

EU status for settled children

What do we know about settled status for children?

Last month, the Children's Commissioner wrote twice to the Home Office setting-out a number of questions about how "the settled status" system will work for children. These letters are available [here](#) and [here](#). This week, we received a comprehensive response from the Minister of State, Rt. Hon Brandon Lewis MP, you can read this [here](#)¹. This blog outlines what we asked and what we've learnt. This is part of a long-running series of work the Children's Commissioner has undertaken examining the future immigration status of EU national children post-Brexit. For details of previous work please click [here](#).

Firstly, we asked about the legal position of children within the settled status scheme.

To understand the settled status system introduced for EU nationals, it is necessary to touch on the two legal systems on which it's built - 'Indefinite Leave to Remain' (ILR) in British law and 'Permanent Residency' in EU law. For adults, the differences between these two are fairly minor, but for children they differ fundamentally in how they recognise children – understanding this is vital to understanding the potential issues with settled status.

In British immigration law, children are rarely recognised as distinct from their parents. So if a parent acquires ILR or citizenship, their children will generally acquire this. Permanent Residency works differently because the child is granted permanent residency in their own right, in recognition of their time spent resident in an EU country (in this case the UK). What this means – and this is vital – is that any child resident in the UK for five years *has* obtained permanent residency (it is not something you have to apply for, it is bestowed automatically). Children who have gained permanent residency are entitled to settled status. For more information on this see the legal opinion the Children's Commissioner obtained from Lisa Giovannetti QC, available [here](#), and our accompanying [briefing](#).

Both systems can cause legal and bureaucratic impediments to children being able to obtain immigration status - and particular problems occur when they combine. For example, children in Britain may automatically be entitled to Permanent Residency, but in some cases they will need to prove this, and to do this the Home Office expected them to apply in their own right. The problem being that the Home Office has designed a system for adults based on documentation children don't have – tax receipts, leases etc. This created the absurd situation where parents could be granted permanent residency cards, but have their child denied, as occurred in [this high-profile case](#).

The British system of considering children in relation to their parents also causes issues; the most obvious being for children in care. But other groups are also disadvantaged: one group of children we have encountered frequently is children whose parents originate from countries which do not allow dual nationality (for example most Scandinavian countries). This left some children in the situation where their parents could not apply for British citizenship without relinquishing their original nationality - which they did not want to do. This prevented their children applying for British citizenship, even though, as many children told us, they had lived their whole life in Britain, only spoke English and would want British citizenship even if it meant relinquishing their second nationality. The British immigration system does not recognise these children, or the strong connection they have to Britain as a result of having grown up here.

To get around the problems with both systems, the Children's Commissioner campaigned to have the settled status scheme allow children to apply for status in their own right or with their parents. Initially, the Government said children would only be able to apply with a parent, but then in answer to a [Written](#)

¹ Note, some of the questions we posed in our first letter became redundant because the Government abandoned plans to end free movement on the 31st January in the event of a no deal.

[Parliamentary Question](#) kindly tabled on our behalf by Rt. Hon Hilary Benn MP, the Government accepted that children would be able to apply in their own right. The Minister confirms this in his letter.

How will this work in practice?

Giving children a legal right to something is only of any use if they can exercise this right. Children's ability to exercise their immigration rights can be severely curtailed by a Home Office bureaucracy designed for adults – as outlined above. The Minister reaffirms in his letter to the Children's Commissioner that children will be considered the same as adults and must establish "identity, residence and criminality". The issue for children is normally around residency – how do you prove you were somewhere if you don't have a lease, a wage slip or a tax return? The Children's Commissioner asked the Home Office to ensure that wherever a parent is granted settled status, the child should be presumed to have been resident with them. The Minister essentially confirms this. Wherever a child is applying with a parent, they will only need to provide evidence of their identity, their relationship to their parent and the parent's application number. This is welcome news and suggest the Government are taking a pragmatic approach.

We have formally requested, under Section 2F of the Children's Act, the statistics on applications and refusals to see if children are being disadvantaged in practice. This data was due to be provided to us last week, it has not arrived but has been promised.

This leaves three groups who need to apply in their own right, and will need to find evidence of residence:

- Children in state care

The Government is clear they expect local authorities to ensure all children in their care acquire settled status. We hope local authorities will ensure this is done, and include children in special guardianship orders. *Crucially, the Minister confirms that local authorities will be able to vouch for a child's residence in Britain for the time spent in care and before (ie a child who has been in care for two years but was in resident in Britain before will not have to independently verify their residence with their parents from whom they are separated).*

- Children applying in their own right (for whatever reason) and adults who grew-up in Britain, and need to rely on time spent in Britain as a child to establish residency (ie a 19-yr old who needs to show continuous residency in Britain from age 14). Both of these groups need to establish residency as a child.

Again, however, the Home Office approach has adopted a more pragmatic approach and is now explicit that a "letter or certificate from your school, college, university or other accredited educational or training organisation showing the dates you enrolled, attended and completed your course"². Young adults at university can also rely on student finance documentation.

The position for children with a criminal record or in custody

Criminality

As stated above, the Minister says all children will have to confirm that they are not barred from acquiring settled status because of criminality. Yet the Minister also confirms the bar for what will prevent a child acquiring settled status is high: a child will only be prevented from acquiring settled status if they are subject to a deportation order, which in turn is only done to children in exceptional cases regarding national security.

Custody

² <https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence#evidence-that-covers-longer-periods-of-time>

If a child is in custody (unless in remand and then not convicted), time spent in custody will not count towards settled status. Moreover – and this is vital – time in custody means that residency is ‘broken’ and residency requirements will reset on release. This is applying the same standard to children as adults, in a way that undermines the particular consideration we expect to be given to children.

However, the Minister also confirms that when a child has five years residency in Britain prior to entering custody, then they will have acquired permanent residency and can translate this into settled status. So any child who has had five years residency prior to going into custody can still get settled status. It is vital that all those working with children in custody – across the Youth Estate, in Youth Offending teams and elsewhere in local authorities – knows and acts on this. The Children’s Commissioner has written to Directors of Children’s Services and the Director of the Youth Custody Service to this end.

The children who will be disadvantaged by this regulation will be those who don’t have five years residency prior to entering custody. The situation for these children will depend on when they are released.

- 1) For children released from before January 31st (or the Brexit date if it is delayed)
For these children their residency requirements will ‘re-set’, but they will be given the opportunity to stay in Britain and acquire settled status after 5-yrs. In the meantime, they are eligible to apply for pre-settled status will give them most of the same rights.
- 2) For children released after January 31st (or the Brexit date if it is delayed)
These children will not be able to apply for or achieve settled status, they are eligible to stay in the Britain until December 2020, after which they will need to apply for “European Temporary Leave to Remain”, for a maximum of 36 months.

What happens to EU nationals who arrive after we leave the EU?

These children will be eligible to remain as now until December 2020, to stay beyond this point they will need to acquire “European Temporary Leave to Remain” or another immigration status (for example as the child of a parent on a skilled work visa).

What happens to family unification involving non-EU nationals?

The EU upholds family unification for non-EU nationals in two main ways:

- 1) The Zabranò principle – as explained in the [legal opinion](#) we obtained from Lisa Giovanetti QC. This enables parents who are non-EU nationals to remain in the EU to care for an EU national child. The future of this is unclear.
- 2) The Dublin III agreement which allows for unaccompanied child asylum seekers who arrive in the EU to be reunited with family members in another EU country (an exception to the general EU rule than asylum seekers in the EU must seek asylum in the first country in which they arrive). The Minister confirms that should Britain leave the EU without a deal, then Britain’s participation in this scheme will cease and families will have to rely on Article 8 of the ECHR. However, should we secure a deal then participation will remain during the transitional period. After this, the Government has committed to finding an agreement on the EU with this under Section 17 of the EU Withdrawal Act 2018.

Converting Settled-Status to Citizenship

As touched on above, the options for children to acquire citizenship in their own right are very limited. However, after acquiring settled-status children will be able to apply for citizenships when their parents do. See our [previous briefing](#) for more details.