

KIND Resources.

EEA National Children in Need

A briefing

January 2023





KIND UK (Kids in Need of Defense UK) works to protect undocumented children in the UK.

- We provide free legal help to children, young people and families as they navigate the UK's immigration and nationality procedures. We partner with lawyers and law firms across the country to ensure the best quality legal advice and representation
- We protect the rights and wellbeing of undocumented children and young people
- We campaign for systemic change to ensure that all children are safe and able to thrive regardless of their immigration or nationality status

Last year we supported over 700 undocumented children, young people and families. Over 450 lawyers from 20 partner law firms worked on KIND cases, and we achieved a success rate of 99%.

KIND UK is a collaboration between five award-winning, UK based organisations that specialise in children's immigration and asylum law: Migrant and Refugee Children's Legal Unit, JustRight Scotland, Coram Children's Legal Centre, Central England Law Centre, and Greater Manchester Immigration Aid Unit.

We partner with KIND, a US charity supporting legal representation for children facing deportation proceedings alone.

For information about accessing KIND UK's services visit:

www.kidsinneedofdefense.org.uk/cases-we-take

Initial information about a child's immigration status/citizenship at:

www.pathtopapers.com

For information on other sources of legal advice visit:

www.kidsinneedofdefense.org.uk/where-to-get-legal-advice

For queries about this resource, please contact:

cynthia.orchard@centralenglandlc.org.uk

1.

Introduction

This briefing discusses support for children in need who are EEA nationals or family members of EEA nationals, residing in the UK after the UK's withdrawal from the European Union, focusing on local authorities' duties to provide support under Section 17 of the Children Act 1989 (England).

2.

Local Authority duties to support children under the Children Act 1989 (England) and Children Act 2004 and related guidance

Section 17(1) of the Children Act 1989 confirms that it is the duty of the local authority to safeguard and promote the welfare of children in their area who are in need and to provide them and their families with a range and level of services appropriate to those needs. Services may include accommodation, assistance in kind, and cash.

Section 11 of the Children Act 2004 also requires local authorities and other public bodies in England and their partner agencies to safeguard and promote the welfare of children.

Detailed statutory guidance as to how local authorities, agencies and individual social workers should work together to safeguard and promote the welfare of children is provided in the Working Together to Safeguard Children guidance (July 2018).¹ The guidance outlines how local authorities should meet their legal obligations, requires local authorities to cooperate with other organisations and agencies to improve the wellbeing of local children, and anticipates a child-centred approach.

3.

EEA nationals and immigration status after the UK's departure from the European Union (Brexit): Settled Status and Pre-Settled Status

Since the UK's departure from the European Union, EEA nationals² and their family members³ living in the UK have been required to apply to stay in the UK under the EU Settlement Scheme (EUSS). The deadline for applications was 30 June 2021.

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1. Department for Education, Working together to safeguard children: Statutory guidance on inter-agency working to safeguard and promote the welfare of children, <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>
 2. This includes nationals of EU countries, plus Switzerland, Norway, Iceland and Liechtenstein.

The government issued a statement on 6 August 2021 confirming that the rights of EEA nationals and their family members who apply late (after 30 June 2021) to the EU Settlement Scheme will be protected if there is reasonable cause for the delay.⁴

EEA nationals and qualifying family members who had been residing in the UK for 5 years prior to 11pm on 31 December 2020 should be granted 'Settled Status'. Those who were in the UK prior to 31 December 2020 but did not meet the 5-year requirement at that date should be granted 'Pre-Settled Status'. Pre-Settled Status can later be converted to Settled Status (after 5 years' residence in the UK is completed). Eligible family members who arrive in the UK after 31 December 2020 to join a qualifying EEA national family member residing in the UK prior to that date are eligible to apply for Pre-Settled Status if certain conditions are met.⁵

4.

Recourse to Public Funds and Section 17 Support

Some people in the UK are not eligible to receive support which is classified as a 'public fund'. The definition of public funds for immigration purposes is provided in Section 115 of the Immigration and Asylum Act 1999 and Home Office guidance.⁶ Many, but not all, types of mainstream welfare benefits are considered 'public funds'. Community care support, such as support provided under Section 17 of the Children Act, is not considered 'public funds'.

People without leave to remain in the UK (including most people seeking asylum and many others) and people with many types of leave to remain (including, for example, visitors, students, dependent spouses and children, and work permit holders) have 'no recourse to public funds' (NRPF).

5.

EEA nationals and eligibility for public funds after Brexit

Some EEA nationals in the UK are eligible to receive public funds (including most welfare benefits such as Universal Credit), if they meet the financial and other criteria.

Settled Status: EEA nationals who have been granted Settled Status are generally eligible to receive public funds.

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3. Relevant family members include: spouses, civil and unmarried partners; Dependent children and grandchildren; and dependent parents and grandparents.
 4. <https://www.gov.uk/government/news/temporary-protection-for-more-applicants-to-the-settlement-scheme>.
 5. See 'Apply to the EU Settlement Scheme' <https://www.gov.uk/settled-status-eu-citizens-families>.
 6. Home Office, [Public Funds: Migrant access to public funds, including social housing, homelessness assistance and social care](#), v 18 (Aug 2021); and see list in [s115 of the Immigration and Asylum Act 1999](#).

Pre-Settled Status: EEA nationals who have been granted Pre-Settled Status may be eligible to receive public funds if they meet certain criteria showing an independent ‘right to reside’ in the UK prior to the Brexit deadline (31 December 2020) and ongoing, including:

- Working or self-employed and meet other criteria relating the income requirements and duration of employment
- Looking for work after a job or self-employment ended
- Unable to work because of pregnancy (usually from 6 months of pregnancy) or recent birth and planned to return to work or look for work within 41 weeks of the baby being born
- Unable to work due to illness (and they previously worked in the UK)
- In certain circumstances, looking after a child in school (and at least one parent was/is working).

There has been recent litigation at the Court of Justice of the European Union and the UK Supreme Court relating to the rights of certain persons with Pre-Settled Status to receive public funds. The result requires a complex analysis in some cases, and there may be future litigation to clarify some points.⁷ In general, at present:

- EEA nationals who have Pre-Settled Status who do not meet any of the above criteria are generally not eligible for public funds, unless refusal of public funds would breach their right to dignity, their right to family life, or the best interests of a child. They may not be eligible for public funds if they are actually being provided alternative support available to them, such as Section 17 support (and that support prevent their rights being breached).
- In *SWP v AT (Aire Centre and /MA Intervening) [2022] UKUT 330 (AAC) (12 Dec 2022)*, the Upper Tribunal found that a mother and child with EU PSS who experienced domestic violence were eligible for Universal Credit, even though they had no independent right to reside. Where there is an actual and current risk that the applicants cannot live in the UK in dignified conditions, then universal credit should be awarded. The theoretical availability of Section 17 support does not mean that an application for universal credit can be refused.⁸

7. See eg *Fratila and Another (Respondents) v Secretary of State for Work and Pensions and Another [2021] UKSC 53* (“Fratila”) and *CG v Department for Communities (NI)*, Application C-709/20 (Court of Justice of the European Union, 2021), summarised in: ‘Advice for people with pre-settled status following the judgment of the Supreme Court in *Fratila* and the decision of the Court of Justice in *CG v Department for Communities*’ (Child Poverty Action Group, Dec 2021) <https://cpag.org.uk/welfare-rights/legal-test-cases/current-test-cases/eu-pre-settled-status>.

Application to EU Settlement Scheme was submitted in time and is pending: People who applied to the EU Settlement scheme by 30 June 2021 and are still waiting for a decision on their application are eligible for public funds if they: lived in the UK by 31 December 2020 and they meet at least one of the Pre-Settled Status + right to reside criteria (above) or had lived in the UK legally and continuously for at least 5 years by 31 December 2020.

Application to EU Settlement Scheme was submitted late (after 30 June 2021): the rights of such persons are protected while their application is pending, and they are eligible for public funds if they: lived in the UK by 31 December 2020 and they meet at least one of the Pre-Settled Status + right to reside criteria (above) or had lived in the UK legally and continuously for at least 5 years by 31 December 2020.

Not yet made an application under the EU Settlement Scheme (for an EEA national in the UK prior to 31 December 2020): such persons are now considered to be unlawfully present in the UK. They are generally not eligible for public funds. However, if they have reasonable grounds for not having made an application (which may include being a child or adult with limited capacity), they should make an application immediately and then are eligible for public funds if they: lived in the UK by 31 December 2020 and they meet at least one of the Pre-Settled Status + right to reside criteria (above) or had lived in the UK legally and continuously for at least 5 years by 31 December 2020.

EEA nationals who arrived in the UK after 31 December 2020 (not joining EEA family member in UK prior to that date): these EEA nationals have to meet the criteria for permission to stay in the UK which apply to people of all nationalities. They generally do not have recourse to public funds (but may be eligible to make a ‘Change of Conditions’ application if destitute).⁹

For destitute children who are lawfully present in the UK but are not eligible for public funds because they do not meet the above criteria (or who may

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8. See also <https://cpag.org.uk/news-blogs/news-listings/destitute-eu-nationals-pre-settled-status-can-rely-eu-charter-fundamental>.
 9. A change of conditions application means applying to become eligible to receive public funds. Such an application can be granted where a person is destitute or at risk of destitution; they are a parent/carer of a child and need access to public funds for reasons relating to the child’s welfare; or there are ‘exceptional circumstances’ relating to their financial situation. Such applications are very likely to be granted for most applicants who are receiving Section 17 support. For more information or to make a referral for legal advice to apply for a change of conditions, see the Unity Project. Currently, destitute EEA nationals who have Pre-Settled Status but no independent right to reside in the UK are not permitted to make a ‘Change of Conditions’ application to allow them recourse to public funds, making them worse off than other destitute persons who can make a Change of Conditions application. This may constitute unlawful discrimination. See ‘Advice for people with pre-settled status following the judgment of the Supreme Court in Fratila and the decision of the Court of Justice in CG v Department for Communities’ (Child Poverty Action Group, Dec 2021) <https://cpag.org.uk/welfare-rights/legal-test-cases/current-test-cases/eu-pre-settled-status>.
 10. A human rights assessment is needed only for people who are excluded from support by Schedule 3, NIAA 2002, to assess whether they can avoid their destitution by returning to their country of origin. Schedule 3 bars the provision of social services support to a person who is ‘in breach of immigration laws’, unless the support is necessary to prevent a human rights violation. EEA nationals with Pre-Settled Status have permission to stay in the UK, so they are not in breach of immigration laws, and no human rights assessment is needed.

be eligible but are not yet in receipt of public funds), the Local Authority must provide support for them and their family under Section 17 of the Children Act (until mainstream benefits are in place).

If (and only if) the destitute child/family is not lawfully present in the UK, before refusing Section 17 support, the Local Authority must do a human rights assessment to consider whether refusal of support would result in a breach of the child's/families' human rights.¹⁰

6.

Local authority support for EEA nationals after Brexit

Prior to Brexit, under the Nationality, Immigration and Asylum Act 2002 (Schedule 3, Paragraph 5), EEA nationals were not eligible to receive the types of local authority support listed under Schedule 3 (which included Section 17 support), unless refusal of support would result in a breach of their human rights.

After the UK left the EU, the eligibility of EEA nationals for support from local authorities changed. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (S.I. 2020/1309) amended Schedule 3, Paragraph 5 to the Nationality, Immigration and Asylum Act 2002. This amendment removed EEA nationals from the list of those who were not eligible to receive services listed under Schedule 3. This means that EEA nationals who are lawfully present in the UK are not excluded from local authority support, including under Section 17 of the Children Act (and those who are not lawfully present can only be refused such support if that refusal would not result in a breach of their human rights).

7.

Conclusion

Under the current law (as of August 2022), EEA national children (and their parents) who have Pre-Settled Status, Settled Status, or are otherwise lawfully present in the UK are eligible to receive support under Section 17 of the Children Act. EEA national children who do have Pre-Settled Status, Settled Status or are otherwise lawfully present MAY be eligible for Section 17 support, but it depends on their circumstances, and expert legal advice may be needed. We strongly recommend that local authorities seek expert legal advice prior to refusing support to any child who is an EEA national or family member of an EEA national child.

Appendix

Cases illustrating the complexity of some of these issues :



Gemma

[Child in Need and family, EU Pre-Settled Status](#)



Khalima

[Child in need taken into care, EU Settled Status for relative of EEA national, domestic violence](#)

See also:

Resources & Training

[Resources & Training section of KIND UK's website](#)

KIND UK's briefing

['Children in Need' and Immigration and Citizenship Matters: A guide for local authorities](#)