

## Briefing: A settlement for European children in the UK

### Summary

In 2016, 679,000 European national children under the age of 18 resided in the UK.<sup>1</sup> A small additional number of non-European children also live in the UK under rights provided for by EU law. A significant proportion of these children live here long-term: around 258,000, or 38%, were born in this country.<sup>2</sup> Children living in the UK under EU law are often 'well-integrated', attending school, making British friends and speaking English.<sup>3</sup> Some children have no memories of life in another country, lack relationships with family or friends abroad, and/or have no meaningful connection with their 'home country'.

It is critical that any new rules governing the rights of European nationals in the UK after Brexit must be workable, fair and take into account the rights of children and young people who have grown up in this country. EU national children and young people should not be seen merely through the free movement prism as 'family members': appendages of their parents/relatives with status in the UK dependant on their parents' status and residence.

Non-EU children currently struggle to regularise their immigration status in a system which is complex, expensive and for which there is no free legal advice.<sup>4</sup> Any new system for EU nationals must avoid an increase in children finding themselves undocumented as a result of practical barriers or policy decisions. The application system must be as simple as possible and the evidential threshold must be one that all children can meet. The costs of applying for settled status must be no higher than the current cost for permanent residence and there should be a right of appeal for all applications under this new scheme. The barriers to children registering as British citizens, including prohibitively high fees, should also be considered against the benefits to the individual and to the UK as a whole.

The government has published its plans for 'Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU'.<sup>5</sup> While these may change depending on the outcomes of the negotiation process, we welcome proposals to grant individuals with five years' continuous residence 'settled status' and new modernised procedures that are 'as smooth and simple as possible'. The European Commission have also released their views on the future position of citizens' rights. These principles are brief, and require equal treatment of EU nationals with British nationals. However, neither the Commission, nor the government has addressed the specific needs and rights of children in its plans, and more detail is required on the process and evidential requirements if we are to be reassured that EU national children will not fall through the gaps, as non-EU children do in our current immigration system.

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<sup>1</sup> Migration Observatory analysis of Labour Force Survey 2016, Quarter 1 (Jan-Mar), conducted May 2017, Numbers are rounded to nearest 1,000 prior to calculating percentage

<sup>2</sup> Ibid and Migration Observatory, Young People and migration in the UK: an overview, December 2016  
<http://www.migrationobservatory.ox.ac.uk/resources/reports/young-people-migration-uk-overview/>

<sup>3</sup> Migration Observatory, *ibid*

<sup>4</sup> Coram Children's Legal Centre, 'This is my home', 2017 <http://www.childrenslegalcentre.com/this-is-my-home/>

<sup>5</sup> Home Office, Prime Minister's Office, 10 Downing Street, UK Visas and Immigration, Department for Exiting the European Union, and Foreign & Commonwealth Office, "Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU", at <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>

A child-friendly settlement for European nationals currently residing in the UK should:

- Allow European nationals in the UK with permanent residence or who are able to show five years' residence, including all EEA family members and those with derivative rights, indefinite leave to remain through a simple process that is easy to administer with no application fee; and
- Ensure that all children and young people who have been in the UK are able to apply for settled status in their own right; and
- Ensure that children and families are able to protect their rights through a right of appeal in domestic courts and access to an independent adjudication mechanism (the European Court of Justice); and
- Provide and promote clearer guidance on European national children whose future is in the UK who may be registered as British citizens through the Secretary of State's discretion.

## Context for the recommendations

### **Hasn't the government already announced its proposals and all EU nationals will get settled status after five years?**

Under the current British proposals, 'qualifying' EU nationals (and their family members) will get settled status (indefinite leave to remain under the Immigration Act 1971), once they have been in the UK for five years (those with less than five years' residence will get temporary residence status until they qualify for settled status). This 'settled status' will not be automatically conferred – all EU nationals, including those with permanent residence documents, will have to make an application. The Home Office is renowned for using lengthy, complex forms that would prevent a child or young person making their own application without legal advice. Though not stated, failure to make this application successfully could see an individual's right to be in the UK lapse, which would result in their losing their right to work in the UK, rent private accommodation, or have a bank account or a driving licence.

The proposals raise a number of questions concerning:

- The individual rights of children
- What further criteria will be used to assessed eligibility for settled status
- Fees and evidential requirements.
- Accessibility of the application form and process.

### **Why do we need to look at the rights of children and young people specifically?**

The only reference to children in the government's proposals simply states that:

“Children of EU citizens eligible for settled status will also be eligible to apply for settled status. This applies whether those children were born in the UK or overseas, and whether they were born or arrived in the UK before or after the specified date. Specifically, children

of EU citizens who hold settled status and are born in the UK will automatically acquire British citizenship (and with that, the right to live in the UK).”<sup>6</sup>

Children are only mentioned in the government’s plans as family members of their parents, not as individuals in their own right. Currently no consideration is given to European children separated from their parents, either with other family members or in social services care, in the UK. The Government’s proposal suggests they would need to rely on their parents having been here for five years. Children may have a right of residence that their family members do not have, or they may not be in contact with family members in the UK. Given that children can be exercising their treaty rights while being in education,<sup>7</sup> for example, they must have an independent right to the new ‘settled’ status where appropriate. Any decisions on residence and status must take into account the best interests of the child,<sup>8</sup> and children’s rights should not be made dependent on the rights of their parents.

It is also critical that children in care are not left out. There are currently 70,440 looked after children in England, but no information on how many are European nationals, because the data is not collected. These children must be given the stability they require before they become adults. Local authorities caring for them need to provide them with clear information and legal assistance.

EXAMPLE: Daniel is a Portuguese child who came to the UK at the age of two and entered the care system when he was six. He is now 11 and in foster care. All contact with his parents has ceased, and their whereabouts unknown. He will not be adopted or automatically acquire British nationality. Any settlement must take account of such children’s need for permanence and stability and their claim to stay.

The government’s proposals currently accept that children and young people who are third country family members can be granted settlement. This is very important. The right to free movement including extended family members for workers has given rise to complex family relationships of dependency.

### **What should the application process look like?**

The proposals do not offer any detail on how EU nationals will be able to apply for settled status, and what the evidential requirements will be. There have been assurances that EU citizens who lived in the UK as self-sufficient will not need to show that they had comprehensive health insurance in order to qualify for the new settled status. It is not clear whether this would extend to students, including children in compulsory education. We believe that eliminating the additional requirements across the board will help ensure that children are able to gain settled status.

The government proposes to minimise the burden of documentary evidence. Caseworkers will use existing government data, such as income records to determine how long EU nationals have reside

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<sup>6</sup> Ibid, para 31

<sup>7</sup> A child who is in compulsory education is exercising treaty rights where they meet the additional requirement of holding comprehensive sickness insurance, and not being a burden on the host state. The UK government has proposed eliminating these additional requirements for an application for settled status.

<sup>8</sup> Under Article 3 of the UN Convention on the Rights of the Child

in the UK. However, much of this data is not available for children. It is important that data about children in care, collected by the Department for Education, is used to ensure that they are able to access settlement. The burden to ensure that they do not become undocumented should not fall on looked after children.

CCLC has written extensively about the problems facing children making immigration applications and the onerous evidential burdens that are placed on them. It is essential that any new system must be sufficiently simple for children and young people to complete by themselves, given the absence of legal aid for immigration applications. The evidential threshold must be one that all children can meet. CCLC believes that the only evidential requirement for this policy is demonstrating the period of residence, for example, through GP or school records, or bill payments. The evidence must be sufficiently flexible to ensure that a child has access to the right documents and is able to demonstrate their own entitlement.

The fee for the application has not yet been decided – the proposals states that they will be set at 'a reasonable level'. Yet, there is currently a huge difference between the £65 fee for a document certifying Permanent Residence and the £993 it costs to register as a British citizen or the staggering £2,297 it costs for a non-EU national to apply for indefinite leave to remain – all fees set by the Home Office. The costs of applying for settled status must be no higher than the current cost for permanent residence.

Legal rights are meaningless unless they can be enforced in the event that they are breached. There should be a right of appeal for all applications under this new scheme and the Court of Justice of the European Union should continue to have jurisdiction in the UK. If these rights are enshrined only in UK law, the UK Parliament could unilaterally legislate at any time to amend or remove these rights. In light of the government's attempts in recent years to codify its own very narrow approach to Article 8 of the European Convention on Human Rights in the Immigration Rules,<sup>9</sup> this is a relevant concern.

### **Which children might not qualify?**

The Government proposals require five years continuous residence, begun prior to the yet to be determined cut-off date. However, although the cut-off date is unclear the Government has suggested that it may be retrospective. This would cause considerable unfairness. There will be children born throughout the transitional period who will not qualify on this basis. There will also be children who cannot meet five years residence before the deadline because they will not yet be five years old. It is clear that these children will need to have settled status in line with their parents and siblings and should not be excluded from rights due to the timing of their birth. However, the total lack of consideration of this group in the government proposal is concerning, and illustrates the wider view on the rights of European children.

Eligibility for settled status will be subject to an assessment of 'conduct and criminality, including not being considered a threat to the UK'. The lack of definition of these terms is concerning,

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<sup>9</sup> Coram Children's Legal Centre, 'Growing up in a hostile environment: the rights of undocumented migrant children in the UK', 2013, at [http://www.childrenslegalcentre.com/wp-content/uploads/2013/11/Hostile\\_Environment\\_Full\\_Report\\_Final.pdf](http://www.childrenslegalcentre.com/wp-content/uploads/2013/11/Hostile_Environment_Full_Report_Final.pdf)

especially in light of the problems currently faced by children trying to register as British citizens, or those who apply for indefinite leave to remain (settlement).<sup>10</sup>

Currently, the UK government can only remove or exclude European nationals only on the grounds of public policy, security or health. Where European nationals have permanent residence, only the most serious cases are individuals removed from the UK. There are additional safeguards for children.<sup>11</sup>

In comparison, someone who has an out of court disposal (for example, a caution) would be forced to wait two years before applying for settlement under current criminality rules. If the same rules applied to EU nationals under the new scheme it would risk leaving children and young people who have committed minor misdemeanours outside the new settlement regime. It is unclear what status they would qualify for, and whether they would then be pushed into the onerous 'human rights' route under the Immigration Rules. Forcing this group through a human rights route would cause administrative delays while human rights applications and appeals are processed and would be a very significant diminution in the rights of this group who would suddenly have to pay the immigration health surcharge, high application fees and would lose access to public funds.

This could impact children who have spent all their lives lawfully in the UK as European citizens, and suddenly find themselves without stability because they cannot obtain the new settled status in the time limit. It will also impact children with parents who have criminal records. The proposal is silent on whether the child's rights to remain in the UK would trump a parent failing to meet the 'conduct and criminality' assessment.

EXAMPLE: Elizabeth is a 17 year old French child. Ten weeks ago she accepted a caution for a shoplifting offence. She was with a group of friends and was the only one caught. It is not clear whether she would be eligible to apply immediately for settlement with the rest of her family, or whether she would be caught by the importation of the criminality threshold from the immigration rules and would be forced to wait two years from the date of the offence.

### **Surely children who are born here are British?**

British nationality law does not give nationality to children on the basis of where they are born. Their nationality depends on their parents' status, or the length of time they are in the UK.<sup>12</sup> Children born before 30 April 2006 are only British if at least one parent had confirmation of their settled status in the UK. After that date, a child is British only if a parent had permanent residence at the time of birth. For children to subsequently gain citizenship, an application for registration will need to be made, together with a fee.

We do not know how many European children are born in the UK but do not have citizenship. Last year, 192,227 children were born in England and Wales to a mother who was born outside the

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<sup>10</sup> See, for example, Project for the Registration of Children as British Citizens, 'Systemic obstacles to children's registration as British Citizens', 2014, at <https://prcbc.files.wordpress.com/2015/08/systemic-obstacles-on-the-registration-of-children-as-british-citizens.pdf>

<sup>11</sup> See Immigration (European Economic Area) Regulations 2016, reg 27

<sup>12</sup> British Nationality Act 1981, sections 1 & 3

UK<sup>13</sup>. That statistic does not tell us whether the mother or her children had already gained British nationality.

In addition, some children and young people may not want to apply for British nationality, either because the cost of the application, or because it may mean giving up another nationality they hold. The cost of registering as a British citizen is very expensive: considerably higher than in other EU member states. The expense, complexity of forms and lack of available legal aid all act as barriers to applying for nationality as a child.<sup>14</sup>

### **What about family reunion rights?**

One issue is the preservation of the special status of EU nationals in terms of the family reunion rights they currently hold. Family members arriving after the UK leaves the EU will be subject to the same rules as those joining British citizens.

Under the immigration rules, only immediate family members (children and spouses) are in general allowed to apply for leave to enter or remain as relatives of workers, or British family, in the UK. For example, many students are not eligible to bring dependents with them when they apply to study in the UK. Rather than create a two-tier set of rules for family reunion, the Immigration system must provide real family reunion rights for all which properly reflect the right to respect for family life under Article 8 of the European Convention on Human Rights.

## **Recommendations**

### **1. A simplified system based on five years' residence**

CCLC is gratified that the government proposals demonstrate that they have listened to and engaged with the concerns of a variety of stakeholders. We advocated for including all family members including those with retained rights in any settlement and believe that this is a key principle for the rights of EU nationals. It is now important that the proposed system, whereby EU national in the UK must show five years' residence to qualify for indefinite leave to remain, is significantly simplified, low cost and with an evidential threshold that all children can meet. Children unable to achieve the five years following the cut-off date (because of their date of birth) should be granted settlement in line with their parents at birth, through the low-cost route.

### **2. Conversion of permanent residence to ILR**

Those who have permanent residence, or are in the UK as family members of someone with permanent residence, should also see their leave automatically converted to ILR, without needing to make a further application. The system of requiring re-applications is onerous and unnecessary. It requires the Home Office to process additional applications, encourages Europeans currently in the UK to delay resolving their status and creates a further burden for families who have already

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<sup>13</sup> Office of National Statistics, Parents Country of Birth: England and Wales: 2015  
<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/parentscountryofbirthenglandandwales/>

<sup>14</sup> For more information on barriers to citizenship see Coram Children's Legal Centre, 'This is my home: Securing permanent status for long-term residents of the UK', 2017, at <http://www.childrenslegalcentre.com/this-is-my-home/>

secured their permanent residence documents. Officials are already familiar with a wide range of different documentation, there is no particular advantage to altering existing UK issued permanent residence cards.

### **3. Ensure that rights to family reunion are addresses as part of any final settlement**

We do not believe that EU citizen children, or children with EU family should lose out on growing up in family units with extended family members once the UK leaves the EU. If we value the contribution made by those working or self-employed in the UK, then we should look to guarantee allowing entry and leave to remain for a broader number of family members than currently set out in the immigration rules. We know that the current immigration rules have deprived children of growing up with grandparents where the stringent threshold cannot be met and we do not believe that this should impact this group. Currently visit visas for non-EU nationals are difficult to obtain and can mean children being deprived of the sort of relationships they have previously been able to have.

### **4. Include those with derivative rights**

Some European nationals resident in UK derive their rights to live, study and work in the UK from the determinations of the ECJ, and from citizenship of the European Union. These are known as derivative rights, because they are derived from interpretations of EU law not from the Citizens' Free Movement Directive. If the UK will not be bound by EU law, provision should be made for persons exercising derived ('derivative') rights of residence to remain lawfully in the UK.

### **5. Citizenship for children**

Children who are European citizens need to be in a secure position so that they may continue in education, to access healthcare and to have stability in their future. Many children who are born in the UK and live here for the first ten years of their lives can apply for British citizenship, and a child may also be registered as a British citizen through the Secretary of State's discretion. There should be guidance issued and promoted on how this discretion can be exercised in favour of EEA national children whose futures lie in the UK: including both children in care and those with families.

### **6. This settlement should apply to all those who arrived before UK withdrawal**

All European nationals who arrive before the date when the UK's actual withdrawal at the end of negotiations takes effect should fall within the new arrangements settlement and should have the opportunity to acquire indefinite leave to remain after five years. Any other cut-off date would be arbitrary and could give rise to protracted legal challenges.

## Case studies

The Migrant Children's Project advice line at Coram Children's Legal Centre we saw a 50% spike in the number of inquiries related to European law following the referendum vote. These case studies are anonymised examples of the queries we have received:

### **Care-leaver and baby - demonstrating five years residence**

We received a call from the hospital assisting a 19 year old pregnant Polish care-leaver. She had come to the UK in 2008 with her parents who were working. It is not clear whether they were registered under the Workers Registration Scheme, and she no longer had any contact with them. Establishing her right to be here for the new settlement route may be difficult, as she has lived in a variety of different placements and did not have much evidence of the length of her stay. She will need to gather information from the different foster places and independent accommodation where she has lived, as well as school records. Depending on the cut-off date, her child may be born after the date (which can be any time from 29 March 2017) and therefore will be unable to accrue the five years required for settlement from that point.

### **Family – meeting the eligibility criteria if the cut off date is before Brexit**

We spoke to an Italian/Brazilian woman who had grown up in the UK. Her elderly parents had lived in the UK for over twenty years, and she had gone to school and university here. As an adult, she had gone to Brazil where she had married a Brazilian man and had children. Although her parents were Italian nationals, she had let her documents lapse, and had not taken steps to ensure her children had Italian nationality. As a result of the Brexit vote, and knowing that her parents were elderly and would need family care in the UK, she decided to return with her family to Britain. The caller will need to re-apply for her Italian identity documents, and in order for her husband to work, he will need to apply for a family permit to show to employers. Having made the decision to return after Article 50 was triggered, the family has already made the move from Brazil to the UK because of fears that they would not be able to do in the future, and now they face the prospect of having to move to Italy, or apply under the immigration rules, if they are unable to meet the five years settlement. They will not know whether they are able to stay until the cut-off date is decided and publicly announced.

### **Young person – minor criminality**

We spoke to an Italian national aged 19 who was born in the UK in 1998. However, he only held Italian nationality as his mother took a career break to have children and was not working at the time of his birth, so he was not eligible for automatic British citizenship at the time. However, as he grew up in the UK, he and the rest of his family acquired permanent residence through his mother's work. As a teenager he committed a series of minor offences relating to drug-taking. As he had been in the UK over ten years, under EU law he could only be deported if the Home Office was able to show there were imperative grounds of public policy, health or security. This is an extremely high threshold, based on an understanding that the UK is his home, where he was brought up and educated. However, as he has spent some time in a youth offending institution, he would not be eligible for indefinite leave to remain for seven years after his release date under the current rules, and if these were imported into the thresholds for the new European settlement, he would be left without confirmation of his right to be in the UK, despite currently having no impediments to staying and working in the UK. This would be a major upheaval for a young person who has only ever lived in the UK and whose family are based here.



## Background

All European Economic Area (EEA) nationals (EU nationals plus nationals of Iceland, Liechtenstein and Norway – we will refer to this group as European nationals) face an uncertain future in the UK after Brexit. For most non-European migrants residing in the UK, their eligibility for leave to remain in UK, and the conditions attached to it, are laid out in the immigration rules.<sup>15</sup> For European nationals, a different set of legal rules apply. The Treaty establishing the European Union enshrines the principle of freedom of movement and rights of residence within the territory of the EU for any nationals of the European Economic Area. This is set out in EU law, in what is known as the Citizens' Free Movement Directive' (referred to as the 'Citizens' Directive').<sup>16</sup> The free movement of persons constitutes one of the fundamental freedoms of the European Union, but the free movement principle primarily relates to adults' economic activities and was not conceived with children in mind.

In the UK, the Citizens' Directive is converted into national legislation by the Immigration (EEA) Regulations (2006 and consolidated 2016). This makes provision for an initial right of residence in another member state for up to three months. After this period, only those who are engaging in certain activities continue to have a right of residence. These activities essentially involve being economically active in a prescribed way. The Regulations term this 'exercising a treaty right'. Someone who is exercising a treaty right is referred to as a qualified person; in general, only a European national may be a qualified person. The Directive also sets out the circumstances in which someone can be excluded or removed from the UK: on the grounds of public policy, health or security. The longer someone spends exercising treaty rights, the less likely it is that they can be forced to leave the UK.

To be a 'qualified person', an EU national may be working (full- or part-time), or self-employed. Alternatively, they may be retired, a student or self-sufficient (for example raising children) where they have comprehensive sickness insurance and have sufficient resources to avoid becoming a burden on the state. Where someone loses their work, they may keep their status by becoming a job-seeker. After five continuous years of engaging in qualified activities, an EEA national becomes permanently resident in the UK. Permanent residence means someone does not have to continue exercising treaty rights in the UK in order to have a right of residence. The Citizens' Directive describes it as a form of settlement, and it is a right that is in both the directive and the UK regulations.<sup>17</sup>

European citizens who have a right of residence as a qualified person have the right to be joined in the state where they are living by their family members, regardless of nationality. In some cases, their family member may be someone who is European but who is not themselves exercising treaty rights. The family members who can join a European national may be divided into 'direct' family members: their children (under the age of 21, or still dependant), grandchildren or step-children, grandparents, and a spouse or recognised civil partner. Additionally, in some circumstances extended family members (dependent aunts, uncles, siblings and their children, and a live-in partner) will be able to accompany a European citizen and will have a right to reside as long as the European citizen is exercising treaty rights. Only these indirect family members require documents as a family member. However, it is likely that other family members who are not themselves European nationals will have acquired documentation to demonstrate their right to work, rent property and open a bank account in the UK. A family member who is in the UK for five years with someone with permanent residence or exercising treaty rights is then entitled to permanent residence.

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15 The Immigration Rules are statements of policy with which the Secretary of State for the Home Department must comply.

16 DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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

17 Ibid, Article 16

Part of the Coram group, Coram Children's Legal Centre is a leading children's legal charity, committed to protecting and promoting the rights of children. Founded in 1981, CCLC has over 35 years' experience in delivering legal services, guidance, training, policy and law reform and international consultancy on child rights. CCLC is a centre of specialist expertise in the rights of children affected by UK immigration control. See [www.coramchildrenslegalcentre.com](http://www.coramchildrenslegalcentre.com)

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