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Appendix EU - issues arising in practice

CONTEXT

- June 2018 Statement of Intent

“The Home Office will work with applicants to help them avoid any errors or omissions that may impact on the application decision. Caseworkers will have scope to engage with applicants and give them a reasonable opportunity to submit supplementary evidence or remedy any deficiencies where it appears a simple omission has taken place. A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens. User-friendly guidance will be available online to guide applicants through each stage of the application process.”

CONTEXT

- Private Beta Phase 1 (1,053 applications) – 28.8.18 to 17.10.18
- Private Beta Phase 2 (29,987 applications, including small cohort of looked after children & vulnerable adults assisted by NGOs) – 1.11.18 to 21.12.18
- Public Beta (200,420 applications) (*“limited to applications using either an EU passport or a biometric residence card”*) – 21.1.19 to 29.3.19

In each phase, all decided cases resulted in grants, although in PB2 and Public Beta some applicants who expected SS were granted PSS. Administrative Review applications in these cases were generally successful.

CONTEXT

- Scheme opened – 30.3.19
- Limited data
 - To 10.6.19 – Over 800,000 applications (incl Beta phases), 700,000 grants of status
 - No refusals (!)
 - Unknown number granted PSS where believed entitled to SS (NB: you don't apply for SS, but you can indicate not content with grant of PSS)

CONTEXT

- Assessments / evidence to date (*inter alia*):
 - Home Office reports on each Beta phase
 - Independent Chief Inspector of Borders & Immigration Report May 2019
 - Home Affairs Select Committee Report May 2019
 - Evidence to Brexit Select Committee 3.7.19

CONTEXT

EFFECTIVENESS TO DATE (ANECDOTALLY & FROM REPORTS, ETC)

- Scheme is successful on its own terms:
 - IT system holding up
 - Quick decision making
 - Home Office making enquiries / applying flexibility
 - 100% grant rate (albeit not necessarily of the status desired)

CONTEXT

- BUT...
 - Cohort in Beta testing phases was easy to reach and easy to document.
 - Not necessarily true for significant proportion of remaining 2.5m+
 - Real concern that “easy win” cases masking large cohort of hard to reach / more complex cases
 - Opting for “*constitutive*” rather than “*declaratory*” scheme (i.e. requirement for status to be applied for and granted, rather than conferred by operation of law) risks a large number of people who are entitled to SS or PSS not getting it
 - In which case, once the application deadline passes, they will be illegally resident, subject to hostile environment & removal. Windrush parallels are obvious.

WHO IS AT RISK OF FAILING TO SECURE RIGHTS?

- Migration Observatory: *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (Apr 2018)
- Flagged four groups of people potentially at risk:
 1. Unaware of need to apply (e.g. children, long-term residents, those with PR, people who believe ineligible)
 - BMA, Nov 18, 37% of EU national doctors in UK unaware of settled status scheme
 2. Vulnerable / reduced autonomy (victims of DV where partner holds docs, victims of exploitation not paid for work, people living in poverty / without stable housing)

WHO IS AT RISK OF FAILING TO SECURE RIGHTS?

...

3. Individuals who will face difficulties navigating the application process (language barriers, age, disability, digital exclusion)

4. People who will have difficulty showing residence (no bank account, not in employment or training, recent arrivals, no passport or national ID)

To what extent have these concerns been allayed?

APPLICATION PROCESS

- Three stages
 - Verification of nationality / identity
 - Verification of residence
 - Criminality check

NATIONALITY / IDENTITY CHECKS

- **SMARTPHONE APP**

- Used through PB1 (by some applicants) PB2 and Public Beta. Generally working well (if people have biometric ID document with chip)
- Android only until 2020 – significant shortcoming
- Problems with NFC on some older Android devices
- Problems with docs from particular countries (ICIBI 6.28)

NATIONALITY / IDENTITY CHECKS

- Alternatives:
 - Submit by post
 - Attend centre for verification (fee payable)
 - Assisted Digital Service (help using internet over phone, in person, or home visit)

NATIONALITY / IDENTITY CHECKS

- “[R]equired proof of identity and nationality” defined in Appendix EU as valid passport, national identity card or (for non EEA national) biometric immigration document

...unless ... the Secretary of State agrees to accept alternative evidence of identity and nationality where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons

NATIONALITY / IDENTITY CHECKS

- This exception to the general rule is extensively glossed in the main EU Settlement Scheme guidance. Examples given
 - Trafficking cases where trafficker holds document
 - Document withheld by family member, employer
 - Victim of domestic abuse and unable to produce document as a result (applicant to be asked for evidence in support of allegation)
 - Refugee status
 - Other reasons including serious medical condition, mental incapacity, age

NATIONALITY / IDENTITY CHECKS

- Looked after children:

If the applicant is a child under the age of 18 in local authority care and:

- the required document has been lost or destroyed, or was never obtained or provided; and
- there is satisfactory evidence that it is not in the best interests of the child for the local authority to obtain the required document on their behalf, such as where doing so may risk the child, contrary to their own best interests, leaving local authority care; or
- there are significant practical barriers to obtaining the required document, such as the national authority requiring the consent of both parents, but the parents are absent or un-cooperative,

the applicant is to be asked to produce alternative evidence of their identity and nationality (see Other supporting information or evidence below).

NATIONALITY / IDENTITY CHECKS

- Alternative supporting evidence:
 - Docs previously issued by Home Office
 - Expired passport
 - Official docs from home country (subject to further requirements)
 - Official docs from UK authorities (subject to further requirements)
 - Official docs from another EU Member State (subject to further requirements)
 - Biometrics which match an existing government record

NATIONALITY / IDENTITY CHECKS

What about those who do not hold relevant documents but not due to circumstances beyond their control, etc?

- Significant area of concern – potentially large numbers in hard to reach groups unaware of need to apply
- Need to apply to home authorities and be granted before eligible to apply
- Could take many months in complex cases
- May find themselves in intractable position as deadline approaches.

NATIONALITY / IDENTITY CHECKS

- What is being done to mitigate this?
 - Nothing systematic
 - Home Office advertising, clearly not reaching significant groups of people
 - £9m in grants to 57 organisations, ? Includes outreach
 - Embassies of individual countries taking some steps to reach citizens
 - Concerns expressed that despite this, significant numbers of people will never reach point where they are eligible to apply

EVIDENCE OF RESIDENCE

- Primary source = online checks with HMRC / DWP
- If not available, hierarchy of evidence in main guidance (*EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members*, v.1.0). Categories are non-exhaustive:
 - **Preferred** – evidence covering lengthy periods (e.g. 12 month bank statements, official confirmation of employment or school attendance)
 - **Alternative** – similar evidence but for shorter periods, e.g. 1 month bank statement (“*likely to be sufficient for the period it covers*”)
 - **Unacceptable** – references from family or friends, photographs of special occasions, cards, scrapbooks

DIFFICULT CASES

- Issues arise both re:
 - Evidencing identity / nationality
 - Evidencing residence
- E.G. Non economically active victim of DV:
 - Will be expected to produce evidence of DV (e.g. police report) to be able to rely on alternative evidence of identity / nationality, and will still have to be able to produce alternative evidence
 - If not on HMRC / DWP systems and no strong evidence of long stretches of residence, will have to piece together evidence of residence month by month
 - Potentially very labour intensive

DIFFICULT CASES

- Home Office willingness to assist does not extend to these sort of enquiries:
 - ICIBI called on Home Office to accept responsibility for making reasonable enquiries on behalf of those who find it difficult to prove their eligibility.
 - Home Office response refers to
 - existing support “*such as the telephone advice from our customer support centre and face-to-face assisted digital support*”
 - Funding for NGOs to assist vulnerable individuals
 - I.e. no real acceptance of duty to make enquiries directly of, e.g., local authorities itself.

CRIMINALITY I

- App EU silent about impact of convictions, but...
- EU15(1): mandatory refusal if applicant subject to DO or Decision to Make DO
- Disclosure / discovery of certain convictions prompts referral by UKVI to Immigration Enforcement for deportation to be considered (*EU Settlement Scheme: suitability requirements, v.1.0*)

CRIMINALITY II

- Requirement to disclose UK & overseas convictions which “*appear in their criminal record in accordance with the law of the State of conviction at the time of the application*” (not spent convictions, cautions, etc)
- Also checked against PNC and Warnings Index
- UKVI conduct initial assessment of suitability and take a view on whether to refer to Immigration Enforcement “*for full case by case consideration of the individual’s conduct under the public policy and public security test as set out in the EEA Regulations 2016*”
- (See separate guidance in *EEA decisions taken on grounds of public policy*, v.3.0, Dec 17)
- If IE decide to deport or exclude then they will refuse the application for SS/PSS

CRIMINALITY III

- When must UKVI refer to IE?
 - *Inter alia*:
 - Any conviction in past 5 years resulting in imprisonment
 - The applicant “*has, at any time, received a conviction which resulted in their imprisonment for 12 months or more as a result of a single offence*”
 - 3 + convictions in past 3 years unless resident for over 5 years
 - Case “*of interest*” to Criminal Casework (e.g in prison awaiting consideration of deportation)
 - Applicant “*entered, attempted to enter or assisted another person to enter or attempt to enter into a sham marriage*”, etc
 - Specific guidance on foreign convictions

CRIMINALITY IV

- Unless...
 - Previous decision not to pursue deportation / exclusion or revoke DO/EO, and no subsequent offence
 - Previous deport decision overturned on appeal
 - *“applicant received a custodial sentence and at the time the applicant was in prison, the applicant’s conviction did not meet the criteria for referral to the Home Office and the applicant has not committed any further offence that meets the referral criteria”*
 - (Suitability guidance sets out what those criteria were)

CRIMINALITY V

- Post-Brexit Offending – falls to be considered by reference to domestic immigration rules / law (deterrence, etc, in issue). Much stricter regime.

REFUSALS

- No refusals to date
- However, grants of PSS being made where individuals claim entitlement to SS if residence checks don't establish 5 years' residence.
- No stats for numbers of such cases.
- Many Administrative Review applications challenging PSS rather than SS have succeeded
- No reasons given for decision to grant PSS rather than SS. Prejudices applicants (a fortiori, vulnerable applicants) in preparing application for Administrative Review (and, in due course, appeals)

RING FENCING CITIZENS RIGHTS?

- Costa Amendment
- Barclay / Barnier exchange

Thank you for listening

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