Department for Business, Innovation & Skills

Annex 2: New eligibility category for higher education student support response form

You can reply to this consultation online at https://bisgovuk.citizenspace.com/

The consultation response form is available electronically on the consultation page: https://www.gov.uk/government/consultations/student-support-for-non-UK-nationals-who-have-lived-in-the-UK-for-a-long-time (until 8 January 2016). This form is fully interactive and downloadable. The form can be submitted online/by email or by letter or fax to the address below. If you require a printed version of the consultation, the response form or require the consultation in another format please also contact this team.

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 8 January 2016.

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Please tick a box below which best describes them as a respondent.

	Business representative organisation/trade body
	Central government
X	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)

	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

Question 1

1. Do you agree that it is reasonable to introduce a requirement that students who are under 18 years old and who are not settled in the UK should have to demonstrate seven years continuous residence in the UK (including three years' ordinary lawful residence immediately before the start of their course) in order to be eligible for student support?

Comments:

We do not believe that using Immigration Rule 276ADE for the purpose of establishing eligibility for student support is reasonable. The difference in purpose between the Immigration Rules and the Education (Student Support) Regulations 2011 mean that the use of Rule 276ADE without modification is unsuitable. PRCBC have drafted an alternative regulation, set out in our full submission below.

We do not see how any students will be able to apply for student support before they are 18, and the difference in treatment between those who are 17 and those are 18 is both unfair and unjustified.

Questions 2

2. Do you agree that it is reasonable to introduce a requirement that students who arrived in the UK as children and are aged 18 to 24 years and who are not settled in the UK should have to demonstrate that they have spent at least half their life continuously resident in the UK (including three years' ordinary lawful residence immediately before the start of their course) in order to be eligible for student support?

Comments:

We do not believe that this is reasonable to introduce this requirement because of the harsh effect of the difference in treatment between those who are able to apply for student finance at the age of 17 (which will be a particularly small group, giving the normal time-scale for applying for university) and those applying aged 18 or over. Children are unlikely to be responsible for regularising their stay in the UK, and for most this is the responsibility of a parent or legal guardian. For children who are placed in foster care in the UK, the local authority has responsibility for them. PRCBC has identified a number of cases where local authorities have failed in their obligations towards children in their care, resulting in these children turning 18

without lawful stay in the UK. In the experience of PRCBC some of these children are in fact eligible to register as British citizens.

Please see the full PRCBC response to the consultation which includes an alternative draft regulation. The draft regulation can be imported into the Student Support, and all other student support regulations.

Question 3

3. Question 3: Would you support a rule allowing those who are aged 25 or above and who are not settled in the UK to become eligible for student support if they have been continuously resident on the UK for at least 20 years (including three years' ordinary lawful residence immediately before the start of their course)?

Comments:

PRCBC do not believe that this is reasonable to introduce this requirement as its effects are particularly harsh. The requirement to achieve lawful residence for three years preceding an application for student finance may result in delays for young people who are only able to regularise their stay as adults. It does not take into account the start of the academic year, which can require a young person to wait a further year before becoming eligible for student support.

Please see the full PRCBC response to the consultation which includes an alternative draft regulation. The draft regulation can be imported into the Student Support, and all other student support regulations.

Why rule 276ADE is unsuitable for eligibility for student support

PRCBC believes that importing an immigration rule to the student support regulations is unsuitable for a number of reasons.

Firstly, the Immigration Rules do not represent a complete code for interpreting Article 8. This was accepted by the Home Office in the cases of *R(otao Nagre)* [2013] EWHC 720, where it was stated that "T*he Secretary of State does not contend that the new rules completely cover every conceivable case in which a foreign national may have a good claim for leave to remain under Article 8*" [§33] This was approved in the Court of Appeal in *SS (Congo)* [2015] EWCA Civ 387. Therefore, the test for considering a case outside the rules is where there are "exceptional circumstances"; there is therefore additional criteria in the consideration of rule 276ADE which requires consideration of exceptional circumstances. This detracts from the simplicity of setting out a bright-line rule, and imports not only further scrutiny of cases, but also a right of review.

Right to review

Applications under the Immigration Rules are subject to a much greater level of scrutiny that an application for student support. Not only this, but an application under Rule 276ADE attracts a right of appeal. The blanket adoption of Immigration Rule 276ADE as the bright-line rule is therefore potentially problematic without a right of review or appeal. A regulation which failed to acknowledge this right to further scrutiny would be eminently challengeable.

Although this was suggested in the *Tigere* judgment, neither the arguments nor the judgment were examining the Immigration Rules and subsequent case-law in great detail, and the court did not consider Immigration Rule 276A00 which should be read alongside rule 276ADE and sets out the terms of any leave granted outside immigration rule 276ADE. The court and may not have considered the cumulative impact of case-law on the implementation of the Immigration Rules.

Further, the requirement for 3 years lawful residence in the UK, approved by the Supreme Court, will mean that any applicant for a student loan will already have had an immigration application scrutinised. Therefore, there cannot be any justification for importing the Immigration Rules as a gateway to a student loan, whilst raising the threshold higher than for an immigration application.

Question 4

4. Can you supply any additional information in support of or against these proposed extensions of eligibility, including any statistical data, or identify unintended consequences for other cohorts or sub-groups?

Comments:

Please see the full PRCBC response to the consultation set out below.

Question 5

5. Do you have any evidence that the policy proposal will have any equality implications and affect persons with a protected characteristic?

Comments: [leave space]

Those impacted by the proposed new eligibility regulation for a student loan are third country nationals from outside the EEA or the UK. The majority of those who would qualify for student finance under the proposed changes to the regulations will therefore most likely be from black and minority ethnic (BME) communities. Under the Equality Act 2010, race includes nationality (s9(1)(b)) and consideration should be given to both the direct and indirect discriminatory impact of the proposals. We

do not believe that the current proposal is sufficient to address the issue of discrimination raised in the *Tigere* judgment.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply X

BIS/15/650/RF

Full submission of the Project for the Registration of Children as British Citizens (PRCBC)

The Project for the Registration of Children as British Citizens (PRCBC) is the first and only organisation to focus directly on children and young adults and their right to British citizenship.

The first main object of PRCBC is the relief of poverty by the provision of legal advice, aid, assistance and services, relating to the registration of children as British citizens, to those persons who could not otherwise obtain such provision due to lack of means.

The second main object of PRCBC is the advancement of education, particularly but not limited to matters relating to the legal framework of British citizenship status.

Therefore, in response to this consultation, PRCBC which to propose the following draft regulation. This could be imported into the Education (Student Support) Regulations, 2011 and other relevant regulations

A person “A” is an eligible student who qualifies for support where:

1) A entered the UK when aged under 18; and

2) On the first day of an academic year of the course A has been continuously resident in the UK for at least seven years; and

3) has been lawfully and ordinarily resident in the UK and Islands throughout the three-year period preceding the first day of the first academic year of the

Explanation of the draft regulation

[1] As the consultation states at paragraph 18 – 'amongst the factors the Court considered to be material were that she [*Tigere]* had entered the country as a child' The definition of a child in domestic law is set out in the Children Act 2004 section s.65 and Children Act 1989 section 105 '"child" means …..someone under the age of 18'. The UN Convention of the Rights of a Child, was ratified by the UK in 1991, in Article 1 defines a child as 'a person aged under 18 unless, under the law applicable to the child majority is attained earlier'. The age of majority in the United Kingdom is 18, it was set at 18 in s.1 of the Family Law Reform Act 1969. See paragraph 38 *HC v SSHD* [2013] EWHC 982 (Admin)

[2] PRCBC would recommend that the 7-year condition is linked to the first day of ***an*** academic year, rather than the first day of ***the first*** academic year as this category would be analogous to those who obtain (or whose relevant family member obtains) either Refugee Status or Humanitarian Protection – in such circumstances, the student becomes eligible for Student Support and (from the start of the following academic year) for 'home' fees if they meet the relevant eligibility criterion after the start of their first academic year.

[3] "continuously" should be given its normal meaning, allowing for absences from the UK of up to six months, in line with regulation 3 of the Immigration (European Economic Area) Regulations 2006/1003.

[4] "lawfully" – we would recommend that this word be defined as follows, to ensure that those who during the 3-year period have been waiting for the final outcome of an asylum of human rights application are not excluded:

"(1) For the purposes of these regulations, a person who made a claim for asylum or a claim on human rights grounds and has leave to enter or remain in the UK is to be treated as having been lawfully resident in the UK and Islands throughout any period that their asylum claim or claim on human rights grounds was pending.

(2) For the purposes of these regulations

i a "claim for asylum" means a claim by a person that it would be contrary to the United Kingdom's obligations under the Refugee Convention to remove him from or require him to leave the United Kingdom;

ii a "claim on human rights grounds" means a claim by a person that it would be contrary to the United Kingdom's obligations under the European Convention on Human Rights to remove him from or require him to leave the United Kingdom

(iii) A claim is pending

(a) while it is neither decided nor withdrawn,

(b) while an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the

United Kingdom against the decision on the application (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision is pending (within the meaning of section 104 of that Nationality, Immigration and Asylum Act 2002)

(d) an application for permission to apply for judicial review of the decision on that application has been made and permission or the application for judicial review has not been refused or withdrawn."

Precedents for reference:

Definition of 'claim for asylum' – see Nationality Immigration and Asylum Act 2002 s 77, s 78

'Pending' - see s 3C of the immigration act 1971; 'pending' refers to the 2002 Act

Benefits of the proposed regulation

The combination of the three eligibility criteria above would have the following advantages:

i relative simplicity as compared with the proposals for differing age-related periods of long residence and, therefore, less challenging evidence requirements (for example, many who arrive as children will have school and/or further education college records)

ii would provide for students who had come to the UK as children and have been given immigration leave by the Home Office at least three years before the start of their course and would, therefore, exclude from this category those who had arrived, or remained, unlawfully in the UK as adults.

iii limiting this category to those who have arrived in the UK when they were under 18 would have the advantage of being inclusive of those who had not attended school for one reason or another, while those who *had been* in primary / secondary / FE while under 18 would have another evidence route open to them.

iv would remove the substantial and significant increases in 'long residence' years that would be required for those aged 18 as compared with a 17-year-old and aged 25 (requiring 20 years – ie since they were 5 years old) as compared with a 24-year-old (who would require 12 years – ie since they were 12 years old)

Temporary migrants

Paragraphs 27 to 30 propose that the calculation of any ‘long residence’ period should exclude time in the UK as a temporary migrant. This would exclude time that the student had been in the UK, for example, as a worker [eg under Tiers 1 or 2 of the immigration points-based system (PBS)] or as a student [eg under Tier 4 of PBS] or as the family member of any such categories.

PRCBC would propose that such periods as temporary migrants should not be excluded from the ‘long residence’ period because:

§ those whose period of long residence had included periods of lawful residence would not be treated less favourably than those whose periods of residence had included periods of unlawful residence – any less favourable treatment for those with periods of lawful residence that fall to be excluded from any ‘long residence’ calculation might appear to be unfair:

§ any temporary migrant who had been continuously resident in the UK for seven years would normally have contributed to UK economy and community in substantial ways;

§ workers and their dependants who had been continuously resident in the UK for seven years would normally have strong connections with the UK whether or not they had applied for, or obtained, indefinite leave to remain in the UK

§ under the current Immigration Rules for Tier 4, students are generally subject to a 5-year cap on their leave as a student (including any extensions of their leave or any leave granted as the result of any subsequent entry clearance application) and additionally any applications for further student leave need to be for study that constitutes ‘academic progression’ – it is therefore unlikely that substantial numbers of Tier 4 students or their dependants would attain seven years’ continuous residence in the UK ***and*** achieve three years’ lawful and ordinary residence in the UK and Islands;

§ under the current Immigration Rules, only those taking a postgraduate course that is at least 12 months long, or government-sponsored students taking a course that is over six months long, can now come to the UK with their dependants – so this, combined with the 5-year cap above, would mean that very few dependants of Tier 4 students would attain seven years’ continuous residence in the UK.

§ Those who are in the UK as workers would in general achieve settlement after 5 years and therefore would be eligible for a student loan in any event. As with Tier 4 students and their dependants, the only exception for 5 years settlement would be those who were lawful but who due to the nature of their stay were on the ten year route to settlement. This is settlement after 10 years lawful and continuous residence. It is perverse that this extended period of time of remaining in the UK lawfully would result in individuals and their family members being denied a student loan, whereas someone who had spent time unlawfully in the UK would be eligible.

It would appear, therefore, that excluding any periods in the UK as a temporary migrant from any 'long residence' calculation would introduce an unnecessary complication to the eligibility criteria as well as appearing to give unfavourable treatment to those whose long residence contains longer periods of lawful residence.

Residual discretion

Although PRCBC are aware that BIS are seeking a bright-line rule in respect of eligibility and are not minded to include residual discretion in the regulations, PRCBC recommends that some form of residual discretion is retained. Some cases do not fall exactly within the criteria can still be considered for student finance. Within every rule there may be occasional individuals whose circumstances are so exceptional as to warrant granting student finance. This is suggested by Lady Hale at paragraph 28 of the judgment in *Tigere.*

In the experience of PRCBC, many young people are unaware of their immigration status, or unable to take steps to regularise without assistance from their parents or guardian. In a number of cases, children and young adults have an entitlement to registration as British citizens under the British Nationality Act 1980, and are unable to do so for reasons entirely outside their control. In some instances, as a direct failure within local authority departments. PRCBC has advised children and young people who are extremely capable and want to study further. The impact of being prevented from studying because of lack of an available loan has a detrimental impact on young people, and the feelings of being "left behind" can leave young people feeling depressed, unable to move on, and in some cases suicidal.

Project for the Registration of Children as British Citizens (PRCBC)

8 January 2016