



Public Law Project

Immigration and Social Security Co-ordination (EU Withdrawal) Bill Briefing for the Public Bill Committee of the House of Commons 28 February 2019

I: Introduction

1. The Public Law Project ('PLP') is an independent national legal charity. PLP's mission is to improve public decision-making and facilitate access to justice. We work through a combination of research and policy work; training, conferences and second-tier support; and legal casework including public interest litigation. Our strategic objectives include promoting and safeguarding the Rule of Law; ensuring fair systems for public decision making; and improving access to justice.
2. PLP takes no position on the UK's decision to leave the European Union. Our work around Brexit is intended to ensure that Parliament is appropriately sovereign, the executive held to account, and the interests of disadvantaged groups properly and effectively represented. We hope to ensure procedural fairness to those likely to be most affected by the Brexit process.
3. As part of its Brexit work, PLP has two major projects underway. The SIFT Project (Statutory Instruments: Filtering and Tracking) aims to scrutinise the statutory instruments ('SIs') made in the wake of Brexit to ensure that they conform to public law principles and do not undermine fundamental rights.¹ Additionally, PLP's Brexit, Immigration and Administrative Justice Project looks at the impact of changes in immigration law and policy on administrative justice.² This project focuses on administrative justice issues arising from the EU Settlement Scheme.
4. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill ('the Bill') will have a wide-reaching impact on the UK's immigration system and the breadth of the delegated powers it confers has major implications for our constitutional settlement, including the ability of Parliament to exercise control over immigration policy. In this briefing, we consider two challenges that this Bill poses for Parliamentarians:
 - a. It creates unjustifiably broad powers for Ministers to reshape our immigration and social security coordination systems with minimal Parliamentary scrutiny. Parliament must be alive to how Ministers are already using their delegated powers under the European Union (Withdrawal) Act 2018 ('EUWA') when considering the scope of, and safeguards to, delegated powers in the Bill. **The powers as drafted in the Bill must be narrowed in order to prevent Ministers rewriting our immigration and social security systems without adequate Parliamentary scrutiny.**

¹ <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/>

² <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/brexit-immigration-and-administrative-justice-project/>

- b. It does not provide for an appeal right for applicants to the EU Settlement Scheme (the Scheme). **Members should support New Clause 10 which would guarantee a right of appeal to the First-tier Tribunal in respect of decisions made under the Scheme.**³

II: Delegated Powers

5. Unjustifiably broad delegated powers are a recurring theme in primary legislation implementing Brexit.⁴ The delegated powers in EUWA were unprecedented in their breadth.⁵ The powers in this Bill appear even broader. Clause 4 includes the power to make SIs which amend any legislation the Minister wishes so long as it is 'connected with' the repeal of free movement legislation. Clause 5 confers 'an appropriate authority'⁶ with the power to 'modify' the Co-ordination Regulations by SI.

Observations on SIs produced under EUWA

6. In January 2019, PLP launched the SIFT Project to monitor and scrutinise Brexit SIs to check if they conform to public law standards and do not undermine fundamental rights. We highlight below two preliminary observations from that work which are relevant to consideration of the delegated powers in the Bill.

(i) Significant Policy Changes

7. While EUWA was going through Parliament, the Government stated that EUWA would not be 'a vehicle for policy changes' and that the delegated powers gave 'the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU.'⁷
8. Evidence gathered during the initial stages of the SIFT Project indicates that delegated powers in EUWA are being used to make significant policy changes without adequate Parliamentary scrutiny.
9. A clear and relevant example is the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 ('INA Regulations'), laid on 11 February 2019.⁸ The INA Regulations

³ Public Bill Committee amendments laid as at 26 February 2019

https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/amend/immigration_daily_pbc_0225.pdf

⁴ See also, provisions in the Agriculture Bill and the Healthcare (International Arrangements) Bill, which are discussed in this [blog post](#) by Professor Mark Elliott of Cambridge University.

⁵ See the concerns expressed by PLP in our briefings during the passage of EUWA available here: <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/>

⁶ The Secretary of State, a devolved authority or a Minister of the Crown acting jointly with a devolved authority

See clause 5(7) of the Bill.

⁷ See forward to the White Paper by Rt Hon David Davis MP, Secretary of State for Exiting the European Union; see also paragraphs 3.10 and 3.17 of the White Paper and paragraph 14 of the Explanatory Notes.

⁸ For a further illustration see the letter sent by a group of 13 civil society organisations, including PLP, to the Department for Exiting the European Union, about the removal of clauses requiring penalties to be effective, proportionate and dissuasive: <https://publiclawproject.org.uk/latest/removal-of-the-requirement-for-effective-proportionate-and-dissuasive-penalty-schemes-from-retained-eu-law/>

were laid solely using the powers under ss 8(1) and 23(1) and paragraph 21 of schedule 7 to EUWA. They will come into force on 30 March in the event of a no deal, or at the end of a transition period in the event of a deal.⁹

10. Regulations 47, 48, 54, 55 and Schedule 1 of the INA Regulations revoke swathes of retained direct EU legislation including, for example, European Union Regulation 604/2013 (commonly known as the ‘Dublin III Regulation’).¹⁰ This Regulation contains rules to establish a system which is designed to allocate responsibility for asylum claims made anywhere in the European Union. It is the mechanism by which the UK currently returns asylum seekers to other European countries, and under which asylum seekers may be transferred to the UK to have their asylum claims considered here, for example because they have close family members in the UK.
11. The INA Regulations also change the grounds on which a decision can be made to restrict admission to or residence in the UK of an EEA national or their family member or to deport an EEA national or their family.¹¹ They replace the current thresholds, laid down in the Immigration (European Economic Area) Regulations 2016 and in EU law, with the domestic law threshold currently applicable to non-EEA nationals, in relation to conduct occurring after the INA Regulations come into force. That includes a presumption in favour of deportation for anyone sentenced to 12 months’ imprisonment or longer, irrespective of the length or nature of their residence.
12. PLP takes no position on whether these changes are desirable as a matter of policy. However, they do represent significant policy changes which are being made by an SI laid under EUWA at the same time that this Bill is under consideration by Parliament.

(ii) Inadequate Scrutiny

13. The manner in which the powers under EUWA are being exercised to amend retained EU law has impeded effective Parliamentary scrutiny. There has been a consolidation exercise, which has resulted in long SIs and made effective scrutiny of them more difficult. From August to December, the average number of pages for Brexit SIs increased each month: in August it was 3 pages; in December it was 33 pages.¹² Notably, the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, runs to 619 pages. Furthermore, many of the SIs group together disparate subject matters which makes effective scrutiny more difficult. The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 consists of 24

⁹ The Explanatory Note says: ‘All the provisions in this instrument will commence on exit day in a ‘no deal’ scenario, or in a ‘deal’ scenario from the end of the planned implementation on 31 December 2020, as set out in the draft Withdrawal Agreement with the European Union published on 14 November 2018.’

¹⁰ Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹¹ See for example Part 2, Chapter 2, Regulation 43 of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019.

¹² <https://www.hansardsociety.org.uk/blog/westminster-lens-brexite-statutory-instruments-dashboard#what-is-the-average-length-in-pages-of-a-brexite-si-each-month>

disparate Parts. The SLSC stated in their review: '[e]ffective scrutiny is inhibited by the wide range of issues included.'

14. Effective scrutiny has also been hampered by a lack of impact statements and inadequate explanatory notes that do not effectively telegraph the changes made. The SLSC concluded in its examination of the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019: '[w]e were sceptical that so wide-ranging an instrument could be scrutinised effectively. With concise, well-focused briefing it might have been possible. Unfortunately, neither EM1 nor EM2 has proved adequate. The lack of contextual detail inhibits a proper understanding of the significance of the impact of the various components of the Regulations.'¹³
15. The SLSC has written letters as recently as 19 February 2019 to the Treasury stating that the failure of departments to lay impact assessments at the time the SIs facilitating Brexit are laid, is impeding effective scrutiny of the instruments.¹⁴ A spike in the number of explanatory memoranda requiring replacement since April 2018 has also been reported.¹⁵

Delegated Powers in the Bill

16. Delegated powers are contained in clauses 4 and 5 of the Bill. These supplement the Home Office's existing powers to implement sweeping policy changes to the immigration system by secondary legislation and through statements of changes to the Immigration Rules pursuant to section 3(2) of the Immigration Act 1971. Indeed, the EU Settlement Scheme is found in the Immigration Rules rather than primary legislation. These new clauses, which include a Henry VIII power to amend primary legislation, represent a constitutionally unacceptable accumulation of power in the Home Office to rewrite the UK's immigration system with minimal Parliamentary scrutiny.

Clause 4 - Ending Free Movement

17. Clause 4(1) allows the Secretary of State by SI to 'make such provision' as he considers 'appropriate in consequence of, or in connection with' any provision in relation to ending free movement. This includes modifying primary legislation (clause 4(2)a) and retained direct EU legislation (clause 4(2)b) and to make supplementary, incidental, transitional, transitory or saving provision and to make different provision for different purposes (clause 4(3)). The Secretary of State can also make provision in respect of people not entitled to exercise free movement rights prior to the repeal of the free movement legislation (clause 4(4)).
18. **These powers are unjustifiably broad.** Clause 4(1) allows the Secretary of State by SI to amend any legislation, including primary legislation, he considers 'appropriate' provided it is 'connected with' or 'consequential to' the repeal of free movement legislation. Under clause 4(4), this includes amending legislation affecting those who were not entitled to rely on EU law free movement rights immediately before the repeal of free movement law under clause 1. Given the use of the term 'in connection with', this is potentially a breathtakingly wide power.

¹³ <https://publications.parliament.uk/pa/ld201719/ldselect/ldseclega/292/29204.htm>

¹⁴ https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Session%202017-19/SKM_C30819021911490.pdf

¹⁵ <https://publications.parliament.uk/pa/ld201719/ldselect/ldsecleg/266/26604.htm>

19. Clause 4 is also a Henry VIII clause, permitting amendment to primary legislation, as well as to retained direct EU legislation (clause 4(2)). It draws no distinction between retained direct principal EU legislation and other forms of retained EU law, despite the careful distinction drawn by EUWA and additional provisions added to EUWA during its passage through Parliament to ensure that such amendments received greater Parliamentary scrutiny.¹⁶ Clause 4(6) provides that such powers are to be subject to the 'made affirmative' procedure the first time they are used, so that they will come into effect immediately, before they can be considered by parliament.
20. In its delegated powers memorandum to the Bill,¹⁷ the Government stated that the purposes of the clause 4 powers are to tidy up the statute book and to protect the rights of EEA nationals. However, the initial observations of the SIFT project, described above, indicate that Ministers are using delegated legislation to make significant policy changes with minimal Parliamentary oversight. If Ministers only intend to use the delegated powers in clause 4 for the purposes set out in the delegated powers memorandum, clearly stipulated limits on the powers should be on the face of the Bill.

Clause 5 - power to modify retained direct EU legislation relating to social security co-ordination

21. EU regulations relating to social security co-ordination (the 'Coordination Regulations') will form part of retained EU law after exit day. The Coordination Regulations provide a reciprocal framework to protect the social security rights of people moving between EEA states.
22. In relation to clause 5, PLP endorses [JUSTICE's briefing for the Committee](#) (at paras.36-44). We draw attention in particular to paragraph 40 which refers to the fact that Government has already laid regulations under section 8 EUWA making amendments relating to social security co-ordination, including most recently on 30 January 2019 (after the second reading of this Bill), when the Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019 was re-laid as a draft affirmative following a recommendation by ESIC.

III: Appeal Rights and the EU Settlement Scheme

23. The Bill has no right of appeal against decisions made under the EU Settlement Scheme. It appears that the Government has chosen to make provision for such rights only in the event of the United Kingdom withdrawing from the EU with a withdrawal agreement in place. As PLP highlighted in its briefing for Parliamentarians and civil society titled: *No Deal, No Appeal: A Draft Amendment to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill*,¹⁸ this unnecessarily ties the availability of a right to appeal against decisions being made under the EU Settlement Scheme to the fate of the present withdrawal agreement.
24. Given the contentious politics around the approval of the present Withdrawal Agreement, it is conceivable that there could be no legislation implementing such an agreement before the Scheme fully opens in late March. Amending the Bill to include

¹⁶ See Schedule 7, Part 1, s3 of EUWA

¹⁷ Memorandum, paras. 10-11, available [here](#)

¹⁸ The Public Law Project, '[No Deal, No Appeal: A Draft Amendment to the Immigration and Social Security Co-ordination Bill](#)' (14 January 2019)

a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) would remove uncertainty as to whether individuals can appeal adverse decisions when the Scheme is open to all EEA nationals eligible to make applications. PLP notes that the Statement of Intent published by the Home Office on 21 June 2018 on the Scheme did not expressly make a commitment to have appeal rights in legislation implementing a withdrawal agreement. The relevant paragraph in the Statement of Intent states that:

Primary legislation is required to establish a right of appeal for the scheme, but subject to Parliamentary approval, we intend that those applying under the scheme from 30 March 2019 will be given a statutory right of appeal if their application is refused. This will 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.¹⁹

25. Therefore, the Bill should be amended to secure the statutory right of appeal promised in the Statement of Intent. **New Clause 10 provides for such an amendment and would ensure that there is a right of appeal to the First-tier Tribunal.**
26. We know from the Government's policy paper on citizens' rights that in the event of a 'no-deal' Brexit, there would only be a circumscribed system of administrative review and judicial review against decisions being made under the EU Settlement Scheme.²⁰ Evidence gathered by PLP as part of its [Brexit, Immigration, and Administrative Justice Project](#) suggests that neither judicial review nor administrative review is an adequate mode of administrative redress in this context. Administrative review lacks the degree of independence and impartiality inherent in an appeal to the First-Tier Tribunal (Immigration and Asylum Chamber). As academic research into how administrative review is conducted shows, there are fundamental questions about the separation of reviewers from decision-makers, the quality of training reviewers receive and the extent to which an applicant gets a fair hearing in the review process.²¹ Although judicial review is a consequential aspect of the rule of law and an important constitutional safeguard for ensuring the administrative part of our Government complies with the law, it is also an inadequate mode of redress for fact-intensive matters such those which arise in the context of immigration. Unlike an appeal to the Tribunal, judicial review is limited to a consideration of the procedural aspects of a decision, as opposed to the appraisal of both law and fact which is available on appeal.
27. PLP is concerned that the provision of a right of appeal has not been thought of as a necessary component in the design of the EU Settlement Scheme from the outset. This is symptomatic of a wider approach taken by the Government to redress within the context of immigration. Statistics gathered by PLP as part of its [Brexit, Immigration and Administrative Justice Project](#) evidence the marginalisation of the Tribunal as an integral part of the administrative justice infrastructure around immigration.²² Figure 1 below shows the diminishing scale of appeals to the First-tier Tribunal as a

¹⁹ Home Office, *EU Settlement Scheme* (21 June 2018) para 5.19.

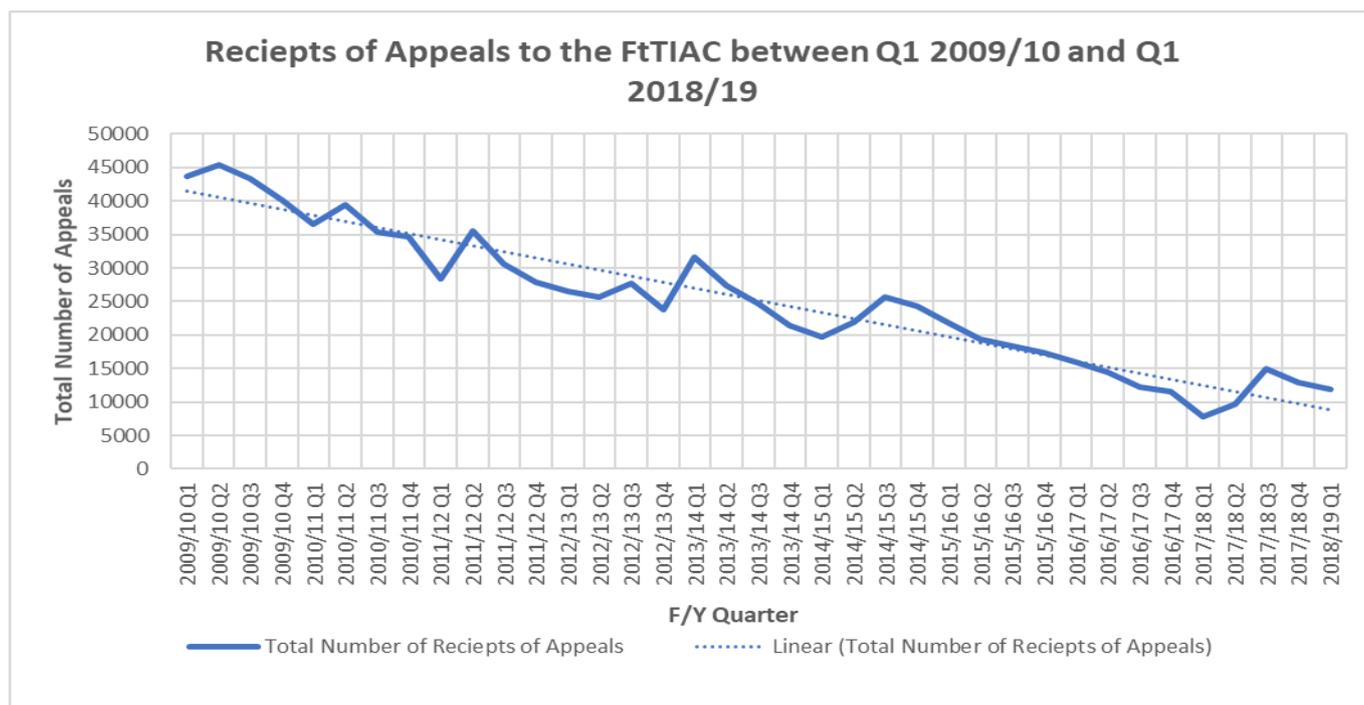
²⁰ Department for Exiting the European Union, *Citizens Rights – EU in the UK and UK Nationals in the EU* (6 December 2018) para 11.

²¹ See research by R Thomas and J Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254119 >

²² For analysis of this evidence see J. Tomlinson and B. Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal' (2019) 33 *Journal of Immigration, Asylum and Nationality Law* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314110

consequence of the removal of rights of appeal against the majority of decisions taken by the Home Office. Over the 9 year-period shown in Figure 1, there is almost a 72% decrease in the total number of receipts of immigration appeals received by that Chamber in the First-Tier Tribunal. Therefore, the Government's hesitance to introduce a right of appeal against refusals or wrongful decisions taken under the EU Settlement Scheme should be seen as part of a wider policy of removing immigration administration from the jurisdiction of the Tribunal.

Figure 1 Graph showing the decrease in receipts of appeals to the First-tier Tribunal (Immigration and Asylum Chamber)

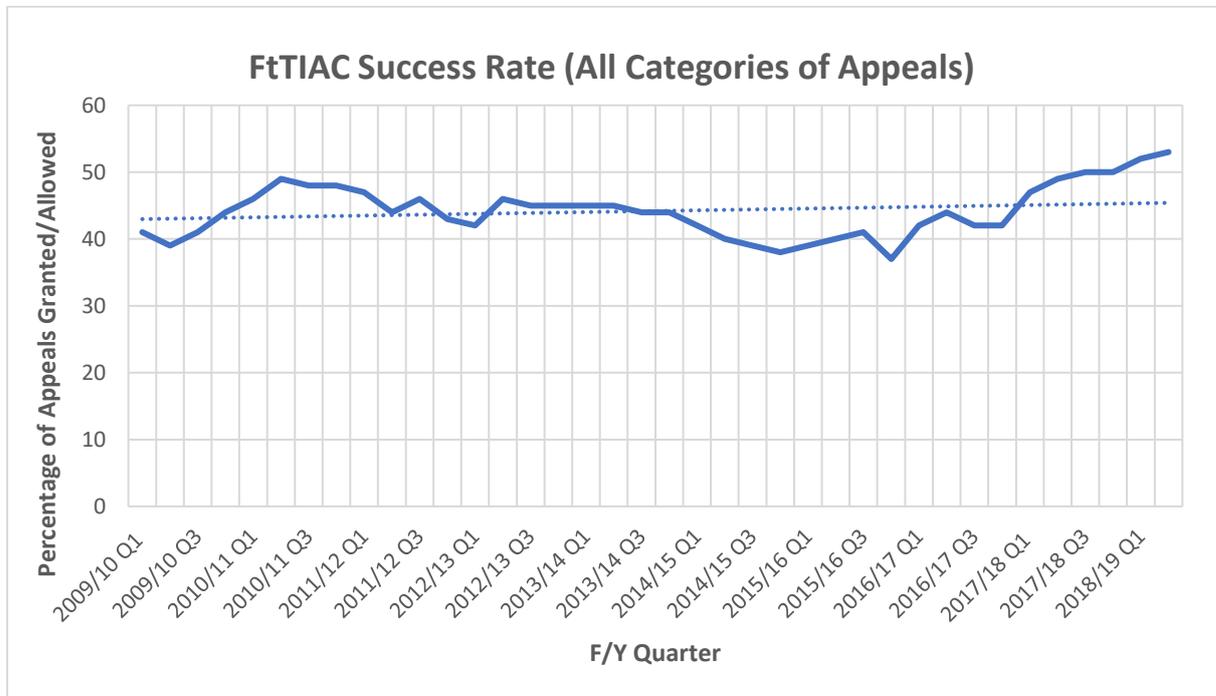


28. Based on the research we have conducted, PLP is advocating for a right to appeal to the Tribunal not only as a matter of principle, but also because of the practical consequences which flow from the outcomes of the different modes of redress. The available evidence suggests that the growing use of administrative review within the context of immigration has resulted in a system where individuals are less likely to succeed in overturning an adverse immigration decision. Before access to the First-tier Tribunal was severely restricted by provisions in the Immigration Act 2014, around 49% of appeals were successful. Therefore, when an applicant receives an adverse decision within the context of immigration, bringing a matter before the First-tier Tribunal means there is a 50:50 chance of having that decision overturned. As figure 2 below shows, in the most recent four financial quarters, the percentage of appeals granted or allowed by the Tribunal has consistently stayed over 50%. 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.²³ Generally, this means there is a significantly greater likelihood of a Home Office immigration decision being overturned on an appeal to the Tribunal than on an application for administrative review.

²³ See findings in Tomlinson and Karemba (above).

Therefore, it is PLP's position that the Bill should be amended to include a right of appeal against decisions being made under the EU Settlement Scheme.

Figure 2 Graph Showing the Outcomes of Appeals Before the FtTIAC



Conclusion

29. In light of the above, the Bill should be amended to ensure that: delegated powers are narrowly tailored; and a right of appeal in relation to the EU settlement scheme is provided. These amendments are constitutionally important. It is essential for Parliamentary democracy and the Rule of Law that the Bill ensures effective Parliamentary oversight and limits on Ministerial powers to effect policy change. Furthermore, to uphold the constitutional right of access to justice it is important that EU settlement scheme applicants can challenge unlawful decision-making by way of a tribunal appeal.