

# Mobility: Immigration alert

January 2023



## United Kingdom

### High Court rules EU Settlement Scheme unlawful

#### Executive summary

On 21 December 2022, the England and Wales High Court [ruled](#) that the EU Settlement Scheme (EUSS) breaches the UK's Brexit Withdrawal Agreement with the EU as it fails to protect the rights of nationals of EU member states ("EU nationals") with pre-settled status if they do not seek further immigration permission before the expiry of their pre-settled status. The High Court held that the terms of the Withdrawal Agreement mean that EU nationals with pre-settled status should not become unlawful residents in the UK if they do not make a further application for permanent/settled status.

#### Key developments

The High Court held the EUSS to be unlawful in the case of *Independent Monitoring Authority v Secretary of States*, following a challenge by the Independent Monitoring Authority (IMA), which was set up by the UK government to look after the rights of EU nationals. Part of the scheme (i.e., the requirement for EU nationals with pre-settled status to become unlawfully present in the UK if they do not submit a second application for settled status before the expiry of their pre-settled status) is based on an incorrect interpretation of the Brexit Withdrawal Agreement.

The EUSS was introduced to grant nationals of the EU and European Economic Area (EEA) member states living in the UK before 31 December 2020 an immigration status that allows them to remain in the UK permanently after Brexit. Upon completing five years of continuous residence in the UK, eligible individuals are granted settled status and can then apply for British citizenship one year after. Under the current rules, all EU and EEA nationals with pre-settled status (i.e., those who

had been in the UK for less than five years as of 31 December 2020) must submit a settled status application after completing the five-year qualifying period and before the expiry of their status; otherwise, they will become illegal residents and lose all their rights, including the right to live and work lawfully in the UK.

In the judgement, the High Court ruled that individuals with residence rights under the Withdrawal Agreement retained the right to live permanently in the UK as long as they meet the relevant conditions, which do not include the requirement to submit a second application for settled status. Accordingly, an individual cannot lose their residence rights once their pre-settled status expires.

The Home Office has confirmed that it will appeal the judgement. Given the number of people the decision will impact, it is likely that this matter will eventually proceed to the Supreme Court.

#### Impact on employers

Individuals with pre-settled status applying for settled status will gain further evidence of their right to reside permanently in the UK. If part of the EUSS is found to be unlawful, this may impact the [right to work](#) checks for prospective employees with expired pre-settled status. Employers may expect further guidance from the Home Office in due course.

#### Key steps

EY will continue to monitor these developments. Should you have any questions, we encourage you to contact one of our immigration professionals.

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