



Department  
for Business  
Innovation & Skills

**New Eligibility Category for Higher  
Education Student Support**

DECEMBER 2015

# Contents

<b>Contents</b> .....	<b>2</b>
<b>New eligibility category for HE student support</b> .....	<b>3</b>
1. Foreword from the Minister of State .....	4
2. Executive Summary .....	5
3. How to respond .....	7
4. Confidentiality & Data Protection .....	7
5. Help with queries.....	8
6. The proposals .....	8
7. Consultation questions .....	12
8. What happens next? .....	13
<b>Annex 1: Consultation principles</b> .....	<b>14</b>
Comments or complaints on the conduct of this consultation .....	14
<b>Annex 2: New eligibility category for HE student support response form</b> .....	<b>15</b>

# New eligibility category for higher education student support

The Supreme Court judgment in the case of R (Beaurish Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57 [2015] 1 WLR 3820, given on 29 July 2015, declared that it was unlawful to refuse Ms Tigere a student loan solely on the basis that she was not settled in the United Kingdom. The effect of the Court's judgment is to require the Secretary of State to consider adopting more tailored criteria for eligibility for student support which would avoid breaching the Convention rights of other similar applicants.

This consultation is seeking views on the Secretary of State's intention to create a category of people without settled status eligible for student support where they have been resident in the UK for a long period of time and where for part of that time they have been ordinary lawfully resident. The Secretary of State seeks views on the potential impact of this option.

Issued: 2 December 2015

Respond by: 30 December 2015

Enquiries to: Glenna Pryor, Department for Business, Innovation and Skills, Higher Education Student Funding, Level 1, St Pauls Place, 125 Norfolk Street, Sheffield S1 2FJ. [He.consult@bis.gsi.gov.uk](mailto:He.consult@bis.gsi.gov.uk)

This consultation is particularly relevant to Higher Education Institutes and immigration rights advocacy groups.

## **1. Foreword from the Minister of State for Universities and Science**

The Supreme Court judgment in the case of *Beaurish Tigere*, 29 July 2015, ruled that it was unlawful to refuse her a student loan solely on the basis that she was not settled in the UK.

I have considered this judgment and intend to introduce new criteria for eligibility for student support which will avoid the risk of breaching the Convention rights of similar applicants by enabling people who have a long residential connection to the United Kingdom to enter Higher Education alongside their peers with settled status.

This document puts forward potential options that will protect the rights of those the Supreme Court identified, while at the same time recognising that public finances for higher education are finite and that the bodies responsible for student support require clear rules to administer the system in a way that is cost effective for the public purse.

I am keen to hear your views, both individuals and organisations, on the potential impact of the options put forward in this document.

## 2. Executive Summary

1. On 29 July 2015 the Supreme Court issued its judgment in the case of *Beaurish Tigere*. The Court ruled that it would be unlawful to refuse Ms Tigere a student loan solely on the basis that she did not satisfy the settlement criterion, given her personal circumstances (she had entered the country as a child, had been schooled here and had family here). It ruled that the requirement that Ms Tigere be settled in the UK in order to be eligible for student support breached her rights under Article 14 (discrimination) read with Article 2 of Protocol 1 (access to education) of the European Convention of Human Rights. The effect of the Court's judgment is to require the Secretary of State to consider adopting revised criteria for eligibility for student support which would avoid breaching the Convention rights of other similar applicants. The Court upheld the requirement of three years' ordinary lawful residence that all individuals, with minor exceptions, must meet in order to be eligible for support. It did not rule that settlement could not be a criterion in cases other than those such as Ms Tigere's.
2. The Secretary of State has given careful consideration to the judgment and has considered a number of options to address it. These are described in more detail in the proposals section of this document.
3. For a substantial period of time the Secretary of State has considered that the settlement requirement is the most effective way for individuals to demonstrate a fundamental connection to the UK and to suggest they are likely to remain here and make a long-term contribution to the UK economy and society. Such evidence remains important as a condition for obtaining student support. However, in light of the Supreme Court's judgment, he accepts that this commitment could also be demonstrated if someone has been here a long time as a matter of fact. His preferred option, and the focus of this consultation, is to create a new eligibility category to sit alongside existing categories. The new category would apply to those under the age of 18 years who came to this country as children and who have been resident in the UK for at least seven years and to 18 to 24 year olds who have been resident in the UK for at least half their life. The Secretary of State is also interested to hear views as to whether, in certain circumstances; persons aged 25 years or above who have been here a long time should also be eligible for student support. In all cases, the person would also need to satisfy the long-standing three years' ordinary lawful residence requirement in line with other applicants. Applicants who are current temporary migrants or the dependants of temporary migrants would not be eligible to apply. The time spent in a temporary migrant route will be discounted in the calculation of the required eligibility period spent in the UK.
4. This new category would require the student to demonstrate a long period of actual residence in the UK. The specific consultation questions are:
  - 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?

- 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?
  - 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 in the UK for at least 20 years (including three years' ordinary lawful residence immediately before the start of their course)?
  - Can you supply any additional information in support of or against these proposed extensions of eligibility, including any statistical data, or unintended consequences for other cohorts or sub-groups?
  - Do you have any evidence that the policy proposal will have any equality implications and affect persons with a protected characteristic? Protected characteristics in The Equality Act 2010 are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.
5. It is intended that this amendment would come into force in respect of the academic year 2016/17 at the latest.
  6. Higher education is a devolved matter in Scotland, Wales and Northern Ireland so this change would apply only to students seeking student funding in England.
  7. The consultation will last for four weeks. During this time it is our intention to hold a round table discussion with representative advocacy groups of young people affected by this policy proposal.
  8. The Department intends to publish a response and an equality assessment early in 2016.

### 3. How to respond

9. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear whom the organisation represents by selecting the appropriate interest group(s) on the consultation form and, where applicable, how the views of members were assembled.
10. You can reply to this consultation online at <https://bisgovuk.citizenspace.com/>
11. 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 30 December 2015). 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 or the response form these can also be obtained. Alternatively if you require the consultation in another format please also contact this team:

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12. If you wish to complain about the way the consultation is being run please refer to Annex 1 Consultation principles.

### 4. Confidentiality & Data Protection

13. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
14. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## 5. Help with queries

15. Questions about the policy issues raised in the document can also be addressed to the policy team address given in section 3.

## 6. The proposals

16. Students applying for higher education student funding have to meet personal eligibility criteria set out in the relevant Regulations, which can include their having “settled” status on the first day of the first academic year of the course. There are other categories of eligible status, for example for those with refugee status and for EU nationals. For detailed descriptions of the eligibility categories please refer to the Education (Student Support) Regulations SI 2011/1986 Schedule 1 Part 2: <http://www.legislation.gov.uk/ukxi/2011/1986/schedule/1/part/2/made>. With the exception of those holding refugee status, students must also have been ordinarily resident in the UK, Channel Islands or the Isle of Man throughout the three years immediately preceding that date. EU applicants need to show three years’ residence in the European Economic Area and Switzerland and to be present here on the first day of the course.
17. On 29 July 2015 the Supreme Court issued its judgment in the case of *Beaurish Tigere*. This ruled that it would be unlawful to refuse Ms Tigere a student loan solely on the basis of the settled status criterion. It ruled that the requirement for Ms Tigere to be settled in the UK for her to be eligible for student support breached her rights under Article 14 (discrimination) read with Article 2 of Protocol 1 (access to education) of the European Convention on Human Rights. The Court held that the Education (Student Support) Regulations 2011 remain in force. The effect of the Court’s judgment is to require the Secretary of State to consider adopting revised criteria for eligibility for student support which would avoid breaching the Convention rights of other similar applicants.
18. There were a number of factors that led to a majority decision of the Supreme Court to rule that Ms Tigere’s human rights had been breached by the application of the settled status criterion although the individual judgments of members of the Court differed slightly. Amongst the factors the Court considered to be material were that she had entered the country as a child; that as a child she was not responsible for establishing her immigration status; that she had lived here for many years and was unlikely to be removed from the UK; that as a child she had been schooled in the UK at both primary and secondary level and was therefore integrated with her peers; and that she had strong connections with the UK as her family was here. The Supreme Court’s judgment does not provide a single view of what the future eligibility criteria should be to deal with a case such as Ms Tigere’s. This leaves it open to the Secretary of State to consider a range of options. In doing so, we have taken the factors identified by the Supreme Court as our starting point in considering options for changes to the Regulations.

### The settlement criterion

19. The Supreme Court ruled that it was unlawful to reject Ms Tigere’s application solely on the grounds that she did not satisfy the settled status criterion. It is long-standing government policy that eligible students should be settled here within the meaning of the Immigration Act 1971 and should not have any restrictions on the time they can stay in



the UK, unless they fall within other eligible categories such as those with refugee status and EU nationals. The settled status category also includes some Commonwealth citizens with the right of abode (a right to enter and live in the UK without any immigration restrictions). Settlement demonstrates a substantial commitment to the UK, as those with the right to stay here permanently are likely to do so and thereby are in a better position to contribute to the economy and society. However, the Court also said that this could be demonstrated if someone had been here a long time as a simple matter of fact in certain circumstances.

20. We have considered replacing the settlement criterion entirely (so that no prospective student has to satisfy it) with a single requirement that each applicant has completed a longer period of **lawful residence** in the UK, including those with settled status. This would have administrative simplicity because it would be a single rule which would apply to all applicants for student support giving clarity to applicants and institutions. It would also be straightforward for the Student Loans Company to administer.
21. However, this would be a very broad category which would open up eligibility to all applicants with limited leave to remain (e.g. here for short-term reasons of work or study), including many who do not share the characteristics highlighted by the Supreme Court in its judgment.
22. We do not favour this option because the current settlement requirement is an effective way of evidencing a fundamental connection to the UK for the majority of applicants, and it acknowledges the particular status that a non-EEA national who is settled in the UK enjoys. This option would give eligibility to a much larger number of people, including those here on a temporary basis, and it would extend support to categories of individual unlikely or without permission to remain in the UK for the long term. The costs of this option would be unaffordable. Any new residency requirement would therefore need to be for a longer number of years than the three years' ordinary residence requirement and continue to take some account of immigration status. This would create an additional requirement for UK nationals. The Secretary of State considers it would be unreasonable, and inconsistent with his overall policy objectives, to remove eligibility for student support from some individuals with settled status who currently would be entitled to that support, thereby delaying their entry into higher education.

### A wholly discretionary scheme for “long residence” cases

23. An alternative would be to create discretion within the Regulations for the Secretary of State to make students eligible where he considers there to be a risk that, given their long residence in the UK, their human rights would otherwise be breached by refusing student support. For those students who were not settled in the UK and believed they were in this position, an individual assessment of their personal circumstances and immigration status would need to be undertaken, including the verification of any evidence.
24. This approach has the apparent attraction that it would enable case-by-case review in order to identify those whose characteristics are analogous to those of Ms Tigere.
25. The majority of the judges recognised, however, that in practice such an approach would be impractical. Decisions would be based on the many and variable circumstances of family connections, dependants, employment, commitments and community and other ties. It would require a different skillset for administrators and be

difficult to deliver for any sizeable number of people who, because of the academic cycle, would all be applying at the same time of year. It would also require significant resource to administer such a system, which would be an inefficient use of public funds. It might also be necessary to impose an administration fee on applicants to discourage speculative claims and help contribute to the significant delivery costs. In addition, implementation of this option would require primary legislation which would mean it would be unlikely to be implemented for the 2016/2017 academic year.

26. It is also important that eligibility criteria are clear and transparent so that students, institutions and administrators understand them and can reliably base their plans and decisions upon them. In particular, students need to know whether they will be able to get student support when they start considering which A level (or equivalent) courses to study and which universities and courses to apply for. This approach would not give this much needed clarity and the judgment recognised this. On that basis, pending responses to this consultation, we are not minded to proceed with this option.

### A new long residence requirement

27. Our favoured option is to create a new eligibility category to sit alongside the existing categories in the Regulations in the same way as we have incorporated changes in EU law in the recent past. This new category would require students, if under the age of 18 on the date of starting their course, to have lived in the UK for at least seven years continuously; or, if between the ages of 18 and 24 on the date of starting their course, to have spent half their life in the UK. This would demonstrate that they were sufficiently connected to the UK for the purpose of benefiting from a student loan on the advantageous terms of the student support scheme. Applicants who are current temporary migrants or the dependants of temporary migrants would not be eligible. The time spent in a temporary migrant route will be discounted in the calculation of the required eligibility period spent in the UK.
28. They would also need to satisfy the requirement for three years' ordinary lawful residence which has been in place since the 1960s, in line with most other applicants. The Supreme Court unanimously upheld the lawfulness of this requirement. It requires that an applicant for student support has been ordinarily resident in the United Kingdom and Islands (Channel Islands and Isle of Man) throughout the three-year period preceding the first day of the first academic year of the course.
29. This new category would recognise that such persons had a clear connection with the UK; were likely to be integrated with their peers here; and were unlikely to be removed from the UK unless they committed a serious criminal offence. It would identify those in this country who are sufficiently connected to it for the purposes of receiving the considerable public subsidy represented by the student loan scheme.
30. Our intention is not to give eligibility for student support to people who are here on a temporary basis only and who may not remain in the UK permanently. This is important as student funding takes the form of student loans and non-repayable grants which are a substantial cost to public funds over a long period of time. Therefore this policy proposal is not intended to apply to those categories of persons, and their dependants or family members, who are here on a temporary basis only including for the purposes of, for example, receiving full-time education or work.

31. Relevant to this option is the consideration that the person would have been in the UK for a significant time while they were of statutory school age. This requirement would have some similarities with paragraph 276ADE(1) of the Immigration Rules applied by the Home Office for the grant of leave to remain on grounds of private life, which takes account of length of residence in the UK. This rule was referred to by Lord Hughes in his judgment in the Tigere case, as an example of a policy that took account of length of residence.
32. Paragraph 276ADE(1) includes a person:
- who is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect them to leave the UK;
  - who is aged 18 years or above and under 25 years and has spent at least half their life living continuously in the UK (discounting any period of imprisonment); or
  - who has lived continuously in the UK for at least 20 years (discounting any period of imprisonment).
33. This new category would require a student under 18 years old to have lived in the UK for at least seven years continuously prior to the start of the academic year in which they start their course. The applicant for support would also need to be under 18 years old when starting their higher education course. Temporary migrants or the dependants of temporary migrants would be excluded and any time as such would not count towards the calculation of the required eligibility period.
- 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 the academic year in which they start their course in order to be eligible for student support?
34. Relatively small numbers of people start their university higher education at age 17 or earlier. By far the majority of students are aged 18 years, or over, by the time they start their university course. A new eligibility category based upon the above immigration rule for those aged 18-24 years old would require that they had lived at least half their life in the UK. This would give a potential range of 9 to 12.5 years in order to qualify for support, depending on their precise age at the start of the academic year in which they start their course. Temporary migrants or the dependants of temporary migrants would be excluded and any time as such would not count towards the calculation of the required eligibility period.
- 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 the academic year in which they start their course) in order to be eligible for student support?

35. The immigration rule has provision for those who have lived continuously in the UK for 20 years. It is perfectly possible to take the view that an adult who has been in the UK a long time has had the opportunity to formalise his or her status within the immigration rules under the Immigration Act 1971, and should have done so in the event he or she wishes to receive student support. However, there may be legitimate reasons why this might not have happened in some circumstances. We are interested in receiving evidence as to whether we should provide support to those over 25 years of age without settled status in certain circumstances. Temporary migrants or the dependants of temporary migrants would be excluded and any time as such would not count towards the calculation of the required eligibility period.
- 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 in the UK for at least 20 years (including three years' ordinary lawful residence immediately before the start of their course)?
36. The Student Loans Company administers around 1.5 million applications for student funding each year. It is therefore important that any new criteria are easy to understand and apply and inexpensive to operate. In this proposal the Student Loans Company will need to verify the evidence supplied by the applicant with the Home Office and potentially with other organisations such as schools. Although there will be an additional cost to do this, it should be relatively straightforward. Estimated Student Loans Company additional administration costs are around £200,000 for the initial set-up costs and £100,000 per annum in ongoing costs. There will also be additional costs for the Home Office in verifying applicant information.
37. The Home Office does not collect data by reference to length of residence in a way which allows us to quantify who might qualify for student support in the proposed new category of eligible student. It is therefore impossible for us to calculate with precision the costs of creating this new category. We estimate that every additional 2,000 students will generate annual costs of around £16 million in loans and £0.6m in allowances.
38. The Education (Fees and Awards)(England) Regulations 2007 enable Higher Education Institutions to charge higher fees to people who do not fall within the Regulations schedule of eligible persons. Therefore institutions will wish to be aware of this potential change which would mean that they would need to charge home fee rates to people who fall into this new category.
39. There are a number of other student support schemes which have similar eligibility criteria and which may need to be considered following the outcome of this consultation. These schemes include the Advanced Learning Loans, the future postgraduate loan scheme, and the Department of Health's NHS Bursary scheme and Social Work bursary scheme. Responses to the consultation will be shared with the Department of Health and within the Department for Business Innovation and Skills to consider whether changes should be made to their respective schemes.

## 7. Consultation questions

40. The consultation questions are:

Question 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 before the start of their course) in order to be eligible for student support?

Question 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?

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 here continuously resident in the UK for at least 20 years (including three years' ordinary lawful residence immediately before the start of their course)?

Question 4: Can you supply any additional information in support of or against this extension of eligibility, including any statistical data, or identify unintended consequences for other cohorts or sub-groups?

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

## **8. What happens next?**

41. The Department will respond to the consultation in 2016 and publish an Equality Assessment. It is our intention to amend the Regulations for the academic year 2016/17.

## **Annex 1: Consultation principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

### **Comments or complaints on the conduct of this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone Angela on 020 7215 1661  
or e-mail to: [angela.rabess@bis.gsi.gov.uk](mailto:angela.rabess@bis.gsi.gov.uk)

However if you wish to comment on the specific policy proposals you should contact the policy lead (see section 6).

## 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 30 December 2015). 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 30 December 2015

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

<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)

	Trade union or staff association
	Other (please describe)

### Question 1

42. 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:

### Questions 2

43. 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:

### Question 3

44. 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:



#### Question 4

45. 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:

#### Question 5

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

Comments: [leave space]

#### 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



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