ILPA further evidence for the House of Lords' Select Committee on the European Union for its enquiry into the possible consequences of Brexit on EU rights

Introduction

ILPA has been asked to provide further evidence to the Committee on how non-EEA nationals may qualify for settlement in the UK as well as on how EEA nationals may currently obtain permanent residence in the UK under European Union law.

Settlement: non-EEA nationals

The Immigration Rules, HC 395 as amended, set out the leave which to enter or remain in the UK. Some may lead to settlement; others may not. For example, a spouse, or a Tier 2 worker, may be granted limited leave but be able, at the end of that leave, to apply for settlement, while a student may be granted limited leave, and may be able to apply for further leave, but that leave will never lead to settlement. For example it is possible to extend leave as a Tier 4 student (for example to progress from a Bachelors to a Masters, but it is never possible to apply for indefinite leave to remain as a student.

The picture is complicated by the rules on 'switching'. A student may switch from the student to spouse category on marrying a British citizen and may thus qualify for settlement as a spouse. Whether it is possible to switch depends upon the categories a person is switching from, and to. Thus a person with leave for less than six months cannot switch into the spouse category but a person with leave for more than six months can do so.

The categories of the Immigration Rules under which a person may apply for settlement (indefinite leave to remain) are closely and narrowly defined with prescriptive criteria, setting out not only what a person must prove in order to qualify for leave but also how they must prove it. As a result, the Immigration Rules are very long, complex and supplemented by a large amount of guidance and case law. The Court of Appeal has expressed concern about the level of complexity involved:

> *The detail, the number of documents that have to be consulted, the number of changes in rules and policy guidance, and the difficulty advisers face in ascertaining which previous version of the rule or guidance applies and obtaining it are real obstacles to achieving predictable consistency and restoring public trust in the system, particularly in an area of law that lay people and people whose first language is not English need to understand.* *Hossain & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 207, paragraph 30 per Lord Justice Beatson.
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> *The rules governing the P[*oints*] B[*ased*] S[*ystem*] are set out in the Immigration Rules and the appendices to those rules. These provisions have now achieved a degree of complexity which even the Byzantine emperors would have envied".* Pokhriyal *v Secretary of State for the Home Department* [2013] EWCA Civ 1568, per Lord Justice Jackson
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> *I fully recognise that the Immigration Rules, which have to deal with a wide variety of circumstances and may have as regards some issues to make very detailed provision, will never be*

> *"easy, plain and short" (to use the language of the law reformers of the Commonwealth period); and it is no doubt unrealistic to hope that every provision will be understandable by lay-people, let alone would-be immigrants. But the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present. I hope that the Secretary of State may give consideration as to how their drafting and presentation may be made more accessible. Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74, per Lord Justice Underhill

The complexity of the Immigration Rules and accompanying procedures has also been acknowledged by Ministers:

> *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them."* Rt. Hon. Lord Taylor of Holbeach, Minister, in response to Lord Lester of Herne Hill, HL Deb, 12 December 2012: col1087

The following, therefore provides a broad overview of the requirements of the rules but cannot fully reflect the detailed criteria in the Immigration Rules and the evidential requirements.

General requirements for settlement

For a person to qualify for settlement, the Immigration Rules must first provide for a route to settlement in the category in which they are applying. The rules in each category identify whether it leads to indefinite leave to enter or remain. A route to settlement may be preserved for those already in the UK even though it is not accessible to new entrants. For example, a person granted leave to enter as an overseas domestic worker before 6 April 2012 may qualify for settlement if they meet the criteria, but those granted leave after this date cannot do so as the route to settlement was removed.[1]

The requirements for settlement under the different categories of the Immigration Rules usually include a **qualification period**, setting out the length of time a person must have had leave to enter or remain before becoming eligible to apply for settlement in that category. The length of time during which a person must have held leave to enter or remain before qualifying for settlement varies according to the category. Absences from the UK that render a person ineligible for settlement vary according to category. For example:

- Investors, entrepreneurs and skilled migrants under Tier 2 of points Based System normally become eligible for settlement after five years lawful and continuous residence under specified categories of the Immigration Rules. There are exceptions. An investor who entered the route under the Immigration Rules in force on or after 6 November 2014 can apply for settlement after two years , they must have had continuous residence of two years if they have money of their own under their control in the UK amounting to at least £10 million. For applicants who entered the route under the Immigration Rules in force before 6 November 2014, they may also qualify after continuous residence of two years if they own personal assets with a value (once any liabilities are taken into account) of at least £20 million, and have at least £10 million under their control and disposable in the UK which has been loaned to them by a UK regulated financial institution. Continuous residence is three years. For applicants who entered the route under the Immigration Rules in force on or after 6 November 2014, they must have had

[1] Statement of Changes in Immigration Rules, HC 194.

continuous residence of three years if they have money of their own under their control in the UK amounting to at least £5 million. For applicants who entered the route under the Immigration Rules in force before 6 November 2014, they may also qualify after continuous residence of three years if they own personal assets with a value (once any liabilities are taken into account) of at least £10 million, and they have at least £5 million under their control and disposable in the UK which has been loaned to them by a UK regulated financial institution. For applicants who entered the route under the Immigration Rules in force on or after 6 November 2014, they must have had continuous residence of five years if they have money of their own under their control in the UK amounting to at least £2 million. For applicants who entered the route under the Immigration Rules in force before 6 November 2014, they may qualify after continuous residence of 5 years if they: have money of their own under their control in the UK amounting to at least £1 million, own personal assets with a value (once any liabilities are taken into account) of at least £2 million, and they have at least £1 million under their control and disposable in the UK. There are similar accelerated settlement rules for entrepreneurs. See the Immigration Rules, Part 6A

- A person may qualify for settlement on the grounds of long residence following ten years lawful and continuous residence in the UK. This gives effect to the Council of Europe Convention on Establishment [2] which protects those who have been lawfully resident in a member State for 10 years or more and will thus afford protection to EEA nationals and their third country national family members who have been lawfully resident in the UK for more than ten years.

There are also specific requirements in particular categories. A person applying for settlement will normally need to demonstrate that they continue to meet all the requirements for leave to enter or remain in the relevant category in addition to further requirements for settlement in that category.

Most routes to settlement require that the applicant show sufficient knowledge of the English language and life in the UK.[3] The knowledge of life in the UK requirement may be met by sitting the Life in the UK test or through a combination of English language and citizenship classes under very specific requirements. The language requirement may be met through being a national of certain English-speaking countries, passing an approved test in speaking and listening in English at a particular level or holding a recognised academic qualification taught in English. Settlement under some categories of the rules does not include this requirement, for example those made for settlement as a refugee or as a survivor of domestic violence following the breakdown of a relationship due to domestic violence in a relevant category. Other exemptions may also be applied in individual cases where the decision-maker considers that it would be unreasonable for the applicant to fulfil that requirement because of their physical or mental condition.

Exclusions on the grounds of criminality apply and applicants will be refused indefinite leave to remain if they have been convicted of an offence within specified periods (there is no concept of a spent conviction for the purposes of immigration or nationality law.[4], , the length of which depend on the seriousness of the offence, before making their application. Despite a lengthy

[2] HC 395, paragraph 276B.
[3] HC 395 Appendix KoLL.
[4] The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 140 and 141.

battle by ILPA, Rights of Women, Southall Black Sisters and others, this requirement applies to those applying as survivors of domestic violence.

A controversial change to Home Office guidance in 2016 means that person may also be refused settlement on character grounds, if they have been in breach of immigration laws at some time in the past. Previous versions of guidance may reference to facilitating unlawful immigration by others. Overstaying by no more than 28 days was previously disregarded in immigration applications where having valid leave to enter or remain was a requirement, but from 24 November 2016[5] this provision will become more restrictive and overstaying following the expiry of leave will only be disregarded if this is for no more than 14 days and the applicant can show that there was a good reason for so doing beyond their or their representative's control.

In most cases, the application must be made on a **mandatory form and a fee** must be paid. There is no fee, however, for settlement applications made following a grant of leave as refugee or humanitarian protection. Other more limited exemptions also apply. The fee for an application for settlement made within the UK is currently £1875 for a single applicant, with a further £1875 payable for each dependant included in the application. A family of four would therefore pay £7500 for the application. There are additional fees for taking the relevant Life in the UK or English language tests.

Indefinite leave to remain: E**EA nationals**

Where an EEA national can show five years continuous residence as a qualified person, they will acquire permanent residence under EU law. They can obtain a document to evidence this status, but are not required to do so.

Can an EEA national also apply under the Immigration Rules? In what circumstances?

The Home Office guidance on the Long Residence rule (paragraph 276A of the Immigration Rules states

> *Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:*
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> - *the spouse, civil partner or other family member of an European Union (EU)*
> - *an EEA national exercising their treaty rights to live in the UK but have not qualified for permanent residence*
> - *former family members who have retained a right of residence*
>
> *During the time spent in the UK under the provisions of the EEA regulations, the individuals are not subject to immigration control, and would not be required to have leave to enter or leave to remain. ..*
>
> *However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK.*
>
> *Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules.*

[5] HC 667.

This does not affect the rights of family members of EEA nationals to permanent residence in the UK, where they qualify for it .[6]

The reasoning is dubious; the conclusion sound, and it gives effect to the UK's obligations under the Council of Europe European Convention on Establishment.

What of, for example, leave as a spouse or partner under the Immigration Rules?

The Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) provide

Leave under the 1971 Act

1.—

...

(2) Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions shall not have effect for as long as the person has that right to reside.

The new Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) provide at Schedule 3:

Leave under the 1971 Act

1. Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions do not have effect for as long as the person has that right to reside.

The word 'also' is unequivocal; a person may both have leave and a right to reside. Rights under EU law cannot be extinguished by a grant of leave under the immigration rules.

This raises the prospect of, for example, an EEA national married to a British citizen applying for limited leave to remain as the spouse of a British citizen or settled person under Appendix FM and subsequently for indefinite leave to remain as a spouse. The EEA national might be a person who cannot satisfy the Home Office that s/he has a right to reside. For example, the Home Office contends that because a spouse, who does not work, of a British national, does not have comprehensive sickness insurance over and above access to the NHS, s/he is not a qualified person as a self-sufficient. Or the EEA national might be a worker but fearful that s/he will not acquire permanent residence prior to Brexit and might wish to have the option of applying for indefinite leave to remain as a spouse.

The rules for limited leave to remain as a spouse state

[6] Home Office Guidance, long residence, v 13
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488265/Long_Residence_v13.0_EXT.pdf

Immigration status requirements

E-LTRP.2.1. The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings

E-LTRP.2.2. The applicant must not be in the UK –

(a) on temporary admission or temporary release, unless:

(b) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and

(i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and

(ii) paragraph EX.1. applies; or

(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded)

Indefinite leave to remain as a partner can be granted to a person who has had 60 months leave to remain as a partner, providing that other requirements of the rules are met. (see HC 395, Appendix FM, paragraph E-ILRP).

We have seen grants of leave under the rules to EEA nationals; we have also seen decisions to the contrary.