

# A reflection on the Home Office's Reasonable Grounds to applying late to the EU Settlement Scheme

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## Summary

The Reasonable Grounds policy set out in the EU Settlement Scheme guidance are welcome but are ultimately subject to quick changes depending on departmental reaction and have no scrutiny. Whilst setting out grounds and circumstances in which reasonable grounds will be shown, it provides no insight into when they will not. Some of the examples and suggestions made by the3million are adopted (especially with regards to process) but there are still gaps in the reasoning. For example, it is unclear when someone with support needs (arising from a disability for example) would not be able to demonstrate reasonable grounds.

There is no guidance on how other immigration enforcement mechanics of the Home Office and its delegated functions operate when encountering people who need to apply late to the scheme. This will be key to ensuring that those who miss the deadline are quickly identified and helped to apply.

The Home Office looks to be taking a welcomed pragmatic approach that will hopefully be an example for other parts of the department and immigration rules. However, there is no opportunity for scrutiny and no understanding of the reasons they would refuse an application (which is prominent in other guidance). The guidance also highlights the shortcomings in other areas such as the lack of rights pending decisions and retrospective grants of rights which put those who miss the deadline at risk of losing employment, housing and other vital support.

The Home Office has now published their much anticipated policy on what basis someone can apply late to the EU Settlement Scheme:

Pages 26 through 44 of

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/974762/main-euss-guidance-v10.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974762/main-euss-guidance-v10.0.pdf).

Ultimately, the policy and decision whether someone can apply late is based on discretion: whether it is reasonable for someone to apply late. Introducing a discretion into a decision making process is more subject to human error than a fixed criteria - particularly where issues of decision makers' resources may arise.

The strength of the guidance and scope of those that fall within it will help decision makers avoid error and strive to 'good' outcomes. Whether a reason for applying late is 'reasonable' is one for each individual circumstance, as acknowledged by the guidance. But the scope and process set for an assessment are instrumental to who may be included within that 'reasonable' assessment.

### **Scope of 'Reasonable Grounds'**

The 'scope' is the same as that of the rest of the EU Settlement Scheme - a policy of 'looking to grant' above a 'reason to prove'. This coupled with a policy of affording applicants the 'benefit of the doubt' is welcomed. However, there is a suggestion that the latter intention is 'for the time being'.

Of concern is the general policy that the more time that has elapsed since the deadline, the harder it will be to satisfy reasonable grounds. How this will work in practice remains to be seen but particular exemptions are acknowledged to this approach in specific examples set out in the guidance.

Unfortunately, the original idea to set out general principles within the 'reasonable grounds' assessment floated to us has not made it to guidance. This involved the decision maker working within a framework of:

1. circumstances in which a person was not aware of the need to apply (the 'awareness' category); and/or
2. Circumstances in which a person was prevented from applying (the 'prevented' category).

We felt this was helpful as it didn't restrict decision makers and encouraged them to think beyond broad notions of 'reasonableness'.

The guidance then goes on to establish examples where 'reasonable grounds' would typically be made out. It begins with themes and presents worked examples. It also highlights the sorts of evidence expected as part of the application process.

Importantly, it doesn't set out examples where an applicant would fail the reasonable grounds assessment. This presents a challenge to caseworkers who only have positive parameters to work within.

The categories highlight key areas the Government have pointed to before but goes further in specific areas.

### **Children**

Importantly this is a broad category that isn't restricted to care leavers but all children of parents who did not apply for status on their behalf. The guidance prompts that there is no need to establish a 'reason why they didn't apply in time' when cases present these reasons. Amongst the examples given is an adult who was a teenager at the time the application should have been submitted.

### **Those with mental capacity issues**

Where this is relied on and evidence provided this will always be a reasonable ground. The evidence set out is flexible and not restricted to medical evidence. However, this does not address the wider issues raised by Migrants Organise in their legal challenge about the practicalities as to 'how' a person who lacks capacity is able to decide and submit an application.

### **Those with support needs**

In most cases, those who demonstrate that they have support needs will satisfy decision makers of reasonable grounds. The examples given are of older people, it would be helpful to have examples of younger people with support needs. As with the general observation above, it is unclear to what extent there would be situations where someone who had support needs, and those needs produce an inability to apply, that would not be a reasonable ground to apply late.

### **Serious Medical conditions or significant medical treatment**

This example attempts to strike a balance between ongoing conditions preventing an application and the treatment received that would give rise to being unable to apply. The former is understood to be any illness which should include physical and mental and clarification of this would be helpful in the examples. For example, would someone with depression who was unable to perform day-to-day tasks fall within scope? Pregnancy/maternity is helpfully included. Again, no examples are given as to when reasonable grounds would not be satisfied.

### **Victims of Modern Slavery**

Where a person 'may' be a victim of modern slavery (which includes trafficking) it will normally constitute reasonable grounds. Where a person is recognised as a victim of trafficking either at the Reasonable or Conclusive Grounds stage of assessment by the National Referral Mechanism ('NRM') no further evidence will be required and reasonable grounds will be made out.

Where an assessment has yet to be conducted, caseworkers are prompted to speak with senior caseworkers and refer the case to local safeguarding for referral to the NRM.

A caseworker can still, even prior to a decision on Reasonable Grounds being made, proceed with a reasonable grounds decision. However, this is conditioned on a discussion with a senior caseworker/referral to safeguarding.

Whilst it is good to see explicit reference to a cooperative working with the referral mechanics, and some discretion to caseworkers to decide on reasonable grounds without the need for a NRM decision, the factors to be considered would require a detailed assessment of an applicant's circumstances. The Home Office should work in close partnership with the decision making body to understand their professional assessment on an applicant's case before reaching their own conclusions. Especially if there are complications in the analysis.

### **Abusive or controlling relationship or situation**

As with the other example areas, those in this situation would 'normally' constitute a ground to applying late. A flexible and pragmatic approach is promoted and lifted from other lessons learned in other areas of immigration control.

### **Other compelling practical or compassionate reasons**

It is important to note that these reasons are 'two'. Compelling practical or compassionate reasons. What makes a 'practical' reason for not applying 'compelling' is unclear from the

guidance. But it positively points to this particularly broad cohort as satisfying ‘reasonable grounds’:

‘A person who *may have been unaware of the requirement to apply to the EU Settlement Scheme by the relevant deadline or they may have failed to make an application by that deadline because for example no internet access, had limited computer literacy or limited english language skills or had been living overseas*’

There appears to be no restriction on this part of the guidance. This falls in line with recommendations we have made to the Home Office. It is unclear given this language what distinguishes ‘compelling practical’ from just ‘practical’ reasons. In what circumstances someone would not have reasonable grounds given these examples remains unclear.

The final parts of the guidance reflect on circumstances where someone did not have a permanent address, hampered from accessing support owing to COVID-19 are included. As well as someone who ‘overlooked the need to apply’ in light of their personal circumstances.

### **The Procedure to establishing Reasonable Grounds**

The ‘procedure’ is also similar to that of the EU Settlement Scheme more generally.

Firstly, the assessment of ‘reasonable grounds’ forms part of the general assessment of the application (the ‘Eligibility’ criteria of Appendix EU). Should you fail to satisfy the decision maker of reasonable grounds, you will have a right to administrative review and appeal to a tribunal. This is reflected in the Immigration Rules which were recently amended to incorporate ‘reasonable grounds’ as part of the Eligibility assessment. Prior to this, it appeared to be a separated decision making process which was cause for concern - one we flagged and appears to have been resolved.

Secondly, the evidence required and enquiry of the decision maker is not restricted. They are, like with the other parts of the Settlement Scheme, required to work with the applicant to acquire and examine the evidence as thoroughly as possible. How the performance of this is measured and assessed remains to be seen. Evidential flexibility was flagged by us in our submissions. Indeed the examples referred to above in ‘scope’ include nods to the types of evidence accepted which are in keeping with our recommendations.

Of help is guidance to Immigration Enforcement team that gives them the ability to issue a notice that allows a person who appears in scope of the scheme 28 days to apply. There are restrictions on the extent they can make decisions and the notice allows a stay on any action. This guidance is restricted to internal Home Office enforcement and doesn’t extend to providing operational guidance to other delegated border control functions. This will be central to

preventing exposure to hostile environment architecture if there is no referral mechanism by those who identify people living without immigration status in the UK.

### **Rights pending decisions and retrospective grants of status**

Finally, the guidance doesn't address the continuing problem for those who apply after the deadline and what rights they have until they receive a decision. At present, those pending late applications will have no right to work, rent etc. until a final decision is made on their case. If there are some contentions, difficulties with evidence, an appeal, a person could be pending a decision for a very long time with no rights (as confirmed in recent reflections of the Family Division of the High Court (para 79: <https://www.bailii.org/ew/cases/EWHC/Fam/2021/783.html>)).

Free access to the NHS is an exception to this for those who successfully apply late. The Department for Education also makes an exception, in that they will treat those with a pending application as potentially eligible for home fees / student finance (<https://www.gov.uk/government/publications/student-finance-eligibility-2021-to-2022-academic-year> - Grace Period paper).

For rights to be granted pending a decision would require not just a policy document change but issuing of new regulations to amend the rights currently not granted to people pending decisions. Furthermore, there would need to be a retrospective grant of status for those who are successful with their late applications to be compliant with the terms of the Withdrawal Agreement. Again this would require regulatory change (and possibly changes to primary legislation).