

**Briefing note for Friends, Families and Travellers and others, on issues relevant to Gypsy, Roma and Traveller individuals from the Home Office’s report, “EU Settlement Scheme: Statement of Intent”**

**Public Law Project, July 2018**

**Introduction**

1. On 21st June 2018, the Home Office published “EU Settlement Scheme: Statement of Intent”. The 60-page ‘Statement of Intent’ (‘SOI’) provides information about how the government envisages that the settled status regime will operate[[1]](#footnote-1). Although there is some detail, the SOI is unspecific and confusing in places. The SOI is clear that many of the features of the settled status scheme, particularly the application process, are still in development. There are two annexes to the document: Annex A - “Documentary evidence of continuous residence in the UK” and Annex B - “Draft Immigration Rules for the EU Settlement Scheme”. Careful attention should be paid to Annex B, which we anticipate will be laid as new immigration rules by the Home Secretary under section 3(2) of the Immigration Act 1971.
2. There will be NO full consultation on the scheme – or (as we understand it), the accompanying Rules. The Home Office is relying on feedback of the settled status user groups it has set up. In addition, there is a covert invitation to respond on the document directly on page 2: “Any enquiries or feedback regarding this publication should be sent to us at EUSTatementofIntent@homeoffice.gsi.gov.uk2 . We believe it is vitally important for Gypsy, Roma and Traveller (‘GRT’) individuals and those that represent them to take every opportunity available to them to tell the Home Office about difficulties with the scheme and how it should be improved now, before it is set up.
3. The timetable for the roll out of the scheme is unclear. The SOI says that the design of the process is being informed by the user groups and beta testing (a small scale voluntary pre-pilot), is imminent. This timetable indicates that any representations about the scheme should be made without delay, and requests for data from the pre-pilot should be requested for further analysis.
4. We do not believe that membership of the user groups is public knowledge. We understand that Friends, Families and Travellers (FFT) has been invited to join the safeguarding user group. We have suggested via our networks that Roma Support Group should also be invited.

**Recommendation: Thought should be given to: a) representations on membership of the user groups, b) immediate and direct response to the Home Office on the SOI and c) requests for data from pre-pilot and pilot stages.**

1. This note is not a summary but instead attempts to identify possible key issues of concern for GRT communities and potential areas for further work. Consideration may be given to broader campaign work outside of legally focused recommendations below.

**Key issues**

*Definition of “child”*

1. The SOI states that children will pay 50% of the adult application fee- £32.50 rather than £65.00. “Children” for the purposes of the fee reduction must be under 16 (see SOI at [4.6]). However, a “child for the purposes of eligibility of a non-EU citizen close family member is defined as under-21 and potentially 21 or over if they are a dependent child (see SOI at [6.6]).
2. Our view is that the Home Office should be treating applicants who are under 18 as children. This is the definition of a child set out in the Children Act 2004 as well as international treaties that the UK is a party to, including the United Nations Convention on the Rights of the Child (UNCRC).
3. We consider that representations should be made on this issue. There will be a number of organisations, such as those specialising in children’s rights (e.g. Children’s Rights Alliance England, Just for Kids Law, and Article 39) and those working on free movement issues that may be willing to join an alliance on this issue[[2]](#footnote-2)*.*

**Recommendation: Consider making representations on this issue in addition to any wider campaigning/alliance building, and possibly a question for the Immigration Minister, Caroline Nokes MP and/or the Children’s Minister, Nadhim Zahawi MP.**

*Irish citizens*

1. The SOI states that Irish citizens are allowed to apply for settled status, but that there is no need for them to do so. At [2.6] it states:

*“Irish citizens enjoy a right of residence in the UK that is not reliant on the UK’s membership of the EU. They will not be required to apply for status under the scheme (but may do so if they wish), and their eligible family members (who are not Irish citizens or British citizens) will be able to obtain status under the scheme without the Irish citizen doing so.”*

1. The SOI does not provide any further detail on how Irish citizens’ rights will be secured after Brexit. As [Simon Cox](http://travellermovement.org.uk/wp-content/uploads/TTM-Brexit_and_Irish_citizens_in_the_UK_web.pdf), [Bernard Ryan](https://www.theguardian.com/politics/2016/oct/19/law-may-be-needed-preserve-rights-irish-uk-after-brexit) and others have noted, the government’s legal position in relation to Irish citizens’ rights after Brexit is incoherent.

**Recommendation: Further consideration to be given to what legal advice should given to Irish citizens that FFT and others work with now, and whether they should be advised to make a settled status application. Also, follow up work with Traveller Movement as to what their response to the SOI is and consideration of a co-ordinated response?**

*Accessibility of the application process*

1. The SOI commits to the application process being primarily digital (at [4.4]):

*“First, it will need to be made, initially at least, in the UK and made using the required application process. This will be the digital application process which will be provided on GOV.UK, or the assisted digital application process for those who need assistance to complete the online application process, for applicants under the scheme who are covered by the Withdrawal Agreement. Consideration is also being given to the particular circumstances in which the provision of a paper application form may be appropriate. We will also confirm the scope, beyond a parent applying on behalf of a child or a local authority on behalf of a ‘looked after’ child, for the application process to be completed on behalf of a person without the capacity to complete it themselves.”*

1. Digital exclusion is a significant challenge for GRT communities, as it is for many socially and economically disadvantaged groups. Possible allies on this area of concern include disability organisations and we can provide further links on this if needed. In addition to a campaigning and legal response, you may also consider what resources FFT, Leeds Gate, RSG and other organisations have to support individuals with making digital applications and make organisational plans for this. We have been working on digital exclusion in relation to online courts and are familiar with some of the key challenges and areas of difficulties and would be happy to discuss this further if that would be helpful[[3]](#footnote-3). A first key step will be to seek information about what provision will be made for those who are digitally excluded by way of assisted digital support and/or paper channels.

**Recommendation: Seek further information on what provision will be made for those who are digitally excluded. Consider asking for a paper channel for those who are digitally excluded. Make representations on the need for an assisted digital service. Consider alliance building. Request assurances on data sharing from pre-pilot and pilot stages and on an ongoing basis to ensure that accessibility can be properly evaluated and adapted to safeguard accessibility for GRT individuals**.

*Discretion*

1. The SOI frequently refers to the discretion that will be conferred on Home Office staff reviewing applications for settled status. For example, at [5.15], the SOI states that:

*“A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens.”*

1. The SOI is explicit that this will be discretion to grant rather than to refuse applications. However, whenever discretion is introduced into a process, there is an opportunity for prejudice, particularly against marginalised groups. Consider what safeguards might be built into the system, such as requesting that one central team deal with GRT applications and/or offering specific training to the Home Office. Such training could focus on common challenges for GRT individuals and common pitfalls/discriminatory approaches plus cultural awareness training.
2. It is intended that the process will be a paper based review. There is reference to introducing primarily legislation for statutory right of appeal for applications after 30 March 2019.

**Recommendation: Consider requesting for a central team to assist with and decision make on all GRT settled status applications and offer specialist training to the Home Office.**

*Suitability (criminality)*

1. We anticipate that this will be the most difficult issue to respond to: Both because it is potentially the most stigmatising and contentious, but also the most complex.
2. The SOI provides (at [1.13]) that “*the overwhelming majority of EU citizens and their family members have made a positive contribution to the UK and will be unaffected by this criterion. But it is right that we identify any serious or persistent criminals, or anyone who poses a security threat, to protect all of us who live in the UK. We will therefore conduct checks against UK criminality and security databases and conduct overseas criminal records checks as appropriate.*”
3. The SOI continues (at [5.5]) that *“the person will also need to make a valid application under the scheme (see section 4) and not fall to be refused because of serious or persistent criminality or other public policy reasons, as set out in the agreement on citizens’ rights reached with the EU”*.
4. The SOI outlines further details( at[ 5.16]):

“*As agreed with the EU in the deal on citizens’ rights, criminality and security checks will be carried out on all applications for status under the scheme.**In line with the draft text of the Withdrawal Agreement, conduct (including any criminal convictions relating to it) before the end of the implementation period (31 December 2020) 22 by a person protected by the agreement will be assessed according to the current EU public policy tests for deportation, as set out in the EEA Regulations, while their conduct (including any criminal convictions relating to it) after that period will be considered against UK deportation thresholds. This is a sensible approach to ensure that we identify any serious or persistent criminals, or anyone who poses a security threat, to protect everyone who lives in the UK; we are not concerned here with minor offences, such as a parking fine. It will not affect the overwhelming majority of EU citizens and their family members*.”

1. The reference to “minor offences” such as “parking fines” is unhelpful messaging from the Home Office. GRT communities could be put off from applying if they have committed offences that are more serious than parking fines or have committed more than one offence. That is not the standard for refusal of on the basis of suitability.
2. The SOI provides that the standard for refusal on the basis of suitability is the standard contained in the Draft EU Withdrawal Agreement.
3. The key section on criminality and suitability in the draft Withdrawal Agreement ([here](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf)) is set out at [17(p)] :

*“criminality and security checks may be carried out systematically on applicants with the exclusive aim of verifying whether restrictions set out in Article 18 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host State may, should it consider this essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC on enquiries to other States regarding previous criminal records”[[4]](#footnote-4)*

1. Article 18 of the draft Withdrawal Agreement provides:

“*Restrictions of the right of residence*

*1. Conduct of Union citizens or United Kingdom nationals, their family members or other persons, exercising rights under this Title, that occurred before the end of the transition period shall be considered in accordance with Chapter VI of* [*Directive 2004/38/EC*](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF)*.*

*2. Conduct of Union citizens or United Kingdom nationals, their family members or other persons, exercising rights under this Title, that occurred after the end of the transition period may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.*

*3. The host State or the State of work may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Title in the case of abuse of those rights or fraud as set out in Article 35 of Directive 2004/38/EC. Such measures shall be subject to the procedural safeguards provided for in Article 19 of this Agreement. 4. The host State or the State of work may remove applicants who submitted fraudulent or abusive applications from its territory under the conditions set out in Directive 2004/38/EC, in particular Articles 31 and 35 thereof, even before a final judgment has been handed down in case of judicial redress sought against any rejection of such an application*.”

1. Chapter VI of Directive 2004/38/EC sets out the EU public policy tests for deportation (the underlined text is the overarching test):

*“Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.”*

1. In addition, more stringent tests apply to those who (a) have acquired permanent residence following 5 years continuous residence (b) have continuously resided in the UK for 10 years or more or (c) are minors under the age of 18. In the case of those with permanent residence, the test requires “serious grounds of public policy”. In the case of those with more than 10 years residence and minors, there must be “imperative grounds of public policy or public security”. This is a very high test.
2. In “Appendix EU: EU citizens and family members” of the Draft Immigration Rules it it states that:

*“****EU15****. An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:*

*(a) The applicant is the subject of an extant* ***deportation order*** *or of a decision to make a deportation order; or*

*(b) The applicant is the subject of an extant* ***exclusion order*** *or* ***exclusion decision****; or*

*(c) The applicant is subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC.*

***EU16****. An application made under this Appendix may be refused on grounds of suitability where, in relation to the application and whether or not to the applicant’s knowledge, false or misleading information, representations or documents have been submitted (including false or misleading information submitted to any person to obtain a document used in support of the application) and the information, representation or documentation is relevant to the decision whether or not to grant the applicant leave under this Appendix.*”

1. We are concerned by the inclusion of EU15 C. Refusal of settled status on the basis of non-exercise of rights is not related to suitability and not permitted by the Draft Withdrawal Agreement.
2. It appears likely that if an applicant’s conduct reaches the standard set out in Chapter VI of Directive 2004/38/EC, the Home Office would instigate deportation proceedings against that individual under (currently) the Immigration (EEA) Regulations 2016. An individual (currently) has a right of appeal against a decision to remove taken on public policy grounds. A decision to make a deportation order or remove an EU national on criminality grounds could then form the basis for the refusal of settled status on suitability grounds under EU15.
3. EEA deportation rules are highly complex and we have not attempted to explain them in detail here. We would be happy to advise further.

**Recommendation: Representations could be made to the Home Office directly, through user groups and the APPG, in relation the complexity and expansive nature of the suitability criteria and in particular the inclusion of EU-15 C. GRT communities will need information about the type of criminality that will lead to them being refused settled status and assistance with making applications where there may be questions around ‘suitability’. Representations to the Home Office should be made about the need for clarity, information and assistance. We will be able to advise further on this.**

*Evidential requirements- proof of identity and nationality*

1. At [4.8] the SOI sets out the proof of identity and nationality requirements:

“.*.the applicant will need to provide the required proof of their identity and nationality. For an EU citizen, this will be a valid [in date] passport or a valid national identity card. For a non-EU citizen family member, this will be a valid passport, a valid biometric residence card issued under the EEA Regulations or a valid biometric immigration document, commonly known as a biometric residence permit.”*

1. Obtaining the required ID could be a major barrier to GRT communities applying for settled status. This is both a financial barrier (the cost of passports and ID cards is often significant) and practical (e.g. it may require them to return to their country of origin). The ID requirement creates a double layer of decision making for applicants to navigate and in some cases may mean that the Home Office are pushing the difficulties elsewhere.
2. The SOI does state, at [4.8] that:

“*The Home Office may accept alternative evidence of identity and nationality where the applicant is unable to obtain or produce the required document due to circumstances beyond their control or to compelling practical or compassionate reasons.*”

**Recommendation: Further consideration should be given to what the implications and challenges are for requiring GRT individuals to have current and valid ID cards or passports, both on the individuals concerned, but also on the offices that may be called on to provide the ID and their available resources. Requests for clear guidance on when the ID requirements will be waivered should be requested and in particular, what should happen when an applicant lacks financial means to return to their country of orgin to obtain a passport or supporting documentation. Consideration should also be given to provisions for children who apply at the same time as their parents to be exempt from the ID requirements set out at [4.8].**

*Evidential requirements- proof of continuous residence*

1. Section 5 of the SOI sets out the continuous residence requirement and states [5.4] that where the applicant is an EU citizen and automated checks of HMRC and DWP data indicate that they have been continuously resident in the UK for a period of five years, then they will be granted settled status (subject to criminality and security checks). Annex A lists documentary evidence of continuous residence, distinguishing ‘preferred’ (Table 1) and ‘alternative’ (Table 2) evidence.
2. A key concern is that the evidential requirements for continuous residence will not take into account the cultural, social and economic lives of GRT individuals and communities.

1. The SOI appears to be alive to this concern. At [5.6] it states that:

*“We will publish a list of the type of documentary evidence which the applicant will be able to provide of their continuous residence in the UK. A draft of this list is at Annex A to this document. We will seek to guide applicants to use the evidence they may have which most readily evidences their continuous residence. But this guidance will not be prescriptive or definitive.* ***We recognise that some applicants may lack documentary evidence in their own name for various reasons, and we will work flexibly with applicants to help them evidence their continuous residence in the UK by the best means available to them.****”* (Emphasis added.)

1. There is little detail provided about how this flexibility will apply and no suggestion that the Home Office has specifically considered the needs of GRT communities. Further information should be sought, with assurances that the requirements will not discriminate against GRT individuals and communities. We consider that the Home Office should currently be conducting equality impact assessments of the scheme generally, and the evidential requirements specifically, if they have not already. You may want to make requests associated with this work now and attempt to inform and shape it.
2. One form of evidence that will be particularly relevant to FFT, Leeds Gate and RSG is set out in Table 2 of Annex A, “Alternative Evidence”:

*“A dated letter from a UK government department, another UK public body or a* ***UK charity*** *confirming the applicant’s physical interaction with them, e.g. Job Centre Plus or Citizens’ Advice. This will be treated as evidence of residence for the month in which it is dated, unless it explicitly confirms interactions over a longer period***.”**(Emphasis added.)

1. Charities supporting GRT individuals could potentially become a key source of evidence of continuous residence for GRT applicants for settled status. We anticipate that this will have significant resource implications for those organisations. Such organisations may not have easily searchable records and may need to spend considerable resource identifying contact with individuals over 5 year periods. They may need to build new/improved systems so that that information can be identified now, or may need to revise some of the work done recently to bring organisational systems inline with GDPR. There are also difficulties that may be posed by organisations having deleted records recently to comply with GDPR. Taking such a role in settled status applications may also significantly change the dynamic of relationships between those organisations and individuals e.g. from supportive to gatekeeping. We consider that knowledge of this aspect of the scheme and possible resource implications will feed into charities’ organisational planning and should be shared immediately with them.

**Recommendation: Consider whether there is in principle agreement for charities to take this role in providing evidence and make representations as appropriate. Information share with organisations impacted and consider organisational impact and additional resources that may be required. Also consider education and outreach initiative to explain to GRT communities how the settled status scheme will work generally, and particularly how the evidential requirements will operate, including that records of “interactions” with a UK government department, another UK public body or a UK charity (including FFT, Leeds Gate and RSG) are a valid source of evidence, possibly with support from other organisations and with funding.**

**Conclusion**

1. This note has highlighted what we consider are some of the key issues for the GRT communities and some ideas on next steps. As stated at the beginning of this note, the structure, process and rules for the settled status scheme is not being put to full consultation. Our view is that immediate work needs to be undertaken to ensure that the scheme takes into account GRT needs to ensure that GRT individuals and communities are not further marginalised or excluded. Our view is that there is an opportunity now to request further information and assurances from Ministers and raise the profile of these issues in Parliament. In addition, there are opportunities to alliance build on issues outside of the GRT world, and feed into the development of the scheme via participation in the user groups and in direct response to the SOI. Please let us know how we can assist.

**The Public Law Project**

**5 July 2018**

1. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> [↑](#footnote-ref-1)
2. The recent report on ‘profit’ made by the Home Office from children applying for citizenship (<https://www.freemovement.org.uk/home-office-makes-almost-100-million-from-children-registering-as-british-citizens/>) and the High Court challenge by Project for the Registration of Children as British Citizens (https://prcbc.wordpress.com/news-updates/ ) may help any campaign work you want to do also. [↑](#footnote-ref-2)
3. You may want to look at the Executive Summary from a recent report on how to prevent digital exclusion from online justice that we contributed to for some of the key areas of concern in terms of accessibility – many of which might apply here <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf> [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)