

# **coram** **Children's Legal Centre**

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## Children left out?

## Securing children's rights to stay in the UK beyond Brexit

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## Foreword

*Foreword by Jonathan Portes, Professor of Economics and Public Policy at King's College London, Senior Fellow, UK in a Changing Europe and Coram Children's Legal Centre trustee*

With one year left before the close of the EU settlement scheme, vulnerable children risk falling through the cracks. This report sets out why and how the government needs to act to stop that happening.

Proportionally, many fewer children than adults have applied to the EU settlement scheme so far. Not all of those who have not are at risk of becoming undocumented. But those in care, homeless, or with complex needs or family circumstances are disproportionately at risk. Losing the right to live in the country where you have grown up is a tremendous risk with long-lasting consequences.

This does not need to happen. There are simple steps the Home Office could take to reduce costs, streamline applications, increase awareness and eliminate unnecessary barriers and bureaucracy – saving public money and the time of civil servants and the courts as well as helping children. No child should lose their rights because we, as a society, do not think that they matter enough. The time to act is now.

## Acknowledgements

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Coram Children's Legal Centre is one of the 57 organisations grant funded by the Home Office to support vulnerable applicants to the EU settlement scheme. Our work beyond this is possible thanks to the generosity of our funders at trusts and foundations. We would like to thank The Legal Education Foundation, Paul Hamlyn Foundation, Esmée Fairbairn Foundation, the Baring Foundation, Pears Foundation and Trust for London for their support for our work.

Since the referendum result in 2016, civil society has risen to the challenge of promoting the rights of EEA citizens for whom the UK is home. We are proud to have been part of an effective network of collaboration and to work alongside determined and committed partners, including colleagues at the 3million, the Brexit Civil Society Alliance, the East European Resource Centre, Rights of Women, the Immigration Law Practitioners' Association, The Children's Society, Unlock, the Law Centres Network, the Joint Council for the Welfare of Immigrants, Public Law Project, New Europeans, Glassdoor Homeless Charity and many, many others. Thanks also to Professor Helen Stalford – University of Liverpool, and Professor Kathryn Hollingsworth – Newcastle University. We would like to thank them for this spirit of collaboration that helps us all to get the message heard that Brexit must not leave people without secure immigration status.

## Introduction

With one year left before the close of the EU settlement scheme on 30 June 2021, this report looks at what the UK needs to do to make sure no eligible child living in the UK is left without status.

The purpose of the EU settlement scheme is to allow European Union, European Economic Area and Swiss citizens to remain living lawfully in the UK. The scheme also covers their family members and some former family members from countries outside the EU, EEA and Switzerland, as well as some people with rights derived from EU law. All those eligible to apply to the scheme are required to make an application by the deadline of 30 June 2021. If they do not apply but remain in the UK they will be undocumented and unlawfully resident. This means that they will be subject to hostile environment policies which restrict access to homes, healthcare, education, work, benefits, bank accounts and driving licences. They will be liable to be removed from the UK, even if this is where they grew up.

For brevity, those eligible to apply are referred to in this report as ‘EEA citizens’, but one of the dangers demonstrated by this report is that people eligible to apply to the scheme who are from outside the EEA are among those most at risk of becoming undocumented. Indeed, the Home Office does not even have an estimate of eligible non-EEA citizens.<sup>1</sup>

High numbers of applications have been made to the EU settlement scheme overall, but looking only at the headline number may be masking a specific gap when it comes to children. By 31 May 2020, a total of over 3.6 million applications had been made to the EU settlement scheme (it is important to note that this is the number of applications not the number of individual applicants and one person can submit repeated applications).<sup>2</sup> Of the over three million grants of status made by March 2020, 412,820 were for children.<sup>3</sup> We do not know how many children in the UK need to apply to the settlement scheme, but estimates would suggest it could be far in excess of the 493,800 applications made by children by March 2020. While estimates are approximate as they are based on data including the Labour Force Survey which are not drawn up with children in mind, it is thought that there were more than 900,000 children of EU citizen parents (not including Ireland) living in the UK in 2017, born either here or abroad.<sup>4</sup>

Some children who have tried to apply for status under the EU settlement scheme have been unsuccessful. Up to 31 March, 1790 applications by children have been withdrawn or rejected as ‘void’, and 520 were rejected as ‘invalid’. Twenty children’s applications have been refused.<sup>5</sup> It is possible that some of these children have since applied again and been granted status, but these figures should raise concerns that hundreds of children are potentially struggling to navigate the scheme.

Many, especially UK-born children, among the estimated 900,000 children may either be British citizens automatically by birth, or may be entitled to apply to become British through the process known as ‘registration’. Indeed, there may be parents who are applying for a British passport for their child or applying to register their child as British instead of applying for their child under the EU settlement scheme. Yet in our experience families, parents, carers and young people themselves struggle to understand the complexities of UK nationality law and we are concerned that there could be a high level of misunderstanding. This could lead some children to lose out both on their citizenship rights and their rights to settled or pre-settled status under the EU settlement scheme.

<sup>1</sup> House of Commons Library, ‘The progress of the EU Settlement Scheme so far’, April 2020, at

<https://commonslibrary.parliament.uk/home-affairs/immigration/the-progress-of-the-eu-settlement-scheme-so-far/>

<sup>2</sup> EU Settlement Scheme quarterly statistics tables, May 2020, at <https://www.gov.uk/government/statistics/eu-settlement-scheme-statistics-may-2020>

<sup>3</sup> EU Settlement Scheme quarterly statistics tables, March 2020, at <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-march-2020>

<https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/>

<sup>5</sup> EU Settlement Scheme quarterly statistics tables, March 2020, at <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-march-2020>

Coram Children's Legal Centre has been supporting children, young people and families to make applications to the EU settlement scheme since the second pilot of the scheme in November 2018. We have drawn on the 324 cases we have supported up to June 2020 in writing this report, as well as the experience of supporting a further 480 people with EUSS-related queries dealt with through our email advice line. Of the 324 cases we supported, 209 of the children, young people or parents were receiving support from a local authority, either as looked after children (including children in the secure estate and young people in secure mental health units), care leavers, or vulnerable families. The remaining children, young people and families we supported were otherwise vulnerable, for example because they were experiencing homelessness. CCLC's work on the EU settlement scheme has been across England and Wales. Some areas of law discussed in this report are devolved matters and so some of the analysis below will not apply UK-wide.

The cases we have supported are unusually complex. They are not the average done-in-a-day applications. As such, they provide insight into the glitches in the scheme, its blind spots and its blurred edges. These complex cases also foretell the kinds of applications which are likely to be still unresolved towards the end of the scheme when simpler applications have been neatly dealt with, as well as those that will still be yet to be made after the deadline because they have fallen through the cracks.

In summary, the significant gap between the number of applications received from children so far and the number of children potentially needing to apply raises serious questions about whether the EU settlement scheme is working for children. It should prompt decision-makers to ask what can be done in the next year to ensure that no child becomes undocumented on 1 July 2021. Based on our experience, we make a number of detailed recommendations throughout this report as well as the following headline recommendations:

1. The Home Office must take concrete action, including scrapping the £1012 fee, to help children who are entitled to British citizenship to understand and realise their rights.
2. The Home Office, Department for Education and Ministry of Justice must work with local authorities, the devolved administrations and civil society to make and resource a comprehensive plan to identify and support every single eligible child in care and care leaver, including those eligible to apply as family members of EEA citizens, as soon as possible.
3. The deadline to apply to the EU settlement scheme must be extended beyond 30 June 2021.
4. After the deadline, children and young people eligible under the EU settlement scheme must not be brought under the UK immigration system's existing long and expensive routes that are currently failing other children and young people.

# 1. Children and young people's citizenship rights

## 1.1. Which children are British and which can become British?

Many of the estimated 900,000 children of EEA citizen parents living in the UK will be British citizens, either automatically by birth or because they have registered and become British. Many more will have a right in law to register and become British. However, as outlined in our previous report on the EU settlement scheme *Uncertain Futures*, many parents simply do not know whether or not their child is, or could be, a British citizen.<sup>6</sup> For social workers who have little effective contact with a child's parents nor any paperwork, this can be even harder to work out. And confusion is well-justified: UK nationality law is exceedingly complex, and how it applies to EEA citizens has changed drastically several times since the 1990s.<sup>7</sup>

Even where it is clear that a child is British, Section 3(8) of the Immigration Act 1971 puts the burden of establishing citizenship on the person making the claim to it (or in the case of a child, on their parent or carer). In practice, this means that although a child may in theory be British – automatically by birth, for example – if they cannot gather the requisite evidence they will not be recognised as British or issued with a passport. Dual British-EEA citizens are ineligible for status under the EU settlement scheme; this places some families and carers in legally challenging and complex positions because they may not understand whether the child is British or be able to prove it.

### Case study 1: *Gabi and Dora*

CCLC submitted an application for Gabi, a Spanish national care leaver, whose four-year-old daughter Dora was born in the UK to a British father. The child is automatically British. However there was significant domestic violence and a non-molestation order was put in place before Dora was born to protect Gabi from further violence. There is no family court order in place to protect Dora. The father could not be recorded on Dora's birth certificate. As his participation would be required both to apply for a British passport and to apply for a Spanish passport or ID card, Dora is stuck in limbo, unable to prove her British nationality and unable to obtain the documentation of her Spanish nationality necessary to be able to apply under the settlement scheme.

### Case study 2: *Adam*

Adam is a four-year-old child born in London and in care. As a Romanian citizen the consent of both his parents is required for a passport application to be accepted by the Romanian Embassy. However, the identity of Adam's father is unknown, and this made it impossible for Adam to obtain a Romanian passport. Because of this, he must apply on a paper form. As Adam is only four years old, and is separated from his parents, he can only apply for pre-settled status. This means his social workers will have to go through this process again in the future once Adam is over the age of five and has evidence of having lived in the UK for five years. However, it will be difficult for his social workers to prove Adam's residence in the UK before he came into care without applying for permission to share sensitive court documents, so an application for settled status may be delayed. Unless an application for Adam to become British is made (and paid for by the local authority), he will not be able to have a passport or any ID until after his eighteenth birthday. This will impact his life in many ways, not least meaning he cannot leave the UK for holidays or to visit Romania.

<sup>6</sup> Coram Children's Legal Centre, *Uncertain Futures: the EU settlement scheme and children and young people's right to remain in the UK*, March 2019, at [https://www.childrenslegalcentre.com/wp-content/uploads/2019/03/EUSS-briefing\\_Mar2019\\_FINAL.pdf](https://www.childrenslegalcentre.com/wp-content/uploads/2019/03/EUSS-briefing_Mar2019_FINAL.pdf)

<sup>7</sup> See HM Passport Office guidance document 'Treaty rights', at <https://www.gov.uk/government/publications/treaty-rights>

We recommend that:

- The Home Office should provide better public information on when a child is automatically born British and when they can register as British, and link to this from the EU settlement scheme information. Information on children's citizenship rights should be translated and actively promoted as an integral part of the Home Office's information campaign on the EU settlement scheme.
- The Home Office should take a proactive approach to helping a child or young person establish their claim to British citizenship

## 1.2. Prohibitively high citizenship fee

Like Adam, at least 67 of the children referred to CCLC to apply to the EU settlement scheme had (or will go on to have) an entitlement to register as British under the British Nationality Act 1981. Another 50 children were not born in the UK but were under 18 and in local authority care and so, although not entitled to register as British citizens, may have a claim to apply under the discretion of the Secretary of State to become British. Unfortunately, there is a fee to register as a British citizen through either of these routes as a child: the application to the Home Office costs £1012. Unlike for other Home Office fees, there is no exemption for children in care. If the child is in the care of children's services then the onus is on children's services to pay.

Collectively, paying for the citizenship applications of just this sample of 117 vulnerable children would cost children's services departments £118,404. This represents a significant shift of funds intended to provide vital services to children from local to central government. According to the Home Office's own estimates, £74,880 of this total would be profit to the Home Office.<sup>8</sup>

This fee, for local authorities, is a serious issue. But for families it can be an insurmountable barrier to documenting a child.

### Case study 3: *Nadia*

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Nadia is a four-year-old German citizen, born in the UK. She was granted pre-settled status after CCLC helped her to apply to the EU settlement scheme without a passport, after meeting her and her mother at an outreach drop-in where they also received advice on homelessness. However, this does not fully resolve the issue for Nadia. There is no hope that she will be issued with a German passport, as this requires the co-operation of her father, whom she does not know and who no longer lives in the UK. She is left with no physical proof of her German citizenship. She could apply to register as British but sadly the more than £1000 fee for a citizenship application is unobtainable for Nadia's mother, who is living on the breadline and whose own immigration status bars access to benefits.

We recommend that:

- The fee for a child to register as British should be abolished. As an interim measure, the fee exemption that applies to many immigration applications for children in care should be extended to also cover nationality applications. All such fee exemptions should be extended to care leavers too.

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<sup>8</sup> The unit cost of processing an application for a child to register as a British citizen is on average £372. Home Office, Visa fees transparency data, April 2020, at <https://www.gov.uk/government/publications/visa-fees-transparency-data>



### 1.3. Why citizenship is needed

For many of the children we have advised, an application for immigration status under the EU settlement scheme is the bare minimum required to safeguard their right to live in the UK, whereas citizenship would provide both security and practical advantages that the EU settlement scheme cannot provide. For others, there will be particular needs such as for a young person who is transgender who needs to be able to change the gender marker on their passport (possible in the UK but not in some EEA states) or due to an additional need such as a cognitive disability, where navigating the digital status portal throughout their life will present major challenges.

#### Case study 4: *Stephanie*

Stephanie is a 12-year-old looked after child with significant cognitive impairment. Following support from CCLC, she was granted settled status, which was digital but tied to her French passport. However, it will always be difficult for Stephanie to prove her status. She obtained no physical document from the Home Office and her disability makes it virtually impossible for her to navigate the government status portal without help. This will only get worse when she gets older and leaves care. For Stephanie, the only way to get a physical standalone document that evidences her status is to become British by registration and then apply for a British passport. Without a British passport, Stephanie will always struggle to prove her right of residence, which puts the care she will undoubtedly need as an adult at risk.

It is for local authorities to assess the needs of children in care with a long-term view, but this unavailability of physical evidence of status poses a difficult challenge for local authorities in their plans for children leaving care. Additional resources and funding of social services would need to be applied to manage the risks for such young people going forwards.

Other children and young people we supported have spent so long in the UK that they did not know they were not British. This was evident in interviews CCLC conducted with some of the care leavers we supported to apply to the settlement scheme about their views of the scheme.

*I want to be British because I've lived here for about 14 years now, I've lived here since I was seven years old. I've basically been raised in this country... I know this country more than my own.* Wiktoria

*I didn't know about any of this or know I needed to apply – I genuinely thought my whole life I was British.* Nesta

These interviews also demonstrated that some young people are aware of the limitations of their immigration status, and feel its impact on their sense of permanence and security in the UK:

*It would be beneficial to have a citizenship rather than having to be sort of near citizenship but not exactly have it. You don't know how legislation and that kind of stuff will change in the future.* Enzi

Unfortunately, as care leavers who have already turned 18, these young people do not have the same opportunities that those still under 18 have to become British. Some ways to register as a British citizen, including at the discretion of the Secretary of State under section 3(1) of the British Nationality Act 1981, cease to apply on the young person's 18<sup>th</sup> birthday. It is still possible for young people in this position to become British, but generally they must instead apply to naturalise.

We recommend that:

- It should become mainstream practice for local authorities to realise a looked-after child's option of registering as a British citizen where the child wishes to and it is in their best interests, taking into consideration the effect on any other citizenship they hold.

## 1.4. Naturalisation: a particular problem for care leavers

The interaction between the EU settlement scheme and UK nationality law is not straightforward. This is because the EU settlement scheme is a test of *presence*, and not a test of *lawful residence*, and one of the requirements to naturalise as a British citizen is that the applicant '... was not at any time in the period of five years ending with the date of the application in the United Kingdom in breach of the immigration laws'.<sup>9</sup> Lawful residence as an EEA citizen or the family member of an EEA citizen is generally determined by whether or not the relevant EEA national is exercising their Treaty Rights under the Directive 2004/38/EC (the Free Movement Directive),<sup>10</sup> for example by working, or by whether they had another type of lawful basis for their residence (for example the derivative rights known as Chen or Ibrahim Teixeira derivative rights).

For the first year of the EU settlement scheme there was little clarity about whether and how those who held settled status would be able to apply to naturalise. However, the Home Office has since confirmed that settled status alone is not proof of prior lawful residence for the purpose of a naturalisation application.<sup>11</sup> This means that applicants who apply for settled status who wish to naturalise afterwards may have to provide more evidence to show their exercise of Treaty rights or other basis for lawful residence. This is likely to come as a shock to many people.

It will create a particular problem for care leavers. Whether or not an EEA citizen teenager was lawfully resident with reference to the Free Movement Directive will normally depend on whether or not their parent was working, even if they were in care and estranged from their parent. An 18-year-old care leaver with settled status could be eligible to naturalise as British if they can show that their parent was working continuously in the UK for the five years.

But many children in care and care leavers will have had parents who were either absent, were abusive or who led chaotic lives. Some of the children and young people whom CCLC has supported to apply to the EU settlement scheme had no family members left in the UK and no paperwork relating to them. Other children, particularly young people who elect to go into care as an older teenager, are estranged from their parents and simply do not have the contact required to prove that their parent was lawfully resident in the UK, for example, that their parent was exercising Treaty rights by working. It is typically too onerous for children's services to collect this wider information when a child is taken into care, and social workers likely would not have known to ask whether a parent was exercising Treaty rights, let alone for documentary proof of this.

It will be possible for young people in this situation to apply to naturalise on the basis of their own lawful residence, but this may mean waiting for five years following the grant of settled status, which for many current care leavers will mean that they will have leaving care support when they try to do so. They will have to navigate naturalisation – high fees, tests, and a citizenship ceremony – alone.

The considerable practical and legal challenges faced by care leavers seeking to naturalise serve to highlight the importance of resolving a child's citizenship while they are still a child and while important options, such as to register as British under the discretionary power, still apply.

We recommend that:

- The Home Office should give clear information to people granted settled status about what they will have to show at the point of applying for naturalisation, and how this relates to their settled status.

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<sup>9</sup> schedule 1 of the British Nationality Act 1981

<sup>10</sup> For an explanation of Treaty Rights, see Home Office, 'Guide AN: Naturalisation Booklet – The Requirements', at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/893012/guide-an-06-20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/893012/guide-an-06-20.pdf)

<sup>11</sup> See Home Office, 'Nationality policy: Naturalisation as a British citizen by discretion', May 2020, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/885368/naturalisation-as-a-british-citizen-by-discretion-v5.0-gov-uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885368/naturalisation-as-a-british-citizen-by-discretion-v5.0-gov-uk.pdf)

## 2. Children in care and care leavers

### 2.1. Eligible children and young people are not being systematically identified

Prior to the settlement scheme opening in March 2019, the Home Office estimated based on Office for National Statistics data that there were around 5000 looked after children and a further 4000 care leavers across the UK who would be eligible to apply to the EU settlement scheme.<sup>12</sup> Our concern is that there has not been any successful, systematic attempt to accurately identify and count the true number in order to support each one to apply before the deadline. From our work training local authorities on the EU settlement scheme, providing email advice for social workers, and directly supporting 178 looked-after children and care leavers' cases mostly referred by local authorities, our impression of local authority practice is mixed. We have seen that some local authorities have systematically identified eligible children and young people and have taken the necessary action to submit applications for those children and young people.<sup>13</sup> In other local authorities, however, we are very concerned that there is no lead being taken; identification and referral for support depends on whether the child or young person happens to have a social worker or personal adviser who is aware and knows the steps to take. In others, we fear no identification has been attempted yet at all.

Furthermore, even where vulnerable children and young people are being identified, this is not translating into applications made to the EU settlement scheme, and still less to timely grants of status. A recent report by The Children's Society based on Freedom of Information Act requests found that across 153 local authorities, a total of 3612 looked after children and care leavers had been identified.<sup>14</sup> For these 3612 children and young people, only 730 applications to the EU settlement scheme had been made, as well as 187 applications for British citizenship (though it was not clear if both applications were made for some children). Among the 730 EU settlement scheme applications, there were only 282 grants of settled status and 122 grants of pre-settled status. The gap between the number of children and young people identified and the number of applications made, and still more grants of status, clearly shows that the government faces a very large challenge in ensuring the EU settlement scheme resolves status for children and young people in state care with a year to go.

The Home Office figures above are estimates of EEA citizen numbers only, and do not attempt to count the number of eligible non-EEA citizens, who could apply for example as family members. CCLC is particularly concerned about these children and young people. Identifying them is an enormous challenge, and their eligibility to apply to the scheme at all often requires specialist support, which is hard to come by and some of which is government-funded for only a limited remaining period.

Separated children are able to access legal aid for advice and representation in their immigration and nationality law matters. This includes the EU settlement scheme and citizenship applications. Although legal aid is a necessity for children with complex cases, it is not yet known how many separated children are accessing legal aid since they were formally brought into scope in October 2019. However, as recent research has shown, immigration legal aid providers are few, very unevenly spread, and struggled to meet demand even before separated children were brought back within scope.<sup>15</sup>

We recommend that:

- The Home Office, Department for Education and Ministry of Justice must work with local authorities, the devolved administrations and civil society to make and resource a

<sup>12</sup> Immigration: EU Nationals: Written question – 222791, 18 February 2019

<sup>13</sup> See, for example, the work of Manchester City Council with the Greater Manchester Immigration Aid Unit, at <https://secure.manchester.gov.uk/news/article/8365/manchester-signs-up-to-show-its-support-for-young-people-affected-by-brexit-immigration-changes>

<sup>14</sup> The Children's Society, 'Looked After Children and the EU Settlement Scheme: A guide for local authorities', at <https://www.childrenssociety.org.uk/sites/default/files/looked-after-children-and-the-eu-settlement-scheme-a-guide-for-local-authorities.pdf>

<sup>15</sup> Jo Wilding, Droughts and Deserts. A report on the immigration legal aid market, June 2019 at [http://www.jowilding.org/asylum\\_legal\\_aid.html](http://www.jowilding.org/asylum_legal_aid.html)

comprehensive plan to identify and support every single eligible child in care and care leaver, including those eligible to apply as family members of EEA citizens, as soon as possible.

- Any person who has been looked after under any section of the Children Act 1989 (or equivalent legislation in the devolved administrations) for any period of time as a minor must subsequently be able to make a late application for status under the EU settlement scheme.

## 2.2. Thousands of unidentified children are in other forms of care

The 5000 looked after children and 4000 care leavers estimated by the Home Office as needing to apply to the EU settlement scheme are the tip of the iceberg of vulnerable children in need of support. There is a danger that authorities are completely missing the needs of other children, including children in alternate care arrangements whose contact with their local authority is less, or non-existent.

The bright line between 'looked after children' and children known to local authorities but not in care or looked after causes an artificial barrier to children accessing the support that they need. The Home Office has acknowledged this, because an attempted data-gathering exercise conducted in the summer of 2019 asked local authorities to provide the numbers eligible to apply to the EU settlement scheme who were either looked after children, care leavers, *or on child protection plans*. However, as outlined in the amended guidance to local authorities and health and social care trusts, there are considerable differences in the duties and obligations arising for each of these categories of children and young people. For children in England, this guidance states that: 'if you identify other eligible children receiving support, for example children in need, you can promote the scheme and signpost to relevant available support.'<sup>16</sup>

### Case study 5: Lucia

Lucia is Paul's sister; Paul is in care, and was referred to CCLC for support in making an application for settled status. They are both Romanian citizens born in the UK. However, Lucia is not in care, and instead is the subject of a Special Guardianship Order; this means that legal responsibility for her was transferred from the local authority to her maternal aunt. Despite repeated requests, the local authority would not facilitate a referral for Lucia to CCLC's EU settlement scheme project, and we have been unable to contact her guardian to offer help in applying to the EU settlement scheme on Lucia's behalf or to inform them of the importance of doing so. This is worrying: there is a risk that Lucia's special guardian does not know about the settlement scheme or that she is responsible for Lucia's application. Lucia, like Paul, does not have a passport, and so faces an evidentially complex application with little or no support.

As well as children under special guardianship arrangements there are unknown numbers of children in informal or private fostering arrangements in the UK who are separated from their parents but not receiving statutory support from a local authority. These children are an extremely vulnerable group.

We recommend that:

- The Home Office should support and resource local authorities to identify all eligible children known to them so that social workers can disseminate information on the EU settlement scheme where possible.

<sup>16</sup> Home Office, EU Settlement Scheme: looked-after children and care leavers guidance, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883018/looked-after-children-EUSS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883018/looked-after-children-EUSS.pdf)

## 2.3. Unclear role of social workers

The government's amended guidance for local authorities, published in May 2020, restates that social workers are expected to prepare and submit immigration applications on behalf of children in care for whom the local authority holds parental responsibility. However, no statutory change has been made granting social workers this power or providing any form of oversight over the quality of the applications that they submit on behalf of children. This presents new risks for children and serious challenges for their social workers.

### **Case study 6: Peter**

CCLC are assisting Peter, a French care leaver. The local authority had previously tried to assist him to make application for settled status but had submitted the wrong type of application. This resulted in him being granted a registration certificate that will become meaningless after 30th June 2021. CCLC are assisting Peter to resubmit the settled status application following the correct procedure.

When the original version of the guidance for local authorities on the EU settlement scheme was first published in April 2019, there was an 'expectation' that social workers submitted applications for children in care. This was strengthened in the re-issued guidance, and there is now a 'mandatory obligation' on social workers.

This is a recent development and best practice in this area is still to be established. However CCLC has worked with some local authorities that have undertaken to ensure that at least one member of social worker staff has sufficient training to identify and triage complex cases by ensuring that they have registered with, and are regulated by, the Office of the Immigration Services Commissioner – the regulatory body for immigration advisers. CCLC strongly supports this action, which serves to safeguard children's welfare by ensuring social workers know what kinds of cases are too complex for their level of immigration law competence. CCLC considers that cases for children and young people may be considered complex where there are significant gaps in a child's residence evidence, issues evidencing a child's nationality, a potential case for British citizenship or where a child could be automatically British, arguable eligibility as an EEA citizen family member, indicators of trafficking, or youth offending.

We recommend that:

- The Office of the Immigration Services Commissioner and the Home Office should make it clearer to social workers what they can do within their role: whether they should be making applications for any child or young person and if so, how this work is regulated and overseen.



## 3. Challenges posed by pre-settled status

### 3.1. Some of those with pre-settled status may fail to apply for settled status

Although by June 2020 the EU settlement scheme has been running for over a year, there is still confusion about the difference between pre-settled and settled status. We are concerned that applicants granted pre-settled status may not always understand that they will need to re-apply in order to remain in the UK lawfully. We are concerned that there is a risk of hundreds of thousands of people falling out of the EU settlement scheme because they do not make the application for settled status before their pre-settled status expires. Each person's personal deadline is only contained in digital form and not on a physical document (except for third country nationals with a biometric residence permit). In many cases, there is likely to no longer be grant-funded advice by the time these applications for settled status have to be made. Furthermore, by that time there will also be new, post-1 January 2021 EU arrivals, who will be subject to a different legal regime, increasing the risk of confusing information which will make the path for those with pre-settled status seem less clear, with a risk that they fall off their EUSS path.

We recommend that:

- No child or young person who previously held pre-settled status should fall off their route to settled status in the event that they do not make the settled status application at the right time. Nor should they ever be brought under the UK immigration system's existing long and expensive routes that are currently failing other children and young people.
- The Home Office should commit to prompting holders of pre-settled status before their status expires and telling them what they need to do to do to remain lawfully in the UK.

### 3.2. Getting settled status 'in line' with a parent

Children are granted status under the EU settlement scheme in their own right, and not as a dependant of one of their parents. However, a child or young person can choose to apply instead linking their application to their parent, and getting status in line. This would be relevant, for example, where the parent has lived in the UK for over five years but the child has not. However, this option can be difficult for some children. Children in care may not be able to link their application to their parent's because of estrangement and so may have to wait longer for settled status. This applies most acutely to children under the age of five, who cannot have accrued five years' continuous residence due to their age so have pre-settled status while they wait to reach five years

### 3.3. Care planning

Children benefit when the adults responsible for them plan for the long-term. More pressingly, however, children can suffer from short-term thinking. EEA citizen children become looked after for the same reasons as British children, including neglect, abuse, abandonment, family dysfunction, and moments of family crisis, interaction with the criminal justice system, and illness or disability of the child or a family member. And like all looked after children, approaches to the care of EEA citizens should foreground stability and permanence.<sup>17</sup> Putting this into practice for EEA citizen children, however, means acknowledging two things: (1) that these children are likely to live in the UK well into their adult lives, and (2) that regardless of whether they choose to do so, the UK should offer them a permanent home.

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<sup>17</sup> 'The permanence and the stability [fostering] can bring to children's lives trumps everything else in its importance. The pursuit of permanence should be moved to the centre ground of policy at the Department for Education.' Foster Care in England: A Review for the Department for Education by Sir Martin Narey and Mark Owers, February 2018, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679320/Foster\\_Care\\_in\\_England\\_Review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679320/Foster_Care_in_England_Review.pdf)

CCLC believes that vulnerable children should not be granted short-term forms of immigration status, and that settlement and/or citizenship offer more appropriate levels of protection. In practice, however, vulnerable EEA citizen children are being granted pre-settled status. This poses challenges for local authorities seeking to plan for children's futures, and very immediate challenges for young people who must undergo a probationary period before being able to settle in the UK.

Where pre-settled status is granted to child or young person a local authority must plan for settled status as part of their duties to safeguard children. This is addressed directly by the re-issued guidance for local authorities and health and social care trusts on the EU settlement scheme, looked after children and care leavers, which states that:

*In accordance with existing statutory duties the local authority or health and social care trust must, in all circumstances, seek to secure the best possible outcomes for the looked after child, safeguarding and promoting their best interests and acting as a good corporate parent to enable each looked after child to achieve their full potential in life. Addressing immigration issues early as part of any assessment and care plan, offering support and if necessary, seeking legal advice about the appropriate action based on the circumstances of the individual looked after child is an important part of these responsibilities.<sup>18</sup>*

In practice, this means that a child's care or pathway plan must not merely contain a reminder to apply for settled status, but instead should feature clear and concrete information about what action needs to be taken and when, by whom, and who can help. It is good practice for immigration status to have its own section in a child's care plan to ensure that this likely high risk and high need issue is not subsumed into other kinds of planning such as planning related to family relationships.

A child's care status is fluid, and may change often as a child moves between family and local authority care. This is an additional challenge for local authorities seeking to ensure that a child with pre-settled status is granted the settlement they need to live in the UK long-term.

### Case study 7: Alise

There are two Latvian siblings under interim care orders (ICOs). One of the children will be eligible to apply for settled status under the settlement scheme while the other child, Alise, can only apply for pre-settled status because she is only two, and her mother will not co-operate with the local authority. Alise only recently came into care under the ICO, and the local authority has little evidence of her residence in the UK before that. Because of this, an application for settled status may not be possible until Alise is seven years old. By this point Alise may no longer be in care by the time she is eligible to apply for settled status, so the issue arises as to who will be responsible for ensuring that she makes an application for settled status when she becomes eligible to do so.

It is hard to see how a grant of pre-settled status in these circumstances is an adequate safeguard for Alise's long-term residence in the UK, or is in Alise's best interests. If Alise's parent were in the UK, co-operating with the local authority and had applied for settled status, Alise's status could have been 'upgraded' to settled status in line with that of her parents. But it is not reasonable or practical to tie the status of separated children to their parents, when they could and should otherwise attain settlement in their own right.

We recommend that:

- The Home Office should introduce a provision to grant settled status to all looked after children and care leavers who apply to the EU settlement scheme.

<sup>18</sup> Home Office, Looked-after children and care leavers: local authority and health and social care trust guidance, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883018/looked-after-children-EUSS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883018/looked-after-children-EUSS.pdf)

### 3.4. Access to benefits

A child's immigration status will not affect their rights to be cared for by the local authority, to access compulsory education or to access primary healthcare. However, immigration status does affect young people's access to further and higher education and mainstream benefits and their right to work, so immigration status issues become relevant and urgent as the child turns 18.

Many care leavers were referred to CCLC only once they had left care and they struggled to access benefits. Applications for welfare benefits such as universal credit are one of the ways young people transition from being in local authority care to independence. But entitlement to benefits for EEA citizens has long been a complex issue.<sup>19</sup> For young people who are granted settled status, entitlement to access benefits is considerably simpler than it has been in the past, as settled status is considered a right to reside for benefits purposes. For young people who are granted pre-settled status, however, it has become even more complex, as while pre-settled status does confer a right to reside, it is not a right to reside for benefits purposes.

During the transition period, two concurrent and overlapping systems of rights and entitlements are in place: the EU settlement scheme, and the pre-existing regime of entitlement to benefits on the basis of an applicant's (or their family member's) right to reside under the EEA Regulations. In practice, these concurrent systems mean that that a care leaver with pre-settled status must rely on their exercise of Treaty rights (for example by working) or that of their parent (if they are under 21) if they are to be entitled to access benefits. This can cause real difficulties for care leavers, particularly if they are unable to sustain employment because of a vulnerability, disability or health concern, or if they wish to enter higher education and cannot work while they study.

We recommend that:

- The Department for Work and Pensions and the Home Office should amend regulations so that all those with pre-settled status can access benefits.

### 3.5. Access to higher education

At present, student finance regulations<sup>20</sup> have not been amended for the year 2020-2021 to reflect the possibility that applicants can have been granted either pre-settled or settled status under the EU Settlement Scheme. As such, the regulations do not yet effectively implement agreements concerning citizens' rights under the Withdrawal Agreement.

As in the case of applications for benefits, children and young people holding pre-settled status may struggle to demonstrate that they were 'ordinarily resident' for the required period prior to applying for student finance. Ordinary residence is a complicated term and includes reference to 'lawful residence'. In the case of EEA citizens this relates to whether or not the applicant or their parent (if they are under 21) has been exercising Treaty rights. The period of ordinary residence that needs to be proven for young people granted pre-settled status is five years, but this issue also impacts holders of settled status, who need to show three years' ordinary residence.

We recommend that:

- The student finance regulations for 2020-2021 must be amended to reflect the changing nature of immigration status for those with EU rights.

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<sup>19</sup> For more information see Child Poverty Action Group, 'Brexit, Benefits and the Right to Reside', March 2019, at <https://cpag.org.uk/welfare-rights/resources/article/brexit-benefits-and-right-reside>

<sup>20</sup> The Education (Fees and Awards) (England) Regulations 2007 (as amended) Schedule 1 paragraph 13



## 4. The operation of the scheme in practice

### 4.1. Applying without ID documents is long and complex

For children with some nationalities acquiring an ID document is without the active participation of all of those with parental responsibility is very difficult. For children of some other nationalities, it is impossible. UK court orders are not universally accepted by consulates as part of an application for a passport, and some EEA states require court documents instead to be ratified by their national courts. It is likely that there are some kinds of decisions made by the UK Family Courts, such as Specific Issue Orders, had never been tested in this context in the courts of some EEA states. At best, this process could lead to a significant delay, but at worst it amounts to an insurmountable obstacle in the way of a child obtaining a document to prove their EEA nationality.

In CCLC's experience, the Home Office has issued paper forms where requested because a looked-after child had no ID document. This has been welcome; it would not be appropriate for the Home Office Settlement Resolution Centre staff to act as gate-keepers for who could and could not submit an application.

Once an application has been submitted, however, CCLC has had mixed experiences of Home Office exercise of discretion. Paper form applications have so far taken considerably longer than other kinds of application to be decided, with delays of more than six months extremely likely. Where a looked after child has not had a passport, for example because they were unable to apply for one without involvement from both parents, or because the Home Office already held the child's document, decisions and case-working have been consistently reasonable.

However, where a child lives with a single parent we have experienced greater difficulty establishing that the child cannot access proof of their EEA citizenship.

#### **Case study 8: *Benedict***

Benedict is a German national born in the UK. His mother could not obtain a passport for him as the German authorities require the consent of both parents. Benedict's mother is a survivor of domestic violence at the hands of Benedict's father and could not contact her abuser for support or additional evidence. CCLC assisted Benedict to make an application using a paper form and provided evidence of his father's nationality and evidence from the German Embassy on their policy of not issuing passports without the consent of both parents. Despite having all the necessary information and evidence, including that Benedict's mother was a victim of domestic violence, the Home Office case-workers repeatedly requested further evidence of Benedict's nationality. The Home Office eventually granted Benedict settled status, some seven months after he made his application. The Home Office's delay in applying its flexibility policy caused significant strain on the family. Benedict's mother's application was dependant on her son's, and with her status unresolved she was unable to claim benefits. They were living in poverty and were extremely distressed about their uncertain future.

As noted above, where a child has to make an application on a paper form, and where they will have no form of ID going forwards, there is a strong argument to say that seeking legal advice on securing British nationality will almost always be in the best interests of that child. This is not an optional extra to the settlement scheme, but rather a result of it: digital status means that without the ability to access a document showing their first nationality, children will also have no chance of securing a British ID document without becoming British.

We recommend that:

- The Home Office should analyse and publish its data on paper form applications and work to streamline the casework process based on the issues it sees commonly arising, to avoid delay.
- Paper form cases where a child has no ID document are likely to be cases where a child is vulnerable so the Home Office should prioritise timely decision-making on these cases.

## 4.2. Automated national insurance checks and young people at risk

The automated system of checks against an applicant's benefits and tax record, which is what makes the application process simple for the majority of EEA citizens applying to the settlement scheme, has caused problems for some young people applying alone. For young people who have only recently entered work, including care leavers, their national insurance record is an incomplete measure of their residence in the UK. CCLC has supported several care leavers who, not realising that additional evidence of their residence was required, were incorrectly granted pre-settled status. We are concerned that individuals to whom this happens do not always understand that what they have been granted is a temporary status which will, after five years, expire.

### Case study 9: Zuzanna

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Zuzanna is a Polish care leaver who has been resident in the UK for 14 years. She initially applied for settled status under the EUSS herself without any assistance and provided her National Insurance number but no further evidence of her long residence in the UK. The automated check against her tax record showed that she had been working for two years, and she was granted pre-settled status as a result. Zuzanna only realised that there was a difference between pre-settled and settled status when she encountered difficulties accessing welfare benefits and social housing. She had not understood that pre-settled status meant she would need to apply again in the future. CCLC helped Zuzanna to obtain the relevant documents she needed and to make an application for settled status which was granted.

## 4.3. Problems with digital status

In general, children and young people above a certain age are digitally native and generally capable of navigating the systems built by the Home Office for them to view and prove their status. Nevertheless, keeping track of the details and document they need to access their status could be challenging for some children and young people, and is likely to become an issue especially for young people who leave care and who lose the adult in their life who held that information for them. Moreover, some vulnerable children and young people, as the case study of Stephanie above demonstrates, may never be able to manage such systems due to disabilities and could be made considerably more vulnerable as a result.

In addition, there have been teething problems with digital status which have impacted children and young people because of the length of time it has taken employers, landlords and other branches of government to adapt to a new regime.

**Case study 10: Paolo**

Paolo is a 21 year old Portuguese care leaver who was granted settled status early on in the scheme after living in the UK since he was eight. He never received email confirmation of his status (the email could have gone to his spam folder), and assumed he had not yet received a decision for four months. After this time, he re-contacted CCLC because his application for universal credit had been rejected on the basis that he did not yet hold settled status. When his universal credit application was turned down his local authority threatened to cease his leaving care support without supporting him into council housing. An adviser at CCLC helped Paolo to log into the online portal and saw that his status had in fact been granted, and an advocate helped Paolo to resolve the issue with the leaving care service. Six months later, Paolo got back in touch to ask if it was legal for employers to turn him down for jobs because he did not have physical proof of status.

Despite the government moving away from the rhetoric of the hostile environment, its architecture remains in place. The provisions of the Immigration Acts 2014 and 2016 and other rules limiting access to homes, healthcare, work, benefits, bank accounts and driving licences still apply. We share with other stakeholders concerns that people with only digital status are going to face significant challenges to proving their status and may face discrimination as a result.

We recommend that:

- The Home Office should issue physical documents. At minimum, the Home Office should create a discretionary system through which people who are particularly vulnerable can apply to get physical proof of their status under the scheme, such as a biometric residence permit.
- In the absence of physical documents, the Home Office should undertake a large-scale information campaign prior to 1 July 2021 to ensure everyone who needs to – including landlords, employers, educational establishments, banks and benefits advisers – understand digital status.

## 5. Applicants to the EU settlement scheme who are citizens of countries outside the EEA

The term 'third-country nationals' refers to people who are not citizens of the UK or the EU or EEA (or Switzerland) – that is, they are people from the rest of the world. As the EU settlement scheme was created, there were many questions about how the scheme would treat people who are not themselves citizens of EEA countries but who up to now have lived in the on the basis of EU law rights. Primarily, these questions related to the families of EEA citizens, who under EU law were able to live with the relevant EEA citizen in the UK. For example, an Italian nurse working in the UK may have had an American partner with a child whose rights to live in the UK were linked to the Italian citizen's free movement rights. Generally, such family members can apply to remain in the UK under the EU settlement scheme, but as we detail below there can be problems evidencing family relationships in particular situations, especially where relationships have broken down.

Questions remain about certain family member situations that bring into relief the edges of the scheme. Who falls under it and who is excluded? Is it right that there are family units where half the members can get status under the scheme but the other half fall outside the scheme, or where just one member of the family is left out? Added to these questions are the complexities of what happens to so-called derivative rights under EU law under the EU settlement scheme; we do not cover these in this report except to mention the situation for so-called Zambrano carers below. Zambrano carers are parents from outside the EEA who have a British child and who in EU law hold rights to live in the UK based on that child's right to enjoy their EU citizenship.

### 5.1. Family members who cannot prove their relationship to an EEA citizen

We have never known how many non-EEA family members are eligible to apply to the EU settlement scheme, but with 3.6 million applications received by May 2020 we now have figures for how many people have applied. By 31 March 2020 there had been 24,720 applications to the EU settlement scheme made by current or former family members of EEA citizens under the age of 18. By comparison, 152,960 adult family members aged 18 to 64 have applied.<sup>21</sup> On its own, this figure for children tells us very little, but when contrasted to the figure for adult applicants it is low.

Family member applicants are also more likely to have their application refused on either suitability or eligibility grounds than EEA citizens (350 of 640 total refusals).<sup>22</sup>

Family members of EEA citizens must prove their relationship in order to be granted status under the EU settlement scheme. This includes children, step-children and grandchildren of EEA citizens. The evidence required for a settled status application is evidence of the family member's continuous residence in the UK for the five year period, and evidence of the family relationship. However, this is a very difficult requirement for many children to meet.

Proof of relationship can also be a practical obstacle to a child obtaining the passport they need to apply to the EU settlement scheme. In the case of children where only one parent is an EEA citizen, and where the child is being raised by a sole carer, it can be very hard to prove a child's EEA citizenship. Embassies and consulates often require the participation of both parents in the process of obtaining an ID document or birth certificate, and may also refuse to give decisions in writing if applicants cannot meet their required processes. If the non-carer parent is the EEA citizen through whom the child has inherited their EEA citizenship, the non-EEA citizen parent is often faced with a serious problem proving the child's nationality to both the embassy in question and the Home Office. The Home Office has at times suggested that applicants try to use the Family Court to obtain evidence

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<sup>21</sup> EU Settlement Scheme quarterly statistics tables, March 2020, at <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-march-2020>

<sup>22</sup> EU Settlement Scheme quarterly statistics tables, March 2020, at <https://www.gov.uk/government/statistics/eu-settlement-scheme-quarterly-statistics-march-2020>

of parentage, rather than exercise their discretion or make the reasonable enquiries outlined in the caseworker guidance. Obtaining a declaration of parentage from the Family Court is a lengthy process, for which there is not usually legal aid. Moreover, the Family Court has a 'no issue' principle which means orders are only issued where strictly necessary, and the Family Court is not there to deal with issues that are purely to do with the administration of immigration application processes.

The EU Settlement Scheme Statement of Intent, published by the Home Office in June 2018, introduced 'a principle of evidential flexibility', which was intended to enable caseworkers 'to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens'.<sup>23</sup> This wording was subsequently included in the caseworker guidance '*EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members*'. But in practice there are considerable practical challenges faced by applicants seeking to prove their eligibility as a family member. These challenges, including often requiring the co-operation of a family member who may be estranged, are exacerbated in the case of children, and particularly acute in the case of children in care or who have been the victims of abuse at the hands of a parent or family member.

It is critical that the Home Office exercises discretion in favour of the applicant to make reasonable enquiries as to the residence and identity of the EEA citizen on whom a child's eligibility depends. The EU settlement scheme is designed to be applied to by applicants without support from an immigration adviser, and while some funding exists for particular categories of vulnerable applicants the vast majority of applicants will apply without any assistance at all. If the Home Office fails to assist vulnerable applicants who struggle to prove their eligibility, applications will be rejected from applicants who were arguably eligible under the scheme.

### Case study 11: *Ama*

Ama is a young mother who has lived in the UK since the age of 14. For 9 years, she lived in the UK as the family member of her mother's EEA citizen partner. She was initially granted an EEA family permit, however her subsequent applications for permanent residence were refused. This was in part due to her mother's divorce from her partner. Though the divorce did not affect Ama's entitlement to settled status, it made it difficult to gather the requisite evidence. Ama and her two young children were unable to access the support they clearly needed as they soon dropped out of status. After years of precarity an adviser at CCLC assisted Ama with the gathering of evidence and she was finally granted settled status. Her local council found a flat for the family and they now have fewer worries.

We recommend that:

- The Home Office should adopt a more proactive approach to help children and young people to establish their family relationships. In practice, this may mean making enquiries to secure relevant evidence or information where applicants are unable to provide evidence of a family member's identity or residence.

## 5.2. Non-EEA citizen children who turn 21

Family members of EEA citizens who are not EEA citizens themselves can 'age out' of eligibility in a way that EEA citizens cannot. The Home Office has in part recognised the serious problems caused by the cut-off for older non-EEA citizen children, and amended the scheme to allow for a family member applicant who would only have been granted pre-settled status before the deadline to later apply for settled status even after they turn 21. However, if a young person whose eligibility to apply to the scheme is through a family member, and they have not already accrued five years' residence in the UK on this basis, they will cease to be eligible to apply to the EU settlement scheme on their

<sup>23</sup> Home Office, EU Settlement Scheme: statement of intent, June 2018, at <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

21<sup>st</sup> birthday. In practice, this splits families in two: parents and children under 21 (or older children proved to be dependent) are able to apply for status under the scheme, but most older children cannot.

We recommend that:

- A person who can show a period of dependency as a child of an EEA citizen family member whilst under 21 should be eligible to apply to the EU settlement scheme.

### 5.3. Child eligible, parent ineligible

It is possible for a child to be granted status under the EU settlement scheme but for their sole carer to be ineligible. This might be because the child's other (non-carer) parent is an EEA citizen, but the relationship was not considered 'durable' by the Home Office, or because the parent with caring responsibilities does not fall within one of the narrow retained rights provisions. If a child is forced to leave the UK because their sole carer is unable to secure status under the EU settlement scheme, the purpose of the scheme has not been fulfilled: that child will be unable to reside in the UK.

#### Case study 12: *Grace and Angela*

Grace is a Guinean national who came to the UK at the age of 18, as the family member of her EEA citizen father. Her father was abusive and told her to leave the family home after she had turned 21. She had not yet completed five years of residence in the UK. CCLC assisted her in making an application under the EUSS, however this was refused on the basis that she had not shown dependency on her abusive EEA citizen father. Her younger sisters, her four year old daughter Angela, and her abusive father are all eligible for settled status. CCLC is supporting Angela, also a national of Guinea, to make an application as the grandchild of her EEA national grandfather. However, even if her status is granted, and despite her whole family living in the UK, she may not be able to remain in the UK as her mother is not protected by the EU settlement scheme.

### 5.4. Family members abandoned in the UK

Family members of EEA citizens often came to, and reside in, the UK because the EEA citizen exercised their free movement and brought their family here. However, until that family has been resident in the UK for five years, the non-EEA citizen family members have no free-standing rights of their own. CCLC has advised children who, after several years of residence in the UK at a formative stage in their childhoods, suddenly find themselves stranded in the UK ineligible to apply to the EU settlement scheme or any other form of status because the EEA citizen family member has left the country. Abandonment cases were not covered by the rights regime in place before the EU settlement scheme was created, but the deadline of the scheme has made their cases more acute.

### 5.5. No pre-settled status where a child's parent goes to prison

If a child has lived in the UK for five years as a family member before an EEA parent serves a criminal sentence, the child can apply for settled status without the criminal sentence having an impact. However, for pre-settled status, the Home Office considers that the child's continuous residence would be broken along with the parent's by the imprisonment.<sup>24</sup> This means that a child could have been living in the UK under EU law rights as a family member for four and a half years but if their EEA parent goes to prison before they reach five years, they cannot apply for pre-settled status and the four and a half years count for nothing; clocking up residence would have to start from scratch again once the parent was released and then only if the child is still young enough to count as a dependant

<sup>24</sup> See:

[https://www.whatdotheyknow.com/request/605834/response/1452975/attach/3/FOI%20Response%2055571%20Final.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/605834/response/1452975/attach/3/FOI%20Response%2055571%20Final.pdf?cookie_passthrough=1).



by then and if release is before 31 December 2020; if it is after, eligibility for the EU settlement scheme is gone.

Children living in the UK under EU law rights should not be punished for a criminal sentence served by their parent. The iniquity is even more acute in the case of a child who is in care, or a child whose parent is imprisoned because of crimes committed against them or their other parent.

We recommend that:

- A non-EEA child's continuous residence for pre-settled status should not be broken by their parent's imprisonment.

## 5.6. Zambrano carers and their children

Zambrano carers are non-EU nationals who are primary carers of British citizens. They are very often vulnerable single mothers who have had a child with a British man with whom they are not together, and are also disproportionately mothers from black or minority ethnic backgrounds.<sup>25</sup> Although not EEA citizens themselves, Zambrano carers are lawfully resident in the UK because of rights derived from EU law. The rights in question are the rights of British children to enjoy their rights under EU law. If their primary carer is refused a right of residence in the UK, but the consequence is that the British child would be compelled to leave the UK because s/he would accompany her/his primary carer, then the carer should be allowed to reside here and cannot be refused a residence permit.

The non-British siblings of British children with a Zambrano carer parent are also protected by these rights. However, unlike EEA citizen children (who are considered to be dependent on their parent up to the age of 21) these children are only protected until the age of 18.

Unlike other derivative rights holders (for example Chen or Ibrahim/Teixeira carers) Zambrano carers are not protected by the Withdrawal Agreement. However, the Home Office later brought them within the scope of the EU settlement scheme and they were able to submit applications from 1 May 2019. On 2 May 2019 the Home Office published guidance<sup>26</sup> which introduced a new test which Zambrano carers had to meet in order to be considered eligible for the scheme. Any application to the EU settlement scheme as a Zambrano carer 'must' be refused if a person has either 'limited leave to enter or remain in the UK' or has 'not made any attempt to apply for limited leave to enter or remain in the UK'. In other words, an applicant should (i) have no legal right to reside in the UK; and (ii) have previously made an application for leave to remain in the UK which was refused.

Anyone who is a Zambrano carer is very unlikely to be refused leave to remain under the right to family and private life; CCLC believes that this requirement is both incorrect and irrational. EU law and domestic case law do not impose any such requirement, and the domestic regulations themselves, which seek to define the way in which UK decision-makers are required to interpret Zambrano, do not require or permit such a requirement. The requirement moreover completely defeats the purpose of a having a separate application process for Zambrano carers.

In practice, this requirement is a test applied long before a potential applicant has made their case to a Home Office caseworker. Even where a Zambrano carer has previously been recognised as such by the Home Office and has a UK government-issued residence card on that basis, Zambrano carers cannot apply online, and cannot use the EU exit: ID Document Check app on their phone. Instead, they must contact the Settlement Resolution Centre by phone or email and request that they be issued a paper form. In practice, this means that Zambrano carers must make their case to a Home Office

<sup>25</sup> Recent research by The Unity Project on the demographic of parents applying as sole carers of British children who needed recourse to public funds found that an estimated 85% were single mothers and 'nearly all' were black or minority ethnic. See Agnes Woolley, 'Access Denied: The cost of the 'no recourse to public funds' policy', June 2019 at <https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faad9c/1561048725178/Access+Denied+-+the+cost+of+the+No+Recourse+to+Public+Funds+policy.+The+Unity+Project.+June+2019.pdf>

<sup>26</sup> Home Office, EU settlement scheme: person with a Zambrano right to reside, at <https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance>

call handler in the first instance, and not a caseworker, and that this call handler has the power to decide whether or not the applicant should even be given the chance to apply.

### **Case study 13: *Emily***

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Emily is a Nigerian national who is the primary carer of two British children. She was issued with a derivative residence card as a Zambrano carer under the EEA Regulations. Her passport which contained her derivative right of residence expired and she applied for a biometric residence permit. The Home Office refused to issue a new card, despite the fact that they had already recognised Emily as a Zambrano carer, and nothing about her situation had changed, on the basis that she had not made a previous application under Appendix FM to the Immigration Rules or under Article 8 ECHR. CCLC assisted her with an appeal against that refusal which was allowed by the First-tier Tribunal. CCLC also assisted her with an application for settled status as a Zambrano carer under the EUSS which has been granted.

We recommend that:

- The requirement for Zambrano carers to have applied for, but not to hold, status under the Immigration Rules prior to an application under the EU settlement scheme must be removed.
- Settlement Resolution Centre staff should not 'gatekeep' access to the EU settlement scheme by refusing to issue paper forms to potential Zambrano carers.
- The non-British children of Zambrano carers should be considered 'dependent' until the age of 21, in line with other child applicants under the EU settlement scheme.



## 6. Applications by children and young people with a criminal record

In June 2020, the settlement scheme had been open for 15 months and has only one year left. Despite this, there is still a great deal of uncertainty about how applications from individuals with criminal records are being considered by the Home Office. Guidance for caseworkers on the suitability criteria is heavily redacted and difficult to read<sup>27</sup> and there is very little public-facing information. What information there is for people who are in youth offending institutions or prisons is extremely unclear, even on the basic message of whether people in prison can apply. Between the Home Office, Ministry of Justice, Department for Education, the devolved administrations and local authorities, it is not evident that anyone is systematically identifying eligible children and young people in the secure estate, even those who are looked-after or care leavers, let alone communicating with them or providing access to information or legal advice. In general, suitability cases are complex and we are concerned that children and young people with criminal records are not getting adequate, if any, support.

Of 324 cases in which CCLC has assisted children, young people and parents, questions of suitability arose in 23. Of these, nine were children's applications and ten were cases involving offending that took place while under the age of 18. From these cases, we have seen the following issues emerge, which we detail below:

- significant decision-making delay
- inadequate articulation of child-specific legal tests
- no appropriate consideration of childhood offending
- pre-settled status disproportionately denied because of short custodial sentences
- confusion and no support for children and young people in custody, and
- ineligibility for pre-settled status of non-EEA children whose EEA citizen parent serves a custodial sentence.

### 6.1. Significant decision-making delay

It is difficult to say much definitively about suitability because we know so little about how it is applied in practice. This is because there is a lack of case-working clarity and because the Home Office appears systematically to be taking a very long time to make decisions in cases of people with criminal convictions. Consequently, providing accurate advice on how the Home Office will apply criteria is difficult. We do not know how the Home Office is applying its own guidance and so cannot tell children or young people what to expect. We have also observed that the substantial delays affecting cases where the Home Office is actively considering suitability are causing considerable stress to children and young people applying. This is in part because of the gulf between the five-day processing time advertised by the Home Office<sup>28</sup> and the drawn out, months-long waiting for children and young people with these complex cases.

We recommend that:

- The Home Office should provide transparent information to applicants and stakeholders on why suitability cases are taking so long to process and should provide a target timeframe.

<sup>27</sup> Home Office, 'EU settlement scheme: suitability requirements', April 2020, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/878321/euss-suitability-guidance-v3.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878321/euss-suitability-guidance-v3.0ext.pdf)

<sup>28</sup> EU Settlement Scheme: current estimated processing times for applications <https://www.gov.uk/government/publications/eu-settlement-scheme-application-processing-times/eu-settlement-scheme-pilot-current-expected-processing-times-for-applications>

## 6.2. Inadequate articulation of child-specific legal tests

Children's applications must be considered in line with children's rights standards but these are not clearly articulated. When they apply, children are not asked to make a declaration about criminal offences. However, all children aged ten and over are subject to checks against the Police National Computer and the Warnings Index. This is wider than a criminal records check. Unhelpfully, the information on gov.uk incorrectly suggests that these automatic checks only happen for those aged 18 or over<sup>29</sup> but guidance states that they will be carried out for everyone aged ten and above, intended to determine whether a decision should be made to deport the applicant.

Under the Immigration (European Economic Area Regulations) 2016, a child under the age of 18 cannot be deported except on 'imperative grounds of public security'. The 'imperative grounds of public security' wording is also found in Article 20 of the Withdrawal Agreement and both mirror Chapter VI of Directive 2004/38 (Articles 27-33). This is an extremely high threshold and given this, we question why the routine records check is necessary for children. The test is included in Appendix EU by virtue of reference to Regulation 27 of the Immigration (European Economic Area) Regulations 2016, but this specific test for children is not mentioned in the suitability guidance at all.<sup>30</sup>

Furthermore, the EU-law derived thresholds, including the 'imperative grounds' test for children, only apply to conduct up until the end of the transition period, so up to 31 December 2020. The Government is keen to impose UK-law thresholds in relation to conduct from 1 January 2021 and Appendix EU will apply a lower 'conducive to the public good' test to conduct that occurs after that date. The problem is that the 'conducive to the public good' test in Appendix EU, as well as the suitability guidance, do not articulate any specific considerations for children. Missing considerations include that children are not subject to automatic deportation provisions,<sup>31</sup> that the child's best interests must be considered as a primary consideration and that there are specific considerations in relation to proportionality in children's cases.

We believe no child should be refused on suitability grounds and deported. Remarkably, if a child were to be refused because of their convictions, they would not automatically be entitled to legal aid to challenge their deportation, even if they were born or had grown up in the UK. Legal representation for any child with such a complex case is essential.

We recommend that:

- Children should be removed from routine Police National Computer/Warnings Index checks.
- The suitability guidance should explicitly mention the 'imperative grounds of public security' test for children in relation to conduct until the end of the transition period and that the child's best interests must be a primary consideration.
- In relation to conduct after the end of the transition period, Appendix EU and the suitability guidance must reflect the specific considerations that apply to children.
- If a child is refused on suitability grounds and faces deportation, the Home Office must proactively highlight to the child in their refusal letter both the contact details of appropriate grant-funded legal support organisations that deal with complex cases and the availability of legal aid including via the exceptional case funding scheme.
- Any refusals of children on suitability grounds must be recorded clearly in the published statistics.

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<sup>29</sup> Gov.uk states: 'If you're 18 or over, the Home Office will check you have not committed serious or repeated crimes, and that you do not pose a security threat.' <https://www.gov.uk/settled-status-eu-citizens-families/what-youll-need-to-apply>

<sup>30</sup> For further consideration of these questions, see: Kathryn Hollingsworth and Helen Stalford, Briefing: the EU settled status scheme and children in conflict with the law, 2019, at <https://www.liverpool.ac.uk/media/livacuk/law/2-research/ecru/June.25.FINAL.-EUSS.and.Youth.Justice.pdf>

<sup>31</sup> Contained in the UK Borders Act 2007

### Case study 14: *Michael*

Michael is a Swedish citizen who has lived in the UK since he was five years old. He is a very vulnerable care leaver now aged 18 with a criminal conviction from when he was 13. CCLC submitted an application for settled status for him before he turned 18. The CCLC solicitor made representations that the offence did not meet the threshold for deportation, that the sentence received was non-custodial, and that in the considered view of his social worker it was unequivocally in Michael's best interests to remain in the UK. However, some seven months later the Home Office is yet to make a decision on his application. The delay is causing significant distress, as Michael fears for his future.

### 6.3. No appropriate consideration of childhood offending

Children 'age out' of the legal tests mentioned above and if they apply after they turn 18 they are treated as adults. In general, deportation action is more likely to take place once a young person has turned 18.<sup>32</sup> Yet offending that occurred while someone was a child ought to continue to be treated as distinct. The primary aim of the youth justice system is to prevent children from offending and reoffending. Special measures are taken throughout the youth justice system to ensure that mistakes made in childhood do not have a detrimental effect on a child's later life.<sup>33</sup>

It is unclear whether or not the Home Office takes into account the age of an applicant at the point at which an offence occurred. On its face, the suitability guidance makes no distinction between offences committed by children and those committed by adults. We believe no one should be deported or removed on the basis of offences committed as a child. Decision-makers must take account of the person's age at the time of the offence, how long ago it occurred, and the present risk of reoffending.

We recommend that:

- The suitability guidance should reflect the different natures of childhood and adult offending.

### Case study 15: *Eric*

Eric is a Spanish citizen. Years before his arrival in the UK, he was sentenced to three years in prison for a drug-related offence at the age of 18. He was released early due to his good behaviour. Eric moved to the UK to be with his partner Alma, also a Spanish citizen, and their two young children. Alma tragically passed away leaving Eric to care for four young children: their two children and two of Alma's nieces. CCLC helped Eric to submit an application for settled status under the settlement scheme. Eric declared his past criminal conviction pointing out that, almost 12 years after his conviction, he has had no further incidents with the police. Ten months since making his application, Eric has yet to receive a decision from the Home Office. This delay is damaging to the well-being of the children in his care, who have grown up in the UK, and is causing Eric a tremendous amount of stress as the family lives in constant uncertainty.

<sup>32</sup> Home Office guidance states: 'This section tells you about the general procedure followed by staff in institutions of the Youth Justice Board (YJB) estate when they refer convicted criminals under the age of 18 years to Immigration enforcement's criminal casework to be considered for deportation action. Such action, if staff in YJB consider it appropriate, will not usually take effect until after the child FNO [foreign national offender] is aged 18.' See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492795/MG\\_-\\_MU18s\\_PI\\_v6.0\\_EXT.pdf#page7](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492795/MG_-_MU18s_PI_v6.0_EXT.pdf#page7)

<sup>33</sup> Crown Prosecution Service legal guidance on youth offenders, at: <https://www.cps.gov.uk/legal-guidance/youth-offenders>

## 6.4. Short custodial sentences disproportionately breaking continuous residence

If an applicant has lived in the UK for five years, they can rely on this to get settled status, unless since they completed the five years a 'supervening event' has occurred, which includes a deportation or removal decision. Where the applicant has served a custodial sentence but has not been subject to such a decision, when the applicant applies to the EU settlement scheme, the Home Office will consider afresh whether to deport or remove. In most of these cases, the applicant should get settled status.

By contrast, if an applicant has lived in the UK for under five years and would be in line for pre-settled status, a custodial sentence of *any* length has the effect of resetting the clock on an applicant's continuity of residence in the UK. The period of imprisonment does not count towards residence and they start to accrue residence again from scratch upon release. This means that a child might have lived in the UK for four and a half years and be sentenced to six months in prison and upon release before 31 December 2020 the four and a half years would count for nothing and their period of residence would have to restart from scratch; if they were released after 1 January 2021 they would no longer even be eligible under the scheme.

Children who commit criminal offences are subject to a different sentencing regime to adults.<sup>34</sup> Youth-specific sentences include Detention and Training Orders, the first half of which is served in custody, and the second half of which is served in the community. Within the youth justice system very short custodial sentences can be given to children by magistrates without any knowledge of the implications for their immigration status. For such short custodial sentences to reset the clock on a child's residence in their application for pre-settled status is disproportionate. The blanket discounting of years spent growing up in the UK because a child or young person has been in a youth offending institution for as little as a few weeks cannot be fair; the current rules disproportionately penalise children and young people.

We recommend that:

- There must be discretion for Home Office decision-makers to consider the proportionality of residence being broken by a child's or young person's short custodial sentence.

## 6.5. Confusion and no support for children and young people in custody

It is not clear who, if anyone, has responsibility within the youth secure estate for identifying eligible children and young people and ensuring that they apply to the EU settlement scheme before the deadline. We are not aware of any comprehensive action on behalf of the Home Office or Ministry of Justice to identify all children and young people in the secure estate who are eligible to apply. Neither are we aware of the Department for Education taking responsibility for identifying those children and young people in custody who are in state care or care leavers, or local authorities doing this on any systematic basis. Nor do we know of any arrangements for practical or legal support for those in custody; it is not clear how someone could make their own application without their document or IT equipment and none of the 57 grant-funded organisations were specifically funded to do work to support this group of applicants. The Home Office is not counting how many prisoners make applications to the scheme<sup>35</sup> and its messaging has appeared to be telling anyone in prison that they cannot apply. This is a woefully inadequate state of affairs with only one year to go before the closure of the scheme.

The Home Office seems to be basing its messages on the situation for those in line for pre-settled status. As explained above, any residence of under five years prior to imprisonment is wiped out

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<sup>34</sup> See: <https://www.gov.uk/types-of-prison-sentence/sentences-for-young-people>

<sup>35</sup> See:

[https://www.whatdotheyknow.com/request/605834/response/1452975/attach/3/FOI%20Response%2055571%20Final.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/605834/response/1452975/attach/3/FOI%20Response%2055571%20Final.pdf?cookie_passthrough=1).

under the EU settlement scheme and you have to start from zero again upon release. The Government's information for applicants on gov.uk states:

*If you've been to prison, you usually need 5 years' continuous residence from the day you were released to be considered for settled status.<sup>36</sup>*

Similarly, when asked specifically about children, the Home Office stated in September 2019:

*A person's continuity of residence in the UK for the purposes of eligibility under the EU Settlement Scheme is broken when they serve a sentence of imprisonment. They will not generally be eligible to apply to the scheme while they are serving that sentence.*

*This is consistent with EU law on free movement, as currently given effect in the UK by the Immigration (European Economic Area) Regulations 2016. This provision applies to children in detention as it does for all applicants to the EU Settlement Scheme.<sup>37</sup>*

This is a deeply troubling and misleading message because it neglects those in line for settled status, who were resident for five years or longer – sometimes even decades longer – before imprisonment. These people, including children and young people who have grown up in the UK, should be able to make applications for settled status from custody. Where no deportation or removal decision has been made, and none can now be made because their conduct does not meet the legal threshold, they should be granted settled status. For all conduct up to 31 December 2020 the test for deportation is a high one, especially for those who have acquired permanent residence ('serious grounds of public policy and public security'), for those continuously resident for ten years or more ('imperative grounds of public security'), and – as we have seen above – for children ('imperative grounds of public security').

### Case study 16: Matteo

Matteo is an Italian 17-year-old who has lived in the UK since he was ten years old. Matteo is currently in youth custody as part of a 12-month Detention and Training Order following county lines-related offences. His social worker was trying to complete an EU settlement scheme application on Matteo's behalf. CCLC advised that they need to apply before Matteo turns 18, not least because past that point no-one can apply on Matteo's behalf without him present. His social worker was deeply concerned about how to answer some of the questions in the application form, and did not understand some of the legal terms. She was worried that his custodial sentence would impact his application, but couldn't see anywhere where she could provide further information that she thought would help the Home Office understand his situation. In the end, Matteo's social worker made an application for settled status for him with remote support from CCLC, but it remains unclear how the Home Office will treat his application due to the fact that he is serving a custodial sentence. Matteo has been waiting a year for a decision.

We cannot be certain how many eligible children and young people are currently held in custody. There are no public statistics on the number of foreign nationals in the secure estate and this is also true of the youth secure estate. Indeed, it is not clear that the Government itself has any record of this. For its part, the Home Office seems to rely on the secure estate identifying and referring all foreign national children,<sup>38</sup> though it is far from clear how 'staff in institutions of the Youth Justice

<sup>36</sup> See: <https://www.gov.uk/settled-status-eu-citizens-families/what-youll-need-to-apply>

<sup>37</sup> A Parliamentary Question answered by Brandon Lewis on 25 July 2019 stated that children in secure care or detention 'will not generally be eligible to apply to the scheme while they are serving that sentence.' <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-07-25/282339/>. This is not found in Home Office guidance, and it is not clear on what legal basis any prohibition on applications could be made.

<sup>38</sup> Home Office guidance states: 'This page tells you about the protocol agreed between Immigration Enforcement and the Youth Justice Board (YJB) for referring child foreign national offenders (FNOs) to be considered for possible deportation or other enforcement action. Youth justice practitioners based at Young Offender Institutions (YOIs) and other secure



Board estate' accurately identify these children given the complexity of immigration and nationality law and such considerations as whether, for example, a child might automatically be British even if they do not know it or have a passport. CCLC attempted in September 2019 to use figures given in the latest HM Inspectorate of Prisons reports to ascertain an imprecise minimum estimate and counted 831 individuals up to age 20 who were recorded as being foreign nationals in youth offending institutions and prisons (not secure training centres or secure children's homes).<sup>39</sup> No breakdown of nationality is given in these reports, so an estimate of the number of EEA citizens is not available.

One thing we do know is that many children in custody are also in care, including those on remand. Twenty-eight per cent of all children in custody as at March 2019 were on remand.<sup>40</sup> This means that they were to be detained in youth detention until a later date when a trial or sentencing hearing would take place. A child who was not formerly looked after enters the care system when they are remanded to custody. For both these children who are on remand and more generally for all looked-after children and care leavers who are serving sentences, it can be difficult to establish who has responsibility for helping them to apply to the EU settlement scheme. Department for Education statutory guidance on care planning, placement and case review states that:

*The child's social worker and YOT case manager must work together to coordinate arrangements for the child's release and subsequent support in the community. The child will continue to have two separate plans: the local authority care plan, which may include a pathway plan (or for a child who became looked after solely as a result of remand, the DPP) and the YOT plan. These must, however be coordinated so the child is clear what will be happening and professionals from both children's and youth justice services understand their respective roles and responsibilities for supporting the child in future and for minimising the possibility of reoffending.<sup>41</sup>*

Amidst this multi-agency and fast-changing picture of responsibility, there is a very high risk that a child's nationality and immigration status will not be resolved and their eligibility to apply to the EU settlement scheme will not be acted upon in time.

Cases of children and young people in custody are only being identified on a piecemeal basis, for example if they happen to have a proactive social worker or if they have contact with a voluntary sector service such as the advice line of the Howard League for Penal Reform. Because of this, CCLC have received few referrals for children in custody. For the majority of the children and young people we have been referred we are applying for exceptional case funding to so that they can get the legal representation they need due to the complexity of these cases.

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establishments under the YJB estate must refer all foreign national children under 18 who have received a custodial sentence to immigration enforcement, to consider whether they should be deported, or failing that removed to their home country, where appropriate. As of 1 May 2013 all FNOs, regardless of sentence or age, are first referred to criminal casework (CC) by prisons and other penal establishments.' See:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492795/MG\\_-\\_MU18s\\_PI\\_v6.0\\_EXT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492795/MG_-_MU18s_PI_v6.0_EXT.pdf)

<sup>39</sup> This estimate is based on prison populations annexed to reports by HM Chief Inspector of Prisons. The data in the reports is not sufficiently broken down by age for us to capture all young people; a report on an adult prison gives the number of foreign nationals aged 18-20. For further analysis see:

Coram Children's Legal Centre, 'Evidence for the Justice Committee inquiry into children and young people in custody', at <https://www.childrenslegalcentre.com/wp-content/uploads/2019/10/Justice-Committee-CCLC-evidence-1.10.19.pdf>.

Numbers of foreign nationals are not included in Ofsted, Care Quality Commission or HMIP reports on secure training centres or secure children's homes.

<sup>40</sup> Youth Justice Board / Ministry of Justice, 'Youth Justice Statistics 2018/19 England and Wales' at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf)

<sup>41</sup> Department for Education, 'The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review', June 2015, at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441643/Children\\_Act\\_Guidance\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/441643/Children_Act_Guidance_2015.pdf)

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We recommend that:

- The Home Office must provide accurate information that makes clear that applicants can apply for settled status while in custody.
- The Home Office should undertake an information campaign with the Ministry of Justice to provide information to people in custody, including children and young people, about the EU settlement scheme.
- The Home Office and Ministry of Justice need to provide answers on how people can practically apply for settled status from custody with regards to access to their documents and IT equipment.
- The Home Office should provide access to its support systems (including the Settlement Resolution Centre and grant-funded organisations) to people applying for settled status from custody.
- The Department for Education should work to support local authority social work and youth offending teams to identify all looked-after children and care leavers whose nationality and immigration status needs to be resolved. The children are entitled to legal aid and professionals should help them to get a lawyer, and the care leavers need to be supported to get legal aid through the exceptional case funding system.

## 7. Submitting late applications to the EU settlement scheme

The Home Office has stated that: 'Examples of reasonable grounds [for submitting a late application to the EU settlement scheme] will include children whose parent or guardian does not apply on their behalf'.<sup>42</sup> CCLC welcomes this confirmation. However, in order for this statement to be relied upon it must be laid out clearly in published guidance.

It remains the case that anyone who has not applied by the deadline of 30 June 2021 will become undocumented, and a period of being undocumented, even if temporary, would have a significant and extremely negative impact. Those who fail to apply before the deadline will lose access to services, will lose the right to work, rent, hold a bank account or driving license, and will lose access to any benefits they may receive. They will be liable to removal from the UK.

Of particular relevance to young people, university applicants who did not submit an application to the EU settlement scheme before the deadline will face significant barriers. For example, in England, 'ordinary residence' is a requirement for young people being able to access student finance and go to university. Ordinary residence is a complicated term and includes reference to 'lawful residence'. Eligibility for student finance in many circumstances requires an applicant to have had three years of continuous 'ordinary residence' prior to the first day of the first academic year of the course.<sup>43</sup> Even a short period of being undocumented aged 17 could have a knock-on effect of a young person not being able to go to university until they are 20 or 21.

The reality is that with one year to go, and in the face of a global pandemic, more time is needed to make sure everyone eligible under the EU settlement scheme can apply. The deadline needs to be extended.

We recommend that:

- The Home Office should publish clear guidance on the circumstances in which individuals can apply to the EU settlement scheme beyond the deadline of 30 June 2021.
- The deadline to apply to the EU settlement scheme must be extended beyond 30 June 2021.

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<sup>42</sup> See the letter from the Minister for Future Borders and Immigration to Lord Morris of Aberavon, then Chair of the House of Lords EU Justice Sub-Committee, dated 9 April 2020, at

<https://committees.parliament.uk/publications/660/documents/2907/default/>

<sup>43</sup> The Education (Fees and Awards) (England) Regulations 2007 (as amended) Schedule 1 paragraph 13



## 8. Appendix

### *Recommendations*

#### 1. Children and young people's citizenship rights

- The Home Office should provide better public information on when a child is automatically born British and when they can register as British, and link to this from the EU settlement scheme information. Information on children's citizenship rights should be translated and actively promoted as an integral part of the Home Office's information campaign on the EU settlement scheme.
- The Home Office should take a proactive approach to helping a child or young person establish their claim to British citizenship
- The fee for a child to register as British should be abolished. As an interim measure, the fee exemption that applies to many immigration applications for children in care should be extended to also cover nationality applications. All such fee exemptions should be extended to care leavers too.
- It should become mainstream practice for local authorities to realise a looked-after child's option of registering as a British citizen where the child wishes to and it is in their best interests, taking into consideration the effect on any other citizenship they hold.
- The Home Office should give clear information to people granted settled status about what they will have to show at the point of applying for naturalisation, and how this relates to their settled status.

#### 2. Children in care and care leavers

- The Home Office, Department for Education and Ministry of Justice must work with local authorities, the devolved administrations and civil society to make and resource a comprehensive plan to identify and support every single eligible child in care and care leaver, including those eligible to apply as family members of EEA citizens, as soon as possible.
- The Home Office should support and resource local authorities to identify all eligible children known to them so that social workers can disseminate information on the EU settlement scheme where possible.
- The Office of the Immigration Services Commissioner and the Home Office should make it clearer to social workers what they can do within their role: whether they should be making applications for any child or young person and if so, how this work is regulated and overseen.

#### 3. Challenges posed by pre-settled status

- No child or young person who previously held pre-settled status should fall off their route to settled status in the event that they do not make the settled status application at the right time. Nor should they ever be brought under the UK immigration system's existing long and expensive routes that are currently failing other children and young people.
- The Home Office should commit to prompting holders of pre-settled status before their status expires and telling them what they need to do to remain lawfully in the UK.
- The Home Office should introduce a provision to grant settled status to all looked after children and care leavers who apply to the EU settlement scheme.

- The Department for Work and Pensions and the Home Office should amend Regulations so that all those with pre-settled status can access benefits.
- The student finance regulations for 2020-2021 must be amended to reflect the changing nature of immigration status for those with EU rights.

#### 4. The operation of the scheme in practice

- The Home Office should analyse and publish its data on paper form applications and work to streamline the casework process based on the issues it sees commonly arising, to avoid delay.
- Paper form cases where a child has no ID document are likely to be cases where a child is vulnerable so the Home Office should prioritise timely decision-making on these cases.
- The Home Office should issue physical documents. At minimum, the Home Office should create a discretionary system through which people who are particularly vulnerable can apply to get physical proof of their status under the scheme, such as a biometric residence permit.
- In the absence of physical documents, the Home Office should undertake a large-scale information campaign prior to 1 July 2021 to ensure everyone who needs to – including landlords, employers, educational establishments, banks and benefits advisers – understand digital status.

#### 5. Applicants to the EU settlement scheme who are citizens of countries outside the EEA

- The Home Office should adopt a more proactive approach to help children and young people to establish their family relationships. In practice, this may mean making enquiries to secure relevant evidence or information where applicants are unable to provide evidence of a family member's identity or residence.
- A person who can show a period of dependency as a child of an EEA citizen family member whilst under 21 should be eligible to apply to the EU settlement scheme.
- A non-EEA child's continuous residence for pre-settled status should not be broken by their parent's imprisonment.
- The requirement for Zambrano carers to have applied for, but not to hold, status under the Immigration Rules prior to an application under the EU settlement scheme must be removed.
- Settlement Resolution Centre staff should not 'gatekeep' access to the EU settlement scheme by refusing to issue paper forms to potential Zambrano carers.
- The non-British children of Zambrano carers should be considered 'dependent' until the age of 21, in line with other child applicants under the EU settlement scheme.

#### 6. Applications by children and young people with a criminal record

- The Home Office should provide transparent information to applicants and stakeholders on why suitability cases are taking so long to process and should provide a target timeframe.
- Children should be removed from routine Police National Computer/Warnings Index checks.
- The suitability guidance should explicitly mention the 'imperative grounds of public security' test for children in relation to conduct until the end of the transition period and that the child's best interests must be a primary consideration.
- In relation to conduct after the end of the transition period, Appendix EU and the suitability guidance must reflect the specific considerations that apply to children.
- If a child is refused on suitability grounds and faces deportation, the Home Office must proactively highlight to the child in their refusal letter both the contact details of appropriate

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grant-funded legal support organisations that deal with complex cases and the availability of legal aid including via the exceptional case funding scheme.

- Any refusals of children on suitability grounds must be recorded clearly in the published statistics.
- The suitability guidance should reflect the different natures of childhood and adult offending.
- There must be discretion for Home Office decision-makers to consider the proportionality of residence being broken by a child's or young person's short custodial sentence.
- The Home Office must provide accurate information that makes clear that applicants can apply for settled status while in custody.
- The Home Office should undertake an information campaign with the Ministry of Justice to provide information to people in custody, including children and young people, about the EU settlement scheme.
- The Home Office and Ministry of Justice need to provide answers on how people can practically apply for settled status from custody with regards to access to their documents and IT equipment.
- The Home Office should provide access to its support systems (including the Settlement Resolution Centre and grant-funded organisations) to people applying for settled status from custody.
- The Department for Education should work to support local authority social work and youth offending teams to identify all looked-after children and care leavers whose nationality and immigration status needs to be resolved. The children are entitled to legal aid and professionals should help them to get a lawyer, and the care leavers need to be supported to get legal aid through the exceptional case funding system.

## 7. Submitting late applications to the EU settlement scheme

- The Home Office should publish clear guidance on the circumstances in which individuals can apply to the EU settlement scheme beyond the deadline of 30 June 2021.
- The deadline to apply to the EU settlement scheme must be extended beyond 30 June 2021.



**Coram Children's Legal Centre**

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Coram Children's Legal Centre, part of the Coram group of charities, promotes and protects the rights of children in the UK and internationally in line with the UN Convention on the Rights of the Child.

For more information, visit [www.childrenslegalcentre.com](http://www.childrenslegalcentre.com).