

Better Pathways project: Briefing 1

Supporting people with EU pre-settled status: guidance for frontline practitioners

EUSS key policy updates

From Statement of Changes - July 2023:

- **automatic 2-year extensions** to pre-settled status (people should receive email confirmation from Sept 2023).
- plans in 2024 to **automatically upgrade pre-settled to settled once people eligible**.
- applications made on or after 9 Aug 2023: people now have to find evidence of residence, eligibility stability and **'reasonable grounds'**.
- if cannot prove 'reasonable grounds' for late application, application will be rejected rather than refused.
- what counts as **'reasonable grounds' has changed** (language barriers / lack of legal representation no longer valid arguments), now have to explain the delay in depth; suggests medical capacity only grounds for acceptance.
- From 9 Aug 2023 applications from **family members who are 'illegal entrants' in the UK will be rejected / not considered**.

From Statement of Changes - Sept 2023:

- as of 9 Aug 2023 **two routes to application are now closed – Zembrano carers route and Surinder Singh route**. Only people who had already applied or whose case was pending or appealed before this date will be considered.
- decisions that are made on refusals or after 5th Oct 2023 are not eligible for admin review.

Other key points:

- it is really important that **EU family members apply for pre-settled status before coming to the UK** and do not just come on their passport as then they will be classed as visitors (this could potentially make them classed as 'illegal entrants').
- Anyone who has a UKVI account or a biometric card can apply for a **digital share code** to prove their right to work to UK employers. If they do not have either of these they have a right to use their immigration documents as proof for a UK employer (see <https://www.gov.uk/prove-right-to-work/get-a-share-code-online> to help someone apply).

(for video summary of the changes, please see 'The Latest Changes to the EU Settlement Scheme: a conversation with Danai Papachristopoulou' <https://www.youtube.com/watch?v=7eZYWqOch74>)

1. Introduction: the Better Pathways briefing series

The Better Pathways four-part briefing paper series responds to current areas of challenge arising for cross-sector frontline practitioners who are supporting individuals and families with the NRPF condition. Each briefing paper collates up-to-date information on legal definitions, policy changes, insights from academic research, shares reflections and good practice from frontline practitioners across the statutory and third sectors, and signposts to useful resources. Each briefing ends with recommendations to develop more supportive pathways to better outcomes for people with NRPF. The briefings can be used as helpful guides for frontline practitioners and as a continuous professional development tool to keep abreast of current NRPF issues from practice and research.

2. What is NRPF?

No Recourse to Public Funds (NRPF) is a condition under Section 115 of the Immigration and Asylum Act 1999 that is mandatory for most types of UK visa. This includes people seeking asylum in the UK, people who are undocumented and considered to be living in the UK illegally, and migrants who have NRPF as an immigration condition on their visa (McKinney et al., 2023). People with an NRPF condition are ineligible to access public funds including, amongst others, a wide range of social security benefits, tax credits and housing assistance (ibid). The following link is a useful NRPF Toolkit for social workers (Dickson et al., 2022), which will also have relevance for wider frontline practitioners:

<https://wlv.openrepository.com/bitstream/handle/2436/624982/Social%20Worker%27s%20NRPF%20Toolkit%202022.pdf?sequence=2&isAllowed=y>

3. What is EU pre-settled status?

Key points:

- All **EEA-born individuals** (EU citizens, and people from Iceland, Lichtenstein, Norway and Switzerland) **living in the UK prior to 31 December 2020** must apply under the EUSS scheme.
- Those who have **not yet applied** must be supported to do so **urgently**.
- **Pre-settled status is temporary** and gives a person **limited leave** to remain.
- **Settled status is permanent** and gives a person **indefinite leave** to remain.
- **Settled status** requires proof of **5 years continuous residence in UK**.

In response to the UK's exit from the European Union, the UK Government opened the EU Settlement Scheme (EUSS) in early 2019, as part of the EU-UK Withdrawal Agreement, with the purpose of implementing a new requirement for EU citizens living in the UK prior to 31 December 2020, and their non-EU family members, to apply for a new immigration status: pre-settled or settled status (Fernández-Reino and Sumption, 2022). This requirement applies to everyone living in the UK who comes from a European Economic Area (EEA) country, that is those in the EU plus people from Iceland, Liechtenstein, Norway and Switzerland. EEA nationals arriving in the UK after the 31 December 2020 in most cases will be unable to establish lawful residence under the EU-UK Withdrawal Agreement (Shelter, 2023a).

The UK Government's initial deadline for EU citizens to apply for the EUSS scheme was June 2021. By the end of December 2021 more than two million people held only temporary, pre-settled status and still needed to apply to gain their 'settled' status in the UK (Fernández-Reino and Sumption, 2022). If an EEA-born person has been living in the UK for five years 'continuous residence', they must apply to switch to settled status for free, with settled status the equivalent of indefinite leave to remain (UK Government, 2023a). If a person has been living in the UK for less than five years or spent more than six months living outside the UK in a 12-month period they are considered as pre-settled until eligible to apply for settled status (Fernández-Reino and Sumption, 2022).

People who did not apply by the June 2021 deadline are not considered to have lawful status in the UK and are at risk of losing access to entitlements, even if they have submitted a late application that has been accepted by the Home Office (NRPF Network, 2022). Legal sources refer to an anticipated 'stricter approach' by the Home Office to what is considered 'reasonable grounds' for a late application after 9th August 2023 and as such there is an urgency to support people to apply as soon as possible (Rollason and Iqbal, 2023). However, the Home Office have recently announced a proposed change regarding the switch from pre-settled to settled in which they have plans to implement an automated system in 2024 to make the switch automatically (Home Office, 2023). Additionally, from September 2023 they will automatically extend those on pre-settled status by another two years before it expires if they have not yet switched to settled status themselves (ibid).

4. What are the rights and entitlements of people with EU pre-settled status?

Key point:

- People with **pre-settled status** need to complete a **habitual residence test** and prove their **right to reside** to access benefits.

As pre-settled status is considered a temporary status, the conditions and rights attached to it are therefore less secure and more complex than for those who have been granted settled permanent status. For example, pre-settled status in itself does not count as proof of 'right to reside' (Fernández-Reino and Sumption, 2022). In 2021, two Romanian nationals applied for Universal Credit (UC) but were refused on the grounds of their pre-settled status which was deemed not a sufficient right to enable them to access means-tested benefits (Child Poverty Action Group [CPAG], 2023). The case, 'Fratila vs Secretary of State for Work and Pensions', received a ruling from the Supreme Court that it was not discriminatory to exclude those who had pre-settled status from claiming UC without qualifying for the right to reside (NRPF Network, 2022). Although the decision was ruled not unlawfully discriminatory in EU law, frontline staff and decision-makers are urged 'to check before refusing benefits on the basis of such a rule that doing so did not breach fundamental rights to dignity (Article 1 of the Charter of Fundamental Rights), family life (Article 7) and the rights of the child (Article 24)' (CPAG, 2023).

For someone with pre-settled status to be eligible for means-tested benefits, such as UC, an EEA person will need to complete a 'habitual residence test' as well as prove their 'right to reside'. The determination of someone's 'right to reside' is considered the most complex part of a habitual residence test decision (Parkes and Morris, 2020).

4.1 Proving 'right to reside'

'Right to reside' key points:

- People can claim (and need to prove) right to reside through 1 of 3 routes/criteria: **worker route, family route, or derivative route.**
- **Worker route:** EEA national who is working, self-employed, or has stopped working within last 6 months; family member of self/employed EEA person.
- **Worker route includes 'retained workers':** a person who is unable to work temporarily due to illness, involuntary redundancy, childbirth.
- **Family route:** applies to EEA/non-EEA family members; cannot be used by someone 21 or over.
- **Derivative route:** EEA parent/carer whose child is in education in UK and whose employment overlaps with time child started education.

There are three criteria/routes under which people can claim the right to reside. The first is the worker criteria. That is an EEA national who is working, self-employed, or has recently stopped working, or is the family member of an EEA worker/self-employed person. The second is the family criteria. That is a family member who has a retained right to reside. The third is the derivative criteria. That is the parent/primary carer (EEA national) of a child who is in education, with the parent/carer having worked in the UK (NRPF Network, 2022).

If a person fits one of these three criteria, they will then need to provide evidence as proof. Those applying under the first '**worker status**' criteria will qualify if their work is deemed 'genuine and effective' by the Department for Work and Pensions, for example someone who has been earning more than £183 per week for three months or more preceding their claim. The same criteria apply to someone who is self-employed. Also related to worker status is that of 'retained worker status', which applies to people who have finished or temporarily paused their employment due to factors such as involuntary redundancy (for which someone can gain retained worker status for up to six months following unemployment), an illness or accident that is temporarily preventing them from working, or childbirth (as long as they return to work within a 'reasonable' period) (ibid).

Notably, the condition of needing to qualify for the 'right to reside' through employment means that a number of people fall through the cracks. For example, this significantly affects parent and single parent households who have to stay at home to look after young children or children with special needs (ibid). Women may face more difficulties in applying for settled status due to a variety of factors: they are more likely to be victims of domestic abuse; they are more likely to be deemed "economically inactive" resulting in inability to provide required records from HMRC or DWP; and are more likely to be employed in informal sectors where there is little paper trail (NPC, 2018 in Lloyd-Williams et al., 2022). A lack of awareness regarding the complex regulations of the right to reside in terms of accessing UC can also lead to challenges, such as people who are made redundant not being aware that their right to UC under the 'worker status' ends six months after unemployment (Parkes and Morris, 2020). Potential challenges also arise in relation to people who are unable to work due to an illness, disability, or caring responsibilities, people who have difficulties obtaining or sustaining work due to situations of homelessness, people who are casually employed and find it difficult to provide sufficient proof of their work, and people who are Zambrano carers (that is those whose right to reside is dependent solely on primary caring responsibilities for a British citizen) (NRPF Network, 2022).

If applying for right to reside through the **family member route**, this process is applicable to family members who are both EEA or non-EEA, with rules dependent on a claimant's age and circumstances. For example, someone under the age of 21 is eligible to make a claim through their parents or grandparents but someone over 21 would not be able to use this route.

The third route of a '**derivative right to reside**' refers to the primary caregiver (EEA citizen) of a child in the UK education system, providing there is an overlap between a child being in the education system and the caregiver being in work in the UK (ibid). One variant is if a parent/carer is not EEA but their child has EU pre-settled status, in which case the parent might be given 'Chen' status, named after the court judgment of that name. If given Chen status, a non-EEA parent or guardian has the right to stay in the UK as a derivative right from the EEA child if they have sufficient resources to support the child until they are aged 18 at which point the child has to be identified as self-sufficient (Home Office, 2023). The Chen status therefore means that the primary carer has NRPF as the child is expected to be funded by them.

4.2 Proving 'habitual residence'

'Habitual residence' key points:

- Assesses whether a person is **planning to stay** in the UK in the long term.
- Applies only to people applying for **Universal Credit, Housing Benefit, or Pension Credit**.
- **People under particular 'right to reside' criteria do not have to prove habitual residence**, including: worker/retained worker status; self-employed/retained self-employed status; retired; or permanently unable to work due to illness or accident at work. This includes the family member of someone under one of these criteria.
- A person will need to show **UK arrival date and proof of their main home** in the UK, Ireland, Channel Islands, or Isle of Man.
- A person needs to show at least 2 (ideally more) pieces of evidence as proof, such as: **travel tickets/boarding pass; wage slips; tax documents; letter from employer; bank statements' tenancy agreement; proof of address on official letters or bills; proof of membership of gyms/local organisations; letter from child's school; proof of closing bank account in country left.**

The habitual residence test applies to people who have recently moved or returned to the UK, including British citizens, who are applying for UC, Housing Benefit, or Pension Credit. It does not apply to people who have the right to reside under one of the following criteria: worker status (including retained worker status); self-employed status (including retained self-employed status); family member of worker or self-employed person; retired or family member of someone who is retired; someone who has permanently stopped working due to illness or an accident at work (or a family member of someone in that position). People who have the right to reside under other criteria will still need to have the habitual residence test (Citizens Advice, 2023).

For those people that need to complete the habitual residence test, a local authority representative (e.g. local council worker, Department for Work and Pensions worker) or third sector worker will check evidence to assess whether they believe a person is planning to stay in the UK, rather than

solely visiting (Citizens Advice, 2023). To assess this, the representative will check things such as: length of stay and reasons for coming to the UK; intentions for work and living accommodation; ties to another country and how often a person returns there; and any memberships of local organisations, such as gyms or community groups (ibid).

A person will be required to show documentary evidence to show arrival date in the UK, Ireland, Channel Islands, or Isle of Man and proof that one of these localities is the person's main home. Citizens Advice (2023) recommend showing as many documents as possible to prove both these requirements, including for example: travel ticket or boarding pass; wage slips or tax documents (or letter from employer in case of zero-hours/casual employment); bank statements; tenancy agreement; bills or letters showing proof of address; letter from child's school; and proof of closing any account in the country a person has left (ibid).

5. How can we better support groups who face particular challenges?

Making access to support easier: key points

- Anyone who has a UKVI account or a biometric card can apply for a digital **share code to prove their right to work to UK employers**. If they do not have either of these they have a right to use their immigration documents as proof for a UK employer (see <https://www.gov.uk/prove-right-to-work/get-a-share-code-online> to help someone apply).
- A person may need additional support due to **language barriers; learning difficulties; digital access**.
- **Parents/carers need particular support** to reduce vulnerability regarding children's status.
- People who have **irregular forms of employment** will need additional support in helping them to **prove their employment through other means**.
- A vulnerable person at risk of homelessness and not eligible for benefits should be given access to accommodation and financial support through local council and social services under the **Care Act 2014**.
- A family at risk of homelessness should be referred for a social services assessment under **Section 17, Children's Act 1989**.
- **A child is not excluded on the basis of their migration status** under Section 17, Children's Act 1989.

5.1 Supporting people to access an EUSS 'share code'

Anyone who has applied to the EUSS scheme, as well as people who created an account when applying for a visa, or people who used the UKVI app to prove their identity for a visa application will have a UK Visas and Immigration (UKVI) account. If someone is advised they can view their immigration status online this will be through their UKVI account. They will then be able to use the service for the following: to get a 'share code' to provide their status to others, such as employers;

to update personal details, such as passport number or email address; to check the rights that they have in the UK, such as the right to work, rent, or claim benefits (UK Government, 2023b).

Everyone has to prove their right to work to a UK employer and the way to do this varies if you are a British or Irish citizen or not. If someone is not a British or Irish citizen they will need to either apply online for a share code through their UKVI account or if they have a biometric card, or present evidence through their immigration documents. It is an individual's right to choose which option and they cannot have their application rejected by an employer if they do not have a digital share code (ibid).

5.2 Being aware of, and responsive to, additional challenges

In addition to challenges raised thus far in this briefing, there are additional wide-ranging circumstances which may impact upon the ease at which particular groups can access the EUSS scheme and accompanying support. The consequences of the challenges facing people with pre-settled status are manifold in terms of the poverty impacts for individuals and families, and on the future impacts for children and young people. This section draws on issues raised by think tanks, charities, academic research, and by practitioners working on an EUSS project and advocacy support at Brushstrokes charity.

5.3 General barriers to access

The Migration Observatory refer to a variety of reports indicating barriers for people securing settled status through the EUSS scheme, such as a lack of awareness regarding the scheme and vulnerabilities that impact upon the ability of people to apply. The latter could apply to people who experience language and/or digital barriers, those who are elderly or have serious disabilities, people who have been victims of trafficking, domestic violence, or modern slavery, people who have no fixed residence, and children. Additional challenges include: providing the necessary documentation to prove identity and/or residence status; the digital nature of the application process and the digital-only status; the lack of ease in being able to switch from pre-settled to settled status (with a person currently having to apply from scratch for settled status); limited translation and interpretation services to support people, and uncertainties around funding in the future to support people with the process at the local level (Fernández-Reino and Sumption, 2022).

(i) Children and young people

Children face particular vulnerabilities in relation to British citizenship and the EUSS scheme (Lloyd-Williams et al., 2022). Legislative changes are referred to as 'severe' for children, with children reliant upon their parents/carers to apply for the new type of status and if they fail to do so or do not qualify the child 'will lose their lawful status under EU law and drift unknowingly into illegality' (Yeo, 2018: 3). Although estimates have been made regarding the total numbers of undocumented children in the UK, the full extent of this situation is largely hidden and as such there is a lack of adequate support on the emotional health and wellbeing needs of undocumented children resulting from their status (Thomas et al., 2018).

(ii) People who are homeless or at risk of destitution

Research by Crisis points to the urgency of the situation regarding the connections between pre-settled status and risk of homelessness, with the possibility of experiencing some of the 'worse forms of homelessness' for EU nationals as 'virtually double the risk for the population as a whole' (2021: 11). Whilst some of the drivers for homelessness of the EU population are similar to the population as a whole, the risks are exacerbated by the EUSS scheme's limitations and restrictions on access to support which, in many cases, leads to an absence of 'an adequate safety net' when people find themselves in challenging circumstances (Crisis, 2021).

In terms of support for people on pre-settled status who are homeless or at risk of homelessness and not eligible for benefits, local Councils can engage with social services and provide accommodation and financial support. There are no immigration-related legislative restrictions on local Councils abilities to provide social services support for people in this situation (NRPF Network, 2022).

In the case of a family becoming destitute or potentially so, the family should be referred for a social services assessment under Section 17 of the Children's Act 1989. In the case of destitution, the children are regarded as being 'in need' under the legislation and Section 17 gives the local authority the power to provide accommodation and financial support to the entire family (Jennings, 2014). If the decision is made that the family are destitute, it is up to the local authority through children's social services to provide for the destitute family whether through payments or provision of housing. This is often temporary accommodation that may go on for months or years until a parent has qualified for the three months work and earned sufficient funds, while at the same time being able to access childcare support and accommodation.

Importantly, children are not excluded from Section 17 on the basis of their immigration status: a rule that is different when applied to adults, unless excluding support will be contrary to a person's human rights or rights under EU law (ibid). In the CPAG case on behalf of 'AT', an EU-national with pre-settled status who had fled her home with her child as a result of domestic violence, who did not meet the criteria for right to reside and did not have enough financial resources for basic subsistence, a three-judge panel of the Upper Tribunal held that she was entitled to rely on the EU Charter of Fundamental Rights even after the UK-EU withdrawal transition period (CPAG, 2022). In this case, the Upper Tribunal ruled that where a person 'was exposed to an actual and current risk that they and their child could not live in the UK in dignified conditions, then the Secretary of State for Work and Pensions should award universal credit' (ibid).

In terms of an individual without a family who has been unable to qualify for the three months 'right to reside' and is without the welfare safety net of Section 17, the situation also compounds the risk of destitution. The individual instead may become homeless and unlike those with rights to benefits, will not qualify for a shelter or a refuge where proof of right to benefits is needed (Shelter, 2023b). In some cases where extreme vulnerability can be proven and a 'reasonable European Convention on Human Rights claim' (Shelter, 2023b) enacted, the Care Act 2014 can be exercised to ensure a person's safety and wellbeing.

(iii) Undocumented migrants

As well as the general poverty impacts associated with destitution, people who are also undocumented and considered 'irregular migrants' under UK law are more vulnerable to additional challenges such as exploitation by landlords, employers, and being drawn into illegal, dangerous or degrading activities (Chartered Institute for Housing, 2023).

(iv) Gypsy, Roma and Traveller communities: insights from EUSS practitioners at Brushstrokes Community Project

'Those of no fixed abode: Gypsy Roma and Traveller communities' is one of the Home Office's identified 'vulnerable groups' in the EUSS application process (Neal, 2022). At Brushstrokes charity, people from Roma backgrounds are one of the groups who regularly access immigration support and this has brought to the fore some specific issues which are important to highlight with local and national policymakers.

Work is an important aspect of Roma communities, but the way they do this is not always compliant with the evidence required for the EUSS scheme. For example, many people do not open a bank account or have payslips that they can save. Similarly, lots of the Roma service users at Brushstrokes have been in long-term relationships for several years but they do not have the necessary paperwork to prove this and do not pay bills together so are unable to prove it that way. Ultimately, the traditional way of life of many Roma people has made it difficult for them to integrate into the EUSS evidence threshold.

Additional reflections by practitioners at Brushstrokes include the potential isolation of people from Roma communities in accessing this information. Service users at Brushstrokes have shared that their social community tends to be centred on other people from Roma backgrounds, many with lower levels of English oral and literacy skills, and they are not aware of the EUSS scheme, the criteria, or that they are doing anything wrong.

Consequently, there is a general consensus amongst the Brushstrokes immigration and EUSS advisors that not enough provision has been made to consider the specific cultural aspects of this group when making decisions about their right to reside and habitual residence test.

6. Implications and recommendations

Key recommendations:

- Make EUSS information as simple as possible, with step-by-step guidance that is tailored to particularly vulnerable groups. Use pictures to show examples of proof of evidence.
- Provide simple guidance to communicate rights and entitlements, e.g. in multiple languages and using images.
- Display guidance and signposting in multiple forms to reach potentially isolated groups, e.g. in poster formats, share with community representatives, share on social media, share through healthcare providers and schools.
- Provide training for frontline staff on making EUSS applications a supportive and more accessible process, and regularly communicate with frontline staff changes/updates to regulations.

This briefing has sought to highlight the complexities attached to pre-settled status which often leads to people not qualifying for the right to benefits and therefore having no recourse to public funds. It also aimed to provide some clarity in this area of potential confusion and with this help to raise awareness of the situation that many EU pre-settled clients find themselves victims of. Unlike people who are going through the asylum system and have an NRPF statement issued on the back of their immigration identity card, the EUSS cases are more complex and there appears to be a lack of clarity in some aspects of the system and a reliance on institutional interpretation of guidelines at third sector and local authority level which in the long-term could lead to inequities in place-based support across the UK.

Research commissioned by Islington Council in response to people being incorrectly denied benefits, recommends a strong case for suspending the habitual residence test, particularly in light of the

increased redundancies and severe economic hardship resulting from the Covid-19 pandemic (Parkes and Morris, 2020). Regarding the habitual residence test challenges are heightened due to a lack of research into how the test operates in practice and whether it is working in the way it was planned to, as well as an absence of UK Government statistics on how the test is working in relation to UC decision-making, with the latter aspect consequently considered 'shrouded in secrecy' (Parkes and Morris, 2020: 3). Consequently, a call for more transparent Government publications of statistics and evidence in this context is called for.

Research by Crisis (2021) similarly brought to the fore EEA citizens missing out on benefits they were entitled to, in their report due to people being unaware of their eligibility or because of language barriers which prevented them from conveying their circumstances and evidence in sufficient detail. Crisis call for increased financial support to increase recruitment of specialist welfare advisors 'who understand EU citizens' entitlements, ensuring that interpreters are always provided at Jobcentres for those who need them, and extending eligibility for welfare benefits for EU citizens with pre-settled status who are at risk of or experiencing homelessness would provide vital protection to prevent people from being pushed into homelessness in the first place' (2021: 16). We therefore propose recommendations that signpost and communicate rights, entitlements, and the EUSS process in simple step-by-step formats, using multiple languages and images and disseminated in multiple forms and using diverse means to reach isolated individuals and groups.

Finally, this briefing has shown the need for further research into the lived experiences of people with pre-settled status, particularly those from EEA applicants who are considered 'vulnerable groups', and their journey to in/accessing public funds. Such research would centre the voices of people who are experiencing considerable hidden poverty and give important insights for third sector practitioners and local policymakers into more detailed and realistic considerations in supporting vulnerable groups. This would hopefully make the process easier for people at a local level, as well as better support the front-line staff who are navigating this complex field.

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