



## The EU Settlement Scheme in relation to looked after children and care leavers

### Westminster Hall Debate

#### 3 September 2019

As members of the Children and Brexit coalition, we are deeply concerned about the implications of the EU Settlement Scheme (EUSS) for looked after children and care leavers from EU and EEA States who are or have been in contact with the criminal justice system (CJS). Looked after children are starkly over-represented in the CJS - around half of the children currently in custody in England and Wales have been in care at some point.<sup>1</sup> Children who are remanded to custody are also treated as looked after.<sup>2</sup>

There is a worrying lack of clarity in current Government policy about how these vulnerable children can apply for the EUSS, how a child's offending behaviour could affect whether they are granted status under the scheme and, crucially, whether they will be subject to the same criteria as adults. The Home Affairs Committee recently warned that the EUSS poses a risk to children who may not be able to satisfy the eligibility criteria, heightening the likelihood of another Windrush scandal.<sup>1</sup> We urge MPs to raise the following concerns.

#### **Background: How criminal convictions affect EUSS applications**

Applications for the EUSS will be checked against crime databases and where this reveals 'serious or persistent' offending, a referral will be made to Immigration Enforcement (IE) for a case-by-case determination as to whether an applicant should be refused status on the basis of 'suitability'. Where an applicant is eligible for EUSS (i.e. where the nationality and residence criteria are met), they may nonetheless be refused status on 'suitability' grounds e.g. if they are subject to a deportation order or based on previous conduct.<sup>3</sup>

However, the Government have recently stated that "*applicants to the EUSS under the age of 18 are not required to answer questions relating to suitability and applicants under age 10 are not subject to the automated criminal record check.*" They have also stated that "*under the relevant provisions of the Immigration (EEA Regulations) 2016, children under 18 benefit from a higher level of protection and can only be deported **on imperative grounds of public security**. There is no single definition of the type of offences likely to satisfy this higher threshold, but offences with a cross-border dimension which disclose particularly serious characteristics are more likely to do so.*"<sup>4</sup>

#### **Failure to differentiate between childhood and adult offending**

The primary aim of the Youth Justice System is to prevent children from offending and re-offending and special measures are in place to ensure that mistakes made in childhood do not have a prolonged detrimental effect.<sup>5</sup> However, current EUSS policy and guidance fails both to differentiate between children and adults and to explicitly exclude children from the criminality/suitability criteria. It does not take into account that childhood offending is usually temporary and that most children 'grow out' of crime. It also risks lengthening and complicating the process of applying for EUSS by unnecessary referral to Immigration Enforcement (IE).

- **Children should be granted settled status regardless of their criminal history.**
- **Notwithstanding this recommendation, we welcome the Government's recent statement that children will be subject to a higher threshold ('imperative grounds of public security') and urge them to set this out in guidance.**
- **There is also need for urgent clarification that this higher threshold will still apply to children in the event of a 'no deal' or during any agreed implementation period.**

<sup>1</sup> Lord Laming (2016) *In Care, Out of Trouble: An Independent Review by Lord Laming* Prison Reform Trust.

<sup>2</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 104.

<sup>3</sup> (April 2019) Immigration Rules Appendix EU.

<sup>4</sup> House of Lords written answer (15 July 2019) HL16825.

<sup>5</sup> For example, sentencing reflects their lower culpability and capacity to change and children's convictions are 'spent' more quickly.

### **Failure to take into account children’s best interests**

We are concerned by the lack of explicit reference in the guidance to the primacy of the best interests of the child when conducting suitability assessments for children under the EUSS.

- **To comply with domestic and international law and to avoid any regression in the protections currently available to children under EU free movement law, the Government needs to provide clear guidance on how, substantively and procedurally, best interests assessments should be conducted and how they will inform decision-making on suitability.**

### **Continuous residence criteria**

Children’s involvement in the CJS can also impact on their eligibility under the continuous residence criteria.<sup>6</sup> Specifically, we are extremely worried that the general caseworker guidance makes no distinction between adults and children in terms of ‘resetting the clock’ on residence following a period of imprisonment/detention of any length. For example, an EU/EEA national child could have lived in the UK for most of their life, be sentenced to a four month Detention and Training Order (DTO) (only two months of which are spent in prison) and this would then have the effect of re-starting the qualifying residence period.

- **The EUSS must be amended to ensure that a custodial sentence imposed on a child does not impact on the calculation of their continuous residence.**

### **Inadequate advice and assistance to children**

Our final concerns relate to the difficulties of identifying and providing adequate advice and assistance to children in the CJS about the EUSS. It is not at all clear from current guidance whether, and how, children can apply to the EUSS from within the secure estate. Furthermore, there is currently no publicly available, centralised data on the nationality or immigration status of children who are involved in the CJS, including in detention. Such children have a heightened need for support as they are likely to have inadequate parental or family support to make an EUSS application. Criminal justice or social care professionals are unlikely to have the level of specialist immigration knowledge or clearance to adequately advise the children for whom they are responsible.

The Home Office has already acknowledged and provided tailored EUSS guidance and concessions for children who are looked after, including those in residential care.<sup>7</sup> Similar guidance should be developed, urgently, for criminal justice agencies and professionals setting out their obligations towards children involved in the criminal justice system in relation to the EUSS. That guidance should include information about sources of appropriate advice and support for children with more complex immigration issues.

- **The Government (e.g. Youth Justice Board or Youth Custody Service) should collect centralised nationality data for children in youth offending services and places of detention.**
- **The Home Office and Ministry of Justice must, as a matter of urgency, publish guidance on children and young people applying to the EUSS from within the secure estate or wider CJS.**

### **Questions for the Minister**

- Will the Government consider granting settled status to all children regardless of their criminal history?
- If not, will the Government set out in guidance that children are subject to the higher threshold of ‘suitability’ and ‘conduct’ when applying for the EUSS – both before and after 31 October and in the event of a ‘no deal’?
- How will the Government ensure that children’s best interests are a primary consideration when making decisions on suitability?
- Will the Government amend the EUSS to ensure that a custodial sentence imposed on a child does not impact on the calculation of their continuous residence?
- Will the Government collect centralised nationality data for children in youth offending services and detention?
- Will the Government publish guidance on children and young people applying to the EUSS from within the secure estate or wider CJS?

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<sup>6</sup> If an applicant has been to prison, he/she will usually need five years’ continuous residence from the day they were released to be considered for settled status (with some exceptions for those with over 10 years residence).

<sup>7</sup> Home Office EU Settlement Scheme: Looked after Children and Care Leavers – Local Authority and Health and Social Care Trusts Guidance.