of the implementation period with an EU, EEA or Swiss citizen, the scheme will basically reflect the definition of 'direct family member' (spouse, civil partner, child, dependent parent/grandparent) and 'extended family member' (durable partner or other dependent relative, with a relevant document in this category issued under the EEA Regulations 2016) as set out in the Free Movement Directive.

Derivative rights of residence are derived not from the Free Movement Directive but other instruments of EU law, including for the primary carer of a British citizen or EU

[30] ONS; Internet Users in the UK: 2018
https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2018

citizen child. Derivative rights continue for as long as the underlying conditions are met, but only Surinder Singh family members can acquire permanent residence under EU law after five years' residence. This is because it is only in the case of Surinder Singh that the CJEU found that the Free Movement Directive applies by analogy and permanent residence is unique to the Directive. Once the underlying conditions cease to be met the derivative right of residence falls away. Once EU law no longer applies in the UK, this could potentially impact both those with a derivative right of residence and those children and adults in receipt of care from them. However, the proposal to provide these cohorts with access to the scheme significantly limits any impact and goes beyond the rights they currently enjoy under EU law.

Further, in any event paragraph 15A of Schedule 3 to the Equality Act 2010 applies to provisions in the Immigration Rules which would otherwise constitute unlawful discrimination in relation to age.

6.2 Disability

The scheme will involve a qualifying period of five years' continuous residence. As currently under the Free Movement Directive, continuity of residence for the purposes of the scheme will not be broken by certain temporary absences. This includes a single absence of up to 12 months for an important reason, which can include serious illness, and temporary absences not exceeding a total of six months in any 12-month period. A concern arises that EU, EEA or Swiss citizens or their family members with a disability may need to return to their member state for treatment or support and would find that they had broken their continuous residence impacting adversely on their ability to secure their status in the UK. In replicating the criteria under the Directive the scheme will mitigate potential adverse impacts of the continuous residence requirement on persons who share the protected characteristic of disability.

As noted above, the scheme will include a generous approach to assessing the qualifying period of residence and how this is evidenced. The scheme will also make provision on basically the same basis as the Free Movement Directive for family members and for retained rights of residence, including where these arise from temporary or permanent incapacity.

We have considered what impact the scheme may have on persons who share the protected characteristic of disability. Home Office analysis of the ONS Annual Population Survey estimated there were around 270k disabled (as defined by the Equality Act 2010) EEA citizens (excluding Irish citizens) resident in the UK and aged 16+ between October 2017 and September 2018, of whom 160k were in employment, with an employment rate (for those aged 16-64) of around 67% -

compared with the estimated overall employment rate for EEA nationals of around 81%.[31] At this stage, we have no reason to suppose that disabled EU, EEA or Swiss citizens or their family members resident in the UK will have disproportionate difficulty in qualifying under the scheme, but we will keep this aspect of the policy under review.

The planned digital application process may disadvantage some disabled persons with accessibility needs. Assuming UK residents reflect EU settlement Scheme applicants' use of the internet, the ONS survey referenced above of 'Internet users in the UK', for Q1 2018, found that 20% of disabled adults had never used the internet. The current online form for permanent residency has been tested and designed to ensure, as much as practicable, accessibility for those with restricted capability and these features will be reflected in the design of the online application process for the scheme. It is also planned that, as now, there will be an assisted digital process, with telephone and face-to-face support available to help complete the online application process, including appropriate provision for overseas applicants. A paper form will also be available in appropriate circumstances in which an individual is unable to use the online form.

The period until 30 June 2021 which we have agreed for EU, EEA and Swiss citizens and their family members resident here by 31 December 2020 to obtain UK immigration status will ensure that applicants have adequate time to make their application. We have also agreed that, where a person misses this deadline for a good reason, they will be given a reasonable further period in which to make an application. These factors, coupled with the fact that the proportion of applicants likely to be adversely affected by an online application process is very low and the availability of assisted digital, make any indirect discrimination in this regard proportionate to achieving the legitimate aim of a streamlined, online application process for UK immigration status and of reducing costs to the taxpayer.

The potential impact of the post-exit end of derivative rights of residence on those requiring care is also considered above. We have also considered what impact requiring family members of British citizens and derivative right holders to apply using a paper form may have on persons with disabilities. Again, for some individuals a paper form may be more accessible to disabled persons with accessibility needs than a digital application process. For others, a digital process may be more accessible. Those who have difficulty completing the paper form will have access to the assistance available to all applicants under the scheme including the assisted digital support. We have also agreed that, where a person misses the deadline for a good reason (such as the fact that they were undergoing serious medical treatment in the run up to the deadline), they will be given a reasonable further period in which to make an application. These factors, coupled with the fact that the proportion of applicants likely to be adversely affected by a paper form is very low, make any indirect discrimination in this regard proportionate to achieving

[31] Unpublished Home Office analysis of Annual Population Survey October 2017 - September 2018

the legitimate aim of a streamlined, online application process for the majority of applicant and of reducing costs to the taxpayer.

6.3 Gender reassignment

A person who has changed their gender during their qualifying period of residence may potentially face indirect discrimination, as they would currently if they decided to apply for documentation under the EEA Regulations, by being required to provide evidence of identity and residence in their original gender. We will seek to learn from the approach taken in respect of other public services, e.g. voter registration, in mitigating this impact through the guidance for applicants and caseworkers as to the operation of the scheme.

Otherwise, there is nothing, at the present time, to indicate that those falling within the protected characteristic of gender reassignment will be particularly affected by the scheme.

6.4 Pregnancy and maternity

As set out earlier, the scheme will involve a qualifying period of five years' continuous residence. As currently under the Free Movement Directive, continuity of residence under the scheme will not be broken by certain temporary absences. This includes a single absence of up to 12 months for an important reason, which can include pregnancy or childbirth. The concern is that EU, EEA or Swiss citizens or their family members who wanted to return to their member state to have a child would find that they had broken their continuous residence impacting adversely on their ability to secure their status in the UK. In replicating the criteria under the Directive the scheme will mitigate potential adverse impacts of the continuous residence requirement on persons who share the protected characteristic of pregnancy and maternity.

We have considered what impact the scheme will have on people who share the pregnancy and maternity characteristic, in terms of the likelihood that women who are pregnant or who have a very young child will be able to qualify under the scheme. We consider that the aspects of the scheme described above will provide sufficient flexibility.

6.5 Race (including ethnic or national origins, colour or nationality)

The scheme will apply equally to all EU citizens. No additional criteria will need to be met by Croatian, EU2 (Romania, Bulgaria) or EU8 (Poland, Latvia, Lithuania, Slovakia, Slovenia, Czech Republic, Estonia and Hungary) citizens who were previously subject to transitional restrictions by virtue of their country's accession agreement with the EU.

We do not consider that the scheme would constitute direct discrimination, as

between (i) non-EEA citizen family members of EEA citizens and those of third country nationals, or (ii) EEA citizens and British citizens. We consider there to be strong arguments that those who entered the UK exercising free movement rights (including during the planned implementation period) and so are beneficiaries of Part 2 of the draft Withdrawal Agreement with the EU are not in a comparable position to those who did not, given their very different entitlements and expectations. For this reason, we do not consider that either as regards the comparison between British citizens and EEA citizens, or between EEA citizens and non-EEA citizens, there is like-for-like comparison.

As regards the treatment of family members of EEA citizens, the scope of the scheme is not restricted to particular nationalities as all EEA citizens and their family members continuously resident in the UK by the end of the implementation period will be able to apply under the scheme. In any event, if the scheme's different application to different nationalities does directly discriminate on grounds of nationality, this would be permitted by the exemptions at Schedule 3 to the Equality Act 2010.

To the extent that the scheme does involve discrimination, however, we do not consider such discrimination to be unlawful. First, as above, EEA and non-EEA citizens are not in a comparable position for the reasons set out above. Even assuming that they were in a comparable position, however, we consider any indirect discrimination to be justified. The scheme reflects the unique status of EEA citizens resident in the UK before the end of the implementation period – stemming from their exercise of Free Movement Directive rights in another EEA state (as UK nationals exercise elsewhere in the EEA) and the right to be joined by their EEA and non-EEA citizen family members to which this gives rise. Many of those EEA citizens have come to the UK and have built a life here, together with their family members, on the basis of our EU membership. They remain welcome and the scheme is intended to provide as smooth a transition on the UK's exit from the EU for them as possible in terms of their immigration status, so that they can carry on with their lives here with minimal disruption for them or for businesses, universities and other organisations. The reciprocation of that smooth transition for UK nationals living elsewhere in the EEA is also something which the UK has secured in the negotiations with the EU and the other EEA countries, as set out in the draft citizens' rights agreements, and the scheme has been developed in that context.

There are no application fees for the EU Settlement Scheme, in contrast to the position on application fees for indefinite leave to remain by third country nationals subject to immigration control. For the reasons set out above, we believe that these groups are not in a comparable position to each other, so direct discrimination does not arise. However, to the extent that an argument may be made that the fees constitute direct discrimination, again this would not be unlawful as it would fall within the exemption at Schedule 3 to the Equality Act 2010.

In the event that any indirect discrimination on grounds of nationality does arise, it is

justified by the same factors as those which justify discrimination on grounds of nationality by the scheme itself.

As regards those who have not yet been continuously resident in the UK for long enough (generally five years) to qualify for settled status under the scheme – including where this reflects the period the relevant EU country has been a member of the EU – they will, if they otherwise qualify, be granted pre-settled status (five years' limited leave to remain) so that they can accrue the length of residence which will then enable them to apply for settled status.

6.6 Religion or belief

There is nothing, at the present time, to indicate that the scheme will have differential impacts in relation to the protected characteristic of religion or belief.

6.7 Sex

The estimated resident population of EEA citizens (excluding Irish nationals) is estimated to be roughly half male and half female, and similar proportions make up the population estimated to be in employment.[32] However, fewer than one in 10 male resident EEA citizens estimated to be in employment are estimated to work part-time, compared to around one in three female resident EEA citizens estimated to be in employment.[33] Under the Free Movement Directive, a person earning less than £155 per week may fail to be considered as a worker as their work is not considered 'genuine and effective' – and any salary threshold may be harder meet if in part-time work compared to full-time work. As noted above, this criterion – and others reflecting qualifying activity under the Free Movement Directive – will not generally be a feature of the scheme. This will help to ensure that there is no disproportionate impact of such a threshold on lower paid workers or those whose earnings have been reduced by time spent on child care or other family responsibilities, which may disproportionately affect women rather than men.

A woman who uses her maiden name for employment, banking or other purposes may have more difficulty evidencing their qualifying period of residence as a family member for the purposes of the scheme, as they would currently if they decided to apply for documentation under the EEA Regulations. We have developed our automated residence checks to accommodate maiden names and will seek to learn from the approach taken in respect of other public services, e.g. voter registration, in mitigating this impact through the guidance for applicants and caseworkers as to the operation of the scheme.

The scheme will take a proportionate approach to evidential requirements where the applicant is a victim of domestic violence, for example by accepting alternative

[32] Unpublished Home Office analysis of Annual Population Survey October 2017 – September 2018
[33] Unpublished Home Office analysis of Annual Population Survey October 2017 – September 2018

evidence of the identity of an EEA citizen from whom the applicant is separated for that reason.

Not making specific provision for some derivative right-holders (Chen, Ibrahim & Teixeira and Zambrano) to continue residing in the UK after exit would impact more on women who are more likely to be a single parent caring for a child. However, the proposal to give these cohorts access to the settlement scheme removes any potential for indirect discrimination based on sex.

6.8 Sexual orientation

There is nothing, at the present time, to indicate that the scheme will have differential impacts in relation to the protected characteristic of sexual orientation.

7. Advance equality of opportunity

As set out above, the scheme will be designed in such a way as to be accessible to all resident EU, EEA and Swiss citizens and their family members, including those with particular protected characteristics, as a means of advancing equality of opportunity.

8. Foster good relations

The scheme is intended to support the transition of resident EU, EEA and Swiss citizens and their family members to UK immigration status as smoothly and easily as is practicable. The policy intention is to provide certainty as soon as possible, enabling them to continue their established lives here with minimal disruption, and helping, among other things, to foster good relations between resident EU, EEA and Swiss citizens and their family members and others living in the UK.

Where we have identified that certain groups who share a protected characteristic may be particularly impacted by certain aspects of the scheme, we have sought to mitigate this impact wherever possible and we will continue to keep this impact under review, and the scope for further mitigation under consideration, as the scheme is further developed. We consider that overall these impacts are proportionate and do not adversely affect good relations between people who share certain protected characteristics and those who do not.

Best interests of the child

Although being a child is not a protected characteristic under the public sector equality duty in s149 of the Equality Act 2010, we have nevertheless carefully considered the impact of the EU Settlement Scheme on children. The provision made has regard to Article 3 of the UN Convention on the Rights of the Child and reflects the duty on the Secretary of State to take account of the need to safeguard and promote the welfare of children in the UK in carrying out his immigration, asylum

and nationality functions, as reflected in section 55 of the Borders, Citizenship and Immigration Act 2009.

Children who are within the scope of the citizens' rights agreements will be able to secure their rights of residence in the UK through the EU Settlement Scheme. The Government is committed to ensuring that the application system under the scheme is user-friendly and streamlined for all applicants, including children. Caseworkers will be looking for reasons to grant applications under the scheme, not reasons to refuse – exercising discretion in favour of applicants where appropriate, to minimise administrative burdens. Where there is a good reason for an application not having been made by 30 June 2021 (the end of the planned post-implementation period grace period), the person will be given a reasonable further period in which to apply. This will include, for instance, the case of a child in the UK whose parents (or the local authority in the case of a 'looked after' child) have not made the application on behalf of the child before the specified deadline.

Individuals are not required to pay a fee when applying for status under the scheme - ensuring there is no financial barrier, including for children and other vulnerable groups wishing to stay. Additional protections will be in place, including support to 'looked after' children, through the scheme's vulnerability strategy, which is being implemented in partnership with vulnerable group representatives, local authorities and other experts, and which uses a range of methods to reach and support all those eligible to apply under the scheme.

The section 55 duty in the 2009 Act is unaffected by our exit from the EU. As now, it will continue to require the Secretary of State to make arrangements to ensure that all immigration decisions take account of the need to safeguard and promote the best interests of children who are in the UK. Section 55 imposes a statutory duty on the immigration authorities in the same way that domestic legislation, through the Children Act 2004 and equivalent legislation across the UK, requires all public authorities to take into account the need to safeguard and promote the best interests of a child in exercising their functions, including decisions that affect that child.

The Home Office has issued statutory guidance on the application of the section 55 duty to immigration functions.[34] This guidance sets out the framework that has been created to ensure that we give practical effect to our obligations under section 55. Where a child or children in the UK will be affected by the decision, the immigration authorities must have regard to their best interests in making the decision.

Caseworkers must carefully consider all the information and evidence provided concerning the best interests of a child in the UK and the impact the decision may have on the child. All decisions must demonstrate that the child's best interests have been considered as a primary, but not necessarily the only, consideration. Decisions must demonstrate that consideration has taken place of all the information and

[34] https://www.gov.uk/government/publications/every-child-matters-statutory-guidance

evidence provided concerning the best interests of a child in the UK.

Family Test

In accordance with the public sector equality duty, we have conducted this equality assessment of the proposed policy for the EU Settlement Scheme. The additional Family Test, as reflected in guidance issued by DWP, is designed to support strong and stable family relationships among those families legally resident in the UK. The EU Settlement Scheme will enable resident EU, EEA and Swiss citizens and their family members to obtain the UK immigration status which they will need in order to remain here lawfully and permanently after the UK withdraws from the European Union.

We have therefore considered the Family Test questions identified in the DWP guidance:

1. What kinds of impact might the policy have on family formation?

The impact would not be significant. The EU Settlement Scheme will replace, with leave granted under UK immigration law, the basis under EU law under which EU, EEA and Swiss citizens can come to and remain in the UK, and form family relationships here or be joined by family members living outside the UK.

2. What kind of impact will the policy have on families going through key transitions such as becoming parents, getting married, fostering or adopting, bereavement, redundancy, new caring relationships or the onset of a long-term health problem?

The impact, if any, would not be significant. The EU Settlement Scheme will replace, with leave granted under UK immigration law, the basis under EU law under which EU, EEA and Swiss citizens and their family members can come to and remain in the UK.

3. What impacts will the policy have on all family members' ability to play a role in family life, including with respect to parenting and other caring responsibilities?

No impact. The DWP guidance suggests that this question is mainly aimed at possible impacts on work/family life balance. This is not relevant to the EU Settlement Scheme.

4. How does the policy impact on families before, during and after couple separation?

No impact. The EU Settlement Scheme will replace, with leave granted under UK immigration law, the basis under EU law under which EU, EEA and Swiss citizens and their family members can come to and remain in the UK. In doing so, it will reflect their existing rights under the Free Movement Directive to retain the right of

residence in the UK following the termination of a marriage or civil partnership.

5. How does the policy impact on families most at risk of deterioration of relationship quality and breakdown?

The impact, if any, would not be significant. The EU Settlement Scheme will replace, with leave granted under UK immigration law, the basis under EU law under which EU, EEA and Swiss citizens and their family members can come to and remain in the UK.

Summary of the evidence considered in demonstrating due regard to the Public Sector Equality Duty

26 June 2017 Command Paper (Cm 9464), 'The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU':
https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu

8 December 2017 Joint Report from the negotiators of the EU and the UK Government on progress during phase one of negotiations on the UK's withdrawal from the EU:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf

ONS publications:
'Internet Users in the UK: 2017'
https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2017

Other:
Unpublished Home Office Analysis of Annual Population Survey – this is internal analysis of a publicly available source.

Data based on analysis of Annual Population Survey is subject to uncertainty and provides estimates only. As a sample survey of UK households it is subject to sampling variation and weighting processes, and coverage of communal establishments is limited meaning some groups (e.g. recent arrivals in hotels/hostels whilst establishing residence, or international students in halls of residence who are only included in the sampling frame if they have UK resident parents) are likely to be undercounted. Estimates presented note where coverage is of EEA or EU nationals and whether Irish nationals are included or excluded. Estimates presented are rounded. Data is unpublished.

Links to published sources may provide notes/limitations to be aware of when

interpreting information presented in this statement.			
SCS sign off	Nicola Smith	**Name/Title**	Head of European Migration and Citizens' Rights Unit, BICSPI
I have read the available evidence and I am satisfied that this demonstrates compliance, where relevant, with Section 149 of the Equality Act and that due regard has been made to the need to: eliminate unlawful discrimination; advance equality of opportunity; and foster good relations.			
Directorate/Unit	Border, Immigration & Citizenship Policy & International (BICSPI)	**Lead contact**	Clive Peckover
Date	22 May 2019	**Review Date**	Ongoing

Retain the completed PES for your records and send a copy to Diversity team@homeoffice.gsi.gov.uk and your relevant business area Equality and Diversity Lead.

Part 2 - Policy Equality Sign-off

N.B. The PES can be completed throughout the development of a policy but is only signed at the point the policy is made public i.e. finalised and implemented.

To assist in evaluating whether there is robust evidence that could withstand legal challenge, the following questions must be asked prior to sign-off.

Q. Has 'due regard' been made to the three aims of the General Duty (Section 149 of the Equality Act 2010)?

- **Eliminate unlawful discrimination**, harassment, victimisation and any other conduct prohibited by the Act;
- **Advance equality of opportunity** between people who share a protected characteristic and people who do not share it; and
- **Foster good relations** between people who share a protected characteristic.

Q. Have all the **protected characteristics** been considered – age; disability; gender reassignment; pregnancy and maternity; race (includes ethnic or national origins, colour or nationality); religion or belief (includes lack of belief); sex; and sexual orientation?

Q. Have the relevant stakeholders been involved and/or consulted?

Q. Has all the relevant **quantitative and qualitative data** been considered and been subjected to **appropriate analysis**?

Q. Have lawyers been consulted on any legal matters arising?

Q. Has a date been established for reviewing the policy?

Further resources including: Case Law; Equality Assurance Table; examples of best practice are available on Horizon.