# From De Facto Grant to "Minded to Curtail": The Inversion of the Evidentiary Burden in the EU Settlement Scheme and the Records the State Refuses to Erase

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**WORKING PAPER: FOR RESEARCH AND DISCUSSION PURPOSES ONLY**


## Abstract

*The EU Settlement Scheme (EUSS) is the largest constitutive registration of residence rights in modern British history, and the principal domestic vehicle for Part Two of the EU–UK Withdrawal Agreement. This article argues that the scheme has undergone a quiet but profound inversion. Conceived before the Withdrawal Agreement bound anyone, it began as a generous, error-forgiving instrument in which the State effectively proved residence to itself and granted status on a near-presumption of eligibility, in reliance on a published "principle of evidential flexibility". Through hardened deadlines, narrowed eligibility, dismantled remedies and a new power to curtail pre-settled status, the practical burden of proof has been displaced back onto the individual. Drawing together strands of scholarship usually kept apart — the eligibility jurisprudence, the welfare and Charter litigation, the data-protection challenges, and the monitoring case law — the article locates an original and corrosive defect at the seam of immigration and data-protection law: the indefinite retention of superseded refusals. It contends that this defect engages both the accuracy principle of the UK GDPR and the citizens'-rights guarantees of the Withdrawal Agreement, and that it should be examined jointly by the Information Commissioner's Office and the Independent Monitoring Authority.*


**Keywords:** EU Settlement Scheme; Withdrawal Agreement; legitimate expectations; effective remedy; data protection; citizens' rights; pre-settled status

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## I. Introduction

The EU Settlement Scheme ("EUSS"), contained in Appendix EU to the Immigration Rules, is the largest single registration of residence rights in modern British history and the principal domestic mechanism by which the United Kingdom purports to honour Part Two of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union ("the Withdrawal Agreement").[2] By the end of 2024 the Home Office had received in the region of 8.4 million applications, and by the end of 2025 more than 5.8 million people had been granted some form of status under it.[3] Of those, a substantial minority — roughly 1.6 million people as at the end of 2024 — held not settled status but *pre-settled* status, a five-year limited leave that must, on the orthodox model, be converted into settlement by a further successful interaction with the scheme.[4]

The orthodox account of the EUSS is that it represents the United Kingdom's faithful and generous implementation of its treaty obligations.[5] That account is today broadly accurate as a description of the rules on their face. It nevertheless conceals both an awkward chronology and a more revealing trajectory. The scheme was conceived, designed and operationally launched before the Withdrawal Agreement existed in any binding form; for its first ten months of public life it was a unilateral, domestic, discretionary construct rather than the implementation of a treaty.[6] It began life as a generous, fast and forgiving instrument, in which the State effectively proved residence to itself and granted status on a near-presumption of eligibility. Over the seven years since, that posture has been progressively inverted: the generosity has been clawed back through hardened deadlines, narrowed eligibility and dismantled remedies, while the procedural protections that European Union ("EU") law would normally demand — above all an effective judicial remedy — were retro-fitted only after litigation forced the issue.

This article advances three connected claims. First, as a matter of legal architecture and administrative practice, the scheme has undergone an *inversion of the evidentiary burden*: what began as a de facto grant, in which the practical burden of proving residence lay on the State, has become a regime in which the individual must affirmatively satisfy a caseworker of continuing eligibility, on pain of removal. Secondly, that inversion is not the sum of discrete and unrelated grievances — the eligibility case law, the welfare litigation, the data-protection challenges, the detention controversies — but the symptom of a single structural pathology: a constitutive, digital, data-dependent regime that relocates the cost of every administrative friction onto the protected individual. Thirdly, and most originally, that pathology has produced a specific and corrosive defect at the intersection of immigration and data-protection law — the

2Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384 I/1 ("Withdrawal Agreement"), Part Two (arts 9–39). The scheme is given domestic effect principally through Appendix EU to the Immigration Rules, made under the Immigration Act 1971, s 3(2).

3Home Office, *EU Settlement Scheme quarterly statistics* (2024–2025 releases). The figures are drawn from the published quarterly releases and the House of Commons Library briefings summarising them; precise totals fluctuate between releases and between application-based and person-based counts.

4On the distinction between settled status (indefinite leave to enter or remain) and pre-settled status (limited leave to enter or remain), see Appendix EU, paras EU2 and EU3, and the definitions in Annex 1.

5For the Government's own framing, see Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) ("Statement of Intent"); and the repeated characterisation of the scheme as "generous" in successive ministerial statements during the passage of the European Union (Withdrawal Agreement) Bill 2019–20.

6The scheme opened fully to the public on 30 March 2019, following test phases from August 2018. The Withdrawal Agreement was concluded on 17 October 2019 and entered into force on 1 February 2020: Council Decision (EU) 2020/135 of 30 January 2020 [2020] OJ L29/1.

indefinite retention of a refusal of EUSS status that is never erased, rectified or marked as superseded, even where the person is later granted status or already held leave on another basis. That defect engages both the accuracy principle of the United Kingdom General Data Protection Regulation ("UK GDPR")[7] and the citizens'-rights guarantees of the Withdrawal Agreement, and it should be examined jointly and urgently by the Information Commissioner's Office ("ICO") and the Independent Monitoring Authority for the Citizens' Rights Agreements ("IMA").

A methodological and historiographical note is warranted. The scholarship on the EUSS has, to date, been written largely in silos. Immigration practitioners have charted the eligibility jurisprudence;[8] welfare specialists have traced the litigation on pre-settled status and social assistance;[9] data-protection commentators have analysed the immigration-exemption challenges; and constitutional scholars have examined the monitoring case law on the non-expiry of residence rights. Each literature is rich; few speak to the others. The contribution of this article is to refuse that compartmentalisation and to read the scheme as a single trajectory in which the doctrinal threads are mutually reinforcing — and, in Part VIII, to identify a defect that none of the separate literatures has isolated because it lies precisely where two of them meet. The analysis proceeds doctrinally and contextually, drawing on the Immigration Rules, the published caseworker guidance, the domestic and EU case law, and the reports of the monitoring bodies and civil-society organisations that have litigated the scheme's defects.

The article is organised as follows. Part II establishes the scheme's pre-treaty origins and constitutive character. Part III reconstructs the original evidential settlement — the de facto grant. Part IV subjects that settlement to analysis through the doctrine of legitimate expectations, in both its domestic and EU forms. Part V examines the remedy deficit and its belated cure. Part VI turns to the Certificate of Application and the interim protections in Article 18(3). Part VII addresses the detention of protected persons. Part VIII analyses the data-protection architecture and the never-erased refusal. Part IX traces the hardening of the late-application regime. Part X analyses the hardening of eligibility through the case law. Part XI considers suitability and deportation. Part XII addresses the welfare frontier. Part XIII examines the monitoring case law and the automatic extensions. Part XIV analyses the redefinition of continuous residence. Part XV turns to the 2026 curtailment process. Part XVI concludes.

## II. A Scheme that Ran Ahead of its Treaty

### *A. The chronology and its significance*

The policy blueprint for the EUSS was the Statement of Intent published on 21 June 2018.[10] A private test phase opened in late August 2018; further test phases ran through the winter; and the scheme opened to the public on 30 March 2019. The Withdrawal Agreement, by contrast, was

7Retained Regulation (EU) 2016/679 (UK GDPR), art 5(1)(d) (accuracy) and art 5(1)(e) (storage limitation), as it forms part of domestic law by virtue of the European Union (Withdrawal) Act 2018, s 3.

8See, eg, the sustained case analysis on the Free Movement blog and the practitioner commentary in the *Journal of Immigration, Asylum and Nationality Law*. For a wider treatment, see C Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback 2020).

9See C O'Brien, "The great EU citizenship illusion exposed: equal treatment rights evaporate for the vulnerable (CG v The Department for Communities in Northern Ireland)" (2022) 47 European Law Review 786; and C O'Brien, *Unity in Adversity: EU Citizenship, Social Rights and the Cautionary Tale of the UK* (Hart 2017).

10(n 5).

only concluded on 17 October 2019 and entered into force on 1 February 2020.[11] For the entirety of its first ten months of public operation, therefore, the EUSS was not the implementation of any binding international obligation. It was a domestic, discretionary construct: leave to enter or remain granted under the Immigration Rules, untethered to any enforceable treaty floor of rights.

This chronology is not a curiosity but an explanatory key. It accounts for the scheme's two defining and ultimately contradictory features. First, because the overriding political imperative was to move several million people through the system quickly and to avoid a "cliff edge", the scheme was engineered to be generous, fast and error-correcting; the Government repeatedly emphasised that caseworkers were looking for reasons to grant rather than to refuse.[12] Secondly, because the rights initially conferred were domestic-law leave rather than directly effective treaty rights, the procedural safeguards that EU law attaches to decisions restricting residence — an independent appeal, effective access to one's own data, the preservation of rights pending decision — were not built in at the outset. The subsequent history is, in large measure, the story of those two features being inverted: the generosity withdrawn, the safeguards added only under legal compulsion, and sometimes incompletely.

### *B. From declaratory to constitutive rights*

The deeper structural pivot lies in the move from declaratory to constitutive rights. Under the law of free movement, the residence rights of Union citizens and their family members were *declaratory*: they arose by operation of law once the substantive conditions were satisfied, and documentation merely evidenced a status that already existed.[13] The EUSS replaced that model with a *constitutive* one: a person who failed to apply, or who applied unsuccessfully, did not merely lack a document — they lacked status, and became, in the Home Office's analysis, an overstayer like any other.[14]

That shift is the hinge on which almost every later difficulty turns, because it relocates the consequences of administrative friction — delay, error, evidential gaps, missed deadlines — from the State onto the individual. It is also in conceptual tension with the structure of the Withdrawal Agreement itself. The Agreement permits a constitutive scheme: Article 18(1) expressly allows the host State to require persons to apply for a new residence status.[15] But the rights the Agreement protects are not, in substance, contingent on the success of any particular application; they are conferred by the Agreement and persist for as long as the substantive residence conditions are met. The friction between a constitutive domestic scheme and a substantively declaratory treaty entitlement is the source of the monitoring litigation analysed in Part XIII. A constitutive scheme is permissible only so long as it does not, in its operation,

11Council Decision (EU) 2020/135 (n above). The transition period ran to 11pm GMT on 31 December 2020: Withdrawal Agreement, art 126.

12The "looking for reasons to grant, not to refuse" formulation recurs in ministerial statements and in early iterations of the caseworker guidance; it is the operational expression of the "evidential flexibility" principle discussed in Part III.

13The principle is long-settled. See Case 48/75 *Royer* EU:C:1976:57, paras 31–33 (the right of residence is conferred directly by the Treaty and does not depend on the issue of a residence permit); Directive 2004/38/EC [2004] OJ L158/77 ("Citizens' Directive"), recital 11 and art 25(1); and Case C-325/09 *Dias* EU:C:2011:498, paras 48–54.

14The constitutive character of the scheme, and the "serious consequences" of failing to make a further application, were acknowledged judicially in *R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), [2023] 1 WLR 1620 ("*IMA*"), esp paras 121–142.

15(n 2), art 18(1), to be contrasted with art 18(4), under which a State that chooses *not* to operate a constitutive scheme must issue declaratory documents.

defeat the substantive rights it is supposed to record; the burden of that proposition runs throughout this article.

## III. The Original Evidential Settlement: The De Facto Grant

### *A. The "principle of evidential flexibility"*

The single most revealing text for understanding how far the scheme has travelled is the preamble of the current caseworker guidance.[16] That preamble reproduces, and expressly adopts, paragraph 1.15 of the June 2018 Statement of Intent. The Home Office undertook to work *with* applicants to help them avoid errors and omissions; caseworkers were to have scope to engage with applicants and to give them a reasonable opportunity to supply supplementary evidence or to remedy deficiencies where a simple omission had occurred; and a "principle of evidential flexibility" was to apply, under which caseworkers would "exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens".[17] The guidance then states, in terms, that the document "has been developed to support that approach".[18]

The founding evidential posture was thus collaborative rather than adversarial: discretion exercised *for* the applicant, the administrative burden *minimised*, and the caseworker's role conceived as facilitative. This was not merely aspirational language. The standard of proof was, and remains, the civil balance of probabilities.[19] But the *practical* burden of proof — the burden of actually assembling and producing the evidence of residence — was, for the overwhelming majority of applicants, carried by the State.

### *B. The machinery of the de facto grant*

The mechanism was — and remains — the automated Residence Proving Service ("RPS"). On the strength of a National Insurance number alone, automated checks are run against HMRC and DWP records. Where those checks indicated five years' continuous residence, and the applicant had not since been absent for more than five consecutive years, the guidance provided that no further documentary evidence of residence would be required, and settled status would issue subject only to family-relationship and suitability checks. Where the automated checks indicated less than five years and the applicant did not dispute the position, pre-settled status followed, again without any documentary residence evidence.[20]

The combined effect of evidential flexibility in the preamble and automated grant in the machinery was that, for most people, the grant of status was *de facto*. The applicant supplied identity, nationality and a National Insurance number; the State proved residence to itself; status issued. This was a deliberate and defensible design choice: faced with several million applicants, an evidentiary regime requiring each to assemble documentary proof of five years' residence would have produced an administrative and humanitarian catastrophe. The automation was the mechanism by which the State honoured, in practice, the Agreement's

16Home Office, *EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members* (Version 31.0, 29 April 2026) ("Caseworker Guidance v31.0"), section "About this guidance". On the legal status of such guidance, see *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, paras 26–47.

17(n 5), para 1.15, reproduced in Caseworker Guidance v31.0 (n 16).

18Caseworker Guidance v31.0 (n 16), "About this guidance".

19Caseworker Guidance v31.0 (n 16), passim, directing caseworkers to ask whether they are "satisfied, on the balance of probabilities" of the relevant matters.

20Caseworker Guidance v31.0 (n 16), section "Checks to establish UK residence". The RPS draws principally on HMRC and DWP datasets, and dispenses with documentary evidence where the automated checks confirm the requisite period.

requirement that the process be "smooth, transparent and simple" and that forms be "short, simple [and] user friendly".[21]

Certain cohorts were brought in by national provision *more generous* than the treaty required. The clearest example is the Zambrano carer: a third-country-national primary carer of a British citizen child enjoys, under EU law, a derivative right of residence to prevent the child being compelled to leave the territory of the Union, but no right to permanent residence.[22] This generosity is the baseline against which every subsequent hardening must be measured. The scheme did not begin neutral; it began deliberately tilted toward the grant — and that tilt, publicly proclaimed and relied upon, is what gives the doctrine of legitimate expectations its purchase.

## IV. The Legitimate Expectation and its Frustration

### *A. The representation and its sources*

The de facto grant was not merely an administrative convenience; it was the foundation of an expectation, in the public-law sense, that the scheme would continue to be operated with evidential flexibility and in the applicant's favour. To found a legitimate expectation, a public authority's representation must be "clear, unambiguous and devoid of relevant qualification".[23] A formally adopted and published policy, repeatedly relied upon in ministerial communication, is a paradigm source of such a representation,[24] and the Statement of Intent is on any view such a source. The representation was reinforced by the structure of the scheme: an applicant told that the State would itself verify residence, and invited to rely on automated checks rather than to retain documentary proof, was induced to order their affairs on the faith of the representation. The failure to retain years of tenancy agreements, utility bills and payslips, once told they would not be needed, is precisely the kind of detrimental reliance that strengthens an expectation, though detriment is not a strict precondition.[25]

### *B. Procedural and substantive expectations*

The doctrine protects two kinds of expectation. A *procedural* expectation — that a particular process will be followed before a decision — is straightforwardly enforceable, and is engaged by the promise that applicants would be given the opportunity to remedy deficiencies before refusal. A *substantive* expectation — of a particular outcome or benefit — is firmly established since *Coughlan*, where the Court of Appeal recognised that, where an authority has induced a legitimate expectation of a substantive benefit, to frustrate it may be so unfair as to amount to an

21(n 2), art 18(1)(e)–(g).

22Case C-34/09 *Ruiz Zambrano* EU:C:2011:124, paras 42–45. The right is a right of last resort and confers no entitlement to permanent residence; the inclusion of Zambrano carers within the EUSS, on a route to settlement, was a matter of domestic generosity rather than treaty compulsion.

23*R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 (QB) 1569 (Bingham LJ), approved in *R (Bancoult) (No 2) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, para 60 (Lord Hoffmann).

24*R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, paras 68–69 (Laws LJ); and earlier *R v Secretary of State for the Home Department, ex p Khan* [1984] 1 WLR 1337 (CA) and *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482 (QB).

25On reliance and detriment, see *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, paras 30–31 and 55; and *R (Patel) v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801, para 44 (detriment is "a relevant consideration … but not an essential prerequisite").

abuse of power.[26] Laws LJ reformulated the inquiry in terms of proportionality: an authority may not resile from a lawful representation on which a person has relied unless to do so is a proportionate response — of which the court is the judge — to a legitimate aim in the public interest.[27] The Supreme Court and Privy Council have since confirmed both the substantive doctrine and the proposition that, once a clear representation is established, the onus shifts to the authority to justify resiling and to show that it actually took the expectation into account.[28]

### *C. The macro-political discount and the limits of the domestic claim*

The countervailing principle is that the courts accord a wide margin to changes of policy in the "macro-political" field, where decisions turn on broad considerations of resource allocation and the management of a mass scheme rather than on individualised assurances.[29] A general recalibration of evidential practice across a scheme of several million applicants sits closer to that macro-political end than to the individualised "home for life" promise frustrated in *Coughlan*.[30] The honest analysis is therefore that a free-standing domestic challenge to the *general* hardening would face real difficulty, the more so given the recent disciplining of the doctrine as an aspect of the principle against abuse of power rather than a free-standing trump.[31]

That conclusion should not be overstated. First, the doctrine retains real force where the hardening operates in the *individual* case — where a particular applicant, told by the RPS process that no further evidence was required, is later refused for want of evidence they were induced not to keep. There the assurance is focused and the reliance concrete, and the *Paponette* burden is squarely engaged. Secondly, even at the level of general policy, the requirement that the authority take the expectation into account when changing course is a discipline of substance: a change introduced without any apparent consideration of those who relied on the original assurance is vulnerable, not because the policy could not lawfully be changed, but because it was changed without the rationality and fairness the law requires of a departure from a published commitment.

### *D. Legitimate expectations as a general principle of EU law*

The more powerful framing is treaty-based, drawing on the parallel doctrine in EU law. The protection of legitimate expectations is one of the fundamental general principles of the EU legal order, the subjective corollary of legal certainty.[32] The EU doctrine is in some respects

26*R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA), paras 57 and 71–82, building on *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835 (HL) and *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681 (CA).

27(n 24), para 68.

28*Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, paras 37–38 (Lord Dyson); and *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383, paras 37–121.

29*R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 (CA) 1130–1131 (Laws LJ); and *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, paras 35–50 (Laws LJ), on the "pressing and focussed" assurance required to fetter a change of policy.

30(n 26), paras 60 and 86. The contrast between an individualised promise and a general policy is precisely the distinction drawn in (n 29).

31*R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96, paras 26–41 (Lord Carnwath); and *Re Finucane's Application for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191, paras 55–73, on resiling for good reason.

32Among the oldest principles in the case law: Case 112/77 *Töpfer v Commission* EU:C:1978:94, para 19; Case 120/86 *Mulder v Minister van Landbouw en Visserij* EU:C:1988:213, paras 23–27; Case C-152/88 *Sofrimport v Commission*

more demanding — it requires "precise, unconditional and consistent assurances" — but in others more protective, operating as a substantive constraint on public power without the macro-political discount.[33] The status of EU general principles in domestic law after exit is much diminished: the European Union (Withdrawal) Act 2018 provides that there is no right of action based on a failure to comply with the general principles for conduct after exit day, and that the Charter is not part of retained law.[34] Were the argument dependent on the general principle as free-standing retained law, it would largely fail.

### *E. Relocating the expectation within the Withdrawal Agreement*

The argument does not so depend. By section 7A of the European Union (Withdrawal) Act 2018, the rights and obligations created by the Withdrawal Agreement have direct effect in domestic law and prevail over inconsistent domestic provision, in terms modelled on section 2(1) of the European Communities Act 1972.[35] By Article 4 of the Agreement, its provisions are to be interpreted in conformity with the relevant case law of the Court of Justice handed down before the end of the transition period, using the methods and general principles of EU law.[36] The good-faith obligation in Article 5, and above all the documentation guarantees in Article 18(1), supply a treaty-anchored analogue to the domestic doctrine that is not vulnerable to the macro-political discount. Article 18(1)(o) is especially significant: it requires the host State to "help the applicants to prove their eligibility and to avoid any errors or omissions", and to "give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions".[37] That is, almost verbatim, the "principle of evidential flexibility" — but in treaty form, and therefore directly enforceable under section 7A. The argument that the hardening frustrates a legitimate expectation thus does its real work not as a domestic claim, weakened by the macro-political character of the change, but as a claim that the State has resiled from a commitment the Agreement *itself* imposes, and from which it may not resile at all. Where the domestic claim is weak because the field is macro-political, the treaty claim is strong because the obligation is unconditional. This migration of a soft domestic expectation into a hard treaty duty is a recurring motif of the analysis that follows, and it explains why the hardening of the scheme is not merely a matter of policy preference but a question of legality.

## V. The Remedy that Was Not: Administrative Review, Article 21 and Effective Judicial Protection

### *A. The original deficit*

The earliest and most consequential defect in the scheme's design was its system of redress. When the EUSS opened to the public on 30 March 2019, an applicant who was refused — or who was granted pre-settled status when they believed they qualified for settled status — had

EU:C:1990:259; Case C-37/02 *Di Lenardo* EU:C:2004:443, para 70. The principle protects expectations engendered by precise, unconditional and consistent assurances from a competent source.

33On precise assurances, see Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* EU:C:2006:416, para 147.

34European Union (Withdrawal) Act 2018, Sch 1 para 3, and s 5(4)–(5). Retained EU law was renamed "assimilated law" by the Retained EU Law (Revocation and Reform) Act 2023; nothing here turns on the renaming.

35European Union (Withdrawal) Act 2018, s 7A; the "conduit pipe" analogy is drawn in *Lipton v BA Cityflyer Ltd* [2024] UKSC 24, [2024] 3 WLR 474, paras 79–83.

36(n 2), art 4(1) and (3)–(4).

37(n 2), art 18(1)(o); see also art 18(1)(r).

no right of appeal to an independent tribunal. The only routes were administrative review, a paper reconsideration by the Home Office itself, and judicial review, a remedy of last resort confined to public-law error and, in practice, unavailable while administrative review remained open. For a constitutive scheme conferring the most basic of rights — the right to remain in one's home — this was a remarkable lacuna.

### *B. The content of the treaty guarantee*

That arrangement sat uneasily with the protections the Withdrawal Agreement would shortly require. Article 21 of the Agreement — "Safeguards and right of appeal" — guarantees that the safeguards set out in Article 15 and in Chapter VI of the Citizens' Directive "shall apply" to any decision restricting residence, and that such decisions are subject to redress procedures permitting an examination of both their legality and the facts and circumstances on which they are based.[38] Those incorporated provisions require, among other things, that the person be able to obtain a redress procedure before a court or tribunal, that the procedure allow for an examination of the proportionality of the decision, and — critically — that removal not, in general, take effect while a redress procedure is pending.[39]

In EU-law terms, the relevant principle is that of effective judicial protection, now reflected in Article 47 of the Charter and long recognised as a general principle binding on the Member States when they act within the scope of EU law.[40] The principle is reinforced by the twin requirements of equivalence and effectiveness, which condition the procedural autonomy of the Member States,[41] and it carries specific weight in the field of free movement, where the Court has held that even decisions touching national security must be susceptible to a form of judicial scrutiny adequate to test their factual foundation.[42] Against that background, the absence of any tribunal appeal in the early scheme was not a marginal shortfall but a denial of the very thing the principle exists to secure.

### *C. The inadequacy of administrative review*

Administrative review — an internal Home Office process, neither before a court or tribunal nor independent — is the paradigm of an inadequate substitute. The point was underscored by the scheme's own statistics: the great majority of EUSS administrative reviews in early samples succeeded, largely because applicants used the process to supply evidence that should have produced a grant first time.[43] A remedy that overturns the original decision in close to nine cases out of ten is not a safeguard against error; it is evidence that the first-instance process was generating error at scale, and that the burden of correcting it had been displaced onto the

38(n 2), art 21, incorporating by reference the safeguards in arts 15, 30 and 31 of the Citizens' Directive.

39(n 13), arts 30–31, including the suspensive-effect protections in art 31(2).

40Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, paras 18–19; Case 222/86 *UNECTEF v Heylens* EU:C:1987:442, paras 14–15 (the existence of a judicial remedy against decisions of national authorities refusing the benefit of a right is essential to securing effective protection of that right); Case C-432/05 *Unibet* EU:C:2007:163, paras 37–44.

41The principle of national procedural autonomy is constrained by the requirements of equivalence and effectiveness: Case 33/76 *Rewe-Zentralfinanz* EU:C:1976:188; Case 45/76 *Comet* EU:C:1976:191; Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* EU:C:1983:318; and Case C-213/89 *Factortame* EU:C:1990:257.

42Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363, paras 53–66 (the person must be informed of the essence of the grounds, and the national court must be able to review the factual basis of a decision restricting free-movement rights).

43Home Office data disclosed in response to Freedom of Information requests indicated success rates approaching nine in ten in early samples, a figure widely reported in the practitioner literature. A remedy that reverses the original decision in nine cases out of ten is evidence not of a robust safeguard but of a first-instance process generating error at scale.

applicant. The very logic of evidential flexibility — that the State would assist the applicant to prove eligibility — was contradicted by a redress system whose principal function was to receive the evidence that flexibility had failed to elicit.

### *D. The instructive parallel of Banger*

The inadequacy of judicial review as a substitute for a full merits appeal was, moreover, not a matter of speculation; it had been authoritatively determined in the closely analogous context of extended family members. In *Banger*, the Court of Justice held that a durable partner of a Union citizen, whose residence the host State is obliged to "facilitate" under Article 3(2) of the Citizens' Directive, must have available a redress procedure enabling a court to verify whether the refusal "is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with".[44] The clear implication, drawn by the domestic courts, was that a bare judicial review — incapable of redetermining the facts — would not suffice.[45] If a durable partner's facilitation decision required a fact-sensitive merits remedy, a fortiori a decision determining whether a Union citizen retained the right to live in their own home did. The early EUSS redress model was thus inconsistent not only with the text of Article 21 but with the settled pre-transition case law that Article 4 of the Agreement makes binding on its interpretation.

### *E. The belated and partial cure*

The defect was cured, but only prospectively, and only once the treaty obligation crystallised. The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 introduced a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber), but only in respect of decisions made on or after 31 January 2020.[46] Applications determined before that date — the entire first ten months of the scheme's public life — never attracted a tribunal appeal at all; those applicants were confined to administrative review and judicial review. When the right of appeal did arrive it was, at least, broad in its grounds, permitting challenge both on the ground that the decision was not in accordance with the Immigration Rules and on the ground that it breached the appellant's rights under the Withdrawal Agreement or the cognate agreements.[47]

The replacement of administrative review by a treaty-compliant appeal was the first great correction of the scheme's design — a tacit acknowledgement that the original redress model was incompatible with the Agreement and with the EU-law right to an effective remedy. It is one of the few movements in the scheme's history that ran in the applicant's favour. As Part IX shows, the subsequent trajectory of redress has been the reverse: the abolition of administrative review and the carving-out, from the appeal right, of the very category of late applicants most in need of it.

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44Case C-89/17 *Secretary of State for the Home Department v Banger* EU:C:2018:570, paras 42–52, esp para 51; applying Case C-83/11 *Rahman* EU:C:2012:519 and Case C-300/11 *ZZ* (n 42). Advocate General Bobek's Opinion (EU:C:2018:225) is explicit that the redress must satisfy Article 47 of the Charter.

45See *Secretary of State for the Home Department v Christy* [2018] EWCA Civ 2378, [2019] 1 WLR 2073, on the unrestricted scope of the *Banger* facilitation right; and the broader recognition that EFMs were entitled to a merits-based redress procedure rather than judicial review alone.

46Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61), reg 3.

47(n 46), reg 8, specifying grounds that include breach of rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement.

## VI. The Certificate of Application and the Hollowing-Out of Article 18(3)

### *A. The interim guarantee*

The Certificate of Application ("COA") was intended to be the practical embodiment of the interim protection in Article 18(3) of the Withdrawal Agreement. Article 18(3) provides that, pending a final decision on an application, and pending the determination of any judicial challenge to a refusal, "all rights provided for in this Part shall be deemed to apply to the applicant".[48] Those rights include the right of exit and entry (Article 14), the right of equal treatment (Article 23, cross-referring to Article 24 of the Citizens' Directive), and the safeguards and appeal rights (Article 21). A holder of a valid COA should therefore be able to work, rent accommodation, access services, and travel and return on the strength of it. The interim guarantee is not peripheral; it is the device by which the Agreement ensures that no protected person loses their rights merely because the State has not yet processed their case, and it is the necessary corollary of a constitutive scheme — for if status is conferred only on application, the rights must be preserved while the application is pending, or the constitutive model would itself extinguish the rights it exists to record.

### *B. The reality: late applicants and withheld rights*

The reality fell far short, in several overlapping respects. First, the United Kingdom initially sought to deny interim rights to late applicants altogether — those applying after the 30 June 2021 deadline — before being forced into a reversal in August 2021 under pressure from civil society and the European Commission.[49] The legal vice of the original position was plain: Article 18(3) draws no distinction between in-time and late applicants, deeming the Part Two rights to apply to any person whose application is pending, and the attempt to withhold interim rights from late applicants was an unannounced derogation from an unconditional treaty guarantee. Other restrictions followed a similar pattern: additional barriers to the rights to work and to rent, and the withholding of National Insurance numbers from those awaiting a decision, which in turn impaired their ability to work, to claim, and even to generate the RPS footprint on which a future grant might depend — a self-defeating circularity in which the State's own delay degraded the evidence it would later demand.

### *C. The reality: unrecognised certificates*

Secondly, the COA's protection was — and remains — frequently unrecognised in practice. The IMA's inquiry into EUSS decision delays found that the protection a COA is intended to confer is not reliably honoured by employers, landlords or carriers, with applicants reporting lost job offers, refused tenancies and denied boarding.[50] Because status under the scheme is digital-only, and decision emails and letters cannot themselves be used as proof to third parties, applicants are wholly dependent on the Home Office's online checking services correctly reflecting a pending application; where they do not, the applicant cannot prove rights they in

48(n 2), art 18(3).

49The reversal followed sustained criticism from the3million and others and engagement by the European Commission; it was implemented through changes to the Home Office's published policy on late applications in August 2021. The episode is documented in the contemporaneous reporting and in the the3million policy materials.

50Independent Monitoring Authority for the Citizens' Rights Agreements, inquiry and reporting into EUSS decision-making delays and the operation of Certificates of Application (2024–2026). The IMA also identified, and the Home Office addressed only after challenge, a practice of pausing applications at the suitability stage without properly considering individual circumstances.

fact hold. The digital-only architecture thus converts an administrative omission — a failure to update a record — into a practical denial of a treaty right, with no paper fallback.

### *D. The travel trap*

Thirdly, and most starkly, the right to travel and re-enter on a COA was effectively negated. The Home Office advised those awaiting a decision not to travel, on the basis that they risked being refused re-entry — advice that civil-society organisations have long contended is inconsistent with Article 18(3), because that provision deems the Article 14 right of entry to apply to a person whose application is pending.[51] The result was an acute trap: a person holding the very document designed to preserve their right of entry could not safely leave the country, even to attend to emergencies abroad or to return to employment. Settled documented cases of applicants prevented from re-entering to resume their jobs, with knock-on harm to employers.[52]

The cumulative picture is of a protection that existed on paper and evaporated in practice. The COA was the mechanism by which the Agreement promised that no one would lose their rights merely because the State had not yet processed their case. Against a backlog that has at times exceeded 137,000 cases, with tens of thousands of applicants waiting more than a year, that promise was not kept.[53]

## VII. Detention, Holding Cells and the Hostile Environment at the Border

The failure to honour interim rights found its most severe expression in the treatment of EU citizens and their family members at the border, and in the detention of people who in fact held, or were entitled to, protected status. The episode is significant not only as a catalogue of individual mistreatment but as the clearest demonstration of the structural thesis of this article: that a constitutive, data-dependent scheme defaults to enforcement whenever the system cannot see the protected status that the law confers.

In the first months after the end of the transition period there was sustained reporting that EU citizens were being detained at United Kingdom ports of entry and transferred to immigration removal centres.[54] Among those affected were people who had travelled to attend job interviews — an activity the Immigration Rules permit visitors to undertake — and others caught by the newly restrictive treatment of EU nationals exploring the labour market.[55] Detainees described being handcuffed, held in vans and cells, having mobile telephones confiscated under removal-centre protocols and being denied access to medication, with some held for up to seven days before removal; a recurring description in the accounts is that they were made to feel "like

51See the analyses published by the3million and by Settled, and the judicial review proceedings brought by the3million challenging the travel guidance, the essence of which is that art 18(3) deems the art 14(1) right of entry to apply to a pending applicant, so that the host State cannot lawfully go behind a valid COA.

52Settled, casework reporting on re-entry refusals affecting EUSS applicants with pending applications; and see the press coverage of EU nationals refused entry while holding pending applications.

53The scale of the backlog is documented in the IMA's reporting (n 50) and in successive House of Commons Library briefings (n 3).

54'EU citizens arriving in UK being locked up and expelled' *The Guardian* (London, 14 May 2021); and 'Handcuffed, detained, denied medicine: EU citizens' UK border ordeals' *The Guardian* (London, 17 May 2021), reporting detentions at Gatwick and transfers to Colnbrook and Yarl's Wood immigration removal centres.

55(n 54). The reporting recorded that "Europeans with job interviews are among those being denied entry and locked up", "despite Home Office rules that explicitly allow non-visa holders to attend interviews".

criminals".[56] Citizens of Italy, France, Bulgaria, Greece and Spain were among those held, and the matter became the subject of diplomatic protest and of a formal written question in the European Parliament.[57] In response to the resulting pressure, the Home Office announced in May 2021 a change permitting EU citizens stopped at the frontier to apply for immigration bail.[58]

These were, in significant part, people who either held protected rights or were entitled to make an application that would confer them. The problem was not confined to the border. Detention practitioners documented cases in which the Home Office asserted, in tribunal proceedings, that there was no evidence that an EUSS application had been made — a stance that risked misleading the tribunal as to the person's removability and producing the refusal of bail, and the deprivation of liberty, on an erroneous and therefore unlawful basis.[59] The legal point is fundamental: where an EUSS application is pending, or where a person was exercising Treaty rights or had acquired permanent residence before the end of the transition period, the safeguards in Chapter VI of the Citizens' Directive, given effect through Articles 20 and 21 of the Agreement, apply, and detention and removal cannot proceed as if the person were an ordinary overstayer.[60]

The structural failure underlying these episodes is the same one that runs through the COA story: a constitutive, digital, data-dependent system in which the fact of a person's protected status is not reliably visible to the officials making liberty-affecting decisions. When the system cannot see the pending application or the protected right — or, worse, when it can see a stale refusal but not the later grant — the institutional default is enforcement. That observation is the bridge to the data-protection failures examined next, where the visibility of the record is not a contingent operational problem but a systemic and remediable defect of data governance.

## VIII. The Data-Protection Architecture and the Records the State Refuses to Erase

### *A. The immigration exemption: twice unlawful*

If the Withdrawal Agreement promised applicants the rights to know what the State held about them and to correct it, the United Kingdom's data-protection architecture undercut that promise from the outset. Paragraph 4 of Schedule 2 to the Data Protection Act 2018 contains the "immigration exemption", which disapplies a range of data-subject rights — including the rights to be informed, of access, to erasure, to restrict processing and to object — to the extent

56(n 54). One detainee, taken from Gatwick to Colnbrook and then to Yarl's Wood for seven days, was initially unable to access her antibiotics; the relative of another reported that detainees were "made to walk through the airport in handcuffs".

57European Parliament, Written Question E-002787/2021, concerning the detention and removal of EU citizens at the United Kingdom border; and see (n 54) (confirmation by the Bulgarian ambassador that a number of nationals had been held).

58(n 54) (the Home Office announced the rule change on Friday 14 May 2021, in response to reports in the Guardian and other European newspapers).

59See the casework of Bail for Immigration Detainees and the practitioner reporting on the detention of EU nationals with pending or unrecognised EUSS applications; and, on the unlawfulness of detention where there is no realistic prospect of lawful removal, the *Hardial Singh* principles as restated in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

60(n 13), arts 27–33; (n 2), arts 20 (restrictions) and 21 (safeguards). Removal of a protected person requires the heightened "genuine, present and sufficiently serious threat" justification, not the ordinary overstayer analysis.

that giving effect to them would be likely to prejudice "the maintenance of effective immigration control".[61]

The Open Rights Group and the3million challenged the exemption. After failing at first instance, they succeeded in the Court of Appeal, which held the exemption incompatible with Article 23 of the UK GDPR.[62] The vice was that Article 23(2) requires any legislative measure restricting data-subject rights to contain a particularised set of safeguards, and the exemption contained none; in their absence it was an unauthorised derogation from fundamental rights.[63] Two features of the litigation bear directly on the EUSS. First, the scale of use: the exemption was relied upon in around 60 per cent of immigration-related data-access requests in 2019, rising to over 70 per cent in 2020 — not a narrow tool for exceptional cases, but the default response to people asking what the State knew about them.[64] Secondly, the rationale: administrative errors are common in immigration casework, and a person who cannot access their own data has little prospect of identifying and correcting an error driving an adverse decision.

The Government's attempt to cure the defect — the Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022 — was itself challenged, and the High Court held that the revised exemption *still* failed to meet the requirements of Article 23.[65] Saini J emphasised that data processed under the exemption is inherently sensitive: it concerns persons in a position of acute vulnerability and significant power imbalance vis-à-vis the immigration authorities, and frequently reveals racial or ethnic origin within the meaning of Article 9 of the UK GDPR.[66] Crucially, the court recognised the very mechanism with which this Part is concerned: that many people refused status are later granted it, and that decisions cannot be properly challenged where legislation prevents access, through subject-access requests, to the underlying data on which errors might be exposed.[67] The exemption has thus been found wanting twice. Even now, the ICO's guidance stresses that it may be applied only case by case, only where necessary and proportionate, with the controller required to balance immigration control against the individual's rights (including any vulnerabilities), to keep records of its use, and to inform individuals that it has been applied unless doing so would itself be prejudicial.[68]

### *B. The never-erased refusal: the practice*

The most insidious data-protection defect in the EUSS is not the inability to access one's data in the abstract. It is the specific, systemic practice by which a refusal of EUSS status is retained

61Data Protection Act 2018, Sch 2 para 4.

62*R (Open Rights Group and the3million) v Secretary of State for the Home Department and Secretary of State for Digital, Culture, Media and Sport* [2021] EWCA Civ 800, [2021] 1 WLR 3611 ("JR1"); the remedies judgment is *R (Open Rights Group) v Secretary of State for the Home Department (No 2)* [2021] EWCA Civ 1573, [2022] QB 166.

63(n 62) (JR1), esp paras 30–32 and the analysis of the mandatory content of art 23(2).

64ibid; and the contemporaneous reporting by the Open Rights Group setting out the disclosed usage figures.

65*R (the3million and Open Rights Group) v Secretary of State for the Home Department and Secretary of State for Science, Innovation and Technology* [2023] EWHC 713 (Admin) (Saini J), declaring the revised exemption in SI 2022/76 unlawful; the declaration was suspended to allow further amendment. The ICO appeared as an interested party and supported the conclusion that the amendments did not bring the exemption into compliance.

66(n 65), on the special character of the data and the heightened safeguards its processing requires.

67ibid; the point that "many migrants who are initially refused status in the UK are subsequently granted it" and that the exemption impedes the correction of errors in the underlying data is reflected in the judgment and in the contemporaneous commentary.

68Information Commissioner's Office, *A guide to the data protection exemptions* (guidance), section on the immigration exemption.

indefinitely and is never erased, rectified or marked as superseded — even where the person is subsequently granted status under the scheme, and even where the person held, at the time of the refusal, another lawful basis of stay. This deserves sustained examination, because it is the point at which the substantive, enforcement and informational failures converge into a single, durable harm, and because it has not been isolated in the existing literature.

Home Office case records are event-based and cumulative. A refusal is recorded as an event; a later grant is recorded as a separate, subsequent event. The earlier refusal is not, on the available evidence of how the system operates, deleted or annotated as overtaken when the later grant is made. It persists in the record alongside — or, in any system that surfaces history chronologically or that flags adverse events, *ahead of* — the grant that supersedes it. The same is true where the refusal was made notwithstanding that the person already held leave on another basis (for example, limited leave under Appendix FM, or leave outside the Rules): the EUSS refusal stands on the record as an adverse immigration event, undiluted by the fact that the person was at all material times lawfully present. The grant, when it comes, does not rewrite the history; it is merely appended to it.

### *C. Why a superseded refusal causes harm*

Why does a stale refusal matter once a grant exists? Because the record does not sit inert; it is the input to a chain of downstream decisions, many of them automated or semi-automated, and in each the persistence of a superseded refusal can distort the outcome. It feeds status and right-to-work and right-to-rent checks, where a history that includes a refusal can colour the assessment, generate queries, or — at worst — be mistaken for the operative position. It feeds border and watch-list flags, where, as Part VII shows, the institutional default is enforcement when the system cannot see protected status, and a record that foregrounds a refusal rather than the superseding grant is exactly the artefact that produces wrongful refusal of entry and detention. It feeds detention and bail decisions, where an incomplete or misleading picture of immigration history can drive the deprivation of liberty on a basis that, because it rests on a stale record, is unlawful. And it now feeds the continuous-residence and conversion assessments analysed in Parts XIV and XV, where historic adverse markers ought to be clean and current before consequences as grave as the loss of status attach.

A refusal that has been overtaken by a grant is, in the statutory language, capable of being "incorrect or misleading as to any matter of fact" about the person's immigration status — not because the historical event did not occur, but because its retention, unqualified and unsuperseded, conveys a false *present* impression of the person's standing.[69] The subtle but important point is that the right to rectification is not confined to correcting events that never happened; the accuracy principle imposes an obligation to reconsider accuracy on request and to take into account the data subject's evidence, and a record that presents a superseded refusal as a live feature of a person's status is, in the relevant sense, inaccurate and incomplete.[70]

69Data Protection Act 2018, s 205(1) (defining inaccurate data as data that is "incorrect or misleading as to any matter of fact"). The point that accuracy is assessed by reference to the impression conveyed, not merely the historical occurrence of an event, follows from the ICO's guidance on the right to rectification (n 70).

70Information Commissioner's Office, *Right to rectification* (guidance): the controller must "take reasonable steps to satisfy [itself] that the data is accurate and to rectify the data if necessary", taking into account the arguments and evidence provided by the data subject; and incomplete data may be completed, including by a supplementary statement.

### *D. The rights engaged and the closed loop*

Several UK GDPR rights and principles bear directly on this practice. The accuracy principle requires that personal data be accurate and, where necessary, kept up to date, and that inaccurate data be erased or rectified without delay; a refusal left to stand after it has been superseded is not "kept up to date".[71] The storage-limitation principle requires that data not be kept in identifiable form longer than necessary for the purposes of processing; the indefinite retention of a refusal whose practical relevance has been extinguished by a grant invites the question whether retention remains necessary at all, or whether it has become retention for its own sake.[72] The right to rectification entitles the individual to have inaccurate data rectified and incomplete data completed, including by a supplementary statement; at a minimum, a superseded refusal should be annotated so that it cannot be read as current.[73] The right to erasure entitles the individual, in defined circumstances, to deletion, including where the data are no longer necessary for the purpose for which they were processed.[74] The right to restrict processing is especially apt: it applies precisely where the individual contests the accuracy of the data, or where the processing is unlawful and the individual prefers restriction to erasure, so that a contested or superseded refusal is a textbook candidate for restriction pending resolution, ensuring that it cannot continue to drive adverse decisions while its status is in dispute.[75] The right to object provides a further route to challenge continued processing.[76]

The cruelty of the design is that the immigration exemption purports to switch off exactly this cluster of rights — access, erasure, restriction, objection and the right to be informed — for immigration purposes.[77] The result is a closed loop: the individual cannot access their record to discover that a superseded refusal persists; cannot readily obtain its rectification, erasure or restriction; and is therefore exposed, indefinitely, to downstream decisions tainted by an out-of-date adverse marker — all while the very exemption that blocks the remedy has been held unlawful twice.[78] The data subject's only formal recourse, if rectification is refused, is to complain to the ICO and to seek a judicial remedy — both of which presuppose that the person knows the refusal is still there, which the exemption is designed to frustrate. The defect is thus self-concealing: it disables the very mechanism by which it would be discovered.

### *E. Why this is not mere administrative untidiness*

It would be a mistake to treat this as a housekeeping point. Accurate data is not a peripheral nicety in the scheme of the Withdrawal Agreement; it is a precondition of the practical enjoyment of the rights the Agreement guarantees. The Court of Appeal has confirmed that the Charter of Fundamental Rights continues to apply, within limits, to the residence rights conferred by Article 13 of the Agreement, and that those rights must be construed by reference to it.[79] A person whose protected status is obscured, in the State's own records, by a refusal that

71(n 7), art 5(1)(d).

72(n 7), art 5(1)(e).

73(n 7), art 16.

74(n 7), art 17(1)(a).

75(n 7), art 18(1)(a) and (b). The ICO's guidance treats restriction as the appropriate interim measure where accuracy is contested: Information Commissioner's Office, *Right to restrict processing* (guidance).

76(n 7), art 21.

77(n 61); the listed rights are precisely those most relevant to discovering and correcting a superseded refusal.

78(n 62) and (n 65).

79*Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307, [2024] PTSR 605, paras 80 and following, holding that the Charter applies to the art 13 residence rights by virtue of art 4 of the Agreement and s 7A of the 2018 Act;

should no longer have operative effect is a person whose Article 18(3) interim protection and Article 21 safeguards are undermined at the level of the data on which every official acts. The harm is not hypothetical: it is the same harm that produced the border detentions and the bail refusals analysed in Part VII. To put the point at its most concrete: a person granted status in 2024, whose 2021 refusal remains live on the system, may be stopped at the border in 2026 because the officer's screen surfaces the refusal; the very automation that was meant to make the scheme frictionless becomes the instrument of a wrongful detention, and the data-protection rights that would have allowed the person to clean their record in advance have been switched off by an unlawful exemption.

### *F. The case for joint ICO and IMA action*

This is precisely the kind of failure that sits in the overlap between two regulators and that neither can fully address alone. The ICO is the regulator of the UK GDPR and the Data Protection Act 2018.[80] The accuracy and storage-limitation principles, the rights to rectification, erasure, restriction and objection, and the lawful operation of the immigration exemption are all squarely within its remit. The ICO is well placed to examine, at a systemic and controller level rather than case by case, whether the Home Office's retention of superseded EUSS refusals complies with the accuracy and storage-limitation principles; whether the absence of any mechanism to annotate or supersede a refusal once a grant is made is compatible with the right to rectification; whether restriction under Article 18 should be applied to contested or superseded refusals as a matter of course; and whether the immigration exemption is being relied upon to defeat rectification and erasure requests consistently with the necessity, proportionality and record-keeping conditions the ICO's own guidance imposes, and consistently with the two judgments holding the exemption unlawful.[81]

The IMA is the body established under the Agreement to monitor the United Kingdom's implementation and application of the citizens'-rights provisions, with powers to conduct inquiries, receive complaints and bring legal proceedings.[82] It has already demonstrated both the will and the standing to act: it secured the landmark ruling in the *IMA* case analysed in Part XIII, intervened in *Siddiqa* and in *AT*, and has reported on the way EUSS decision delays and unrecognised Certificates of Application breach citizens' rights in practice.[83] For the IMA, the persistence of superseded refusals is not a data point but a citizens'-rights problem: it is a mechanism by which the State's own records perpetuate an inaccurate account of a protected person's status, contributing to the very downstream harms — wrongful detention, refused re-entry, denial of interim rights — that the Agreement exists to prevent. It engages Article 18(3) directly, because a person whose record misrepresents their status cannot reliably enjoy the rights "deemed to apply" to them; and it engages the good-faith obligation in Article 5, because a State that retains and acts upon records it knows to be superseded is not implementing the Agreement in good faith.

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permission to appeal to the Supreme Court was refused.

80The ICO's functions are set out in the Data Protection Act 2018, Part 5 and Sch 12–13, and include the power to conduct investigations, issue enforcement notices, and impose penalties.

81(n 68); (n 62); (n 65).

82(n 2), art 159; European Union (Withdrawal Agreement) Act 2020, s 15 and Sch 2 (establishing the IMA and conferring its functions, including the power to bring legal proceedings and to carry out inquiries).

83(n 14); *Siddiqa v Entry Clearance Officer* [2024] EWCA Civ 248 (IMA intervening); (n 79) (IMA intervening); (n 50).

The case for *joint* examination is strong because the harm lives exactly at the seam between the two regimes. The ICO can address the data-protection mechanics — accuracy, retention, rectification, restriction, the exemption — but it does not own the citizens'-rights consequences. The IMA can address the citizens'-rights consequences — the breach of the Article 18(3) and Article 21 protections, the contribution to unlawful enforcement — but it is not the data-protection regulator. A coordinated inquiry, with the ICO scrutinising the controller-level data practices and the IMA scrutinising their effect on Withdrawal Agreement rights, is the proportionate response to a failure that neither regime, working in isolation, has so far resolved. At a minimum, the two bodies should establish: how long EUSS refusals are retained; whether and how a refusal is marked as superseded when a grant follows, or where other leave was held; how often the immigration exemption is invoked to refuse rectification or erasure of such records; and which downstream systems consume historic refusal data, and with what safeguards. The recommendation is modest in form but significant in effect: it would require the State to ensure that the record on which it acts tells the truth about a person's present status, which is the least that either data-protection law or the Withdrawal Agreement can be thought to require.

## IX. The Deadline and the Hardening of Late Applications

Against that backdrop of failing safeguards, the substantive rules hardened in step. The first deadline was 30 June 2021 — the date by which EEA and Swiss citizens resident in the United Kingdom by the end of the transition period had to apply.[84] The public message was generous: anyone with "reasonable grounds" for missing the deadline could still apply. The legal treatment of that promise then tightened in three distinct moves, each of which shifted the cost of lateness onto the applicant.

### *A. The deadline as a validity bar*

First, the status of the deadline changed. For applications made before 9 August 2023 there was no validity or eligibility requirement that the application be made by the required date; a late application was simply considered on its merits. For applications made on or after 9 August 2023, the guidance now provides that the application must be made by the required date, and the assessment of reasonable grounds for delay was relocated to the *validity* stage.[85] This is a critical and under-appreciated shift. A late application treated as *invalid* is not an application at all in the scheme's eyes: the person does not become an "applicant", does not receive a Certificate of Application, and — decisively — does not acquire the Article 18(3) interim rights to work, rent and access services pending decision. The Home Office's own evidence in later litigation was that by January 2023 it had become concerned about "spurious and unmeritorious" late applications being used precisely to obtain a COA and the interim rights that came with it; the 9 August 2023 reform was the response, and its effect was to convert the front door into a filter.[86] The reform is doubly significant because it inverts the relationship between validity and protection: by making timeliness a condition of validity, it ensures that the applicants least

84The deadline and the "grace period" were given effect by the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (SI 2020/1209), which also preserved, with modifications, the residence rights of those exercising free-movement rights at the end of the transition period.

85Caseworker Guidance v31.0 (n 16), sections on validity and on the "required date"; and the underlying changes introduced by Statement of Changes in Immigration Rules HC 1496, with effect from 9 August 2023.

86The Home Office's evidence to this effect is recorded in *R (Here for Good) v Secretary of State for the Home Department* [2024] EWHC 2817 (Admin).

likely to have understood the scheme — the precise cohort the "reasonable grounds" mechanism was designed to protect — are denied interim protection at the very moment they engage with it.

### *B. The tightening of "reasonable grounds"*

Secondly, the standard for "reasonable grounds" tightened. The guidance moved from an accommodating posture to a markedly more restrictive one. It still lists examples of reasonable grounds — children and care leavers, lack of mental capacity, serious medical conditions, abusive or controlling relationships, modern slavery and imprisonment — but it now also contains an express category of circumstances that "will not generally constitute reasonable grounds", and a mere lack of awareness of the scheme is rarely sufficient on its own.[87] The burden is squarely on the applicant to satisfy the caseworker, on the balance of probabilities and on the basis of information supplied with the application, that the grounds exist; assertions without documentary support are a common cause of rejection. The tightening is hard to reconcile with the spirit of Article 18(1)(d) of the Agreement, which contemplates that, where an applicant misses the deadline, the host State "shall allow [the application] to be submitted within a reasonable further period of time" where there are "reasonable grounds" for the failure — a provision that presupposes a generous, protective construction of what counts as reasonable, rather than a restrictive enumeration of what does not.[88]

### *C. The dismantling of redress for late applicants*

Thirdly, redress for late applicants was stripped away. Where a late application is rejected as invalid — rather than accepted and then refused on the merits — there is no right of appeal. The distinction is decisive and, to applicants, opaque: the Home Office will *reject*, not *refuse*, an application it considers unsupported by reasonable grounds, and a rejection carries no appeal. That outcome was challenged and upheld in *Here for Good*, where the Administrative Court held that Article 18 of the Agreement does not confer a right of appeal against a decision that there are no reasonable grounds for a late application; that Article 21 does not apply to the pre-application question of whether reasonable grounds exist; and that Article 47 of the Charter was not engaged so as to require an appeal in any event.[89] The reasoning — that a person outside the deadline is not yet an "applicant" entitled to the procedural safeguards until permitted to make the application — is defensible on the text but troubling in effect: it leaves the most vulnerable cohort, those who missed the deadline, with the weakest remedies, and it sits uncomfortably with the *Banger* principle that decisions determining access to residence rights require a fact-sensitive remedy before a court or tribunal.[90]

Running parallel was the broader withdrawal of administrative review. The Home Office removed administrative review for EUSS decisions made on or after 5 October 2023, even where the underlying application pre-dated that date, on the rationale that it was no longer

87Caseworker Guidance v31.0 (n 16), section on reasonable grounds for making a late application; and Home Office, *EU Settlement Scheme: late applications* (guidance).

88(n 2), art 18(1)(d).

89(n 86), holding that a person outside the deadline is not yet an "applicant" entitled to the procedural safeguards until permitted to make the application.

90Compare (n 44). The distinction is that *Banger* concerned a refusal of facilitation to a person within the scope of the Directive, whereas *Here for Good* concerned the anterior question whether the person may enter the scheme at all; the doctrinal line is fine, and the practical consequence — no merits remedy for the rejected late applicant — is severe.

appropriate to offer a "dual right of redress" of both administrative review and appeal.[91] Applicants are now directed to the First-tier Tribunal for any Withdrawal Agreement challenge. The cumulative effect of these three moves is that the late applicant — disproportionately the vulnerable, the unaware and the poorly advised — faces the highest evidential threshold, the least interim protection, and the weakest redress, a configuration precisely inverse to what a protective reading of Article 18 would require.

### *D. The distributional dimension*

The numbers show why this matters. By mid-2023 the scheme had received around half a million late applications, of which a large proportion led to grants; by late 2024 more than 240,000 grants had followed late applications.[92] Those grants are themselves proof that large numbers of genuinely eligible people missed the deadline — and that the hardening of late-application rules and remedies operated against a population substantial parts of which had valid Withdrawal Agreement rights all along. Refusal, invalidity and pending rates have, moreover, consistently fallen more heavily on particular nationality groups and on non-EEA family members, a distributional pattern of obvious equality concern that maps onto the very groups — Roma communities, the elderly, children in care, victims of domestic abuse — least equipped to navigate a digital, evidence-dependent scheme.[93]

## X. The Hardening of Eligibility through the Case Law

A parallel and arguably more consequential line of authority hardened *who* was eligible at all, and confirmed that the burden of bringing oneself within the rules sits on the applicant. The interpretive theme is constant: the Withdrawal Agreement is read according to the ordinary meaning of its words, in their context and in the light of its object and purpose, in accordance with Articles 31–32 of the Vienna Convention on the Law of Treaties, and not expanded by purposive sympathy; and the definitions in Appendix EU are applied strictly.

### *A. The EU-law baseline*

The strictness of the domestic case law is best understood against the EU-law baseline it displaced. Under the Citizens' Directive, the residence rights of Union citizens and their family members were broad and, for "core" family members, automatic; for "extended" or "other" family members, the host State was obliged to "facilitate" entry and residence, following an extensive examination of personal circumstances.[94] The Court of Justice construed the family-reunification provisions generously: in *Metock* it held that the Directive precludes a requirement of prior lawful residence in another Member State;[95] in *Zhu and Chen* and *Baumbast* it recognised the derived rights of carers necessary to give effect to a child's rights;[96]

91Home Office, *Administrative review* (EUSS guidance), removing administrative review for decisions made on or after 5 October 2023. The stated rationale was that the citizens' rights agreements did not require a dual right of redress and that no other immigration route enjoyed one.

92(n 3). Late-application grants demonstrate that very large numbers of genuinely eligible people missed the deadline.

93See the analyses of the the3million and of the Migration Observatory on the demographic distribution of late applications, refusals and pending cases; and the IMA's reporting (n 50).

94(n 13), art 3(2); and Case C-83/11 *Rahman* EU:C:2012:519, paras 22–24, on the nature of the facilitation obligation and the requirement of an extensive examination.

95Case C-127/08 *Metock* EU:C:2008:449, paras 58–70 and 80–99.

96Case C-200/02 *Zhu and Chen* EU:C:2004:639, paras 45–47; Case C-413/99 *Baumbast and R* EU:C:2002:493, paras 71–75.

and in *Lounes* it held that a Union citizen who naturalises in the host State may retain rights in respect of a third-country-national spouse, lest the exercise of free-movement rights be penalised.[97] The Withdrawal Agreement preserves these categories, but freezes them at the end of the transition period: a person whose residence had not been facilitated, or who had not at least applied for facilitation, by that date does not carry an extended-family-member right into the EUSS. The generosity of the EU-law inheritance thus throws the strictness of the domestic cut-off into sharp relief.

### *B. Durable partners: Celik and the closing of the door*

The leading decision is *Celik v Secretary of State for the Home Department*, in which the Court of Appeal affirmed the Upper Tribunal's reported decision.[98] Mr Celik, a Turkish national, had begun a relationship with a Romanian national and married her in March 2021 — after the end of the transition period — having been unable to marry earlier because of pandemic restrictions. The Court held that he was outside the personal scope of the Agreement: he had neither married before the end of the implementation period nor, before that date, applied for his relationship as a durable partner to be facilitated under the EEA Regulations. The submission that the Agreement should be read "purposively, teleologically, proactively, flexibly and inclusively" was rejected; proportionality and Article 8 of the European Convention on Human Rights could not rescue a person who fell outside the Agreement's scope at the threshold.[99] The companion Upper Tribunal authority *Batool* made the same point for other family members generally: a person whose residence had never been facilitated before the cut-off could not acquire Withdrawal Agreement rights through the EUSS.[100]

There is a respectable critique of *Celik* — and it is one the article advances rather than merely reports. The durable-partner who could not marry because of pandemic closures, and who could not obtain facilitation because the facilitation route itself was being wound down, falls into a lacuna not of their own making; and *Banger* had held, only five years earlier, that durable partners are within the protective scope of EU free-movement law and entitled to a fact-sensitive remedy.[101] The answer given by the Court of Appeal — that the Agreement froze the position at the end of the transition period, and that the remedy for hard cases lies in the residual human-rights jurisdiction rather than in an expansive reading of the Agreement — is textually defensible, but it exemplifies the broader pattern: a scheme that began by looking for reasons to grant now resolves every interpretive doubt against the applicant. The durable-partner definition in Annex 1 to Appendix EU — in particular the requirement for a "relevant document" or another lawful basis of stay at the specified date — has since been applied as determinative in a long line of tribunal decisions.[102]

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97Case C-165/16 *Lounes* EU:C:2017:862, paras 56–62.

98*Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, [2023] Imm AR 5, affirming *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC); permission to appeal to the Supreme Court was refused.

99(n 98), paras 52–66. The Court held that Article 18(1)(r), and the obligation of proportionality, operate only within the personal scope of the Agreement and cannot extend it.

100*Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC).

101(n 44). The tension is that *Banger* treats the durable partner as a person whose relationship the State is obliged to facilitate and whose refusal must be subject to merits review, whereas *Celik* treats the durable partner who did not obtain facilitation before the cut-off as wholly outside the Agreement.

102Appendix EU, Annex 1, definition of "durable partner"; applied as determinative in numerous Upper Tribunal decisions following (n 98).

### *C. The wrong document: Siddiqa and Emambux*

The same formalism was applied to those who took the wrong procedural step before the cut-off. In *Siddiqa v Entry Clearance Officer* the Court of Appeal upheld the conclusion that a dependent sister who had applied under the EU Settlement Scheme family-permit provisions, rather than for an EEA family permit, could not benefit from the Agreement; Dingemans LJ held that a strict application of the rules was permissible, and that applicants, where the requirements were clearly set out on the Government's website, were expected to make the proper application.[103] The point was reinforced in *Emambux*, where the Court held that the Secretary of State determines applications as made and is not bound to advise an applicant of an alternative application that might have been made.[104] The lesson is that the burden of having taken precisely the right step, in precisely the right form, at precisely the right time, rests on the individual; substance does not cure form. This is a striking departure from the EU-law tradition, in which the Court has repeatedly held that excessive formalism must yield where it would defeat substantive rights, and that authorities must look to the substance of an application rather than its label.[105]

### *D. Dependency: Rexhaj*

The hardening extended even to the proof of dependency. In *Rexhaj* the Court of Appeal held that a dependent parent who had been granted entry clearance under the EU Settlement Scheme family-permit route, and who then sought leave under Appendix EU, was not exempt from demonstrating dependency afresh; the assumption of continuing dependency applied only where leave had been granted before 1 July 2021 under Appendix EU itself.[106] The effect is to require applicants to re-prove, at the settlement stage, matters that the generous original design had been content to assume — a small but telling instance of the burden migrating back onto the applicant even within the lifetime of a single family's interaction with the scheme.

### *E. Zambrano carers: Akinsanya and the hollow victory*

The Zambrano line illustrates how even a successful challenge to the Home Office's drafting can leave applicants no better off. In *Akinsanya* the Court of Appeal held that the Secretary of State had misunderstood the scope of regulation 16 of the EEA Regulations 2016 when she defined a "person with a Zambrano right to reside" in Appendix EU so as to exclude anyone who already held leave to remain on another basis; she was required to reconsider.[107] The reconsideration, however, left the definition in substance unchanged, and in the second *Akinsanya* judgment the Administrative Court held that, although the guidance had indeed misunderstood the operation of the Zambrano principle, the exclusion of carers who held another form of leave was, taken as a whole, neither irrational nor discriminatory.[108]

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103*Siddiqa v Entry Clearance Officer* [2024] EWCA Civ 248, paras 60–75 (Dingemans LJ, Baker and Elisabeth Laing LJJ agreeing); the IMA, the AIRE Centre and Here for Good intervened.

104*Emambux v Secretary of State for the Home Department* [2024] EWCA Civ 1459, paras 40 and following.

105The contrast is with the EU-law approach in, eg, (n 13), art 25 (documentation may not be a precondition of rights), and the general principle that procedural requirements must not render the exercise of EU rights excessively difficult: (n 40).

106*Secretary of State for the Home Department v Rexhaj* [2024] EWCA Civ 784, holding that there is no exemption from demonstrating dependency when switching from the family-permit route to Appendix EU, save where leave was granted before 1 July 2021 under Appendix EU.

107*R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, [2022] QB 657.

108*R (Akinsanya and Aning-Adjei) v Secretary of State for the Home Department* [2024] EWHC 469 (Admin) (Eyre J); permission to appeal refused 30 July 2024.

The reasoning rests on the EU-law architecture of the derivative right, and it repays close attention because it shows the domestic courts engaging seriously with the Court of Justice's case law even as they narrow the domestic route. The right recognised in *Ruiz Zambrano* is a right of last resort, arising only where its denial would compel the Union-citizen child to leave the territory of the Union as a whole and thereby be deprived of the genuine enjoyment of the substance of the rights conferred by citizenship.[109] The test has been refined in a series of decisions — *McCarthy*, *Dereci*, *O and S*, and *Chavez-Vilchez* — which together establish that the inquiry is intensely fact-sensitive, turning on the relationship of dependency between the child and the third-country-national carer and on whether the child would in practice be compelled to leave the Union.[110] Where the carer already enjoys leave permitting them to remain with the child, the compulsion to leave does not arise, and the derivative right is not engaged; that, the Administrative Court held, is why the exclusion of carers with alternative leave was lawful as a matter of EU law, even though the guidance had reached the right result for the wrong reasons.[111] The practical result is that a cohort of third-country-national parents of British children — for whom settled status, free of the "no recourse to public funds" condition and of costly decennial renewals, would have been transformative — remain confined to limited leave on the ten-year route to settlement. A victory on construction produced no victory on outcome, and the episode stands as a parable of the scheme's trajectory: the law was clarified, the Home Office was found to have erred, and the applicants gained nothing.

The cumulative message of this case law is that eligibility is a threshold the applicant must clear, strictly, on the wording of the rules, with no margin for the collaborative, error-correcting posture promised in the 2018 preamble. The contrast with the founding evidential settlement could hardly be sharper: the same scheme that once looked for reasons to grant now construes every definitional ambiguity, every procedural misstep and every evidential gap against the person it was designed to protect.

## XI. Suitability, Deportation and the Public-Policy Test

A further dimension of hardening lies in the suitability and deportation framework, where the saved EEA Regulations both protect and expose. The suitability provisions of Appendix EU permit refusal or cancellation where the applicant is subject to a deportation, exclusion or removal decision, has used deception, or otherwise poses a relevant threat.[112] For conduct committed *before* the end of the transition period, however, the suitability guidance preserves the EU-law standard: refusal or removal must additionally be proportionate and justified on grounds of public policy, public security or public health in accordance with regulation 27 of, and Schedule 1 to, the EEA Regulations 2016 as saved.[113]

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109(n 22), paras 42–45; and Case C-256/11 *Dereci* EU:C:2011:734, paras 65–67 (the "genuine enjoyment of the substance" test is stringent, and the mere desirability of family unity, or economic considerations, will not engage it).

110Case C-434/09 *McCarthy* EU:C:2011:277; (n 22); Case C-256/11 *Dereci* (n above); Joined Cases C-356/11 and C-357/11 *O and S* EU:C:2012:776; Case C-133/15 *Chavez-Vilchez* EU:C:2017:354, paras 70–72.

111(n 108). The point is that the *Zambrano* right is residual: it does not arise where an alternative basis of lawful residence removes the compulsion to leave the Union.

112Appendix EU, paras EU15–EU16; and Home Office, *EU Settlement Scheme: suitability requirements* (guidance).

113The EEA Regulations 2016 were revoked but saved for specified purposes, including the assessment of conduct committed before the end of the transition period, by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309) and associated instruments.

That standard is demanding, and its content is supplied by a deep seam of Court of Justice authority. The measure must comply with the principle of proportionality; be based exclusively on the personal conduct of the individual concerned; and that conduct must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".[114] Past criminal convictions do not in themselves constitute grounds; the threat must be current; and the strength of the protection increases with the length and degree of integration of the person's residence, culminating in the enhanced "imperative grounds of public security" protection for those with ten years' residence.[115] The saved regime thus imports, for pre-transition conduct, the full apparatus of EU-law protection against expulsion — a protection markedly stronger than that available to non-EEA nationals under the ordinary deportation regime.

The interaction of this saved regime with the post-Brexit appeal structure has produced its own jurisprudence. In *AA (Poland)* the Court of Appeal addressed the deportation of an EU national for pre-Brexit conduct, with the lawfulness of removal assessed through the lens of the saved regulation 27.[116] The route by which a decision is taken determines the route of appeal: a deportation decision made under the saved EEA Regulations attracts an appeal under those Regulations; a refusal under the EUSS attracts an appeal under the 2020 Citizens' Rights Appeals Regulations; but if no EUSS application has been made there is no decision, and so no appeal under the citizens'-rights appeal provisions at all. That last point connects back to the enforcement failures of Part VII: the absence of a visible application can be the absence of a remedy, and a person wrongly treated as having no protected status may find that the very mechanism for challenging that treatment is unavailable to them.

For conduct committed *after* the end of the transition period, by contrast, the more exacting EU-law public-policy test falls away and ordinary domestic deportation thresholds apply — including the automatic-deportation regime of the UK Borders Act 2007 for those sentenced to twelve months or more.[117] The result is a structural cliff edge that makes the date of conduct, rather than its gravity, decisive to the level of legal protection available. Two persons whose conduct is identical in substance may be subject to radically different removal thresholds depending only on whether the conduct preceded or followed a date that has nothing to do with culpability — a distinction rational as a matter of the Agreement's temporal scope, but capable of producing arbitrariness at the level of the individual case, and one more illustration of the way the date of 31 December 2020 has hardened from a transitional marker into a determinant of substantive rights.

## XII. Status Without Substance: Pre-Settled Status and the Welfare Frontier

The gap between holding EUSS status and actually enjoying the rights it should carry is nowhere clearer than in the welfare litigation, which forms an essential backdrop to the curtailment process analysed below.

114Case 30/77 *R v Bouchereau* EU:C:1977:172, paras 28–35; Case C-482/01 *Orfanopoulos and Oliveri* EU:C:2004:262, paras 64–67; Case C-145/09 *Tsakouridis* EU:C:2010:708, paras 43–50; Case C-348/09 *PI* EU:C:2012:300, paras 33–34; and earlier Case 41/74 *Van Duyn* EU:C:1974:133 and Case C-348/96 *Calfa* EU:C:1999:6. Considerations of general prevention or deterrence do not justify expulsion.

115(n 13), art 28; (n 114) (*Tsakouridis* on the imperative-grounds threshold and the relevance of integration).

116*Secretary of State for the Home Department v AA (Poland)* [2024] EWCA Civ 18.

117UK Borders Act 2007, ss 32–33; and the public-interest provisions in the Nationality, Immigration and Asylum Act 2002, ss 117A–117D, which apply to post-transition conduct.

### *A. The EU-law inheritance*

The treatment of pre-settled status in the welfare system is the domestic afterlife of a long line of Court of Justice authority on the right to reside and equal treatment. The Court had held, in *Grzelczyk*, that Union citizenship is "destined to be the fundamental status of nationals of the Member States" and entails "a certain degree of financial solidarity" between nationals of a host State and those of other Member States;[118] but in a sequence of later decisions — *Brey*, *Dano* and *Alimanovic* — it narrowed that solidarity, holding that economically inactive Union citizens may be denied social assistance where they lack a right to reside under the conditions of the Citizens' Directive, and that such denial is not, in those circumstances, prohibited discrimination.[119] The retreat from *Grzelczyk* to *Dano* is one of the most analysed trajectories in EU citizenship scholarship, and it forms the doctrinal backdrop against which the domestic treatment of pre-settled status must be read.[120]

### *B. Fratila, CG and AT*

Domestic law placed pre-settled status outside the category of qualifying rights to reside for means-tested benefits.[121] In *Fratila* the Court of Appeal held that this exclusion was unlawful discrimination on grounds of nationality;[122] but the Court of Justice, in *CG v Department for Communities in Northern Ireland* — the last reference from a United Kingdom court before the post-transition cut-off — held that EU citizens with pre-settled status and no other right to reside were not, on the facts, protected from such differential treatment, with the consequence that the Supreme Court allowed the Secretary of State's appeal in *Fratila*.[123] The discrimination finding fell away.

*CG*, however, left a decisive "lifeline": because such claimants fell within the scope of EU law, the Charter applied, and the host State could not refuse social assistance where to do so would expose the person to an actual and current risk of living in conditions incompatible with the right to human dignity, read where relevant with the right to respect for private and family life and the rights of the child.[124] That lifeline became the basis for *Secretary of State for Work and Pensions v AT*, in which the Court of Appeal held that the Charter continues to apply to the Article 13 residence rights of the Withdrawal Agreement; that the State must assess whether refusing benefit would place the individual at an actual and current risk of a violation of fundamental rights; and that, if so, support must be provided — it being insufficient to point to support theoretically available elsewhere.[125] The reasoning is constitutionally significant: it establishes that the Charter, though excluded from retained law in general, re-enters domestic

118Case C-184/99 *Grzelczyk* EU:C:2001:458, paras 31 and 44.

119Case C-140/12 *Brey* EU:C:2013:565; Case C-333/13 *Dano* EU:C:2014:2358, paras 68–84; Case C-67/14 *Alimanovic* EU:C:2015:597, paras 57–63. See also Case C-308/14 *Commission v United Kingdom* EU:C:2016:436, upholding the United Kingdom's right-to-reside test against challenge under Regulation 883/2004.

120See O'Brien, *Unity in Adversity* (n above); and the extensive literature on the "*Dano* turn", including D Thym, "The Elusive Limits of Solidarity" (2015) 52 Common Market Law Review 17.

121The relevant amendments treated pre-settled status as not, of itself, a qualifying right to reside for income-related benefits: see the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019.

122*Fratila v Secretary of State for Work and Pensions* [2020] EWCA Civ 1741.

123Case C-709/20 *CG v Department for Communities in Northern Ireland* EU:C:2021:602; *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53.

124(n 123), paras 88–93, invoking Articles 1, 7 and 24 of the Charter.

125(n 79); upholding *AT v Secretary of State for Work and Pensions* [2022] UKUT 330 (AAC). The Court of Appeal confirmed that the *CG* dignity test survives in domestic law via art 4 of the Agreement and s 7A of the 2018 Act, notwithstanding the Charter's general exclusion from retained law.

law through the specific gateway of the Withdrawal Agreement, because Article 4 requires the Agreement's rights to be given the same legal effects as they have in EU law, and those effects include Charter compliance.

### *C. The significance for curtailment*

The welfare saga matters here for two reasons. First, it is the clearest illustration that pre-settled status is "status without substance" — a digital marker that does not, of itself, unlock the full suite of rights, and that requires repeated and resource-intensive litigation to give content. The holder of pre-settled status is, in a real sense, a second-class beneficiary of the Agreement, possessed of a residence right but not of the equal-treatment guarantees that were supposed to accompany it. Secondly, *AT* establishes a constitutional principle of direct relevance to curtailment: where the State makes decisions affecting persons with Withdrawal Agreement residence rights, it must do so consistently with the Charter and the Agreement, assessing the *real and current* impact on the individual rather than relying on theoretical safeguards. That principle — individualised, evidence-based, dignity-protecting assessment — will be tested directly by the 2026 process to strip pre-settled status, analysed in Part XV, and it supplies the standard against which that process must be judged.

## XIII. The Monitoring Case Law and the "Automatic" Extensions

Against this tide of hardening, one decision stands out as a genuine and continuing protection for those *already* granted status — and it is the source of the "automatic extensions" that now define the pre-settled cohort.

### *A. The IMA judgment*

In *R (Independent Monitoring Authority) v Secretary of State for the Home Department*, the IMA — supported by interventions from the European Commission and the3million — challenged the central architectural assumption of the scheme: that a pre-settled status holder who failed to make a second application before their status expired would simply lose their rights and become an overstayer.[126] Lane J held that this was unlawful, making two findings of first importance. First, a person's pre-permanent-residence rights under the Agreement cannot expire; they continue for as long as the person satisfies the Agreement's residence conditions, and Article 15(3) of the Agreement guarantees that, once acquired, the right of permanent residence is lost only through absence exceeding five consecutive years. Secondly, where such a person has satisfied the conditions for permanent residence, they acquire that right *automatically*, by operation of the Agreement, even without having applied for or been granted settled status.[127] The judgment is a vindication of the conceptual point made in Part II: a constitutive scheme may record rights but may not extinguish them, and a domestic mechanism that caused a substantively-qualifying person to lose their treaty rights merely for failing to re-apply was incompatible with the Agreement.

126(n 14).

127(n 14), paras 121–142. The grave consequences of pre-settled status lapsing could not be dismissed as merely procedural, and the assurances about supporting vulnerable applicants could not justify reading the Agreement against its ordinary meaning.

### *B. Implementation*

The Home Office implemented the judgment in stages. From September 2023 it began automatically extending the pre-settled status of those who had not yet switched to settled status, shortly before each grant's expiry, so that no one would fall off a cliff edge merely for failing to re-apply; and it removed the expiry date from the digital profiles shown to third parties in the checking services.[128] From late January 2025 it went further, introducing *automatic conversion* from pre-settled to settled status where automated HMRC and DWP checks confirm five years' continuous qualifying residence with no subsequent "supervening event"; the current guidance preserves a right, exercisable through the Resolution Centre, to request a manual reconsideration of the residence assessment underlying an automated conversion, with the outcome communicated within one month.[129]

### *C. The crucial caveat*

It is essential to be precise about what these "automatic extensions" are and are not. The Home Office has been explicit that an extension of pre-settled status is *not* confirmation that the holder continues to meet the eligibility requirements.[130] The extension preserves the digital status; it does not certify entitlement. That distinction — the gap between holding the status and being able to prove the residence underlying it — is the hinge on which the most alarming recent development turns, and it is the precise point at which the *IMA* judgment, intended as a shield, has been re-forged into the handle of a sword.

The *IMA* litigation also crystallised a structural grievance that civil-society organisations continue to press: that the proper response to the judgment would be to grant settled status automatically to those who have held pre-settled status for five years and meet the conditions, rather than to subject them to a fresh, evidence-heavy "upgrade" process.[131] The scale of that process is large, and at one point a substantial majority of the EUSS decision workload consisted of "upgrade" applications — people who had already demonstrated eligibility for pre-settled status, now held to a raised evidentiary threshold to prove five years of residence. That phrase — a raised evidentiary threshold applied to people who had already cleared the bar once — captures the burden reversal precisely, and it foreshadows the curtailment process, in which the same population is exposed not merely to a demanding upgrade but to the loss of the status they hold.

## XIV. Continuous Residence and the Reversal of the Burden

The structural shift that connects the whole analysis can now be named directly. At the scheme's inception the practical burden of proving residence lay on the State; the current guidance preserves the automated route but reframes it so that, wherever the automation does not deliver a clean answer, the burden falls back onto the applicant.

The "Checks to establish UK residence" section of the guidance makes this explicit. If the RPS confirms five years, status is granted. But if the RPS indicates less than five years and the

128Home Office, *EU Settlement Scheme: implementation of the judgment in R (IMA)* (policy paper, January 2025), and the associated operational changes from September 2023.

129Caseworker Guidance v31.0 (n 16), sections on automated conversion and on requesting reconsideration; (n 128).

130(n 128). The extension preserves the digital status; it does not certify entitlement.

131See the the3million's analyses calling for automatic settlement for those who qualify, and the IMA's reporting (n 50) on the burden of the upgrade process.

applicant disputes it, or if it returns nothing, or if no National Insurance number is supplied, the applicant will be asked to provide documentary evidence to satisfy the caseworker of eligibility.[132] The recurring refrain through the consideration sections — "if you are satisfied, on the balance of probabilities, that the applicant meets the requirements … if you are not satisfied" — locates the risk of non-persuasion squarely on the applicant. The architecture is, in form, unchanged from 2019; what has changed is the population to whom the fallback applies. The self-employed, carers, students, the economically inactive and those not liable to tax leave a thin or absent HMRC/DWP footprint, and it is precisely they for whom the automation returns no clean answer and onto whom the documentary burden therefore falls.

The introduction of Home Office *travel data* compounds this. For an applicant who already holds pre-settled status and seeks to convert to settled status, where the RPS does not confirm eligibility, the caseworker must now obtain travel data and review it manually alongside the RPS data, the previous applications and the current evidence, and must be satisfied that the applicant has *demonstrated* that they meet the residence requirements.[133] Travel data has thus moved from being irrelevant to the start date of residence to being a tool deployed to test, and potentially to contradict, a residence claim — a migration of function from the benign to the adversarial that mirrors the larger trajectory of the scheme.

The decisive substantive change came in July 2025, when the definition of continuous qualifying residence was reworked. The traditional rule — no absence of more than six months in any rolling twelve-month period across the five-year qualifying period — was supplemented by a formulation built around a rolling sixty-month window: a pre-settled status holder qualifies for settled status where their continuous qualifying period began at least sixty months ago and they have been resident in the United Kingdom for at least thirty months in total within the most recent sixty-month period.[134] On its face this was a liberalisation, permitting substantial absence and a rolling rather than fixed qualifying window. But the same Statement of Changes that introduced the rolling window also signalled the Home Office's intention to introduce a mechanism to *cancel* pre-settled status where the holder has *not* maintained continuous residence. The thirty-months-in-sixty rule was not only a gateway to settlement; it was simultaneously being repurposed as a tripwire for removal — a duality that is the key to understanding the development analysed next.

## XV. Treacherous Territory: The 2026 Curtailment Process

In April 2026 the Home Office confirmed how that tripwire would operate. The announcement marks the point at which the scheme's trajectory becomes genuinely treacherous, because it turns the data architecture and the burden reversal traced throughout this article to the active dispossession of status.

### *A. The mechanics*

A very large proportion of the more than 5.8 million people granted status hold pre-settled status, and, by virtue of the IMA-driven extensions, hold it on a basis that says nothing about

132Caseworker Guidance v31.0 (n 16), section "Checks to establish UK residence".

133Caseworker Guidance v31.0 (n 16), sections on the use of travel data in assessing continuous residence; the guidance cautions that travel data must not be used in isolation to establish the start date of residence.

134Caseworker Guidance v31.0 (n 16), definition of "continuous qualifying period" as amended with effect from July 2025; and the associated Statement of Changes in Immigration Rules.

whether they still satisfy the residence conditions. The Home Office has built a process to identify and strip status from those who have "clearly ceased to maintain continuous residence" — specifically, those absent from the United Kingdom for more than thirty months in total in the most recent sixty-month period — and it will prioritise those who have spent very little or no time in the United Kingdom in the most recent five years.[135]

The mechanics are a two-stage funnel. First, HMRC and DWP data are checked; where they establish eligibility for settled status, the digital status is converted automatically and the holder notified. Secondly, where tax and benefit data are insufficient, travel data are checked to identify those who have not maintained continuous residence. A caseworker then decides whether to grant settled status, maintain pre-settled status, or issue a "minded to curtail" notification. That notification informs the individual that cancellation or curtailment is under consideration and invites evidence of United Kingdom residence or reasons for extended absence. The individual has 28 calendar days to respond, with scope to request a further 28-day extension.[136]

### *B. Proportionality and appeal*

Removal is to be subject to a proportionality assessment: the Home Office says it will remove status only where proportionate, weighing the circumstances of the absences and factors such as age, health and integration.[137] There is at present only limited guidance on what "proportionate" means, which leaves an avenue for challenging borderline decisions but no clear standard — and, given *AT*, raises the question whether the assessment will satisfy the requirement of an individualised, Charter-compliant evaluation of real and current impact, or whether it will collapse into a mechanical application of the thirty-months-in-sixty threshold.[138] Where status is removed, the individual is given reasons and a right of appeal — but with a critical sting: where the person is identified as being *outside* the United Kingdom at the date of decision, cancellation takes immediate effect, before any appeal is determined.[139] A person abroad when the decision is made loses their status first and litigates afterwards, from outside the country. That feature is in obvious tension with the suspensive-effect protections incorporated by Article 21 of the Agreement, which, through Article 31 of the Citizens' Directive, restrict the removal of a protected person while a redress procedure is pending.[140] Joining family members are spared the residence review, though their status may still be curtailed for reasons connected to their sponsor's status.

### *C. The tension with IMA and AT, and the convergence of the strands*

This is a profound inversion of the scheme's original logic, and it sits in tension with both the *IMA* judgment and the *AT* principle. Lane J held that pre-permanent-residence rights cannot expire and that permanent residence is acquired automatically once the conditions are met; *AT*

135Macfarlanes, 'EU Settlement Scheme: Home Office confirms process to remove pre-settled status for non-UK residents' (30 April 2026); and GOV.UK, *EU Settlement Scheme status automation update* (April 2026).

136(n 135).

137(n 135). As the Macfarlanes analysis notes, there is at present only limited published guidance on the meaning of "proportionate" in this context.

138Compare (n 79) (requiring assessment of actual and current risk to fundamental rights) with the threshold-based approach described in (n 135).

139(n 135).

140(n 2), art 21; (n 13), art 31(2). The immediate effect of cancellation for persons abroad sits uneasily with the principle that removal should not, in general, precede the determination of a redress procedure.

requires that decisions affecting Withdrawal Agreement residence rights be taken consistently with the Charter and on an assessment of real and current impact. The new process does not, on its face, contradict these: a person who has genuinely maintained residence will be converted, not curtailed, and a person absent for more than thirty months in sixty has, on the Home Office's analysis, ceased to satisfy the residence conditions and so has no surviving right to protect.

But the practical danger lies in the evidential reversal traced throughout this article. The automatic extensions lulled millions into holding a status that "is not confirmation" of eligibility. Many will have under-recorded their United Kingdom presence in HMRC and DWP data — again, the self-employed, carers, students, the economically inactive and those not liable to tax — and for them the burden of *proving* residence, once discharged for them by the State, now lands, on 28 days' notice, on the individual, who must satisfy a caseworker or lose the right to live in the country. The proportionality safeguard is real but thinly defined; the appeal right is real but, for those abroad, runs only after the loss has taken effect.

And here the strands converge. The data on which curtailment turns is the same data architecture that, as Part VIII shows, retains superseded refusals and is shielded by an exemption twice held unlawful from the individual's own scrutiny. A person served with a "minded to curtail" notice may be unable to access their full record, may find a stale refusal sitting in it, and must assemble a documentary residence case within 28 days against a State that holds more data about them than they can see, and some of which may be wrong. The Certificate of Application and detention failures show what happens when the system cannot accurately see protected status; the curtailment process now operationalises that same data, at scale, with loss of status as the outcome and, for those abroad, immediate effect. The questions raised for the ICO and the IMA in Part VIII are therefore not academic: they go to the reliability of the very records on which millions of curtailment decisions will rest. A curtailment regime built on data that the data subject cannot access, correct, or even see is a regime that fails the most basic requirement of procedural fairness — that a person be able to know, and to answer, the case against them.

## XVI. Conclusion

The arc of the EU Settlement Scheme can be stated in a sentence: it began as a constitutive but generous, error-forgiving grant in which the State proved residence to itself, and it has become a conditional, suspicious, evidence-demanding regime in which the individual must prove residence to the State on pain of removal.

Each stage of that journey is documented in the rules, the case law and the caseworker guidance. The preamble of the current guidance still recites the 2018 promise of "evidential flexibility" and of discretion exercised "in favour of the applicant". But the operative provisions that follow describe a scheme that has, in substance, reversed its founding posture: the conversion of the deadline into a validity bar; the abolition of administrative review; the strict eligibility line drawn by *Celik*, *Batool*, *Siddiqa*, *Emambux*, *Rexhaj* and *Akinsanya*; the saved public-policy regime that protects only by reference to the date of conduct; the relocation of the residence burden onto the applicant through the RPS and travel-data architecture; the redefinition of continuous residence; and the 2026 curtailment process. Around that legal hardening sit the operational and informational failures that fall hardest on the individual: a Certificate of Application that did not reliably carry the rights it promised; the detention and

humiliation of people who held protected status; a data-protection exemption twice held unlawful; and a records system that retains a refusal even after it has been superseded by a grant.

The analysis has sought to show that these are not discrete grievances but facets of a single structural pathology, and that the doctrinal tools to address them already exist. The doctrine of legitimate expectations, weak as a domestic claim against a macro-political policy change, becomes a hard obligation once relocated within Article 18(1) of the Agreement. The principle of effective judicial protection, vindicated for durable partners in *Banger*, condemns both the original remedy deficit and the carving-out of late applicants from the appeal right. The dignity-based reasoning of *CG* and *AT* supplies the standard by which the proportionality of curtailment must be judged. And the accuracy and storage-limitation principles of the UK GDPR, read together with the citizens'-rights guarantees of the Agreement, condemn the retention of superseded refusals.

The sustained counter-currents are few: the *IMA* litigation, which forced the acceptance that pre-settled status cannot simply lapse and that permanent residence is acquired automatically; and the welfare litigation culminating in *AT*, which anchored the rights of pre-settled status holders in the Charter. It is a measure of how far the scheme has shifted that the very extensions designed to honour the *IMA* judgment have become the instrument through which a far larger population is now exposed — holding a status that protects them on paper while the residence underpinning it is quietly re-examined and, for those who cannot prove it within 28 days, withdrawn.

If a single recommendation follows from this analysis beyond the obvious need for vigilance, it is the one developed in Part VIII. The practice of never erasing or superseding a refusal — even after a grant, even where the person held other leave — is not a technicality. It perpetuates an inaccurate account of a protected person's status in the State's own records; it is shielded from correction by an exemption already found unlawful twice; and it feeds the very downstream decisions — detention, refused re-entry, denial of interim rights, and now curtailment — that the Withdrawal Agreement exists to prevent. It is a problem of data accuracy and a problem of citizens' rights at once, and for that reason it should be examined, jointly and urgently, by both the Information Commissioner's Office and the Independent Monitoring Authority. The de facto grant has become the de facto trial; the least the State can do is to ensure that the evidence on which it tries people is true.

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