

Children in care – EU rights

This fact sheet provides an explanation of the arrangements for securing the rights of looked-after children/care leavers who are currently in the UK under EU legal rights. For the new rights under the EU settlement scheme (EUSS), see the latter part of this fact sheet and our fact sheet on the EUSS:

www.childrenslegalcentre.com/resources

Please note that, for ease of reference, we are using the terms EU and EU citizens, but these terms will also cover rights of citizens of EEA and Switzerland unless specifically stated otherwise.

What EU rights can children and young people hold?

Direct family members

Children who are in the UK with EU rights will usually have come to UK with, or joined, an EU parent/step-parent who is working, self-employed, studying, self-sufficient or job-seeking ('exercising treaty rights'/'qualified persons').

Qualified EU nationals have a right to be joined by their direct family members and those of their spouse/civil partner, who do not have to be EU nationals themselves. [1]

Direct family members are:

- spouse/civil partners
- children/step-children
- grandparents
- grandchildren

Children who join their direct family member in the UK keep their right to reside as a family member until the age of 21, even if they are no longer dependent on their family member.

If the relevant EU national has exercised Treaty Rights continuously for 5 years, they become permanently resident and so too do any direct family members under 21 who have also lived in UK for 5 years (even if estranged).

Some direct family members are not EU nationals themselves. These family members are not required to hold a physical document called a biometric residence permit (BRP) evidencing their residency status, although it is a good idea to get one for ease of referencing rights.

To come to the UK, non-EU national family members need to apply for an EU family permit, and this should be converted to a BRP after entry. This is not a visa. Instead, it is documentary evidence of EU rights which apply by operation of law and exist regardless of documentation. BRP for

non-EU family members have a face validity of 5 years.

Extended family members

Children who are 'extended family members' (EFMs) – for example, nieces, nephews or cousins of the relevant EU national are not in the same position as direct family members. EFMs must prove their dependence on their family member, and their right to reside is lost if they are no longer dependent. Therefore EFMs who come into care no longer have rights as an EFM. EFMs also include durable (unmarried) partners

EFM's must also get a BRP and are unable to rely on EFM rights unless they hold the BRP *and* remain dependent on the relevant EU national. Therefore EFMs who come into care no longer have rights as an EFM, and their BRP will become invalid.

However, they may be able to establish alternative rights.

Children/carers with derivative rights

Some young people hold EU derived rights of residence, for example as a person who is still in education, and who lived in UK at the same time as an EU national parent who was working as an employee in UK at some point in the past. Other (non-EU national) children of carers with derivative rights, including 'Zambrano' carers, also have derivative rights.

It is important that the strongest EU rights are recognised where possible. For example, if the relevant EU national parent is still working, then

there is a full right of residence, and the prospect of permanent residence, for the young person family member. This is stronger than an assumed derivative right, which is a weaker right.

Effect of parents' work on children's EU rights

Some EU national looked after children will have lived in families where no-one has ever exercised Treaty Rights. In the past, these families have no clear right to reside in the UK. Happily, this will not affect their eligibility to apply under the EU settlement scheme.

Some children, or care leavers, will have been born in the UK to EU national parents who were exercising Treaty Rights and either were, or have since become, permanently resident.

Such children may be British already OR may be entitled to register as British, for a fee, because a parent has got EU permanent residence.

An entitlement to register as British normally only applies where the child has been born in the UK – other children have to register at discretion. A Passport Office policy guide on automatic British citizenship through EU rights is available here: <https://www.gov.uk/government/publications/treaty-rights>.

Common problems

The rights that EU national children already had, or acquired subsequently, typically become hard to evidence when they went into care. The family history, and in particular the parents' work activity

in UK (which may have given rise to free-standing rights for the child), is often not explored or recorded, as it is not seen as relevant.

EU national care leavers are often advised that they have to become qualified persons themselves in order to have any rights, without any investigation into whether they might already be permanently resident or have rights in association with the relevant family member who brought them to UK.

What is the EUSS?

The EU settlement scheme (EUSS) is the process for securing status for everyone who is in the UK under EU rights after the UK leaves the EU. The scheme is already up and running, and status given under it has already secured rights for some people. The requirements to make an application under the EUSS are contained in Appendix EU to the Immigration Rules. The full scheme opened on **30 March 2019** and is continuing despite the on-going uncertainty around leaving the EU.

The EUSS can result in a grant of settled status (indefinite leave to remain) or pre-settled status (limited leave to remain).

It is preferable to have settled status, which will only be given if 5 years' residence in UK can be evidenced. This is a more secure form of status and allows access to welfare benefits, for example.

The EUSS can provide an opportunity to get settled status/permanence for children and young adults who would not previously have had rights, for example those

- whose parents have never exercised Treaty Rights
- who have derivative rights which do not lead to settlement
- who 'aged out' as direct family members at 21 before they had achieved settlement

Are there issues for children applying?

Step 1: get a passport / ID

The first step for looked after children wanting to rely on EU rights is to assist them to get a valid passport in their EU nationality. For some children and young people, this is far from easy as they may be completely estranged from their EU national parent.

Many embassies will anyway not issue a passport or identity document without the active involvement of both parents, in the absence of a court order. This can mean that it is imperative for the social worker to try to engage with the parent and/or the embassy/consulate in order to facilitate the issue of an EU passport to the child. Renewals of passports are sometimes easier, but will often still require involvement of at least one parent.

What if you can't get a passport/ID?

The Home Office has acknowledged the problem with issue of passports to children and in the recent Statement of Changes to the Immigration Rules (7 March 2019). They have included the following paragraph under the definition of

'Required proof of identity and nationality' for an application under the EUSS:

"The Secretary of State agrees to accept alternative evidence of identity and nationality where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons."

A social worker's full written explanation of the compelling practical difficulties encountered in accessing a passport/ID may be critical in persuading the Home Office that the required proof is met.

Step 2: get evidence of a child's residence

A looked after child will often be making an application based on their own UK residence, rather than being 'sponsored' by a parent who is also applying to the EUSS (making an application tied to a parent's application requires the child to have the parent's unique application number and ID).

Applications for children based on their own UK residence will have to rely on alternative evidence, as they will not have a DWP or HMRC record. A letter from a local authority stating how long a child has been in care – or how long the local authority has had contact with the child – will be crucial. Gathering other evidence of duration of residence from before a child came into care, for example from schools or GP &c, is a task with which a child's social worker can help.

Can a child in care get legal advice?

Who should not be making applications?

There is a question of who, rightly, should be advising and assisting looked-after children and young people to secure their rights. The Home Office and the Office of Immigration Services Commissioner (OISC) have stated that local authorities with children under care orders are not required to be regulated to give advice on the EUSS. The Home Office has also published guidance for local authorities on the EUSS. [2]

Coram Children's Legal Centre believes that this will not be appropriate in many, if not all, cases. Advice for children in care around EUSS and immigration/nationality issues will almost always be complex. This is particularly important where there might be youth offending or suitability/character issues, and/or a negative decision will have to be challenged or appealed. Children will often need advice on nationality and immigration issues, as well as advice on the EUSS.

Who can make applications?

There are a number of organisations who have been provided funding to support applicants under the EUSS. [3] However, these organisations will not be able to support all applicants, whether due to capacity or geographical issues.

Legal aid has previously not been available for EU, immigration and nationality matters for children in care or care leavers. However, in July 2018 the UK government announced that they would be

bringing legal aid back in scope for immigration matters for children in care. [4]

This has not yet been brought into force as yet. It is currently going through parliamentary procedure. There is a presumption that unaccompanied and separated migrant children require legal aid and exceptional case funding applications do not require detailed evidence. [5] For further guidance, please see the guidance on ECF for separated children. [6]

While care leavers' immigration cases will not be coming back into scope of legal aid, social workers can still make applications for legal aid (exceptional case funding) on their behalf.

Any young person leaving care with unresolved status should have a plan for advice and assistance on these crucial identity issues written into their pathway plan.

Finally, the Home Office has 'assisted digital' centres but this is only for help with the technical aspects of EUSS applications – these centres will not give advice. It is not expected that young people or their social workers will actually have a problem with the technology required to apply; their issues are more likely to be concerning a lack of ID documentation or patchy residence documentation.

What about British Citizenship?

It is common for young people to want to become British – and to do so would often be in the young

person's best interests. Advice on nationality options and rights is a specialist legal area.

If the young person was born in UK and lives here for ten continuous years, they will have an entitlement to register as a British citizen. These applications, while regulated work, are relatively straightforward. However, we would always advise some legal input, as some children may need to check that registering as British does not close down other dual nationality options (some countries will not grant nationality where the person already holds the nationality of another country).

There may be strong identity or practical reasons to secure a child's EU nationality first, with documentation to prove it. For example, getting settled status through the EUSS is not the same as getting acknowledgement direct from the EU Member State that the person is a citizen of their country.

An EU national child who was not born in the UK will likely have some sort of ID document from their own Member State. Every effort should be made, when the child or young person comes into care, to get hold of the document used, even if expired. It may be the only evidence of their existing EU nationality.

As an alternative, if the parent states that the document is lost (and/or they are unwilling to facilitate a replacement), a full history of the parents' own national identities should be taken,

including if possible a copy of the parent's identity document.

The problem may be perceived to be resolvable upon adulthood when a person can apply of their own volition for their EU passport. If so, then it will be important that documents are kept that show that the EU nationality is already held as a first nationality. This will be particularly important if there is no entitlement route to register for British citizenship (not born in UK), or the young person has to register at discretion – which can only happen before a child turns 18.

There are advantages to being an EU national going forward that it will be important not to lose (such as free movement), as well as identity and cultural issues.

Equally, also becoming a (dual national) British citizen prior to turning 18 is usually in a looked after child's best interests for an number of reasons. This will include for security, identity, educational and development issues.

Most EU national children who have grown up in UK feel that they are, at least in part, British. If the EU passport cannot be acquired until adulthood, the child will need a British passport in order to travel and go on school trips/holidays abroad or within EU.

Children do not need to go through the same ceremonial requirements to gain citizenship and the application is cheaper (although at discretion,

and with a character requirement, so specialist legal advice is needed).

What about care leavers?

A major issue was the right to reside for benefit purposes for EU national care leavers. Some care leavers were excluded from leaving care support under Schedule 3, section 3 of the Nationality, Immigration and Asylum Act 2002 as EU nationals not exercising Treaty rights.

The EUSS should make the situation much clearer for those care leavers who have been resident in the UK for 5 years and who are entitled to settled status under the EUSS.

Local authorities should be amending their Local Offer document issued to care leavers and published on councils' websites. This will mean that those care leavers towards whom the LA still has an advice and assistance duty up to the age of 25 can be made aware of the provisions – and can be offered assistance. This may be invaluable to any care leaver applying to become settled and needing to show 5 years' residence.

Family members now over 21 who are not EU nationals can apply for settled status under the EUSS using the BRP issued originally to them, even if it is expired, and they are estranged from the relevant EU national.

EU nationals who have already left care and now want to naturalise as British have to show that they have become settled in UK at least a year before they apply, and also have to demonstrate legal

residence in UK for a period of years before that. It may be necessary to assess whether they had rights of residence as family members under the pre- EUSS legislation in connection with parents' activities.

Settled status under the EUSS only applies from the date when it was granted, and is silent as to legal residence status prior to the grant. In this circumstance, it will be helpful, as always, if a full picture of the family's circumstances was taken when the young person was taken into care.

Notes

[1] Immigration (EEA) Regulations 2016

[2] Home Office, EUSS guidance

https://adcs.org.uk/assets/documentation/EUSS_LA_HSCT_Guidance.pdf

[3] Gov.uk, List of organisations

<https://www.gov.uk/government/publications/eu-settlement-scheme-community-support-for-vulnerable-citizens/list-of-organisations>

[4] Ministry of Justice, Legal aid for unaccompanied and separated children, August 2018

<https://www.gov.uk/government/publications/legal-aid-for-unaccompanied-and-separated-children>

[5] Guidance on supporting separated and unaccompanied children to access legal aid in immigration cases, July 2019

<https://www.childrenslegalcentre.com/wp-content/uploads/2019/07/NGO-briefing-on-interim-ECF-Guidance-July-2019-FINAL.pdf>

[6] Gov.uk website, Legal Aid Agency

<https://www.gov.uk/guidance/civil-legal-aid-means-testing>

Useful Links

Statement of Intent:

<https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

Appendix EU:

<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu>

EUSS:

<https://www.gov.uk/settled-status-eu-citizens-families>

Home Office guidance for local authorities:

https://adcs.org.uk/assets/documentation/EUSS_LA_HSCT_Guidance.pdf

LGA Information Page:

<https://www.local.gov.uk/topics/communities/refugees-and-asylum-seekers/refugees-and-unaccompanied-children>

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line: mcpadvice@coramclc.org.uk