This report is only concerned with the compatibility or otherwise of the legislation with Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement. It does not consider the merits more generally of the policy contained in the legislation and does not consider the lawfulness of the legislation beyond its compatibility with the Agreements.

Legislation Monitoring Report	
Title	Border Security, Asylum and Immigration Bill – Clause 42
Date of Report	3 June 2025
Date Legislation in force	2 months after the Act receives Royal Assent
Relevant Withdrawal Agreement/EEA EFTA Separation Agreement Right(s)	Residence
What does the legislation do?	The Explanatory Notes to the Border Security, Asylum and Immigration Bill ("the Bill") provide that the purpose of the Bill is *"to improve UK border security and strengthen the asylum and immigration system by creating a framework of new and enhanced powers and offences that, when taken together, reinforce, strengthen and connect*

	capabilities across the relevant government and law enforcement partners which make up the UK's border security, asylum and immigration systems." This Report is only concerned with clause 42 of the Bill, which was introduced by way of Government amendment New Clause 31 and was agreed at Commons Committee stage on 13 March 2025. **Why is clause 42 necessary?** The IMA has been raising concerns with the UK Government for a long time that someone with rights under the Withdrawal Agreement/EEA EFTA Separation Agreement ("the Agreements") may be asked to prove that they were living lawfully in the UK at the end of the Brexit transition period (31 December 2020). "**Living lawfully**" means you were exercising your rights under EU free movement law – for example, by working, being self-employed, studying or being self-sufficient. The IMA considers that it is unlawful to require citizens who were meeting EU free movement rules, to re-prove that they were living lawfully in the UK as of 31 December 2020. The Agreements mean that EUSS status should be sufficient to demonstrate this for those in scope of them. The IMA is also concerned that, as time goes by, it may become more difficult for citizens to find the relevant evidence, such as payslips to prove that this was the case. This would risk citizens not being able to prove and access their rights under the Agreements.

	Because the UK Government decided not to ask EUSS applicants to show that they had been living in the UK lawfully at the end of the Brexit transition period, there is no way of knowing who was living in the UK lawfully then and who was not. The UK Government had provided assurances, both to the IMA and publicly, that their policy position was to treat all EU and EEA EFTA citizens, and their family members, with EUSS status as though they have rights under the Agreements, and to begin with there were no issues. Court cases like *R (IMA)* and *AT* changed this. The case of *AT* (which was concerned with who the Charter of Fundamental Rights of the European Union ("the Charter") applied to), led to the Department for Work and Pensions, and some other public authorities, asking pre-settled status holders to prove they were living lawfully in the UK as of 31 December 2020. This was to establish whether they were eligible to access the additional protections of the Charter which the case of *AT* confirmed were available to protect citizens with pre-settled status who do not have enough money to meet their basic needs, such as food, clothing and accommodation. **What does clause 42 do?** Clause 42 puts into law the UK Government's commitment to treat all EU and EEA EFTA citizens, and their family members, with EUSS status (except where that status was granted in error) as though they have rights under the Agreements. It will mean that, if the clause becomes law, EU and EEA EFTA citizens, and their family members, with EUSS status who currently have no rights under the Agreements

	(because they were not living lawfully in the UK at the end of the Brexit transition period) will be treated as if they do.
Comments	The IMA welcomes the policy objective of clause 42 of the Bill to treat all EU and EEA EFTA citizens, and their family members, with EUSS status as though they have rights under the Agreements. This will mean that no-one who has been correctly granted pre-settled status or settled status should be asked in the future to prove what they were doing at the end of the Brexit transition period. Whilst this does not 'fix' the issue, as it is still not possible to distinguish who has rights under the Agreements and who is *treated* as having those rights, we recognise that the clause seeks to provide a pragmatic solution for citizens and public authorities. The IMA is grateful to stakeholders and European Commission and UK Government officials for their engagement in relation to the clause. The IMA has been concerned in its scrutiny of the legislation to explore the potential for any unintended consequences of the clause both for current and future generations. A number of issues are highlighted below, some of which will require ongoing engagement with the UK Government. The IMA will continue to work together with all parties to ensure successful implementation of the clause. • <u>A – Exclusion of holders of Zambrano/Surinder Singh rights</u>

	Zambrano carers[1] and citizens who applied via the Surinder Singh route[2] do <u>not</u> benefit from clause 42. They do not have any rights under the Agreements. The IMA accepts that it is a matter of policy for the UK Government as to what rights are provided for such citizens in UK law and therefore makes no further comments. UK Government officials have confirmed that citizens who have been granted status via the Zambrano or Surinder Singh routes are distinguishable from other EUSS status holders, and that their status on the online UK Visa and Immigration account is marked accordingly. • <u>B – Requirement to have leave to enter/remain under Appendix EU – subsection (2)(a)</u> To benefit from clause 42, an EU/EEA EFTA citizen or their family member will need to have EUSS status. This means that those EU/EEA EFTA citizens who had but no longer have status will not be protected. In most cases, this makes sense as it would be illogical for someone whose status had been curtailed to be treated as having rights under the Agreements.

[1] Non-EU citizens who have been granted pre-settled status on the basis that their child/dependent adult, who is a UK citizen, would be forced to leave the UK if they were not granted status. New applications can no longer be made.
[2] A route (now closed) for family members of British citizens who lived with them in the EU, EEA EFTA or Switzerland.

	The IMA is however concerned that there may be circumstances where someone's pre-settled status wrongly expires, e.g. where an extension is not applied due to a computer error, or where there is disagreement over whether status has lapsed through long absence from the UK. In such circumstances, citizens who do not have rights under the Agreements will not be protected by this clause, unless and until it is confirmed that they still hold EUSS status. There is also ongoing litigation (in which the IMA has applied to intervene) concerning the position of pre-settled status holders who subsequently have that leave replaced by leave under the MVDAC, the migrant victims of domestic abuse concession (previously DDVC, the destitute domestic violence concession) or Appendix Victim of Domestic Abuse (VDA). Currently, the UK Government does not allow a person to have more than one type of UK immigration leave. This means that pre-settled status holders who do not have any rights under the Agreements and who obtain leave under the MVDAC or Appendix VDA to access certain benefits, which are currently unavailable to them, would not benefit from the clause. Although the litigation is concerned with the position of those citizens who do have rights under the Agreements because they lived lawfully in the UK as at the end of the transition period, the IMA is concerned that subject to the Court's finding on this issue,

	there is a risk that there could be a difference here in treatment between those pre-settled status holders who have rights under the Agreements and those who do not. Whilst the IMA raises the issue in the context of this report, this is a complex issue which goes far wider than this clause. The Home Office have confirmed that their policy intention remains to treat all EU and EEA EFTA citizens, and their family members, with EUSS status as though they have rights under the Agreements, and that they agree that people with rights under the Agreements should be able to access those rights even if they no longer hold EUSS status. The IMA will continue to discuss this clause with the Home Office alongside the litigation. • <u>C- Requirement to have met the requirements for leave at point of grant – subsection (2)(c)</u> The IMA shares concerns that have been raised around the potential unintended consequences of this subsection. In particular, that it could lead to other government departments or other public authorities checking whether leave was correctly granted before they accept that EUSS status holders are protected by the clause. The Explanatory Notes state that *"in all cases the Home Office will have decided that the person meets the requirements of the EUSS, and other public authorities will be expected to rely on that decision for as long as the person holds EUSS leave"*.

	Officials have told the IMA that they are consulting with Government departments around issuing guidance, which will make clear to departments and public authorities that they are to rely on the Home Office's decision on status. Officials have also explained that the reason subsection (2)(c) is necessary, is because without it, the Home Office would be unable to remove status in cases where they have incorrectly made a grant in error. This is because the effect of the clause is that removal of status would otherwise only be possible in circumstances provided for by the Agreements, such as criminality or fraud. Officials gave the example of a third country national durable partner who had incorrectly been given pre-settled status in circumstances where they did not hold an EEA residence card and had therefore been living in the UK unlawfully. Officials stated that without this provision they would be unable to curtail the individual's pre-settled status on that basis and the person would wrongly benefit from rights under the Agreements. Officials have confirmed that it is not Home Office policy to 'look behind' or re-visit status, and that, currently, should it come to their attention that pre-settled status has been granted incorrectly, they will let the status expire, rather than curtail it. The IMA agrees that the Home Office would be prevented from curtailing pre-settled status on the basis of error without the provision. As with paragraph B above, consideration of Home Office curtailment policy goes wider than this clause and is outside scope of this report. The IMA will continue to discuss this issue with the Home

	Office, and in particular will wish to understand how citizens in this position can challenge the expiry of their leave and what evidence will be required to do so. • <u>D – Chen and Ibrahim/Teixeira carers who are incorrectly granted status</u> Chen[3] and Ibrahim/Teixeira cases[4] already have rights under the Agreements where they hold EUSS status. As such they do not require the protection of this clause. Stakeholders raised concerns with the IMA that there may be cases where either the caseworker exercised a discretion when granting them status, or where the grant may have been made in error. In such cases it is argued that they may require the protection of the clause. As explained in paragraph C above, officials have confirmed that there is no policy to 'look behind' status. If status has been granted in error, the citizen would have no rights either under the Agreements or under this clause. In circumstances where caseworkers applied evidential flexibility, it is the Home Office's view that those citizens will still have rights under the Agreements, because the scope for such flexibility, to reduce administrative burdens, did not change the balance of probabilities threshold applicable to a grant of status under Appendix EU.

[3] Primary carer of a self-sufficient EU citizen child.

[4] Children of EU citizen workers/former workers where they are in education in the UK; or the primary carer of such a child where requiring the primary carer to leave would prevent the child continuing their education in the UK.

	• **E – Acquisition of permanent residence before 5 years – subsection (5)** In limited circumstances, pre-settled status holders who were living lawfully in the UK at the end of the Brexit transition period and who reach retirement age may qualify for a right to live in the UK permanently in less than 5 years. The IMA wished to understand how the clause would work for citizens who are protected by the clause. Officials confirmed that it would work in the same way as for persons who had rights under the Agreements. An example is provided below. *Bruno, a Spanish citizen who holds pre-settled status, has been living in the UK since November 2019. He was homeless until he secured work in January 2021. He reaches retirement age in November 2022. Bruno returns to Spain in 2023. He could be absent from the UK until 2028 without losing his status.* • **F – Devolved Governments** The IMA wished to understand what consultation had taken place with the Scottish Government, Welsh Government and Northern Ireland Executive. Whilst citizens protected by the clause should be able to enforce their rights directly against public authorities, consequential amendments may need to be made to devolved legislation. The Devolved Governments may also need to consider the effect of the legislation on any devolved benefits, assistance or support they provide, in particular in relation to

	how they assess destitution. Cabinet Office officials told the IMA that they are continuing to work with the Devolved Governments. Any citizen experiencing difficulties in exercising their rights are encouraged to report a complaint through the IMA Portal. Further information about the IMA and guidance on how to report complaints can also be found on the Website.