

Home Office concession dated 21.10.2021 for young people who entered the UK as children – note for legal representatives

In response to litigation by Islington Law Centre and the Migrant and Refugee Children's Legal Unit (MiCLU), and campaigning work by We Belong, on 26th October 2021, the Home Office announced a major policy concession in relation to the 10-year route to settlement (10YRS), accepting that some applicants – particularly young adults who came to the UK as children and have lived here for a should qualify for Indefinite Leave to Remain (ILR) after having completed 5 years of leave to remain rather than 10 years.

Full details of the concession can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028126/Concession_on_longer_periods_of_leave_and_ILR.pdf

What is the 10YRS?

The 10YRS was introduced in 2012 for people who cannot meet the requirements of other immigration rules but whose removal would breach their rights to private or family life. These include where a young person aged 18-24 years has spent more than half their life in the UK. According to the Home Office, the rationale behind the 10YRS is that it *“generally serves as an incentive to encourage compliance with the core requirements of the Immigration Rules and encourage integration into society. The longer timeframe signals that a person should not benefit from the same entitlement as those who are compliant.”*

Those whose applications for leave to remain are granted on the 10YRS are given leave in 30 month tranches, and are required to make repeated applications until they have accrued 120 months (or 10 years) continuous lawful residence. Fees and an Immigration Health Surcharge (IHS) are payable for each application unless an applicant can demonstrate that they meet the requirements for a fee waiver. The presumption is that leave to remain will be granted with a condition preventing access to public funds unless, on application, the applicant provides evidence that they are destitute, or that there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income that mean that the condition should not be imposed.

What has been conceded by the Home Office?

The concession by the Home Office is significant in that, there is an acceptance that the 10YRS is disproportionate when applied to a class of applicants because the rationale behind the 10YRS does not apply to those applicants who were either born in the UK or entered as children (below the age of 18), but are now young adults (aged 18-24), who cannot be considered responsible for any previous non-compliance with immigration laws and are fully integrated into society in the UK. For those applicants the concession accepts that a 5 year route to settlement is appropriate, meaning that after completing 5 years with leave to remain that cohort should be granted Indefinite Leave to Remain.

Thus the concession cuts the very onerous 10YRS in half for these applicants and significantly expands very narrow individual circumstances in which ILR can “exceptionally” be granted when on the 10YRS as set out in the Family/Private Life Policy in the section ‘Longer or Shorter periods of leave’.¹ Indeed, the concession makes clear that those who meet the criteria set out below may be considered to meet the threshold of ‘exceptional circumstances’, for a grant of early ILR. This is a significant widening of the definition of ‘exceptional circumstances’ for the purpose of policy.

The Home Office concession reflects an acceptance of a central argument made in the legal challenge that applicants who were born in the UK or entered as children and are now young adults, who are fully integrated into society in the UK should not be subject to the lengthy probationary period and further that placing such people on the 10YRS was actually resulting in their de-integration due to the numerous obstacles they faced on the route. We further argued that they cannot be considered responsible for previous non-compliance with immigration laws.

Who is eligible for early settlement under the new concession?

According to the concession published by the Home Office, to be eligible, an applicant must at a minimum (at the time of applying):

- (i) be aged 18-24 years and have spent half their life in the UK (discounting any period of imprisonment),
- (ii) have been born in the UK or entered as a child,
- (iii) have held 5 years leave to remain, and
- (iv) be eligible for further leave to remain under paragraph 276ADE(1) of the immigration rules and have made an application under those Rules.

Their application will then be considered with reference to factors such as (but not limited to):

- Age on arrival
- How long they have lived in the UK
- Strength of connections and integration to the UK
- Whether the applicant is responsible for any periods of unlawful presence (note that children can generally not be held responsible for unlawful presence)
- Efforts made to engage with the Home Office and regularise leave
- Current and previous grants of leave to remain, and length of continuous lawful presence
- The impact of a short period of leave (rather than indefinite leave) on the young person’s health and welfare

It is important to note that whilst the policy mentions the best interests of children generally, it does not list this as amongst the criteria to be considered. Nevertheless, the best interests of any child affected should always be addressed, and must be

¹ Pages 82-83 of the current version of the policy which is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026201/Family_life_as_a_partner_or_parent_private_life_and_exceptional_circumstances.pdf.

taken into account by the decision-maker, as best interests must be a primary consideration when considering what period of leave to remain should be granted.

What about other applications for early ILR on the 10-year route?

Although the concession places an apparent age limit of 24 years old on requesting ILR under the concession, this does not encompass all those who should clearly benefit from the concession based on its rationale. Indeed, in accordance with the immigration rules (see paragraph 276BE), young people who previously met the criteria to be granted leave to remain because they were 18-24 and lived in the UK for half their lives (see paragraph 276ADE(1)(v) of the Immigration Rules) can continue to be granted leave to remain on this route even once over 24. Therefore, in our view, any applicant who was eligible under the paragraph 276ADE(1)(v) criteria and remains on that route but is now over 24 can request a grant of ILR if they meet the other criteria in the policy on the basis that it would be disproportionate to require them to complete a 10 year probationary period.

For all other applications, applicants may continue to apply for ILR where there are particularly exceptional or compelling reasons, such as where the impact of the 10-year route on them or affected children are particularly serious by reference to the Leave Outside the Immigration Rules policy

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684049/lotr-compelling-compassionate-grounds-v1.0ext.pdf

and the [Family life \(as a partner or parent\), private life and exceptional circumstances \(publishing.service.gov.uk\)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684049/lotr-compelling-compassionate-grounds-v1.0ext.pdf) policy.

Practitioners may also wish to consider the extent to which the notes setting out the 'background' to the policy may assist other applicants in arguing that the public interest factors underpinning the 10YRS are less relevant in their case, and that as a result requiring them to complete a 10YRS would be disproportionate, even where they do not meet the other requirements of the policy. Arguably any applicant who is fully integrated and cannot be blamed for prior unlawful presence, could argue that their case is also "exceptional" and they should not be on the 10YRS.

How can applicants access the concession offered under the policy?

The Home Office has not, so far, issued any procedural guidance as to how individuals asserting that their circumstances meet the requirements of the policy may obtain a grant of ILR. As such it is not possible to provide definitive guidance in this regard.

The present wording of the policy indicates that the concession will be considered at the time of an 'application' and refers back to the policy that ILR can be considered exceptionally where an application for further leave to remain is made if requested. Our understanding is that as the concession is accessed, by making the request for ILR at the time of making an application for further leave to remain using Form FLR(FP) if clients have accrued 5 years lawful residence and prior to the expiry of their existing leave.

The application will need to be supported by evidence that the criteria above are met, and legal submissions explaining why the evidence shows that the applicant meets the requirements of the concession. Where the applicant is able to pay the fees, and IHS these will need to be paid. Where an applicant cannot afford the fees and IHS, a fee waiver should be obtained. If the applicant is granted ILR, a refund of the IHS should be claimed.

Representatives assisting young people to apply for further leave to remain on completion of their second tranche of leave to remain should ensure that applications are prepared with evidence to address the issues relevant to the application of the policy, and to ensure that legal submissions set out the extent to which the applicant fits the criteria for a grant of ILR.

Practitioners who represent individuals whose circumstances fall within the concession, and who currently have an outstanding application for further leave to remain should send additional written submissions in support of the application setting out the basis on which the policy applies to their client, and providing any additional evidence in that regard if not already included with the application. Although the policy gives caseworkers a discretion to consider applications by reference to the policy, there is no absolute requirement to do so, and it is therefore advisable for representatives to ensure that the decision-maker's attention is drawn to the application of the policy in individual cases.

Attention must be paid to applications made by family units including adult children. Given that adult children must make separate applications from their parents once they reach the age of 18, it is important that such young people are advised of the potentially shorter route to ILR than that enjoyed by other family members, and that their separate basis of stay is evidenced and appropriate submissions made.

Practitioners are also alerted to the situation of young parents granted leave to remain on the basis of Appendix FM with EX01 as parents of a British child who might also qualify for leave to remain under paragraph 276ADE(1) (v) in their own right. Whilst it is common practice for the Home Office to grant leave on the basis of Appendix FM without making additional findings in relation to the individual's own long residence, this does not preclude those individuals from applying on the basis of the policy where they are able to provide evidence of their continuous presence in the UK for more than half their lives, provided that they reached the 'half life' point before the age of 25.

Practitioners may be approached by young people who have already been granted their third or fourth tranche of 30 months leave or may be concerned about former clients who have already completed 5 years leave to remain and would now potentially qualify for an early grant of ILR but are not at a point in their period of leave when they will imminently need to reapply for leave. Again, the Home Office has not yet provided guidance as to how such individuals may assert their entitlement to a grant of ILR on the basis of the policy concession. For now we would suggest writing to the post-decision case work team at 2PDCTeam4@homeoffice.gov.uk / Post Decision Casework Team, PO Box 3468

Sheffield, S3 8WA², who have been issuing ILR grants for young people we represent, requesting that their limited leave is converted to ILR with representations on why they met the criteria in the concession when they last applied for leave. Where you have contact details for the team that made the most recent decision to grant further leave to remain to your client, it would also be sensible to copy any correspondence to them, inviting them to re-make their decision on the basis of the policy. We are, however concerned that without any official procedure there could be difficulty in obtaining a timely response to any such request. We are raising this with the Home Office and hope to obtain more detail in this regard and will share this when available.

Failure to consider the application of the policy, failure to provide reasons why the SSHD has decided that it does not apply in a specific case, or a failure to apply the criteria for granting ILR after 5 years properly, may give rise to a challenge by way of Judicial Review.

What next?

There are some aspects of the policy as drawn which are problematic in relation to the cohort it was intended to provide with an early route to settlement in recognition of their long residence, integration and lack of culpability for any breach of immigration laws.

The most obvious of these, is the apparent restriction of the policy to those aged over 18 and under 25 at the time of the application for ILR. This criteria appears arbitrary as it fails to provide a route to ILR for those who have met the requirements of paragraph 276ADE(1)(v) of the Immigration Rules, have completed 5 years with continuous residence, and are now aged 25 and over. These individuals share the same characteristics as those to whom the policy applies, but may be placed in a worse position despite lengthier lawful presence in the UK.

We note that some of the young people who brought the challenge to the policy were over 24 when they made their most recent application for further leave to remain and otherwise met the terms of the concession. They were granted ILR in response to the challenge, thus the Home Office can be expected to act consistently in other cases and as above requests for ILR for this cohort should still be made.

The policy concession also specifically excludes its application to children under 18 on the basis that such children will be granted leave to remain in line with their parents. However, this does not provide for children on the 10YRS who are not living with their parents or granted leave in line with them.

We are seeking clarity on the above issues, and will provide updated information as this becomes available. In this regard it would be helpful if practitioners could share their own experiences of assisting clients to access this policy, and the application of the policy by Home Office caseworkers.

² We are unable to provide any guarantee that you will get a response. We have yet to write to this team in relation to any of our clients. However, this would be our starting point in the absence of the provision of specific contact details

