

EU Settlement Scheme – Concerns & Recommendations, August 2018

Summary

Coram Children's Legal Centre (CCLC) welcomes the publication of the settlement scheme Statement of Intent (SoI) and Immigration Rules (Appendix EU). The SoI goes beyond the Withdrawal Agreement to simplify the application process for many individuals. However, as a member of the Home Office Safeguarding Vulnerable Groups user group, CCLC believes that there are still significant obstacles that many children and families will need to overcome in order to gain status. In particular, children who are not EU nationals themselves, or who are in family units with non-EU nationals, risk being left with precarious status through the settlement scheme.

In our view, the following children are particularly at risk:

- **Children who are unable to prove their nationality or length of residence in the UK**
Children in care, for example, may struggle to obtain proof of their length of residence or may require parental consent to obtain nationality documents. Where children are dependent on rights derived from their parents to make an application, then they may be placed at risk where there is domestic abuse or exploitation.
- **Children with complex cases (which will include many separated children)**, who will need support in completing their applications. This will be work that is regulated by the Office of the Immigration Services Commissioner, and there is currently no statutory funding to provide this support.
- **Children from families who derive their rights to remain from EU case-law.** These children are still in limbo, with no particular provision made for their carers to obtain status under Appendix EU.

There will be a number of barriers to settlement for children and young people, some of which are the result of policy decisions made by the Home Office in designing the scheme, and others which are pre-existing practical obstacles. A lack of legal advice and assistance is likely to exacerbate these problems, and the Home Office must make sure that community groups and other stakeholders are adequately equipped to support those who need to make an application under the scheme.

The consequences of not having status are severe and the Home Office should be making every effort to ensure no children and young people find themselves, or their families, in this position.

CCLC has concerns about how European nationals and their family members can be assured status in the UK after exit day in the event of a 'no deal' scenario. Any failure to agree a Withdrawal Agreement with the EU could see the Government backtracking on citizens' rights in the UK. These should be guaranteed regardless of the outcome of negotiations.

Detailed concerns

In June the government publicised its Statement of Intent¹ (SoI) on the EU Settlement Scheme, and in the following month published the Statement of Changes to the Immigration Rules.² As part of the Home Office's Vulnerable Groups safeguarding group, CCLC has put forward a number of concerns and recommendations regarding the specific needs of children, young people and families. We are pleased that the government listened to earlier recommendations and intends for the scheme to be straightforward and user-friendly, with eligibility based on length of residence, and with a right of appeal.³ However, we have a number of ongoing concerns which we urge the government to address as a matter of urgency to ensure that all children are able to access the scheme.

Engagement with civil society and local authorities

The Home Office has begun discussions about its engagement process with civil society, but interaction with the frontline organisations which will bear the brunt of information and advice giving has been limited. It is not clear at this stage whether any funding will be provided to those organisations on which the government will rely to support vulnerable people through the settlement scheme. Civil society organisations are heavily reliant on grants and voluntary income and struggle with sustainability – few, if any, will have spare capacity and resources to meet the support needs anticipated.

There has also been limited engagement with local authorities, and research carried out by CCLC in 2017 highlighted that very few were able to identify European national children in their care. Even fewer authorities had taken steps to ensure that those children would be able to obtain secure leave, either before the introduction of the new scheme or after.⁴

Advice and assistance for vulnerable children and young people and for complex cases

The scheme as currently designed prioritises EU national children who will be applying with their family members. We welcome the decision that a child applying with their parent will be able to gain settled status at the same time as the adult. However, the scheme overlooks situations in which children and young people are separated from their family, or other complex family situations which are difficult to navigate.

There is no clarity about the process for separated children who are unable to apply for the settlement scheme themselves. When a child turns 18, it becomes even less clear how they might make an application if they lack capacity or understanding. The SoI suggests that local authorities will be able to apply on behalf of a looked-after child,⁵ and there will be other circumstances when someone can apply on another person's behalf.⁶ However, CCLC is of the

¹ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727752/CCS207_CCS071811_6274-001_Cm_9675_Immigration_Rules_Accessible.pdf

³ For more information, see CCLC's fact sheet at <https://www.childrenslegalcentre.com/resources/eu-national-children/>

⁴ Coram Children's Legal Centre, Briefing: Settlement for European national children in care, March 2018 at https://www.childrenslegalcentre.com/wp-content/uploads/2018/03/European-national-children-in-care_March2018Final.pdf

⁵ Within the meaning of section 22(1) of the Children Act 1989, section 17(6) of the Children (Scotland) Act 1995, section 74(1) of the Social Services and Well-being (Wales) Act 2014 or article 25(1) of the Children (Northern Ireland) Order 1995

⁶ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, section 4.4

view that in the majority of cases concerning vulnerable groups assistance of this kind will need to be regulated by the Office of the Immigration Services Commissioner (OISC). The OISC intends to publish some clear guidance in the coming weeks about what advice and assistance can be given to EU Citizens seeking settled status that will not require regulation.⁷ However, assisting someone with completing the application form and submitting it to the Home Office via the digital system on their behalf constitutes a 'service',⁸ and social workers will not have the additional registration and qualifications to lawfully apply on behalf of children and vulnerable adults – neither will many community and support organisations.

Case study

A local authority is supporting a Czech care leaver, Eva, who is 20 years old. She arrived in the UK six years ago aged 14 with her mother. It is believed that both were trafficked into the UK, and the mother has been engaging in sex-work ever since. Eva was taken into care shortly after their arrival in 2012, and her mother struggles with alcohol and drug abuse. Eva has severe mental health problems but her application for disability living allowance was refused because neither she nor her mother was exercising treaty rights.

Eva has spent some time at college, but currently lives in supported housing paid for by the local authority. She has had prolonged periods in hospital 'sectioned' under the Mental Health Act. The local authority has made several attempts to renew Eva's Czech documents, but she has been too unwell to travel to London, or has been prevented from travel due to being sectioned. She holds an expired Czech passport. She cannot make an application alone and is seldom well enough to give instructions to someone else to act on her behalf.

Certain cases will be of such complexity as to require expert legal advice: for example, where eligibility is unclear for non-EU family members or where there is a criminal history. In the event of a refusal, it will be possible to ask for an administrative review of decision⁹ and ultimately there will be a right of appeal for those applying from 30 March 2019.¹⁰ Legal assistance will also be required at these stages. Yet, while legal aid will be reinstated for separated children's immigration cases (and hopefully this will cover applications to the EU settlement scheme)¹¹ it is not available for young people over 18 or for vulnerable families, and there are no public plans to change this. In the absence of legal aid, alternative funding will need to be provided to ensure the more vulnerable groups do not fall through the gaps.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728651/OISC_NEWSLETTER_Summer_2018.pdf

⁸ Under the Immigration Act 1999, the Commissioner 'may make rules regulating any aspect of the professional practice, conduct or discipline of [registered persons] in connection with the provision of immigration advice or immigration services.' 'Immigration advice' is defined as: 'advice which— (a)relates to a particular individual; (b)is given in connection with one or more relevant matters; (c)is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and (d)is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings'. 'Immigration services' means 'the making of representations on behalf of a particular individual— (a)in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or (b)in correspondence with a Minister of the Crown or government department'.

⁹ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 5.18

¹⁰ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 5.19

¹¹ <https://www.childrenslegalcentre.com/separated-children-legal-aid/>

Fees

An application under the scheme will cost £65. For children under the age of 16 the fee will be £32.50. Whilst we are pleased that the Home Office have agreed with us that no application fee should be levied where a child is looked after by a local authority,¹² we believe that this fee exemption should be extended to all children and young people who are supported by the local authority. This would include destitute families who rely on support from a local authority provided under section 17 of the Children Act 1989 and therefore would be unable to save the money required to register through the scheme. Until 2017, all Home Office fee exemptions applied to children supported by a local authority rather than exclusively to looked after children, and in our view this change is an unjustifiable cost shift when care-leavers and families are reliant on the local authority for subsistence support.

It is important that there is a fee waiver for those who are unable to afford to save the fee, or who are under financial control of an abusive trafficker, partner or parent. We are concerned that parents may choose not to regularise children – who are less likely to be removed – if they cannot afford the fees to regularise the whole family.

Demonstrating nationality and length of residence

CCLC has repeatedly highlighted cases where children may be eligible for the settlement scheme but are unable to prove this entitlement where they do not have evidence of either their nationality or their length of residence.¹³ Some children will be unable to prove nationality because they require both parents' consent to obtain this in their country of origin. For example, the single parent of a Polish child will usually need a court order confirming that they have sole parental responsibility of the child. However, the no-order principle in family law¹⁴ across the UK prevents the courts from making this order unless there is a contest between parents. An application to the family court is costly, there is no legal aid available and it can be very slow. Furthermore, there are EU countries that require applications for documents to be made in person, making the process of establishing nationality costly and burdensome.

The residence status of a child will often be linked to their parents' documents. The documents outlined in the Sol as being acceptable proof of residence are all those which are held by adults: tenancy agreements, benefit payments, and payslips, for example. Where children cannot access these, or where their parents have an incomplete documentary history, children will lose out. Problems may also arise with demonstrating residency if, for example, a child has been in care for fewer than five years. The Sol states that 'we recognise that some applicants may lack documentary evidence in their own name for various reasons, and we will work flexibly with applicants to help them evidence their continuous residence in the UK by the best means available to them'.¹⁵ Further detail on what this could mean in practice will need to be outlined in future guidance.

¹² Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 4.6

¹³ See past briefings at <https://www.childrenslegalcentre.com/promoting-childrens-rights/policy/brexit-childrens-rights/>

¹⁴ No order principle is found in s1(5) Children Act 1989 "...a court... shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all".

¹⁵ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 5.6

Eligibility of family members

Currently, family members of EU nationals attract the same rights as the EU national they are related to. Most children registering through the settlement scheme will be EU nationals themselves, but non-EU national step-children and other relatives may also be in the UK as a family member of an EU national. Those who are reliant on their status as family members of an EU national will be required to *'provide evidence of that relationship for the relevant period'* as well as *'evidence of [the family member's] continuous residence in the UK'* for the full five year period in order to gain settlement. The Sol states that proof of status of the EU national under the settlement scheme is required, meaning that family members may be forced to wait for the EU national to apply and receive a decision before they can apply to register themselves. It is unclear whether the Home Office will check their own records of applicants where someone is unable to contact their EU family member for this evidence.

This may result in vulnerable people finding the scheme effectively closed to them (if, for example, they are estranged from their family member/s) or being forced to contact violent spouses, parents or other family members. The Sol states that the government *'will accept alternative evidence of the EU citizen's identity and nationality where the family member applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons'*¹⁶ but further guidance on what constitutes compelling practical or compassionate reasons is required. There is also a potential requirement to attend an interview in Annex 2; if the family member does not attend that interview then factual inferences can be drawn. It is unclear how a child separated from an EU national would be able to exert influence over that family member to ensure that they attend.

Case study

Sam was born 18 years ago in Ghana. His parent's relationship broke down and his father came to the UK when Sam was four years old. Sam remained in Ghana, living with his mother. When he was 8 his mother died, and after a number of years living with an abusive aunt and uncle he went to live with his father, who had since married a German woman who had been granted permanent residence in the UK. Sam was granted an EEA family permit and arrived in the UK aged 15 to live with his father, stepmother and their two other children, aged three and one. Unfortunately, Sam's relationship with his stepmother deteriorated and verbal abuse by his stepmother escalated into physical abuse. Children's services commenced a section 47 enquiry and Sam went into local authority care under section 20 of the Children Act 1989 at the age of 16. Shortly afterwards Sam was granted an EEA residence card but this was revoked the following month after his stepmother contacted the Home Office to withdraw her support.

As a matter of law, Sam remains a family member until the age of 21. If required to evidence his entitlement under the scheme, he would be unable to do so without the co-operation of his father and stepmother as he is required to show that they have continuous residence. As he is now over 18, he cannot rely on any concessions to children who are looked after, as he is a care-leaver. He cannot benefit from the fee waiver, as only children who are looked after

¹⁶ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 5.9

are eligible, even though he remains entirely reliant on the local authority for support, and the decision to revoke his EEA residence card has resulted in him being unable to continue his studies or receive benefits.

A third country national is also only considered the family member of an EU national until they reach the age of 21, unless they are able, beyond that age, to prove that they are still dependent on the EU national. This means that, in general, step-children who are not European nationals themselves have no route to settlement under any existing EU or Immigration Rules provision if they cannot complete five years in the UK before they turn 21. The test for dependency is a factual assessment and the young person must demonstrate that they are reliant on the EU national family member to meet their essential living needs.

In contrast, an adult dependent relative – i.e. a parent or grandparent – would be accepted under the scheme without additional evidence of their dependence. This is the result of a policy choice, and the UK could choose to diverge from the Withdrawal Agreement to provide 21 year olds with a route to settlement if they cannot reach the five years by 2021. There is no other provision for them in the existing Immigration Rules.

Children and carers with rights derived from EU law

CCLC remains concerned about what will happen to children and carers with derived rights who currently face ongoing uncertainty. The Sol outlines that ‘Chen’ carers and ‘Ibrahim and Teixeira’ children or carers *‘may be EU citizens eligible to apply for status under the EU settlement scheme. Otherwise, provision will be made in the Immigration Rules for them to apply for leave to remain, consistent with the Withdrawal Agreement. Their current rights do not lead to a right of permanent residence under EU law, but further details will be provided in due course on the new status available to them’*.¹⁷ There is no provision for this group under the statement of changes HC9675, and many will not be EU nationals or have an alternative route to settlement in the UK. If required to rely on their family and private life rights, they will need to demonstrate that they meet the Immigration Rules (as a parent of a child who either is British, or has lived in the UK for seven years and where it would not be reasonable for them to leave the UK). Their EU national children are being forced into uncertainty by the lack of clarification. The Sol also states that Zambrano carers will be provided for in the Immigration Rules, although it is noted that ‘their current rights do not lead to a right of permanent residence under EU law, but further details will be provided in due course on the new status available to them’.¹⁸

Status of those who do not apply before the end of the scheme

It remains unclear what will happen if someone fails to regularise before the end of the scheme. The Sol sets out that there will be a discretion to allow late applications where there is a *‘good reason’*. It is unclear what will constitute a good reason.

¹⁷ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 6.11

¹⁸ Home Office, EU Settlement Scheme: Statement of Intent, 21 June 2018, Section 6.11

Children who may miss the deadline include:

- a) Children who are too young to make their own application and therefore rely on parents who do not apply on their behalf
- b) Children whose parents cannot afford to regularise them
- c) Children and young people in exploitative or violent situations

We are concerned that where parents are in abusive relationships, control of immigration status can be a form of coercion and control, and victims – including children – may be too frightened to see help. A result of recent Freedom of Information requests revealed that more than half of police forces who responded shared a domestic abuse victim's details with the Home Office.¹⁹ Children of these relationships may find themselves without leave to remain as a result of the control exercised by one parent, or may be in a situation where financial control means they are unable to apply for settled status.

The government's current position is that any EU national or family member covered by the Withdrawal Agreement who does not secure or apply for settled or pre-settled status before 30th June 2022 will 'technically have no lawful basis to remain in the UK'.²⁰ CCLC remains concerned that thousands of children could end up undocumented and subject to the 'hostile environment', seriously limiting their access to education, healthcare, accommodation and other services.

Case study

Halima, a Somali woman living with her Dutch husband, approached the Migrant Children's Project advice line as she is experiencing economic abuse and coercive control. Her husband has been working since she arrived in the UK with their child, Abdi, 3 years ago. They have had one other child, Farah, born in the UK in 2017. Halima lives with her husband who is abusive and has said he would like a divorce. He does not want to assist her with any application and although the couple live together he keeps his documents locked away so that she cannot reach them. Neither child has European identity documents although it appears both may be eligible for Dutch nationality. Halima doesn't want to leave because her family member permit granted for six months to allow her entry to the UK has expired and she is afraid of immigration control. When she approached social services she was told they could not help her without a valid document. It is unclear how she will be able to register for settlement, although she is entitled to do so as she is still a family member. She cannot exert any pressure on her husband to assist her and the children, and if he chooses to wait until the final day of registration then she will be in the UK unlawfully and further trapped in her current position. Without Dutch nationality documents, she cannot ensure that her children are registered for settlement in good time either.

¹⁹ <https://amp.theguardian.com/uk-news/2018/may/14/victims-crime-handed-over-police-immigration-enforcement>

²⁰ Home Office delivery of Brexit: immigration: Government Response to the Committee's Third Report of Session 2017–19 (GR) (25 May 2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1075/107502.htm>

Recommendations

- It is vital that any failure to agree a Withdrawal Agreement with the EU does not result in a backtracking on, or dilution of, citizens' rights in the UK. The government should guarantee that they will honour the proposed EU settlement scheme in the event of a 'no deal'.
- The Home Office should complete and publish both an Equalities Impact Assessment and a Child Rights Impact Assessment of the scheme.²¹
- Piloting the scheme must include testing with vulnerable users who are likely to have most difficulty in accessing and demonstrating their status.
- The Home Office and the OISC must be clear about the regulation of this work and what assistance civil society organisations can give. If necessary, the OISC should look at how regulation can be simplified to allow for support to be provided.
- The Home Office should ensure that its communications strategy has a broad enough reach, and that community advice organisations have sufficient resources to assist EU nationals and family members seeking advice and assistance.
- The Home Office should ensure that stakeholders are able to comment on draft guidance that will accompany Immigration Rules Appendix EU, particularly on the definition of compelling practical or compassionate reasons.
- The UK should broaden the scheme to ensure that no children and young people are excluded from the settlement scheme who would otherwise lose their lawful residence. This includes amending the dependency requirements for young people over 21.
- There should be a fee exemption for those receiving support from children's services under section 17, section 20 and the leaving care provisions of the Children Act 1989.
- Zambrano carers and any other groups whose right to remain derives from EU law who will be required to apply under new Immigration Rules must not be subject to high fees or any other barriers to making an application.
- Legal aid should be made available for complex cases (including both the original application and/or the appeals process) and the sector should be resourced to offer support to vulnerable groups engaging with the EU settlement scheme.
- Evidence from a local authority on behalf of a child or young person regarding their length of residence in the UK should be included in the Sol's list of acceptable evidence.

For more information, please contact Frances Trevena, Legal and Policy Manager,
frances.trevena@coramclc.org.uk

²¹ The government has repeatedly stated its commitment to 'giving due consideration to the United Nations Convention on the Rights of the Child (UNCRC) when developing new policy and legislation' and ensuring that government policies – 'whether they hold direct or indirect consequences– consider children'. See UN Convention on the Rights of the Child: Written question - HL1585, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-07-16/HL1585> and Commitment to UNCRC: Written statement - HLWS197, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-10-17/HLWS197/>