



**NO DEAL, NO APPEAL:
A DRAFT AMENDMENT TO THE IMMIGRATION AND SOCIAL SECURITY
CO-ORDINATION (EU WITHDRAWAL) BILL**

'[I]n this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.'

– Baroness Hale, *R v Secretary of State for the Home Department ex parte Saleem* [2001] 1 WLR 443, 458

1. The long-awaited Immigration and Social Security Co-ordination (EU Withdrawal) Bill ('the Bill'), the legislation making provision for a post-Brexit immigration system, is finally before Parliament.¹ Its stated aim is to 'end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration; to confer power to modify retained direct EU legislation relating to social security coordination; and for connected purposes.'² As is common with contemporary legislation, the Bill is largely skeletal, providing powers to make further regulations.³ The flesh of the wider political vision is set out in an accompanying White Paper.⁴
2. What is *not* in the Bill is an appeal right to a tribunal for the sizeable number of EU citizens currently residing in the UK and their family members who are likely to make applications under the EU Settlement Scheme.⁵ The registration aspects of the Scheme have been widely discussed⁶ and new immigration rules have been

¹ UK Parliament, Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 <<https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal.html>>

² See the Preamble to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

³ See accompanying memorandum to the Delegated Powers and Regulatory Reform Committee for assisting scrutiny of the Bill: Home Office, 'Delegated Powers Memorandum' <<https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/delegated-powers-memorandum>>

⁴ HM Government, *White Paper: The UK's Future Skills-Based Immigration System* (December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf>

⁵ See Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf>

⁶ Madeleine Sumption and Zovanga Kone, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (12 April 2018) < https://migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Unsettled_Status_3.pdf>



produced.⁷ Yet the topic of effective redress for those who receive an adverse decision under the EU Settlement Scheme has been a much more marginal aspect of policy discussions.

3. The Bill includes no tribunal appeal right for those making applications under the EU Settlement Scheme. Yet, a commitment to this appears to be in the Withdrawal Agreement. **The Bill therefore creates a ‘no deal, no appeal’ situation:** if there is a withdrawal agreement, and an associated Withdrawal Agreement (Implementation) Bill inclusive of an appeal right, then applicants under the EU Settlement Scheme will have access to a tribunal appeal; if there *is not* a deal, inclusive of an appeal right, then applicants under the Settled Status Scheme will only have access to administrative review in some instances.
4. **In this briefing, we set out the key reasons why a right of appeal against decisions made under the Scheme should be included in the Immigration and Social Security Co-ordination Bill.** The provision of a right to appeal, and the legal aid necessary to enforce that right removes the uncertainty over whether decisions made under the Settlement Scheme will be subject to scrutiny of all aspects of their correctness by the judiciary. The complexity of the Settlement Scheme as provided for in the Immigration Rules is such that errors will be made, and a right to appeal to the Tribunal is the optimum way of securing the legal entitlements of EU citizens and their family members in this context. In this briefing, we provide the draft text of an amendment to establish such a right.

CURRENT FORMS OF IMMIGRATION REDRESS

5. The immigration system is complex.⁸ The Immigration Rules are regarded as so complex that they are included in the Law Commission’s 13th Programme of Law Reform, with a view to making them ‘simpler’ and ‘more accessible.’⁹ Notwithstanding the complexity of the Immigration Rules being an impediment to access to justice in this context, very few categories of immigration appeals remain in scope for legal aid after recent reforms.¹⁰ But when it comes to redress

⁷ Provision for the EU Settlement Scheme has been made through an additional appendix to the Immigration Rules: See Immigration Rules Appendix EU.

⁸ e.g. see Report of House of Commons Home Affairs Committee, Home Office Delivery of Brexit: Immigration (HC 421, 2017 – 19) paragraph 54.

⁹ See Law Commission, ‘Simplifying the Immigration Rules’ <<https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>>

¹⁰ These areas are decisions concerning asylum; immigration detention; national security cases; victims of trafficking and immigration cases involving domestic violence. See concerns raised in House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 311, 2014 – 15) para 38-56 <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>.



for potentially unlawful and unfair immigration decisions, there are three key modes of redress in the present system:

- ***Administrative review.*** A mechanism whereby another official in the Home Office reviews the papers from the initial decision for casework errors. The decision can then be changed if there is an error;¹¹
 - ***Tribunal appeal.*** An oral or paper process in the First-tier Tribunal (Immigration and Asylum Chamber) where all aspects of the merits of the initial decision are considered by an independent tribunal judge.¹² The judge can substitute a new decision for the Home Office decision; and
 - ***Judicial review.*** A process which, in immigration cases, usually takes place in the Upper Tribunal (Immigration and Asylum Chamber). A judge reviews a decision on the basis of narrow legality grounds (*e.g.* procedural fairness, human rights) rather than providing a consideration of the full merits of a claim.¹³ The judge can declare a decision unlawful and the decision then has to be retaken afresh by the Home Office.¹⁴
6. The current position within the immigration system is that, depending on the type of immigration application being made, some applicants have access to a tribunal while others have access only to administrative review. All have access to judicial review as a last resort.

RECENT REFORMS AND THEIR IMPLICATIONS

¹¹ For an overview of how this process works and recent reforms, see here R Thomas and J Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' (2019) Public Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254119>

¹² There is also an upper tribunal appeal right. For a discussion of recent trends and reforms in the tribunal, see: J Tomlinson and B Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First Tier Tribunal' (2019) Journal of Immigration, Asylum & Nationality Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314110>.

¹³ A philosophy famously articulated in *Associated Provincial Picture House, Limited v Wednesbury Corporation* [1948] 1 K.B. 223.

¹⁴ On the immigration judicial review process, see: R Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] Public Law 652; R Thomas and J Tomlinson, 'A Design Problem for Judicial Review: What We Know and What We Need to Know about Immigration Judicial Reviews (UK Constitutional Law Association, 16 March 2017) <<https://ukconstitutionallaw.org/2017/03/16/robert-thomas-and-joe-tomlinson-a-design-problem-for-judicial-review-what-we-know-and-what-we-need-to-know-about-immigration-judicial-reviews/>>. For an on-going study into this particular aspect of immigration redress funded by the Nuffield Foundation, see 'Immigration Judicial Reviews' <<http://nuffieldfoundation.org/immigration-judicial-reviews>>.



7. It is difficult to reduce complex system changes that have occurred in recent years into one overarching trend. However, for anyone seeking to establish a general pattern there is one clear dominant trend: that tribunal appeal rights have been restricted, placing greater emphasis on administrative review and perhaps also judicial review. Recent reforms, collectively, represent a profound de-judicialisation of the immigration administrative justice system.¹⁵ Many applicants, who once had the opportunity of a tribunal appeal before an independent judge (before falling back on judicial review), now only have access to administrative review.

8. There are many ways in which systems of administrative justice can be analysed and the motivations of recent reforms are contested. Though there have been some benefits of de-judicialisation (such as reduced costs for the state and quicker decisions), **the available evidence suggests the growing use of administrative review has resulted in a system where individuals are less likely to succeed in overturning their negative immigration decision.**¹⁶ Before access to the tribunal was severely restricted by provisions in the Immigration Act 2014, around 49% of appeals were successful. Whereas, **over the same period in 2015/16, the success rate for administrative reviews conducted in the UK was 8%, falling to just 3.4% the year after.**¹⁷

WHY A TRIBUNAL APPEAL RIGHT IS PREFERABLE UNDER THE EU SETTLEMENT SCHEME

9. Administrative justice systems are complex but it is clear, on the basis of evidence and experience in the immigration context, that tribunal appeals offer better protection for individuals than administrative review. There are, no doubt, some legitimate reasons to think that tribunals are also imperfect. Immigration appeals have long been criticised on various rounds, including that they are still too inaccessible, at times intimidating, and sometimes produce inconsistent decisions.¹⁸ Yet, at the same time, the tribunal model of redress is robust in terms of its procedural safeguards, familiar, and more trusted than administrative review.

¹⁵ R Thomas and J Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' (2018) Public Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254119>

¹⁶ See above.

¹⁷ For a fuller analysis of available data and evidence, see above note 15.

¹⁸ For a recent critical overview, see: JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* <<https://justice.org.uk/our-work/areas-of-work/administrative-justice-system/immigration-asylum-determination-reform/>>



10. Judicial review, which is broadly seen a constitutional necessity, provides only a narrow legality review which is unable to engage sufficiently with any substantive decision-making issues under the Scheme. It focuses heavily on process. Moreover, immigration cases have long constituted the vast majority of judicial review cases and an increase in caseload pressure could prove problematic.
11. The Settlement Scheme is a huge and challenging administrative undertaking.¹⁹ The Scheme already includes an innovative experiment in automated decision-making.²⁰ It should not be the place to experiment with justice too—if not only because the increased use of automated decisions may create new issues which need to be scrutinised carefully. Moreover, because of the recent drastic reduction in the First-tier Tribunal’s workload, the tribunal could be well-placed to deal with Brexit-related appeals.²¹ The efficiency of the tribunal may also be assisted by the planned greater use of technology in the tribunal service in the coming months.²²

Case Study One

François is a French national studying full-time in the UK since January 2014. He attempts to apply for ‘Settled Status’ – indefinite leave to remain under Appendix EU of the immigration rules on the basis that he is a ‘relevant EU citizen’; who ‘has completed a continuous qualifying period of five years’ of lawful residence in the UK; and in the belief that ‘no supervening event has occurred.’ After making his application accordingly, and uploading his documents of the EU Exit App; François is notified that he is not eligible for indefinite leave to remain but will instead can be granted ‘pre-Settled Status’ a form of limited leave to remain being granted under the Settlement Scheme. From February to September 2015, François went back to Saint-Guilhem-le-Désert in France to visit his terminally ill father. Therefore, the decision not to grant him Settled Status is based on the fact that he does have the requisite 5 year-period of continuous residence in the UK and the evidence to support this. François applies for administrative review, where the

¹⁹ As observed by Madeleine Sumption and Zovanga Kone, *Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?* (above n 6) and Report of House of Commons Home Affairs Committee, *Home Office Delivery of Brexit: Immigration* (above n 9)

²⁰ The Home Office has suggested that the use of technology in this context could be a blueprint for other parts of the immigration system see HM Government, *White Paper: The UK’s Future Skills-Based Immigration System* (above), paras. 9.4-9.9.

²¹ As argued in J Tomlinson and B Karemba, ‘Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-Tier Tribunal’ (above).

²² See R Thomas and J Tomlinson, ‘The Digitalisation of Tribunals: What We Know and What We Need to Know’ (5 April 2018) <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>> and Ministry of Justice, Lord Chief Justice of England and Wales, and Senior President of Tribunals, *Transforming Our Justice System* (September 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf>



reviewer affirms the initial decision. This decision ought to be subject to a full tribunal appeal.

Case Study Two

Katarzyna is a Polish national living in the UK for 8 years working as a cleaner for multiple agencies which supply cleaning staff to firms in the City. She works unscheduled shifts and at times is paid cash-in-hand by some of the agencies which deploy her. Katarzyna has no UK bank account or utility bills in her name which capture her continuous residence in the UK. She holds a Polish passport but has never applied for certification of her permanent residence status nor sought naturalisation. She makes an application to the EU Settlement Scheme after hearing that EU citizens without this new immigration status will be deported after Brexit. Her application is refused for lack of supporting documents which show continuous residence in the UK. She has no recourse to administrative review for this type of refusal. This decision ought to be subject to a tribunal appeal.

THE PRESENT SITUATION OF EU CITIZENS RESIDENT IN THE UK

12. Decisions made by the Home Office under the EU Settlement Scheme do not currently attract a tribunal appeal right. As the Home Office indicated in its *Statement of Intent* on the Settlement Scheme published in June 2018, primary legislation is required to make provision for such a right.²³ At present, only a system of administrative review against some decisions made under the Scheme has been added to the Immigration Rules.²⁴
13. The availability of **an appeal right for the Scheme was agreed to in the Withdrawal Agreement between the EU and the UK** currently awaiting approval by the UK Parliament.²⁵ The relevant part of that Withdrawal Agreement provides that the pre-existing safeguards for decisions made under the free movement framework also apply to decisions concerning the residence rights of persons who fall under the scope of the Settlement Scheme.²⁶ These safeguards principally include 'the right to access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision.' Furthermore, under the applicable EU law incorporated into the

²³ Home Office, *Statement of Intent* (above), para 5.19.

²⁴ See Immigration Rules Appendix AR (EU): Administrative Review for the EU Settlement Scheme.

²⁵ As required under section 13 of the European Union Withdrawal Act 2018.

²⁶ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, Article 21.



Agreement, 'the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the [decision] is based.'²⁷

14. This commitment is partly why the UK Government initially promised that a right of appeal against decisions made under the Settlement Scheme would be introduced. In the Government's own words, 'this would allow the UK courts to examine the decision to refuse status under the scheme and the facts or circumstances on which the decision was based.'²⁸ In the UK system of administrative justice, this can only mean a right of appeal to a tribunal.
15. Even though the Home Office has now committed to fully implementing the EU Settlement Scheme in the event of the UK withdrawing from the EU without a withdrawal agreement in place – the so-called 'no-deal scenario'²⁹ – it seems the Scheme will be without the right of appeal repeatedly promised in previous policy documents. According to a policy paper published by the Department for Exiting the EU in December 2018, among other changes to the Settlement Scheme, in the event of a 'no deal' Brexit: 'EU citizens would have the right to challenge a refusal of UK immigration status under the EU Settlement Scheme by way of administrative review and judicial review.'³⁰
16. The situation now therefore seems to be that: if there *is* a withdrawal agreement, and an associated Withdrawal Agreement (Implementation) Bill inclusive of an appeal right, then applicants under the Settled Status Scheme will have access to a tribunal appeal; if there *is not* a deal, inclusive of an appeal right, then some applicants under the EU Settlement Scheme will only have access to administrative review. **Put simply: no deal, no appeal.**
17. The **present position in respect of the Bill is unsatisfactory** for at least two important reasons. First, the lack of a right of an appeal **generates an unnecessary amount of uncertainty** in an already precarious landscape for EU citizens resident in the UK and their families. Second, the position seems to be that **the quality of justice EU citizens resident in the UK will be afforded is contingent upon a withdrawal agreement being approved by Parliament and an implementing Bill being enacted before 29 March 2019**. Given the short timescale and the

²⁷ Directive 2004/38/EC, Article 31.

²⁸ Home Office, *Statement of Intent*, paragraph 5.19.

²⁹ DExEU, Policy Paper: Citizens' Rights – EU Citizens in the UK and UK Nationals in the EU (6 December 2018), para. 9
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762222/Policy_paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf>

³⁰ DExEU, *Policy Paper: Citizens' Rights – EU Citizens in the UK and UK Nationals in the EU* (6 December 2018), para. 11.



contentious politics around the present Withdrawal Agreement it is reasonable to assume that neither approval nor enactment will occur.

18. We therefore suggest that the following amendment should be made to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill:

When a decision is made under the EU Settlement Scheme in Appendix EU of the Immigration Rules in respect of a person he may appeal to the Tribunal if it relates to a refusal to grant

- (a) an application for indefinite leave to remain (settled status),*
- (b) an application for limited leave to remain (pre-settled status); or*
- (c) if it relates to an incorrect grant of limited leave to remain when the applicant is entitled to indefinite leave to remain under that Appendix to the Immigration Rules.*

Provision of legal aid to make these rights of appeal effective is also critical.

19. This proposed amendment upholds one of the central tenets of justice: that the state provides recourse to an effective mode of redress when an administrative decision which acutely affects the rights of individuals is made.

Dr Joe Tomlinson

King's College London

Public Law Project

E: joseph.tomlinson@kcl.ac.uk

Byron Karemba

Public Law Project

E: b.karemba@publiclawproject.org.uk

PLP was set up to ensure those marginalised through poverty, discrimination or disadvantage have access to public law remedies and can hold the state to account. Our vision is a world in which individual rights are respected and public bodies act fairly and lawfully. Our mission is to improve public decision making and facilitate access to justice. Our priorities are to: promote and preserve the Rule of Law; ensure fair systems; and improve access to justice.
