



# The EU Settlement Scheme: Barriers and solutions for children and vulnerable adults

Gráinne Mellon, Garden Court Chambers

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# Brief Overview of the EUSS

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- UK left the EU on 31 January 2021 under a negotiated deal called EU-UK Withdrawal Agreement
- Appendix EU of the Immigration Rules- two types of status- pre-settled status (EU 14) and settled status (EU 11)
- The basis of rights under EUSS is i) EU nationality/family relationship to EU citizen and ii) duration of presence/residence in the UK
- Deadline 30 June 2021 (end of grace period)- applicants must be in the UK by 31 December 2020 (end of transition period)
- There are a number of differences between EEA Regulations and Appendix EU i) exercise of EU treaty rights (such as work, study etc) is no longer required and ii) rights under EEA Regs are acquired automatically but to get status under EUSS an application must be made iii) status, if granted, will now be held digitally- people will not be issued with any hard evidence of their status



# The EUSS- the requirement to apply

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- Requires a pro-active step to be taken- application to be made before the deadline of 30 June 2021
- Failure to do so has real consequences for children and young people- described as a “cliff-edge loss of rights.”
- Risks include being undocumented and losing access to secondary health care services and public funds, the right to work or rent property when they transition into independence, and risk being barred from learning to drive, holding a bank account and going to university.
- Concern- many EU citizens will find themselves, unknowingly in the UK unlawfully after the deadline.
- No comparable scheme has ever had 100% prospects of success (even without the pandemic)



# Children in care and EU rights

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- Home Office estimate 9000 children in care and care leavers who are eligible to apply for EUSS
- Particular complications with EU children in care and care-leavers- identification, proof of residence/citizenship and suitability.
- Research from The Children's Society (April 2021)- more than 50% of identified EU looked after children and care leavers have yet to apply to EUSS and highlights
  - Difficulty in identifying those who need to apply
  - Complicated application process and individual cases
  - Unclear or lack of statutory guidance
  - Over-stretched capacity within local authorities
- See also research from Coram Children's Legal Centre: Uncertain futures: the EUSS and children and young people's right to remain in the UK.
- 9 June 2021- 45 charities called for the deadline of 30 June 2021 to be lifted.



# Children in care: Home Office guidance

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- Home Office Guidance “*EU Settlement Scheme: Looked After Children and Care Leavers, Local Authority and Health and Social Care Trusts*” dated 4 May 2020:  
<https://www.gov.uk/government/publications/eu-settlement-scheme-looked-after-children-and-care-leavers-guidance>
- Page 7- sets out “mandatory obligations” on local authorities for children with care orders, s. 20 children, children in receipt of local authority support, care leavers and children in secure settings
- Not statutory guidance and difficult role for social workers in making immigration applications.
- See also “*Home Office looked after children and care-leavers survey 2020*”  
<https://www.gov.uk/government/publications/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020>



# Children in care: Home Office guidance

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- Home Office EUSS case-worker guidance dated 21 May 2021  
<https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance>
- See in particular:
  - Alternative evidence of identity and nationality (page 54)
  - Applications in respect of children (page 122)
- Paper forms for applicants without identity documents can now be downloaded and sent via email to [approvedeusspaperform@homeoffice.gov.uk](mailto:approvedeusspaperform@homeoffice.gov.uk)
- <https://www.gov.uk/government/publications/apply-to-the-eu-settlement-scheme-by-post-or-email>



# Case-law: Looked After Children and EUSS

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*Re W and Re Z (EU Settled Status for Looked After Children)* [2021] EWHC 783 -31 March 2021

- Local authorities have **mandatory obligations** to progress EUSS applications on behalf of Looked After Children and can apply for any identity documents necessary for such an application, even in the face of parental objection, under their powers in section 33 (3) of Children Act 1989 and without recourse to courts.
- Helpful comments on impact of insecure immigration status on children and young people, including on their identity- Mr. Justice MacDonald- 17 points and at [79]:

*“It is not acceptable to leave children in a position of ‘limbo’ with respect to their immigration position....A late application will result in the child becoming undocumented for a period, with the concomitant impact on access to services and benefits and liability to immigration enforcement. Even a short period undocumented can have an adverse impact on a child or young person.”*





# Barriers to settlement- Children

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- Lack of oversight and identification;
- Lack of statutory guidance
- Difficulties obtaining legal representation in complex cases (identity documents, parental consent, suitability)
- Complexities and cost of British citizenship applications
- Incorrect status being granted (in particular pre-settled status instead of settled status)
- Rejection or delay- huge backlog in decisions- Home Office- quarterly statistics- 10 June 2021- backlog of 334,500 unresolved cases at end of May
- Late applications (not automatic for children in care/care leavers)
- No right of appeal (if applied before 31 January 2020)-- need to withdraw and re-apply)



# Solutions: children

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- When in doubt APPLY before 30 June 2021
- Consider withdrawing and re-applying to preserve appeal rights if application submitted before 31 January 2020;
- Broader policy campaign and advocacy work:
  - Government to extend deadline beyond 2021 alongside continued outreach, support and monitoring
  - Accept all out of time applications by looked after children and care leavers whether or not they are under 18 at the date of EUSS deadline
  - Issue settled status for children/care leavers
  - Physical documentation for looked after children and care leavers
  - Work with local authorities to help identify children care or those entitled to leaving care support
  - Reform to British citizenship fees/application process for children born in the UK
- 72 grant funded organisations;
- Special shout out to Here for Good Law Referral Process: <https://www.hereforgoodlaw.org/>



# EUSS COVID-19 Guidance

## Mental capacity and late applications

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# Timeline

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- 29 January 2020: UK's Chief Medical Officer announced the first two cases of COVID-19 in the UK
- 23 March 2020: UK entered in 'lockdown'
- 1 May 2020: ILPA wrote to SSHD to ask for COVID-19 related exemption for breaks in continuous qualifying periods for the EUSS
- 4 August 2020: SSHD states that further guidance will be 'published in due course'
- 15 December 2020: Unlawful EUSS COVID-19 guidance is published
- 11 pm 31 December 2020: end of the transition period
- 12 March 2021: Here for Good issues a claim for judicial review
- 6 May 2021: EUSS COVID-19 guidance is withdrawn with commitment that new guidance would be published by 31 May 2021
- 10 June 2021: SSHD publishes revised EUSS COVID-19 guidance
- 30 June 2021: end of the grace period



# Old guidance

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If your continuous qualifying period in the UK has been affected

Your continuous qualifying period will not necessarily be affected if you were impacted by coronavirus public health restrictions. For example, if you had coronavirus overseas and could not return to the UK, or imposed travel restrictions meant you were absent from the UK for longer than planned (providing the period does not exceed 12 months). You will not always have to restart your 5-year qualifying period towards settled status...

## **A single absence from the UK of more than 6 months but not more than 12 months**

If you have been absent from the UK for a single period of more than 6 months, but not more than 12 months, during your 5 year continuous qualifying period due to being ill with coronavirus, and you were unable to return to the UK because you were ill or in quarantine, that absence will not cause you to break your continuous qualifying period. If you are a student who was studying in the UK and are studying outside the UK because of coronavirus, that absence will not cause you to break your continuous qualifying period, where it is for a single period of more than 6 months but not more than 12 months, during your 5-year continuous qualifying period.

Self-isolating will **only** be considered an important reason for absence where you are, or were, **under quarantine conditions**, for example:

- when ill with coronavirus yourself,
- sharing a house with someone ill with coronavirus,
- when required to self-isolate as a result of being, or being in contact with someone who is, in a vulnerable or high-risk category

In all cases where you have been prevented from travelling due to coronavirus you should provide a supporting letter with your application outlining the details and the dates you were ill or were in quarantine.



# New guidance

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- EEA citizens who have been absent from the UK for a period of up to 12 months because of Covid-19 are permitted to rely on that absence being for an important reason. The revised guidance confirms that the EEA citizen does not have to be or have been ill with Covid-19. In addition to any kind of self-isolation or shielding, caring for family members, studying remotely, there is a broadly drafted catch all provision: *“absent from the UK for another reason relating to coronavirus, for example, you left or remained outside the UK because there were fewer coronavirus restrictions elsewhere; you preferred to work or run a business from home overseas; or you would have been unemployed in the UK and preferred to rely on support from family or friends overseas”*.
- EEA citizens who were already absent from the UK for an important reason and were forced to exceed the 12-month maximum permitted absence because of Covid-19, *“coronavirus meant you were prevented from, or advised against, returning to the UK earlier”*. Any absence from the UK beyond the 12-month maximum will not be counted as residence in the UK for the purposes of qualifying for settled status;



# Late applications/immigration enforcement

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“In line with the Citizens’ Rights Agreements, there remains scope, **indefinitely**, for a person eligible for status under the EU Settlement Scheme to make a late application to the scheme where, in light of all the circumstances and reasons, there are reasonable grounds for their failure to meet the deadline applicable to them.”

Duties on immigration enforcement:

- If encounter someone potentially eligible for EUSS, provide a written notice, with (normally) 28 days to apply after written notice
- The officer **will not consider whether**, if the person is within the scope of the EUSS, there are reasonable grounds for their failure to meet the deadline applicable to them under it; you will consider this if the person then makes an application under the scheme.
- **Must** record notice on relevant Home Office IT system.
- no immigration enforcement action for being in the UK without leave will **normally** be taken in respect of them.
- Appears to officer that they might be a joining family member- same process.
- Where the person then makes an application under Appendix EU which is missing any of the components required under rule EU9 for it to be valid, they must be prompted or contacted and given a reasonable opportunity to provide what is needed to validate the application



# Mental capacity

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Non-exhaustive and generally inclusive guidance regarding mental impairment

- Evidence that a formal arrangement, such as a Power of Attorney, is or was in place in respect of the person
- a letter from a doctor, health professional, social services department or solicitor confirming the circumstances
- a letter from the applicant themselves explaining the circumstances and authorising an appropriate third party to act on their behalf
- evidence of a carer relationship where an appropriate third party is providing for the person's care needs, for example a Department for Work and Pensions letter confirming the eligibility of the third party for Carer's Allowance





# Akinsanya – a brief overview

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22 June 2021



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# What it is about

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- *Akinsanya, R (On the Application Of) v Secretary of State for the Home Department (Rev 3)* [2021] EWHC 1535 (Admin) (09 June 2021) The Claimant challenged the Appendix EU definition and SSHD policy which excluded applicants from qualifying for leave as a person with a Zambrano right to reside.
- Definition...  
a person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:  
...  
(b) without leave to enter or remain in the UK, unless this was granted under this Appendix
- Policy: *The Secretary of State considers that this test cannot be met where the applicant has leave to enter or remain in the UK (or a realistic prospect of obtaining such leave were they to apply)*



# The Ruling

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Mostyn J found that

- (1) there was no basis to find that the Ruiz Zambrano right in EU law was a last resort, where no other leave was available looking to substantive differences in types of leave and relying heavily on *Sanneh v Secretary of State for Work and Pensions* [\[2016\] QB 455](#)
- (2) SSHD wrongly construed *Patel v SSHD* [2017] EWCA Civ 2028, *Patel v SSHD* [2019] UKSC 59
- (3) The wording of the EEA Regulations – was clear in that only persons with indefinite leave were excluded from qualifying as being exempt persons defined therein

The Court did not rule on the remaining arguments pleaded by the Claimant.

Mostyn J observed the difficulty with SSHD changing her position given the status of the EEA Regulations.



# What now

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## The order:

- Declaration that both the Appendix EU and policy were erroneous.
- Oder for SSHD to reconsider the relevant provisions of Appendix EU
- SSHD will not consider cases impacted by the judgment until that reconsideration
- Policy on reconsideration will include a reasonable period for applications no less than 6 weeks after that reconsideration to have reasonable grounds for application after the required date
- Valid application before 30 June 2021 will result in issuing of Certificate of Application with right to work, study and rent a place to live, until final determination of their Zambrano application;
- SSHD considering the position in relation to the issue of similar certificates for applications made under Appendix EU on or after 1 July 2021, including in relation to Zambrano applications;
- persons encountered by Immigration Enforcement on or after 1 July 2021 who may be eligible for leave as potential Zambrano applicants under Appendix EU in light of the judgment, will be provided with written notice giving them an opportunity to make a valid application under Appendix EU, normally within 28 days of the date of the written notice.



# Thank you

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