***A gendered EU Settlement Scheme: intersectional oppression of immigrant women in a post-Brexit Britain***[[1]](#footnote-1)

The EU Settlement Scheme (EUSS) is a transitory immigration regime rolled out by the Home Office as part of the measures preparing the UK from its withdrawal from the EU. More can be said about whether the EUSS can truly be hailed an overall “success” several years on from its original introduction. This paper evaluates the supposed “success” of the EUSS by considering two case studies of experiences of vulnerable female immigrants required to apply to the Scheme to remain in the UK after the transition period: those at risk of or facing violence against women and girls (VAWG), and those who are a non-EU family member (NEFM) of an EU citizen. Using theories of intersectionality and vulnerability, this paper outlines how gender and immigration status intersect to make women more vulnerable by virtue of the legal framework of the EUSS, entrenching intersectional oppression faced uniquely by these women.

**Keywords**: Brexit, EU Settlement Scheme, violence against women and girls, non-EU family members, intersectionality, vulnerability.

# **INTRODUCTION**

The UK’s withdrawal from the EU was a long drawn-out process for many reasons, with the unfortunate consequence of adding to significant uncertainty around Brexit’s effect on the lives and livelihoods of EU citizens in the UK after withdrawal. A majority of this group of EU citizens could not vote in the crucial referendum that ultimately decided their fate upon the end of free movement on 1 January 2021. Much early attention was dedicated to their plight via campaigns and subsequent governmental policies aimed at protecting EU citizens and eligible family members from losing rights as a result of Brexit,[[2]](#footnote-2) most notably through the EU Settlement Scheme (EUSS; the Scheme). Attention on this matter continues even beyond the EUSS’s application deadline of 30 June 2021. With this context in mind, this paper seeks to more closely examine a specific group of individuals argued to be at higher risk of greater vulnerability in post-Brexit Britain because of the EUSS’s constitutive immigration framework: immigrant women.[[3]](#footnote-3) Adopting an intersectional analysis to two groups of vulnerable immigrant women – victims of violence against women and girls (VAWG) and non-EU family members (NEFMs) of EU citizens – the paper argues that the application of the EUSS legal framework as established by Appendix EU of the UK’s Immigration Rules is perpetuating unique oppression of these women, at the intersection of their gender and immigration status.

It is acknowledged that there were great strides made to try to secure the rights of EU citizens in the UK after the referendum result was announced. The quick roll out of the EUSS to the public on 30 March 2019 as a fully digital system was a significant task (Home Affairs Committee, 2019), with Kevin Foster, Minister for Future Borders and Immigration describing it as ‘hugely successful’ (Home Office, 2020a). There has been an overwhelming uptake in the number of applicants to the Scheme lasting even past its official deadline (Home Office, 2021a),[[4]](#footnote-4) and relatively high percentage of successful applications. However, what is being ignored, it seems, are the smaller number of unsuccessful applications which increase as the numbers of applications submitted also increase (Benn, 2020).[[5]](#footnote-5) This paper shed lights on this small percentage, which constitutes hundreds of thousands of individuals, arguing that it is women who are disproportionately represented in this group because of the intersectional vulnerabilities of victims of VAWG and the gendered nature of the category of NEFMs in EU law.

Whilst there is some data available on EUSS applicants, this paper is not a thorough empirical analysis of the data. Publicly available Home Office data (2021a) is limited due to the publication of only narrow categories since the Scheme was rolled out. What data could otherwise prove more concretely and explicitly the existence of intersectional vulnerability of certain groups of women is not easily or freely available.[[6]](#footnote-6) This paper’s intention, therefore, is rather to fill an urgent gap in the research agenda pertaining to vulnerable migrant women, who have fallen within the cracks of new EUSS system. The paper’s originality in applying an intersectional lens to the situation allows for a holistic review of the existing literature. By extrapolating from what data exists, the claim can be made that migrant women without a secure immigration status are comparatively more disadvantaged than the general population by the new post-Brexit immigration regime. Turning a blind eye to the vulnerable immigrant women who fall outside the legal protection afforded under the EUSS significantly undermines the government’s claim that the EUSS is ‘operating effectively’ (Home Office, 2020b: 3). Considering intersectionality helps to explain why Brexit has made women at the intersection of their gender and immigration status uniquely more vulnerable in the context of the EUSS.

The intersection of gender (being a VAWG and/or NEFM) and immigration status (in a post-Brexit world) has led to the unique oppression of these women as immigrant women under the legal framework of the EUSS. Given how much attention has been given to streamlining the EUSS process (Yong, 2018), the barriers faced by these immigrant women serves in particular to demonstrate how it is the law itself that exacerbates their intersectional vulnerabilities. Applying Crenshaw’s theory of intersectionality (1989) and Fineman’s theory of vulnerability (2008), the paper argues that the EUSS ignores the vulnerabilities of immigrant women, which have shaped their (intersectional) experiences of its legal framework. This has further embedded societal inequalities, where the law makes women who are already vulnerable due to their gender and immigration status even more vulnerable. The paper outlines how power relations – in this case, between the state under its immigration law regime, and its subjects, those who seek rights to remain after Brexit – play out in an immigrant woman’s experience of the law in a post-Brexit Britain, especially outside the scope of the EU’s free movement framework.[[7]](#footnote-7) The government continuously claiming that the EUSS is a success without reference to the large number of potentially eligible women who will have a precarious immigration status post-Brexit is a troubling state of affairs, due to it perpetuating further intersectional oppression under the law.

This paper is structured as follows. First, it considers where the EUSS has failed to consider immigrant women in a post-Brexit Britain who are at the mercy of the intersection of their gender and immigration status. It briefly outlines the EUSS’s process and criteria, and how these legal processes contribute to exacerbating the vulnerability of these immigrant women who are liable to falling through the cracks of a newly constitutive system. It also introduces the application of theories of intersectionality and vulnerability to emphasise how power relations affect immigrant women’s experiences of the EUSS. Second, the case studies of VAWG and NEFMs are considered in detail to further demonstrate how intersectional oppression plays out under the EUSS. It first argues that a precarious immigration status heightens victims of violence against women and girls’ vulnerability by referring to established literature on the failure of the law to consider intersectional qualities of victims of VAWG, applied to the EUSS and post-Brexit context. It then considers non-EU family members of EU citizens who normally would not have rights by virtue of their third country nationalities, but who derive rights as carers of children and other dependents, and are thus more likely to be women, which limited data shows. Women in this category are uniquely subject to less favourable conditions under the EUSS’s processes. Finally, the paper concludes, arguing that through the lenses of theories of intersectionality and vulnerability, the case studies elucidate that the EUSS process as it applies to victims of VAWGs and NEFMs is perpetuating intersectional oppression because of how the legal framework applies.

# **INTERSECTIONAL OPPRESSION OF VULNERABLE WOMEN UNDER THE EU SETTLEMENT SCHEME**

The UK’s withdrawal from the EU presented a unique situation of what was criticised as “limbo” for many EU citizens in the UK and their families who sought to remain legally in a post-Brexit Britain, gender notwithstanding (Remigi, Martin & Sykes, 2017). In order to mitigate the effects of this, the government repeatedly promised to protect the rights of EU citizens and their families previously enjoyed under EU citizenship in Article 20 TFEU (May, 2017). As one of the negotiating priorities of the EU, it was crucial that the UK government fulfil their promise with haste, hence the roll out of the EUSS after several private beta pilot stages. The Scheme opened to the public on 30 March 2019 offering two legal statuses: pre-settled status (for those who have not yet resided for five years, the qualifying period for permanent residency) and settled status (to replace the status of permanent residency deriving from EU law).[[8]](#footnote-8) In order to obtain one of the two statuses, three criteria have to be satisfied – proof of identity, eligibility and suitability.[[9]](#footnote-9) Identity requires proof of ID and biometrics, eligibility speaks to one’s residency in the UK as an EU citizen (or their family member) and suitability ensures applicants are of good character. The Home Office branded these criteria as ‘three simple stages’ (Home Office, 2018: 2). This paper challenges this assertion, arguing that for many immigrant women previously protected by the EU legal framework, it is actually far from simple, due to the new post-Brexit EUSS legal framework and application of the criteria themselves.

A “vulnerability cohort” was identified early on by the Home Office to take part in private beta testing stage 2 for the EUSS several months before the Scheme opened to the public. This cohort included vulnerable immigrant women.[[10]](#footnote-10) However, very little of the legal framework was changed after the vulnerability cohort’s representatives were consulted and expressed reservations (Home Affairs Committee 2019: 25ff). This can be seen as early indications of the flaws in the EUSS system in terms of its legal design. From this, it can be argued that the source of the inequality faced by vulnerable groups, like immigrant women, actually stems from the law itself – in this case, the interpretation of Appendix EU of the Immigration Rules legally translated to procedures under the EUSS regime. It becomes particularly evident how Appendix EU oppresses women at the intersection of their gender and immigration status when analysing how the EUSS process operates in reality for the two groups of women at the heart of this paper: victims of violence against women and girls and non-EU family members of EU citizens.

Appendix EU of the Immigration Rules applies to all individuals previously eligible under EU law who want to remain in the UK legally after the transition period, gender notwithstanding. This paper argues that the Immigration Rules as they apply to VAWGs and certain NEFMs actually have the effect of uniquely oppressing immigrant women because of their intersecting gender and immigrant status. Some data demonstrates situations where this is true (Barnard and Costello, 2021), and analysing the situation from an intersectional lens highlights how oppression plays out. Appendix EU operates through the constitutive system of the EUSS, which is by and large an online application system, save for some exceptional situations which require a paper application. One of the primary underlying reasons for arguing that the EUSS has a disproportionate effect on women is that many of the most vulnerable are forced to apply by paper.[[11]](#footnote-11) On this basis, the critique of the EUSS is the claim that having a general legal entitlement to rights as outlined above is not enough to guarantee protection, because being a VAWG and/or NEFM translates into a different experience for these women than that envisaged by the Home Office at the outset that is far from simple. Whilst the UK Government purported to protect EU citizens generally in its roll out of the EUSS, it failed to recognise that women subject to the EUSS are uniquely vulnerable because of intersectionality. Within this context, this paper makes its wider argument about the intersectional effects of the Appendix EU of the Immigration Rules for immigrant women specifically.

1. *Intersectionality*

Intersectionality, pioneered by Kimberlé Crenshaw, is one of the theoretical frameworks applied to this paper (1989). It is the lens within which to examine how the law operates to undermine immigrant women’s experiences as a specific category of its own in the context of a post-Brexit Britain. It is this which sets intersectionality as a theory apart from racism, xenophobia or sexism – all which could be argued to be relevant to immigrant women’s experiences in the UK in a post-Brexit Britain with the loss of the EU framework of rights. Intersectionality is instead used to articulate the interaction, in this case, of xenophobia against immigrants with patriarchal oppression. It is not simply the addition of multiple layers of vulnerability, but rather the specific overall experience of an immigrant woman applying to the EUSS in a post-Brexit Britain, whose oppression is due to their ‘intersecting subordinate identities’ (Carbado, 2013). Gender is a contributing factor, but focus must also be on the problems raised by women who also have a precarious immigration status in the context of the new post-Brexit immigration regime. The risk is otherwise of ignoring another part of the population that is already marginalised due to their gender, now also for their immigration status (Crenshaw, 1989: 152).

Intersectional subordination could be said to never have been the intention of the EUSS at the outset. After all, the Scheme itself is an attempt to achieve formal legal equality by allowing a perceived equal opportunity for all EU citizens and their qualifying families, including non-EU citizens, to apply to remain after Brexit. Problematically, the argument here is that these laws in practice fail to achieve substantive equality and are not solutions to the inequalities faced by EU citizens, created by the UK’s withdrawal from the EU. Crenshaw (1991: 1249) clarifies that ‘[i]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment.’ Nonetheless, looking to its form and substance as a constitutive system, in reality, the EUSS is argued to be exclusionary by its very nature. It operates as part and parcel of the hostile environment policy in domestic UK immigration law (Kirkup and Winnett, 2012), which has at its heart the intention of exclusion (Joppke, 1998). In this vein, it is unsurprising that the EUSS criteria themselves put vulnerable women who are victims of VAWG and/or NEFM at a disadvantage. For this reason, the claim made here is that substantive equality is not achieved in reality with the way the law is applied to these women in particular (Spijkerboer & Van Walsum, 2007: 3). In fact, problematically, formal equality under the EUSS privileges the privileged and fails to address the structural inequalities in society that oppress already vulnerable women who are subordinated because of intersecting characteristics.

This intersectional oppression can be seen in the data, or more importantly, in lack thereof. As mentioned, there is a noticeable data gap for statistics relating to outcomes for female applicants to the EUSS making a thorough empirical analysis extremely difficult. Quarterly statistics published by the Home Office provide a breakdown of applications by UK country, age, nationality and even applications by local authority – but not by gender (Home Office, 2021b). This omission obscures what would be starker evidence that there is indeed a gender disparity in the effective functioning of the EUSS. Moreover, only since June 2020 have paper-based applications been included in published statistics on the EUSS. Paper-based applications, required for three exceptional categories of applicant – those unable to access the online application, those who do not have ID, and derivative rights holders (NEFMs) – is a group disproportionately overrepresented by women. Victims of VAWG are more likely not to have ID or be able to access an online application and NEFMs make up the entire third category. Both victims of VAWG and NEFMs’ late consideration in the published statistics, as well as under the eligibility criteria themselves (Home Office, 2019),[[12]](#footnote-12) exemplifies how an immigrant women’s experiences of the EUSS has been relegated to secondary firstly, by being forced to apply by paper; secondly, through the failure to acknowledge their rights at all early on; and more significant recently and thirdly, through mass aggregation of numbers of paper-based applications into the main dataset of applications.

Exact disaggregated numbers of paper-based vs online applications were fairly elusive until a Freedom of Information (FOI) request by Barnard and Costello (2021). Aside from this, whilst data is available on the number of applications made under the derivative rights route in quarterly statistics, none are now available on the other paper-based application categories, obscuring the numbers of those having to applying to the Scheme through these exceptional routes. More importantly, however, the published available data now also does not provides any indication of the rates of success of a paper-based vs online application. On the website for statistics for June 2020 (the first time paper-based applications were counted), a statement reads:

Revisions have been made to the entire back series of monthly and quarterly figures to account for the 10,000 paper applications made to the EU Settlement Scheme through to 30 June 2020, providing a more comprehensive picture of EUSS applications received. (Home Office, 2020c)

These revisions have had the effect of making a direct comparison impossible now as to whether the paper-based route really is the less advantageous one. The FOI provided an early initial indication, showing that the paper-based route did indeed have a higher rate of rejections, but it is clear that subsuming the numbers of paper-based applications in the overall figures obscures what would have been clearer evidence demonstrating the disproportionate effect on certain vulnerable women applying to the EUSS.

What data is available from the FOI demonstrates a disproportionate effect on women of the refused paper-based applications (Barnard & Costello, 2021). The data is mainly about the NEFM route under the EUSS, and will be discussed in further detail later. A stark 89% of refused applications under the NEFM route were applications made under the *Ruiz Zambrano* line of case law (Home Office, 2021b), which primarily grants rights to non-EU carers of EU children, a subsect of the NEFM category.[[13]](#footnote-13) NEFM applicants are indeed mostly women, and it is the way NEFMs are legally defined that leads to their being a disproportionately high representation of women within its scope.[[14]](#footnote-14) This is but one example of how the intersection of immigrant status and gender are disadvantaging immigrant women purely through application of the Appendix EU of the Immigration Rules. For this reason, this paper has chosen two case studies of immigrant women for further analysis who are notably more likely to have to apply via a paper-based application – victims of VAWG and NEFMs.

Victims of VAWG are an exclusive group of immigrant women in this context, and the analysis here draws on established literature on the legal protection of victims of VAWG who are also immigrants in other jurisdictions as well. The latter case study on NEFMs, as alluded to above, highlights in particular that long embedded gender roles means that the law itself has put more women in this category, thereby disproportionately impacting more immigrant women in a negative way. Kofman (1999) argues that men are more likely to have more secure immigration statuses than women in general because they often have more financial resources, which is then rewarded under the law (Raj and Silverman, 2022; Shutes & Walker, 2018). The available data clarifies this to an extent, given that applying by paper carries a higher risk of an unsuccessful application, thereby demonstrating that these two identified groups will be uniquely impacted by the paper-based route because of the intersection of their gender and immigrant status. It thus becomes clear that the legal framework and process of the EUSS exacerbates an immigrant woman’s vulnerability in what is already a precarious situation due to their inherent and universal vulnerability and intersectional experiences.

1. *Vulnerability*

The recognition of human vulnerability further exposes the disproportionate intersectional effect that the EUSS has on female applicants by appealing to the need for the State to address these concerns. In this case, the State’s governance of immigration post-Brexit is the source of additional unique vulnerability due to intersectionality, an argument made by applying Martha Fineman’s theory that human vulnerability should be considered an inherent and constant universal trait (2008: 8). In this context, an argument can thus be made in the vein of compelling the state to address any disparities arising between individuals and their varying vulnerabilities. Fineman argues that because it is the state that confers various forms of privilege in its institutional framework, such as in the law, it should be responsible for remedying these inequalities. The reality that this paper seeks to highlight is that it instead is the opposite in the context of the EUSS – that the law has exacerbated, rather than eliminated, the unique oppression and vulnerability faced by immigrant women in a post-Brexit Britain.

Immigration status and gender are the two vulnerabilities of relevance here, as it is their interaction which has created the disparities in society that Fineman argues needs state intervention. Disappointingly, in a post-Brexit Britain, victims of VAWG and NEFMs seeking to regularise their immigration statuses do not appear to have their vulnerabilities accounted for as per their experiences of the EUSS. In fact, a significant number have been unsuccessful under the Scheme, in stark contrast with the protection afforded before under the EU framework. As mentioned, this is the opposite of the guarantees of protection Fineman calls for. The situation for victims of VAWG and NEFMs is evidence of the law’s (and hence, the state’s) ignorance of vulnerabilities through the promotion of formal equality over substantive equality. The required awareness of the UK’s withdrawal from the EU itself and the new EUSS, plus a thorough understanding of the procedure before even beginning to try to seek status under the new Scheme adds a unique extra burden on immigrant women.

Furthermore, by consistently arguing that the Scheme is working well because of its less than 10% of unsuccessful applications (Home Office, 2021a), official mainstream channels are undermining the experiences of women who face greater difficulties because of their vulnerabilities at the intersection of their immigrant status and gender. Crenshaw argues that marginalised women mainly occupy spaces that are marginalised themselves, explaining why mainstream messaging (such as the law) do not target them appropriately (Crenshaw, 1991: 1250). This is very relevant to the situation of victims of VAWG as well as NEFMs in light of the messaging around the EUSS for a post-Brexit Britain that promotes it as an easy, straightforward online process that demands very little, which they are largely excluded from. The facilitation of the online application process over the paper applications is another clear example of how vulnerabilities at the intersection of gender and immigration status of these women are being forgotten.[[15]](#footnote-15) The blatant ignorance of the consequences for these immigrant women when evaluating the overall effectiveness of the EUSS regime is such as to further deepen intersectional inequalities and vulnerabilities in immigration law (Fineman, 2010). The EUSS process under Appendix EU of the Immigration Rules, now very much a mainstream process, excludes these vulnerable women in its design.

It is the act of formally making certain individuals eligible under a constitutive system like the EUSS which obfuscates the fact that some of these individuals are vulnerable because they are not guaranteed protection in a post-Brexit Britain should they fail to satisfy the constitutive criteria. This is the situation for all EU citizens, irrespective of gender. Fineman’s vulnerability theory looks to bring such overlooked issues into the mainstream, especially important given Dauvergne’s argument (2007: 495) that ‘[c]itizenship law perfects the exclusionary mechanism of migration law by cloaking it in a discourse of inclusion.’ The EUSS regime itself is the closest equivalent in this case to (EU) citizenship, as its “replacement” in a post-Brexit Britain. Many have highlighted the serious consequences of certain vulnerable groups falling outside the EUSS’s scope leading up to and even beyond the deadline for the EUSS which passed at the end of June 2021. This is by either failing to apply for a multitude of reasons (O’Brien & Welsh, 2021), or applying unsuccessfully. A cliff edge was created by the deadline, and though the consequences associated with the cliff-edge deadline are outside the scope of this paper (O’Brien, 2021), certain of those factors associated with the cliff-edge deadline still impact immigrant women uniquely.

In the past, there was a significant difference between being an EU citizen and a non-EU foreign national in the UK because of the higher level of protection demanded by EU law as to equal treatment of its nationals in host EU Member States under the reading of both Article 20-21 TFEU and Article 18 TFEU. EU citizenship status and the law somewhat relieved what can be considered to be the intersectional pressures, which they are facing now, on immigrant EU citizen women (and their families) in the UK.[[16]](#footnote-16) Without the EU citizenship framework to somewhat level the playing field, being a woman and immigrant in a post-Brexit Britain are factors now interacting to reinforce the vulnerabilities of and structural inequalities against such immigrant women even more. Guruge and Khanlou (2004) explains that ‘production, reproduction and presentation of knowledge within a particular ideological foundation can not only perpetuate existing power relations, inequity and vulnerability, but also result in the further marginalization of racialized women’. Therefore, by failing to recognise the difficult experiences of vulnerable immigrant women who face obstacles when seeking to remain in the UK after the transition period, the EUSS legal framework does exactly what Guruge and Khanlou caution against, also inconsistent with arguments around Fineman’s argument about state acknowledgement of vulnerability.

In doing so, in El-Nany’s words (2020: 24), this ‘is the structure that maintains the racialised apportionment of economic opportunity by deeming some people deserving of legal status and others not.’ It highlights how the law is aggravating vulnerability and potentially deepening inequalities, in this case, for immigrant women. In order to remedy this situation, the intersectional oppression faced by immigrant women must first be detailed to highlight exactly how these women, due to their immigration status and gender, are being uniquely affected by the law. The next sections consider victims of VAWG and NEFMs in greater detail. It draws out how the intersecting characteristics of gender and immigration status that has prejudiced these two groups of women in particular, how data vilifies this argument, and what this says about the intersectional oppression that the EUSS is perpetuating in its legal design.

# **VICTIMS OF VIOLENCE AGAINST WOMAN AND GIRLS (VAWG)**

The issues faced by victims of VAWG are a well-documented global issue that has attracted significant scholarly attention over the years. The focus of this section is that in the Brexit context, the intersectional element of not having a secure immigration status alongside being a victim of VAWG creates a distinct system of oppression. Burman and Chantler (2005: 64) noted long before EU withdrawal that specific concerns of minoritized women had not been addressed adequately by the domestic VAWG policy in the UK. At that point, the Government did not even consider the effects that an insecure immigration status would have on one’s risk of domestic violence, despite scholarship identifying and highlighting that intersectionality heightens vulnerability more (Anitha, 2011). Within this context, the argument is that the EUSS is yet another relevant immigration regime that exacerbates, rather than alleviates, such vulnerabilities for victims of VAWG. It shapes these immigrant women’s experiences of the law in a post-Brexit Britain. This section will clarify more specifically how the EUSS framework operates to make these victims of VAWG more vulnerable.

# *Intersectional vulnerabilities of victims of VAWG*

Crenshaw herself speaks to the intersectional vulnerability for immigrant victims of VAWG in the US in her seminal article where the theory of intersectionality was born (1991: 1246ff). She highlights that it makes a significant difference for a victim of VAWG to have citizenship rather than a precarious immigration status in terms of their vulnerabilities under the law. It can be said that this claim is based on the notion that citizenship is a privilege (Miller, 2000; Marshall, 1950), which is especially evident even when compared to what is deemed as more “secure” immigration statuses. This has become especially true for the immigration regime applicable in a post-Brexit Britain. The kind of framing of domestic citizenship laws sees it as a privilege to remain and not be deported, and ultimately affects the development of subsequent domestic immigration laws like the EUSS.

Subsequent to Crenshaw’s establishment of the theory of intersectionality in the early 90s, there was a burgeoning portfolio of literature in the mid-2000s that addressed the glaring lacuna in the area of domestic violence studies and intersectionality (Erez, Adelman & Gregory, 2009; Burman, Smailes & Chantler, 2004; Menjivar & Salcido, 2002; Sokoloff & Dupont, 2005). Before this, the regulation of domestic violence appeared largely to fail to consider the intersectional elements of women of colour’s experiences of VAWG. Most of the arguments centred around the fact that race and class intersected with gender to deepen inequality, as well as arguing that the law is inadequate in recognising Black women’s intersecting identities as distinct from being Black generally, or being a woman generally. The law itself also played a large contributing factor in exacerbating the experiences of these women because of its inadequate response to tackling VAWG for women of colour and immigrants – which has indeed been the case in the UK (Graca, 2017). We now consider these women who are already vulnerable because of the violence they are subjected, yet also subjected to a new immigration regime that requires positive action through its constitutive system, rather than the declaratory framework they were previously protected under before. Importantly, as Crenshaw (1991) noted, it is distinct from being an immigrant generally, or being a woman (subject to VAWG) generally.

Voolma (2018: 1833) explains why there is a unique experience of VAWG for immigrant women, arguing that it is immigration law which shapes much of the lived experiences of victims subject to VAWG. Problematically, it exacerbates what is already a harrowing experience for some of the most vulnerable of society, as ‘the uncertainty inherent in a temporary status that is conceptually important here—a woman not knowing whether she can stay long-term provides perpetrators of violence with a further tool of abuse: exploiting women’s fears of deportation.’ These immigration-specific fears, on top of their vulnerability to being subject to violence, is the intersectionality that the EUSS fails to consider in its framework. The obstacles faced in the context of the EUSS clearly outline how the government failed to consider and address this intersectional oppression.

# *EUSS-specific obstacles faced by victims of VAWG*

The specific issues facing victims of VAWG under the EUSS can be classified by considering two of its three “simple” criteria for a successful application, namely, proof of ID and eligibility. A failure to satisfy these criteria on the face of it may require victims of VAWG to apply by the paper-based route instead. Firstly, proof of ID.[[17]](#footnote-17) What seems to be a simple criteria is more difficult for a victim of VAWG to prove should they be under control or estranged from an abusive partner, and do not have easy access to their ID (Home Affairs Committee, 2019). Difficulties like this have been well documented since the Scheme opened, as the requirement to scan ID for verification purposes on a mobile app raised issues of digital isolation and exclusion, not just for victims of VAWG (Sumption & Fernández-Reino, 2020: 26). This criteria also demonstrates how divergent the experience of a non-vulnerable individual versus a vulnerable one is, where something as straightforward as proving ID may mean precarity in regards to one’s immigration status in a post-Brexit Britain. Therefore those unable to satisfy the mainstream process (proof of ID), and by definition, in this context, already vulnerable, are thus made even more vulnerable because they are forced to operate outside the mainstream processes (applying by paper). By seeking to simplify the process for the majority, the Scheme actually excludes victims of VAWG.

Secondly, eligibility.[[18]](#footnote-18) EUSS eligibility was formally extend to those who may find themselves in the unfortunate position of having their relationship break down due to domestic violence a year and a half after the Scheme officially opened to the public, in mid-2020. This in itself is significantly later than most of the mainstream (Home Office, 2020d: 8).[[19]](#footnote-19) It is a prime example of where formal equality fails to consider the vulnerabilities of immigrant women. This strand of eligibility for victims of VAWG is exceptional, as family members of EU citizens are generally eligible on the basis of lasting durable relationships,[[20]](#footnote-20) with the overall effect of this being to indirectly pressure immigrant victims of VAWGs to stay with abusive (EU citizen) partners, for fears of losing their link with an EU citizen and subsequently being deported. It is clear that the mere act of extending formal eligibility to victims of VAWG does not always translate to adequate legal protection. Instead, there is a glaring need for immigrant women to be aware of the changing legal situation facing them in a post-Brexit Britain. To help this situation, the specific vulnerability faced in these situations by victims of VAWGs should be recognised under the applicable law, yet this is simply not the case.

It is thus the structure of the law itself and the framework within which it operates and applies that is adding to the disparity and inequality between certain eligible vulnerable women applying to the Scheme. The situation that the EUSS presents is summarised by noting the problem that societies have – in particular, patriarchal ones – who may not explicitly condone VAWG, but the cultural expectations of those societies may actually foster an environment that leads to more domestic violence (Kasturirangan, Krishnan & Riger, 2004: 321). Appendix EU of the Immigration Rules has been created in an environment of wanting to create hostility under the guises of the hostile environment policy that applies indiscriminately to all immigrants in a post-Brexit Britain now. These provisions may not seek on the face of it to support domestic violence. In fact, the UK government could argue that it explicitly outlined an exception for victims of VAWG to the “mainstream” eligibility criteria. However, the reality of the legal framework as it applies – considering the procedure from application to a successful status – actually oppresses immigrant women given it is so difficult to apply by virtue of one’s own status, rather than remaining with an abusive partner for fear of being subject to stricter immigration rules now that the EUSS deadline has passed, and risk deportation (Yong, 2019b).

Overall, it is not disputed that victims of VAWG are in extremely vulnerable positions. More recent feminist literature of the mid-2000s and beyond has highlighted how the law itself has failed to consider that intersectional factors make the experiences of women of colour particularly unique and thus more difficult and complicated in terms of resolution (Erez, Adelman & Gregory, 2009; Burman, Smailes & Chantler, 2004; Menjivar & Salcido, 2002; Sokoloff & Dupont, 2005). Oftentimes it is the way the law applies, or how it fails to account for their intersectional qualities like gender and immigration status, as this analysis highlights. One additional but significant issue is that there are differential rates of success for paper-based applications vs online. The bias is towards favouring an online application over a paper one, yet many immigrant women are doomed to applying by paper almost by default. It is most starkly evident in the category of non-EU family members of EU nationals, to which the paper now turns.

# **NON-EU FAMILY MEMBERS (NEFMS) OF EU NATIONALS**

Before delving into the issues facing NEFMs for those who are women and immigrants in a post-Brexit Britain, it is important to acknowledge that non-EU family members of EU nationals, also known as third country nationals, would not normally fall within the scope of the protection guaranteed under the EU Treaties. EU law does not automatically confer rights to individuals who do not hold EU citizenship status.[[21]](#footnote-21) However, it is the case that in certain situations of dependency, some non-EU nationals do derive rights to remain based on their dependency to eligible rights-bearing EU citizen family members. These individuals, known as NEFMs, derive rights and are protected by virtue of an extension of EU citizenship status’ scope through various case law that will be outlined below. This section seeks to outline the issues faced by NEFMs in the context of the EUSS and argue that the most vulnerable of them are most likely to be women – and also sometimes overlapping as victims of VAWG. Similar to victims of VAWG, this category of individuals are precarious for being entirely reliant on an EU family member, and additionally in this particular case, not being EU citizens themselves. The situation exemplifies the vulnerability of an immigrant in a post-Brexit Britain most starkly. The gendered elements play out in the legal definition of NEFMs and intersect with vulnerabilities associated with having a precarious immigration status. Being required to apply via paper-based application also adds to their oppression.

There is a great deal more data specifically on NEFMs than even on female applicants generally to the EUSS, hence their being a case study in this paper. NEFMs, like victims of VAWG, were an afterthought in terms of being granted official eligibility to the EUSS (Home Office, 2019: 10). This is despite having rights under EU law for some time from five groups of established CJEU case law precedents: 1) *Lounes* for naturalised family members of British citizens,[[22]](#footnote-22) 2) *Surinder Singh* for returning family members of British citizens*,[[23]](#footnote-23)* 3) *Chen* forprimary carers of EU national children,[[24]](#footnote-24)3) *Teixeira* & *Ibrahim* for primary carers of EU national children in education,[[25]](#footnote-25) and 4) *Zambrano* for primary carers of British dependents.[[26]](#footnote-26) NEFMs, unlike victims of VAWG, are not all women and are also not all necessarily classified as “vulnerable” in the same way that victims of VAWG may be. Therefore, of the five categories of NEFMs, this paper focuses on the latter three – *Chen, Teixeira/Ibrahim* and *Zambrano* – as these are the categories mostly made up of carers for EU children and dependents, who are most likely to be women of varying vulnerability.

# *Derivative rights holders – Chen, Teixeira/Ibrahim and Zambrano*

The legal background of the rights derived under EU law to non-EU family members of EU nationals in the three aforementioned cases requires further analysis, as it will help explain the differential intersectional effects of various legal bases for rights under EU law which were transposed into domestic UK immigration law. Now they have been carried forward into the immigration regime applicable in a post-Brexit Britain, their intersectional implications are worth considering. First, in *Chen*, a Chinese national travelled to Northern Ireland to give birth. Her daughter became an Irish citizen by virtue of *jus soli* citizenship rules on the island of Ireland.[[27]](#footnote-27) Mother and child returned to the UK where the child’s father, a Chinese national, worked and resided. The mother sought residency under EU law, and the CJEU held that the third country national mother could derive rights from her EU national child in order to remain to care for her, allowing the baby to remain on EU territory and establishing the category of *Chen* derivative rights holders. The child needed to be ‘exercising Treaty rights’ for this to be effective, meaning that at least one parent had to have sufficient resources and comprehensive health insurance to avoid becoming a burden on the national Member State’s welfare systems.[[28]](#footnote-28) Therefore, though this category benefits non-working mothers who are an EU child’s primary carer and whose fathers can support them financially, it primarily rewards those with sufficient resources. As such, it suggests that a single mother supporting a family on her own is not likely to come within the scope of the *Chen* carer category.

Second, the conditions from the CJEU cases of *Teixeira* and *Ibrahim* are slightly more generous than *Chen*, requiring that a child be in education in the host Member State and their parent to be or have been a worker in order for the NEFM in question to be eligible to derive rights. In both cases, single mothers of EU national children sought housing assistance upon a right of residence in the UK. The CJEU held that the claimants derived rights to remain from their children so they could continue in education in the host State. There is less reliance on economic activity than for *Chen* carersby not asking for proof of sufficient resources, but rather asking that at least one parent have been a worker. In theory, this category should empower vulnerable women in a way that *Chen* does not. However, whilst perhaps single mothers would not have to rely on former partners, the *Teixeira*/*Ibrahim* route still requires there to be some proof of worker status from either parent (whether primary carer or not). This harks back to a requirement of some sort of economic activity. The most vulnerable non-working single mother would thus also find this condition less than straightforward to satisfy

The most difficult category of NEFMs and where the data is starkest in terms of vulnerability under the EUSS is *Zambrano* carers, whose situation was also subject to great interest under EU law because of the wide-ranging effects of this case for the scope of EU citizenship status (Yong, 2019a: 112ff; Nic Shuibhne, 2011; van Eijken & de Vries, 2011). Unlike in *Chen* and *Teixeira/Ibrahim*, there is no reference to required economic activity. A Colombian couple in Belgium sought rights to remain with their young Belgian children after their father ceased working. The CJEU held that they could derive rights to remain from their children because without this, the EU national children would be deprived of the genuine enjoyment of their rights under EU law, namely being forced to the leave the EU with their parents if their parents were not able to stay legally. The CJEU appeared to facilitate family reunification. In the context of Brexit, the *Zambrano* carer category would include the most precarious of individuals applying to the Scheme. It has the widest scope given it is the least restrictive and has the least economically driven conditions for eligibility, especially as compared to *Chen* and *Teixeira*/*Ibrahim*. Within this context, the specific issues faced by female NEFM applicants under the *Chen*, *Teixeira/Ibrahim* but mostly the *Zambrano* route, are the focus of this analysis’s considerations. NEFMs who are also victims of VAWG fall within the *Zambrano* category as well.

Extrapolating from the argument that NEFMs, particularly *Zambrano* carers, may only have their rights protected in principle rather than substantively, the paper goes further to highlight the issue surrounding the fact that more vulnerable women have sought protection under the NEFM category than men (Barnard & Costello, 2020). This is an entirely unsurprising revelation. Derivative rights are mainly reserved to non-EU nationals who provide care as family members who move to live with the qualifying British citizen. Carers are more often women both formally in the labour market and informally in the family home, and the male labour bias means that it is men who are the qualifying EU or British citizens that NEFMs rely on when seeking to secure their rights (Kofman, 1999). The high prevalence of single motherhood (versus single fatherhood) and victims of VAWG – both gender specific vulnerabilities – also explains why Barnard and Costello’s FOI demonstrated that the NEFM category disproportionately constituted women. The legal bases of the three aforementioned cases are thus entirely grounded either in proving some form of economic activity, having sufficient resources or being entirely reliant on the status of another individuals. Therefore, the more difficult NEFM derivative rights categories – namely, *Chen*, *Teixeira*/*Ibrahim* and *Zambrano* – will include more vulnerable women than the other routes by design under the EUSS. However, it is *Zambrano* carers that face the most difficulties, and thus will be considered in more detail.

# *EUSS-specific problems faced by* Zambrano *carers*

Whilst there are no published statistics on EUSS applications by gender, other stark statistics illuminate the inequality faced by NEFMs which support the argument that the EUSS has failed to consider intersectional issues faced by the vulnerable immigrant women seeking regularised status in a post-Brexit Britain. Barnard and Costello’s FOI (2020) highlights the disproportionately high numbers of NEFMs who are unsuccessful under the EUSS.This is largely centred around the fact that NEFMs are not able to apply to the EUSS online, and must submit a paper-based application.[[29]](#footnote-29) In September 2020, these paper-based applications made up approximately only 0.2% of the total and just under 3% of all non-EU national applicants (Home Office, 2021d).[[30]](#footnote-30) There has been much emphasis on online applications from the start as they are supposedly meant to be ‘as easy to use as setting up an online account at LK Bennett’ (Home Affairs Committee, 2019: 33). The lack of information now on the Home Office’s website of even the numbers of paper-based application obscures what is a dismal situation for them, but more importantly, for *Zambrano* carers, given they make up a staggering 89% of refusals in the NEFM category (Home Office, 2021b). The high refusal rates for what is clearly a more complicated avenue for rights protection suggests that those in the situation of being an NEFM are at a disadvantage compared to the eligible mainstream EU citizens. It is evident that the derivative rights route is failing to protect the most vulnerable of society.

Looking more closely at the very poor rate of success for NEFM paper-based applications and more so for *Zambrano* carers uncovers the exact nuances in the EUSS process. They severely undermine the claim that the EUSS is simple and straightforward. Clearly, it is not for the most vulnerable of society in the context of the EUSS, who, as outlined above, are often women. The category of *Zambrano* carer lends itself particularly to including a disproportionately high number of women, especially vulnerable ones. Anecdotal evidence suggests that it mainly consists of non-EU national victims of VAWG with EU national children seeking to flee their abusive British or EU partner (McKinney, 2020). As mentioned above, victims of VAWG are already vulnerable whether or not they are EU citizens or NEFMs. The EUSS’s gendered nature is also evident in the design of the *Zambrano* carer conditions. All three routes mentioned are about family reunification rights deriving from young dependents, but the *Chen* and *Teixeira*/*Ibrahim* categories are so heavily based proving on economic activity and self-sufficiency that it remains that an NEFM without financial means would have no choice but to apply to the Scheme through the *Zambrano* route. Problematically, delving deeper into the *Zambrano* derivative rights route uncovers even more obstacles for those seeking rights to remain in a post-Brexit Britain than it first appeared and also an interim explanation for the high refusal rates.

There were various routes which a *Zambrano* carer could take in order to guarantee their right to remain in the UK before 31 December 2020, because the category consists of mainly non-EU nationals who could have had rights under UK domestic law, (pre-Brexit) applicable EU law, or now, post-Brexit “retained” EU law. More specifically, one route is solely based on UK immigration law,[[31]](#footnote-31) the other was based on enforcement of the now repealed Immigration (European Economic Area) Regulations 2016 (hereafter, EEA Regulations 2016)[[32]](#footnote-32) and the final route is through the EUSS. Confusingly, any individual with rights based on the EEA Regulations 2016 (rather than UK immigration law) would have had to apply under the EUSS to be able to remain in a post-Brexit Britain as the Regulations were repealed after 1 January 2021. The domestic UK immigration route based on Appendix FM of the Immigration Rules remained valid,[[33]](#footnote-33) but before 1 January 2021, Appendix FM would have been the least attractive route on the basis that it entails fees of upwards of £1033. In contrast, being protected under the Regulations was a right guaranteed by EU law and thus more easily satisfied. The repeal of the EEA Regulations 2016 as a result of Brexit has clearly affected many more applicants than those under the still existing Appendix FM route. However, it was not so straightforward to apply to the EEA Regulations 2016’s replacement regime, the EUSS, vindicating the argument of a drastic loss of protection of EU citizens’ rights in a post-Brexit Britain and even more so, a disproportionate effect on women given that NEFMs are more likely to be female.

Guidance on eligibility for the EUSS route via derivative rights has only been available since May 2019 (Home Office, 2019), and was based on required exhaustion of the other two options of leave to remain in the UK. Under ‘Annex 1 – Definitions’ of Appendix EU, the definition of *Zambrano* carers as interpreted by the Home Office meant they were unable to apply under the EUSS if they could get other leave to remain, namely, under Appendix FM for at least £1033.[[34]](#footnote-34) This created significant extra obstacles for NEFMs seeking to remain in a post-Brexit Britain and is likely to be the explanation for the high refusal rate for *Zambrano* carers as reflected in the quarterly statistics. Finally, in the face of such injustice, in *Akinsanya*, the High Court held that the Home Office’s reading of Annex 1 was unlawful, namely that claimants had to go through Appendix FM before the EUSS.[[35]](#footnote-35)However, the case was decided just three weeks before the EUSS deadline, and has yet to trigger any formal amendments to the Home Office caseworker guidance, nor of Annex 1, being due before the Court of Appeal. Whilst no more decisions on *Zambrano* carers will be made, refusals or otherwise, what appeared to be a positive step when *Zambrano* carers were originally granted eligibility under the EUSS is now undermined by the realities of applying successfully. Even the declaration of unlawfulness of Annex 1’s definition of a *Zambrano* carer is cold comfort until the Court of Appeal hands down their case.

It is thus only by outlining the full process and the data on the NEFM routes that it becomes evident how the EUSS rules operate to the exclusion of vulnerable women who are seeking to remain in the UK in a post-Brexit Britain. Despite claiming to want to protect the rights of EU citizens seeking legal residency in the UK after the transition period, the design of the government’s EUSS is such that it clearly entails significant procedural difficulties for NEFMs because of its design, with interpretation of the applicable Immigration Rules declared unlawful as in *Akinsanya*.Vulnerable women are thus most likely to be oppressed by the legal framework of the Scheme because of the way NEFMs have been defined in the law, as well as relegated to applying by paper, first overcoming legal obstacles, then applying by the less successful and more cumbersome route. It is a perfect storm of difficulties that are a function of their intersection of gender and immigrant status, exemplifying the heightened vulnerability that being an immigrant woman in a post-Brexit Britain brings.

# **CONCLUSION**

This paper outlined how and why it considers that the transitory regime of protection for EU citizens and their eligible family members of the EU Settlement Scheme entrenches intersectional oppression of women under the law, and how this undermines the mainstream messaging about the Scheme being a success. Adopting a framework underpinned by the theory of intersectionality and theory of vulnerability, it considered two case studies of vulnerable women within the context of the EUSS – victims of violence against women and girls, who are exclusively women, and non-EU family members of EU citizens, of whom the most vulnerable are most likely to be women. In this way, it was possible to highlight specific examples of where Appendix EU of the Immigration Rules as expressed through the EUSS, actually by its design, applicable criteria and application process, disproportionately burden more women in a post-Brexit Britain. From an intersectional perspective, being in a vulnerable position because of one’s gender – such as being a victim of VAWG, or a NEFM carer of an EU citizen – is made worse when having to additionally be aware of, apply to and satisfy the criteria for the new constitutive system of the EUSS because of a referendum they did not vote in. This situation of disparity due to one’s vulnerability has been created by the state, and must be addressed by it.

Intersectional and vulnerability elements highlight how being a both woman and immigrant subject to Appendix EU of the Immigration Rules is more oppressive for immigrant women because of how the legal process specifically affects them. Firstly, victims of VAWG, by their very definition, are vulnerable, and formal extension of eligibility to these women has not translated to their protection, or substantive equality, but actually indirectly acts to entrench them in an abusive situation. It is clear that vulnerable immigrant women’s intersectional needs have been overlooked with the simple fact that they must prove ID or have to put in a (paper) application to the Scheme. Secondly, an NEFM is in a more complicated situation as a non-EU national that has to apply to the EUSS based narrow eligibility criteria and a paper-based application, yet affects more women because of the legal definition of categories of NEFMs, especially *Ruiz Zambrano* carers of EU dependents, sometimes even victims of VAWG as well. In this manner, they are disadvantaged as compared to both EU citizens applying to the Scheme and as well as male NEFMs. This puts these immigrant women firmly outside the mainstream, a situation the law has failed to remedy, and has instead exacerbated. The paper considered it most appropriate to analyse the specific experiences of the two case studies in order to highlight how both groups may experience the EUSS, thereby bringing to attention how the EUSS process itself is adding to the vulnerability of these parties, rather than eliminating it. Whilst a majority of applicants are successful, those who are unsuccessful are the most vulnerable of society, and often women.

**References**

Anitha S (2011) Legislating Gender Inequalities: The Nature and Patterns of Domestic Violence Experienced by South Asian Women With Insecure Immigration Status in the United Kingdom. Violence Against Women 17(10): 1260.

Barnard C and Costello F (2021) EUSS: paper applications to a digital scheme. UK in a Changing Europe. Available at: https://ukandeu.ac.uk/euss-paper-applications-to-a-digital-scheme/ (accessed 11 June 2021).

Benn C (2020) EU Settlement Scheme Refusals and Other Outcomes: What does it mean? Seraphus. Available at: https://www.seraphus.co.uk/news/files/9236b9099a570fc8fdb79d29398e082e-24.php (accessed 1 November 2021).

Burman E and Chantler K (2005) Domestic violence and minoritisation: Legal and policy barriers facing minoritized women leaving violent relationships. International Journal of Law and Psychiatry 28(1): 59-74.

Burman E, Smailes SL and Chantler K (2004) ‘Culture’ as a barrier to service provision and delivery: domestic violence services for minoritized women. Critical Social Policy 24(3): 332-357.

Carbado DW (2013) Colorblind Intersectionality. Signs: Journal of Women in Culture and Society 38(4): 811-845.

Crenshaw K (1989) Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. University of Chicago Legal Forum. 1989: 139.

Crenshaw K (1991) Mapping the margins: Intersectionality, identity politics, and violence against women of color. Stan. L. Rev. 43(6): 1241.

Dauvergne C (2007) Citizenship with a Vengeance. Theoretical inquiries in law 8(2): 489-508.

El-Enany N (2020) (B)ordering Britain: Law, Race and Empire. Manchester: Manchester University Press.

Erez E, Adelman M and Gregory C (2009) Intersections of immigration and domestic violence: Voices of battered immigrant women. Feminist criminology 4(1): 32-56.

Fineman MA (2008) The vulnerable subject: Anchoring equality in the human condition. Yale Journal of Law & Feminism 20(1): 8.

Fineman MA (2010) The vulnerable subject and the responsive state. Emory Law Journal 60(2): 251.

Graca S (2017) Domestic violence policy and legislation in the UK: a discussion of immigrant women’s vulnerabilities. European journal of current legal issues 22(1): 1.

Guruge S and Khanlou N (2004) Intersectionalities of influence: researching the health of immigrant and refugee women. Canadian Journal of Nursing Research 36(3): 32-47.

Home Affairs Committee (2019) EU Settlement Scheme. Report for House of Commons, HC 2017-19, 1945-I, 14 May.

Home Office (2018) EU Settlement Scheme: Statement of Intent. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/718237/EU\_Settlement\_Scheme\_SOI\_June\_2018.pdf (accessed 14 December 2020).

Home Office (2019) EU Settlement Scheme: derivative right to reside (*Chen and Ibrahim*/*Teixeira* cases). Report, 18 November.

Home Office (2020) More than 4 million applications to the EU Settlement Scheme. Available at: https://www.gov.uk/government/news/more-than-4-million-applications-to-the-eu-settlement-scheme (accessed 8 December 2020).

Home Office (2020b), The UK's Points-Based Immigration System: Policy Statement. Report for HM Government, UK. CP 220, February.

Home Office (2020c) EU Settlement Scheme quarterly statistics, June 2020. Available at: https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-june-2021 (accessed 15 October 2021).

Home Office (2020d) Statement of changes in Immigration Rules. Report for HM Government, UK. CP 232, May.

Home Office (2020e) Home Office immigration and nationality fees: 1 December 2020. Available at: https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-1-december-2020 (accessed 14 December 2020).

Home Office (2021a) EU Settlement Scheme statistics. Available at: https://www.gov.uk/government/collections/eu-settlement-scheme-statistics (accessed 14 October 2021).

Home Office (2021b) EU Settlement Scheme quarterly statistics, June 2021. Available at: https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-june-2021> accessed 14 October 2021.

Home Office (2021c) Apply to the EU Settlement Scheme by post. Available at: https://www.gov.uk/government/publications/apply-to-the-eu-settlement-scheme-by-post-or-email (accessed 15 October 2021).

Home Office (2021d) EU Settlement Scheme quarterly statistics, March 2021 Available at: https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-march-2021 (accessed 29 July 2021).

Joppke C (1998) Why liberal states accept unwanted immigration. World Politics 50(2): 266-293.

Kasturirangan A, Krishnan S and Riger S (2004) The impact of culture and minority status on women’s experience of domestic violence. Trauma, Violence, & Abuse 5(4): 318-332.

Kirkup J and Winnett R (2012) Theresa May interview: 'We’re going to give illegal migrants a really hostile reception’. The Telegraph, 25 May.

Kofman E (1999) Female ‘birds of passage’ a decade later: Gender and Immigration in the European Union. International migration review 33(2): 269-299.

Marshall TH (1950) Citizenship and Social Class, and other essays. Cambridge: Cambridge University Press.

May T (2017) The government's negotiating objectives for exiting the EU: PM speech Available at: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (accessed 8 December 2020).

McKinney C (27 August 2020) EU Settlement Scheme rejects majority of Zambrano carers. Free Movement. Available at: https://www.freemovement.org.uk/eu-settlement-scheme-rejects-majority-of-zambrano-carers/ (accessed 14 December 2020).

Menjívar C and Salcido O (2002) Immigrant women and domestic violence: Common experiences in different countries. Gender & Society 16(6): 898-920.

Miller D (2000) Citizenship and National Identity. Cambridge: Polity Press.

Miller Westoby N (2021) Unpaid care work and gender equality in EU Law: Evaluating EU Social Policy and EU Free Movement of Persons Law. PhD Thesis, University of Glasgow, UK.

Nic Shuibhne N (2011) Seven Questions for Seven Paragraphs. European Law Review 36(2): 161.

O’Brien C (2021) Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit. Common Market Law Review 58(2): 431.

O’Brien C and Welsh A (2021) The Status of EU Nationals: Emergency Measures Needed. EU Rights & Brexit Hub. Available at: https://www.eurightshub.york.ac.uk/publications (accessed 27 May 2021).

Raj A and Silverman J (2002) The roles of culture, context, and legal immigrant status on intimate partner violence. Violence Against Women 8(3): 367-398.

Remigi E, Martin V and Sykes T (2017) In Limbo: Brexit testimonies from EU citizens in the UK. Milton Keynes: Byline Books.

Shutes I and Walker S (2018) Gender and free movement: EU migrant women’s access to residence and social rights in the UK. Journal of Ethnic and Migration Studies 44(1): 137-153.

Smismans S (2019) Ring-fencing Citizens’ Rights in the Brexit Negotiations: Legal Framework and Political Dynamics. Report for DCU Brexit Institute. Working Paper 1-2019, 28 January.

Sokoloff NJ and Dupont I (2005) Domestic violence at the intersections of race, class, and gender: Challenges and contributions to understanding violence against marginalized women in diverse communities. Violence Against Women 11(1): 38-64.

Spijkerboer T and Van Walsum S (2007) Women and Immigration Law: New Variations on Classical Feminist Themes. London: Routledge.

Sumption M and Fernández-Reino M (2020) Unsettled Status - 2020: Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit? Report for Migration Observatory, 24 September.

van Eijken H and de Vries S (2011) A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano. European Law Review 36(5): 704.

Voolma H (2018) “I Must Be Silent Because of Residency”: Barriers to Escaping Domestic Violence in the Context of Insecure Immigration Status in England and Sweden. Violence Against Women 24(15): 1830-1850.

Yong A (2018) EU citizens: what settled status after Brexit really means – a legal expert explains. The Conversation. Available at: https://theconversation.com/eu-citizens-what-settled-status-after-brexit-really-means-a-legal-expert-explains-97810 (accessed 6 August 2018).

Yong A (2019a) Human rights protection as justice in post-Brexit Britain: a case study of deportation. In: Ahmed T and Fahey E (eds) On Brexit: Law, Justices and Injustices. Cheltenham: Edward Elgar.

Yong A (2019b) The Rise and Decline of Fundamental Rights in EU Citizenship. Oxford: Hart Publishing.

1. This paper aims to state the law as of 1 November 2021. All errors are the author’s own. [↑](#footnote-ref-1)
2. In this paper, EU citizens broadly refers to EEA nationals as well as the eligible family members of EU citizens who are not always EU or EEA nationals themselves. [↑](#footnote-ref-2)
3. The term ‘post-Brexit’ refers in this case broadly to the time period after the end of the EU Settlement Scheme’s grace period for applicants, that is after 30 June 2021. In addition, constitutive systems are distinguished from declaratory systems in that they require, in the EUSS’ case, a successful application. Declaratory systems in this context refers to EU citizens previously enjoying protection simply by virtue of their EU citizenship status under Article 20 TFEU. See for the arguments weighing up both systems, Smismans (2019). [↑](#footnote-ref-3)
4. The number of applicants as it stands is almost double the number originally estimated for how many EU citizens were in the UK, just over 6 million. See Home Office (2021a) which includes repeat applications and most recent count of these from 30 June 2021 show that they make up about 8% of total applications. [↑](#footnote-ref-4)
5. The catch-all provision of “unsuccessful applications” includes the Home Office categories of refused, withdrawn or void and invalid applications. For explanation of how these categories are defined, see Benn (2020). For the purposes of this paper, anything that is pre-settled or settled status counts as “successful” though it is acknowledged that this is more nuanced than it appears in this paper, as pre-settled status is far inferior to settled status. This is outside the scope of discussion of this paper, but see *CG* (C-709/20) EU:C:2021:602. [↑](#footnote-ref-5)
6. The exception is a freedom of information request made in June 2021 by Barnard & Costello (2021), a source referred to later in this paper. [↑](#footnote-ref-6)
7. There is an argument to be made that the EU’s free movement rules themselves entrench certain gender norms, especially of the family and worker in its treatment of caring responsibilities. This specific argument is outside the scope of this paper, see Miller Westoby (2021). [↑](#footnote-ref-7)
8. See Article 16 of Council Directive on 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC 93/96/EEC [2004] OJ L158/77. [↑](#footnote-ref-8)
9. Appendix EU, Immigration Rules, EU9. [↑](#footnote-ref-9)
10. Rights of Women, a charity supporting the legal rights of vulnerable women, were chosen as one of seven charities invited to participate in private beta testing stage 2 highlighting that the Home Office recognised women’s vulnerability. They were also one of 72 organisations across the UK funded to provide further support for applicants to the EUSS originally published in May 2019, a total of £17 million over two years. [↑](#footnote-ref-10)
11. Paper-based applications are required for those who cannot easily satisfy the three main criteria – those who are unable to access the online application, those who do not have ID and those who have derive rights based on a dependency on an EU citizen, i.e. NEFMs. [↑](#footnote-ref-11)
12. It states ‘The scheme makes separate provision for those with a derivative right to reside based on the CJEU judgment in Zambrano. From 1 May 2019, a ‘person with a Zambrano right to reside’ has been able to apply under the scheme.’ [↑](#footnote-ref-12)
13. *Ruiz Zambrano* (C-34/09) EU:C:2011:124. [↑](#footnote-ref-13)
14. The FOI also shows there is a racial element to the data with Nigerians and Pakistanis making up the top two nationalities of individuals applying to the EUSS under the paper-based route, which is outside the scope of consideration for this paper though. [↑](#footnote-ref-14)
15. Paper applications forms were only freely available to download online two weeks before the application deadline of 30 June 2021, before that, they had to be requested by phone. Now that the deadline for the EUSS has passed, anyone who is submitting late for a valid reason can no longer email the form to Home Office, and must instead post their applications and before doing so, obtain approval from the EU Settlement Resolution Centre that they have been allowed to do this. See Home Office (2021c). [↑](#footnote-ref-15)
16. This is not to say that the EU citizenship framework was the panacea to all problems. In fact, it has been criticised for its narrow scope and gendered nature, see Shutes and Walker (2018). [↑](#footnote-ref-16)
17. Appendix EU9, Immigration Rules. [↑](#footnote-ref-17)
18. Appendix EU11ff, Immigration Rules. [↑](#footnote-ref-18)
19. Also, since the deadline passed at the end of June 2021, the Home Office website has been changed to reflect “reasonable grounds” for missing the deadline, which also includes those in abusive or controlling relationships. [↑](#footnote-ref-19)
20. Appendix EU11, condition 7, Appendix EU12, condition 4, Immigration Rules. See also on derivative rights of NEFMs later in this paper. [↑](#footnote-ref-20)
21. *Lounes* (C-165/16) EU:C:2017:862; *KA and Others* (C-82/16) EU:C:2018:308; *RH* (C-836/18) EU:C:2020:119. [↑](#footnote-ref-21)
22. *Lounes* (C-165/16) EU:C:2017:862. [↑](#footnote-ref-22)
23. *Singh* (C-370/90) EU:C:1992:296. [↑](#footnote-ref-23)
24. *Zhu and Chen* (C-200/02) EU:C:2004:639; Regulation 16(2), Immigration (European Economic Area) Regulations 2016. [↑](#footnote-ref-24)
25. *Teixeira* (C-480/08) EU:C:2010:83; *Ibrahim* (C-310/08) EU:C:2010:80; Regulation 16(3), 16(4) Immigration (EEA) Regulations 2016. [↑](#footnote-ref-25)
26. *Ruiz Zambrano* (C-34/09) EU:C:2011:124; Regulation 16(5) Immigration (EEA) Regulations 2016. Whilst it is understood that the claimant’s full untruncated surname is *Ruiz Zambrano*, the Home Office has referred to this category of individuals as simply “*Zambrano* rightsholders” which will be the term this paper adopts. [↑](#footnote-ref-26)
27. *Jus soli* citizenship is granted to all those born on the territory of the State in question. Therefore in this case, being born on the island of Ireland was enough to confer Irish citizenship onto the baby. [↑](#footnote-ref-27)
28. Art 7(2), Directive 2004/38; *Baumbast* (C-413/99) EU:C:2002:493. [↑](#footnote-ref-28)
29. Only recently was this process made slightly easier, previously those requiring a form had to call the EU Settlement Scheme hotline to ask one to be posted to them, and now this request can be made online. [↑](#footnote-ref-29)
30. This author noted that there were 10,130 paper-based applications as of March 2021 out of just over 5 million in total to the EUSS, with 340,650 of these from non-EU nationals; see Home Office (2021b). [↑](#footnote-ref-30)
31. Under Appendix FM, Immigration Rules, as a parent of a dependent child. [↑](#footnote-ref-31)
32. Regulation 16(5) Immigration (EEA) Regulations 2016. [↑](#footnote-ref-32)
33. Applications made under Appendix FM of the Immigration Rules is subject to the fee under “Leave to remain – Other” of £1033, see Home Office (2020e). [↑](#footnote-ref-33)
34. Under ‘person with a Zambrano right to reside’. See Home Office (2020e). [↑](#footnote-ref-34)
35. *R (Akinsanya) v Secretary of State for the Home Department* [2021] EWHC 1535 (Admin). [↑](#footnote-ref-35)