Landmark Chambers

LANDMARK CHAMBERS' WEBINAR – QUESTIONS AND ANSWERS

EU free movement law and the EU settlement scheme

Introduction

1. On 8 June 2020, Landmark Chambers hosted a webinar entitled "EU free movement law and the EU settlement scheme", with Richard Drabble QC, Tim Buley QC, Matthew Fraser and Alex Shattock as speakers.

2. During the webinar, attendees submitted a number of questions. Most were answered in the Q&A session at the end of the webinar, but the remaining questions are answered here in writing.

Where an EU national and non-EU national were due to marry in the UK (so the non-EU partner can regularise her status in the UK), but cannot currently due to the pandemic, is there anything to stop the EU national going to his home country and performing a civil (lawful) proxy marriage (allowed under the law of the other country and recognised under UK law) then returning to the UK and allowing the non-EU spouse to apply under the EU settlement scheme as his spouse?

EU nationals and their partners can have periods of absence from the UK during the five-year "continuous qualifying period" without breaking that period. It would therefore be possible to go abroad to get married and then return to the UK. However, it is important to note that marriage is not the only way in which a "family member" of an EU national sponsor can be eligible for pre-settled or settled status. A "durable partnership" will suffice, namely where "the couple have lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship)".

Retained rights on divorce. I don't think there's a need for the couple to live together in the UK for that year - just both living in the UK - (as under Reg 10, EEA Regs 2016)

3. That's correct: see the definition in Appendix EU of a "family member who has retained the right of residence", para. (d)(iii)(aa).

The Home Office are delaying making a decision on an EUSS application on the basis that the client has an on-going asylum claim. The asylum claim is also on hold on the basis of the EUSS application. Can't the two applications co-exist?

4. The Immigration Rules prevent more than one outstanding application for leave to remain at the same time: see para. 34BB. Para. 34BB(2) provides that "[i]*f an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application*". So this suggests that the application that came later should be the one that is determined. Plainly the SSHD should determine one of them rather than, in each case, relying on the other as an excuse for delay.

With regard to the fact that granting of EUSS does not terminate another EEA application - that may be to do with WA and the EEA Regs etc but might it also apply to other immigration applications - so if someone has DLR and gets Pre settled status under EUSS does their DLR come to an end?

5. Whereas the Immigration Rules do not apply to those entitled to leave under the EEA Regs (see para. 5 of the Immigration Rules), Appendix EU is part of the Rules. Discretionary Leave to Remain is leave granted outside the Rules and pursuant to the Asylum Policy Instruction on Discretionary Leave. Para. 3.1 of the API makes it clear that DLR "*must not be granted where an individual qualifies for leave under the Immigration Rules*". This is logical and indicates that, if someone qualifies for pre-settled status under Appendix EU, this should result in their DLR getting curtailed.

Would an EEA child be eligible to make an application for settled status. It is important to state that his father who was EEA national is deceased. Would the mother be eligible for pre settled status?

6. Children are not exempt from having to apply for settled status. They need to apply using the same method as adults, albeit they are exempt from providing some information (e.g. NI number, criminal convictions). Assuming she is residing in the UK for a period starting before 11pm on 31 December 2020, the mother will be eligible for pre-settled status, either as an EEA

national herself, or (if not an EEA national) as a "close family member" of the EEA child. The mother and child can and should make linked applications.

Would *Fratila v SSWP* [2020] EWHC 998 (Admin) assist non-EU family members with PSS?

7. Probably not: even if the claimant is successful on appeal, *Fratila* was a case under Article 18 TFEU only, which only applies *"within the scope of application of the Treaties and without prejudice to any special provisions contained therein."* Similarly Article 51 of the Charter of Fundamental Rights provides that the Charter's principles apply to member states *"only when they are implementing Union Law".* So in *Regina (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, Lord Carnwath JSC at para 22 commented that there was no general principle of equal treatment in EU law that applied to non-EU nationals. And as Martin Williams pointed out in the Zoom chat, the Supreme Court has previously held that only the nationals of member states are protected by Article 18: *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783, para 83 (cited with approval in *HC*).

Is there any clarity about what happens if an application for a residence card etc is undecided on "exit day" however defined?

8. Exit day was 31 January 2020, and has already passed. Such applications continue to have to be decided for the time being, and for so long as free movement rights continue in the transition or implementation period. The "implementation period" will come to an end on "IP completion day", currently 31 December 2020. However, the government has envisioned that, via transitional or commencement provisions relating to the Immigration and Social Security Co-Ordination Bill, free movement rights may continue to June 2021 for those who already enjoy such rights. So we will need to see what if anything is said in such transitional arrangements about a pending application for a residence card or similar document. If the transitional arrangements are silent, there may be scope to argue that, since the grant of a residence card is merely declaratory of free movement rights, such applications should continue to be determined up until the point when all such rights cease to exist. On the other hand, subject to any express provisions to the contrary, it should be possible for all such rights to be asserted up

to IP completion date and / or the end of any transitional period under the Bill, whether or not a residence card is issued to prove that right.

9. If there are further queries, please do not hesitate to contact any of us.

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