



## Supplementary Note: ECF, 'Brexit' and the EU Settlement Scheme

### Impact of Brexit on Exceptional Case Funding ('ECF')

1. PLP's ECF guides were first published in 2017 and are no longer maintained. We understand however that they continue to be used by applicants seeking Exceptional Case Funding and their advisors. Legal aid continues to be a priority for Public Law Project, but we are focusing our limited resources on the means test and issues of sustainability in legal aid practice.
2. This supplementary note sets out the impact of the UK's exit from the European Union ('Brexit') upon the test for ECF and the availability of ECF for applications, reviews and appeals under the 'EU Settlement Scheme' ('EUSS') established to implement the 'Citizen's Rights' provisions of the Withdrawal Agreement between the United Kingdom and EU.
3. Following Brexit, section 10(3)(a)(ii) of the Legal Aid, Sentencing and Punishment of Offender's Act was amended to include a reference to 'retained' before 'enforceable EU rights' and the Lord Chancellor's statutory guidance has been amended to reflect this change. Retained EU law usually refers to the body of law preserved in domestic law on exit day by ss. 2 and 4 of European Union (Withdrawal) Act 2018 ('EUWA 2018'). There is no comprehensive list and there are likely to be legal disputes as to what is and is not, preserved as 'retained EU law'.
4. On the other hand, s. 7A to 7C of EUWA 2018 import Withdrawal Agreement law directly with no limitations. Consequently, if a matter is within the scope of the Withdrawal Agreement it must be interpreted and applied consistently with methods and general principles of EU law (s. 7C EUWA 2018) and with CJEU case-law handed down before 31 December 2020 (s. 6(6A) read with s. 7C EUWA 2018).
5. In terms of EU law rights to legal services, the most relevant provision of EU law prior to Brexit was the right to an effective remedy and a fair trial under Art. 47 of the Charter of Fundamental Rights ('CFR') which reflects a general principle of EU law ('effective judicial protection'). Our ECF guides refer frequently to Article 47 CFR, though usually in circumstances where it adds little to other arguments based upon Art. 3 (prohibition on torture, inhumane and degrading treatment), Art. 6 (right to a fair hearing) and Art. 8 (right to family and private life). If a matter is not within the scope of ECHR but is within the scope of EU law, Article 47 CFR is important. Further, Article 47 brings administrative proceedings within the scope of fair trial provisions which within Article 6 ECHR would only apply to civil or criminal proceedings.
6. The position of Article 47 CFR following Brexit depends first on whether the matter in issue falls within the scope of the Withdrawal Agreement. If it is the case that the matter concerns residence entitlements of persons envisaged in Articles 10, 18 or 15 of the Withdrawal Agreement, or rights to equal treatment guaranteed under the Withdrawal Agreement then the Charter of Fundamental Rights applies and so does Article 47 CFR. Where the matter does not fall within the scope of the Withdrawal Agreement but raises retained EU law issues <sup>1</sup>, but the

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<sup>1</sup> The CFR was excluded from retained EU law by section 5(4) European Union (Withdrawal) Act 2018 (EUWA). However, general principles of EU law and retained EU case are part of retained EU law (section 6(7) EUWA). The government's position is that Article 47 "is simply a reaffirmation of a pre-existing general principle of EU law (e.g. *Gaviero (Joined Cases C-444/09 and C-456/09)*" (*Charter of Fundamental Rights of the EU: Right by Right Analysis, 2017, accessible [here](#)*) and



underlying EU law principle of ‘effective judicial protection’ arguably remains relevant to ECF. In many cases any uncertainty is unlikely to be material, as much of Article 47 CFR is reflected in Articles 6 (right to a fair trial) and Art. 13 ECHR (discrimination). Further, Art. 8 (rights to private and family life) has been held in an immigration context to offer procedural protections that are not substantially different to protections offered by Art. 6 ECHR. Reliance on ECHR rights is unaffected by Brexit.

7. In our view, there are comparatively few cases where individuals seeking ECF would have had arguments based on Art. 47 CFR, that cannot be expressed as arguments based on Art. 6 or Art. 8 ECHR. The guides already set out in detail how arguments based on Convention rights can be deployed and the common situations in which they arise for the different, most common categories of law that attract ECF applications.
8. There will rarely be a need to delve into arguments about ‘retained enforceable EU law rights’ in ECF applications following Brexit. But one example would be a person seek ECF for an EUSS appeal but has not established private or family life in the UK. The starting point is to establish that legal aid is *‘being sought for the purpose of a determination of a right guaranteed by or otherwise falling within the scope of EU law’*. In this example, the matter falls within the scope of the withdrawal agreement. Once this is established, the test for whether ECF is required is the same (importance of the issues at stake, factual and legal complexity, capability of the applicant).

## Availability of Legal Aid for the EU Settlement Scheme

9. Individuals may seek ECF in relation to applications or decisions under the EUSS, although consideration should be first given to seeking advice/assistance from one of the many regulated organisations able to offer free advice/assistance. Records should be kept of efforts to contact such organisations or the reasons these organisations cannot assist for presentation to the Legal Aid Agency on request, as these may be relevant to 11) iii, below.
10. Although the deadline for applications was 30 June 2021, it is possible to apply late if criteria are met and there are ‘reasonable grounds’ for the late application. There are several situations in which individuals may seek legal aid:
  - i. **In ‘scope’:** Advice, assistance and representation in relation to a refusal to accept a late application, a lengthy delay in processing an application or the legality of an aspect of the scheme, rules or guidance would be within the scope of legal aid as a public law matter (as the means of challenge is through judicial review).
  - ii. **Out of ‘scope’ (ECF required):** Advice and assistance to make an application the EUSS, apply for administrative review or representation in an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) would not be within the scope of legal aid.

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therefore little was lost by the exclusion of the CFR. Paragraph 3 of schedule 1 EUWA provides that there *“is no right of action in domestic law...based on a failure to comply with any of the general principles of EU law”* and *“[n]o court or tribunal...may... disapply or quash”* any legislation or decision on the basis that it is incompatible with a retained general principle of EU law. However, EUWA is also clear that this exclusion does not apply to *“retained EU case law”* (see paragraph 39(6) of schedule 8). As such, it is unclear whether the general principles contained in retained EU law case law that underpinned Article 47 CFR constitute a *“retained enforceable EU right”*.



11. It may be possible to make an application for ECF relying on Art. 8 ECHR. Art. 8 ECHR can in principle impose an obligation to provide legal aid in respect of applications to enter or remain in the United Kingdom (such as applications under the EUSS) as well as legal aid in relation to an administrative review or an appeal.
12. An application for ECF would involve firstly, establishing that Art. 8 ECHR is engaged and that there has been interference:
  - i. Article 8 will be engaged by the existence of ‘family life’ or ‘private life’ within the meaning of that provision. ‘Family life’ for these purposes is not necessarily confined to the immediate or ‘nuclear’ family but is more readily established in the case of relationships akin to marriage and parent/child relationships (where the child is a minor or dependent). Other relationships and ties to the community built up over a period of long residence may fall within the scope of the concept of ‘private life’. See immigration guide for more detail.
  - ii. There must be an interference with an individual’s family and/or private life for article 8 to be engaged. A total refusal to grant any status under the EUSS would constitute an interference as it would expose that individual to the prospect of having no leave and the hostile environment. At the point of an application, there is a risk of total refusal. After the application, an individual who has received a partial refusal and granted pre-settled status, may face an uphill battle to demonstrate interference as they have a form of leave that permits them to live, work and study in the UK.
13. Where Art. 8 ECHR is engaged, whether a grant of ECF is required would depend on the factors identified in the *Gudanaviciene*<sup>2</sup> case:
  - i. **Importance of the issues at stake:** A total refusal under the EUSS exposes the applicant to a risk of removal and the hostile environment. There is an important issue at stake for applicants applying for ECF to assist them with the process, and for those applying for ECF for administrative review or appeal following a total refusal. It may be more difficult to obtain ECF where there is a partial refusal for the reasons set out above.
  - ii. **Complexity of the procedural, legal and evidential issues:** The scheme is different to other immigration routes and purports to be ‘a streamlined, digital application process’, incorporating evidential flexibility (allowing caseworkers to exercise discretion) and by the Home Office’s usual standards, EUSS guidance is comprehensive and generous. There will nonetheless be more complex cases, for example, an individual who cannot prove residency through the automated data checks therefore needs to compile evidence manually. This will be particularly difficult for marginalised groups with literacy, language barriers and atypical working arrangements:
    - a. Someone who has moved around the UK frequently, such as groups with nomadic lifestyles, who may not have kept detailed records of their residency in the UK.
    - b. A victim of domestic violence who is dependent upon securing evidence from their partner to prove eligibility and/or residency.
    - c. A case where the Home Office caseworker has refused to exercise their discretion in respect of evidential flexibility.
    - d. A case where a person is potentially liable to refusal on ‘suitability grounds’

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<sup>2</sup> R (oao Gudanaviciene & Others) v DLAC & LC [2014] EWCA Civ 1622 at [72]



under EU15 or 16 and representations need to be made as to why they should not be refused, or the refusal should not be upheld.

e. Applications made following the 30 June 2021 deadline will need to justify the reasons for delay.

iii. **How capable is the applicant of presenting their case effectively:** The ability of the applicant to participate in the process without legal assistance, having regard to their age and mental capacity, is a relevant factor when determining whether they should be granted ECF. In this context, it is relevant that (i) there are statutory restrictions on the supply of advice and assistance, (ii) individuals may well have language difficulties and (iii) the law is complex and rapidly evolving.

14. Where a person is within the scope of Withdrawal Agreement, the Charter of Fundamental Rights will be applicable including Art. 47. So for example, if a person would have had a right to reside in the UK on 31 December 2020 because they were working, self-employed, a student, self-sufficient or a family member, they will be within the scope of the Withdrawal Agreement if they applied for EUSS on time or if they have merely arguably reasonable grounds for a late application under EUSS. As such, there should be legal aid for appeals which meet the threshold of the same criteria outlined above<sup>3</sup> and, we suggest this might even be a stronger right to legal aid, bearing in mind the importance of possible loss of a right to reside which is not dependent on the discretion of the Secretary of State but established by an international agreement.

15. As set out in the Migration Observatory's report, 'Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?', some applicants will have serious issues with illiteracy, language barriers, digital exclusion and age-related barriers to accessing the Scheme. RSG's report on BP2 found that only 3% of Roma had the confidence, language and/or IT skills to complete and submit an application without support.

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<sup>3</sup> See e.g. §§60–61 *DEB Deutsche Energiehandels v Bundesrepublik Deutschland* [2011] CMLR 21